The official journal of the Texas District and County Attorneys Association

The Texas Prosecutor

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

An introduction to what child protection prosecutors do

As a Texas prosecutor, I look forward to this journal landing on my desk. There's something luxurious about taking a few moments out of a busy day to check out what other prosecutors around the state are doing.

By Deanna Belknap
Assistant Criminal District Attorney in Tarrant County

Having served on TDCAA's Editorial Committee (which oversees the production of the journal) for three years, I have witnessed the amount of thought and effort that goes into every article to ensure it is relevant and appealing to TDCAA'S service group. I have been a prosecutor for about 11 years now and have managed Department of Family and Protective Services (DFPS) caseloads for roughly half that time.

Having both criminal and DFPS prosecution experience, plus insight into the workings of the editorial committee, I am in the fortunate position of writing an article or two for fellow DFPS prosecutors that I hope will also appeal to criminal prosecutors. I think those who will find this article most interesting are new child protection prosecutors, prosecutors in other divisions who are unfamiliar with yet interested in what their child protection colleagues do every day, and experienced prosecutors who have some interest in handling a DFPS caseload but would first like to know a little more about the cases.

A day in the life

I know from experience that even seasoned prosecutors face a pretty steep learning curve when shifting to a DFPS caseload. Trial skills are transferable, of course—child protection prosecutors are frequently in court. Knowledge of criminal prosecution processes, timelines, and lingo will also come in very handy as many of the parents in these cases have past and pending relevant criminal cases. But you are no longer working under the Code of Criminal Procedure and Penal Code—child protection prosecutors must learn family law

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In memory of Judge Michael J. McCormick

I write to honor the second executive director of the Texas District and County Attorneys Association (TDCAA), **Michael J. McCormick**, who passed away in July at the age of 78.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

Judge McCormick was hired on at TDCAA by **Dain Whitworth** in 1972. His first major assignment: to help a group of Texas prosecutors write a new penal code for the legislature to consider in 1973. (Read more about that revision of the Penal Code at www.tdcaa.com/journal/links-to-the-past-lest-we-forget and www.tdcaa.com/ journal/in-memory-of-carol-vance.)

In 1976, Dain left for private practice, and Judge McCormick took the wheel at TDCAA. It was a time of remarkable growth for the association, as grant funding was becoming available to help professionalize prosecution in Texas and across the country. Even after he left TDCAA in 1980 to become a judge on the Court of Criminal Appeals (CCA), his interest in prosecutor and judicial education was keen. When, in 1993, the Texas Supreme Court showed little interest in managing judicial and criminal lawyer training grants, Judge McCormick stepped in and put the CCA in charge of the grant program. Fast forward to today as the CCA, under the leadership of **Judge Barbara Hervey**, continues to manage the grants that bring judges, prosecutors, and criminal defense attorneys excellent training.

Judge McCormick's family has asked that in lieu of flowers, donations be made in his honor to the Texas District and County Attorneys Foundation at www.tdcaf.org. (Done!) He will be deeply missed, but his legacy in so many areas, including his support of TDCAA, lives on. ❇

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About *The Texas Prosecutor*

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Judge Michael McCormick and the evolution of Texas criminal jurisprudence

The recent passing of former Court of Criminal Appeals **Presiding Judge Michael McCormick** invites us to re-examine just how much influence a single person can have on the world around us.

By Rob Kepple
TDCAA Executive Director in Austin

Judge Michael J. McCormick

Judge McCormick served on the Court of Criminal Appeals as an associate judge from 1981 to 1988, then as the presiding judge from 1989 to 2000. I will suggest to you that the presiding judge's influence on our criminal jurisprudence can't be overstated. During his tenure, Texas criminal law evolved from a rigid and sometimes illogical series of rules in the 1970s and '80s to a more common-sense approach focused on actual harm and fairness.

When I was a young Texas prosecutor in the 1980s, our criminal jurisprudence felt like a series of bear traps for the unwary or inexperienced. The legal principle of fundamental error was applied to all sorts of errors, and the law dispensed with the need for objection or a showing of harm. If a fundamental error occurred, the case was reversed on appeal.

Enter **Funda the Mental Error**, a character Judge McCormick made up in homage to **Johnny Carson**'s old Carnac the Magnificent bit on "The Tonight Show." When the judge would present case updates at TDCAA conferences, he dressed like Carson's Carnac character, a comedy fortune teller. In Carson's version, Carnac would dramatically hold a sealed envelope to his forehead and announce the punchline to the joke that was inside the envelope, then open the envelope to read the set-up to the joke. In Judge McCormick's version, Funda would hold up an envelope containing an appellate opinion and try to predict the fundamental error that demanded a reversal. Truly entertaining—but painful too.

For prosecutors and the general public, it seemed like things changed with a 1993 unpublished opinion from the CCA in *Lionel Gonzales Rodriguez v. State*—the infamous "jury shuffle" case. (Read it here: www.tdcaa.com/journal/judge-michael-mccormick-and-the-evolution-of-texas-criminal-jurisprudence.) **Lionel Rodriguez** was convicted of the random and brutal murder of a young woman named **Tracy Gee**; he shot her in the head and dragged her lifeless body out of her car at a Houston intersection just because he wanted the car. (Read about it at www.clarkprosecutor.org/html/death/US/rodriguez1081.htm.) In an unpublished per curiam opinion to which Judge McCormick and three other judges dissented, the Court of Criminal Appeals reversed the conviction because the trial court had allowed not one, but two jury shuffles of one of 12 mini-panels used in jury selection. The Court summarily refused to consider harmless error, even though no one could, or did, argue that a second shuffle caused harm.

The reversal of this conviction outraged the public and reverberated through the courts and legislature. Indeed, Tracy Gee became a cause célebre and is memorialized with a community center in Houston named in her honor. In the wake of that case, Judge McCormick led the Court in a new direction that focused on harm and common sense. Without fanfare, the presiding judge and his Court slowly refashioned Texas jurisprudence with a dose of common sense and justice. What a wonderful legacy for one of the nicest and most unassuming people you would have ever met. He will be dearly missed.

Civil Practitioner Boot Camp

In conjunction with our yearly Advanced Trial Advocacy Course, which we host every summer

in Waco, TDCAA hosted its first-ever Civil Practitioner Boot Camp. The purpose of the boot camp was to afford civil practitioners the kind of trial skills and practical insights that have been the focus of our criminal law training efforts. By all accounts it was a great success. I'd like to thank our training team, **Brian Klas, Andie Peters**, and **LaToya Scott**, for working so hard to put on a great program, and the faculty (listed below) for the time and expertise they contributed.

Deborah Bonner
C. Scott Brumley
Amy Davidson
Leslie Dippel
Michael Hull
Rebecca Lundberg
Carlos Madrid
Ann Montgomery
Dwayne Simpson

Legislative Update

The legislature was plenty busy in 2023, making up for a pandemic-era low in activity in 2021. We saw a record number of new crimes (58!) and a host of new enhancements. What has garnered the most interest so far: fentanyl murder, the Texas Racketeering Act, and changes to the child pornography laws.

I can report that rural prosecutors are very happy that the legislature, with the leadership of **Lieutenant Governor Dan Patrick**, has invested more than ever in distributing state money to smaller jurisdictions to bolster the salaries of prosecutor office staff, which allows existing employees to stay longer and attracts new workers to come on board. Many of you have used the term "game changer" with regard to the new salary funding.

Stay tuned as the comptroller's office continues to work out the details of that program.

DWI training in 2023 and 2024

Most of you know **W. Clay Abbott**, our DWI Resource Prosecutor, quite well. Clay is a true road warrior, spending weeks on end crisscrossing the state in the TDCAA van (lovingly named Frank the Tank) to offer DWI training for prosecutors and law enforcement alike. Clay's grant has been renewed for another year, so now is the time to contact him and make your request that he brings his outstanding training to your jurisdiction! Drop him an email at Clay.Abbott@tdcaa.com to schedule a date in 2024. ❇

Recent gifts to the Foundation*

Joe Bailey II
Kriste Burnett
Rex Cole, M.D. *in memory of Michael McCormick*
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Erin Faseler
David Finney
Gretchen Flader
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* gifts received between June 3 and August 4, 2023

Clarity and confusion on lesser-includeds

The Court of Criminal Appeals's recent opinion in *Ransier v. State*[1] points out—and resolves—an interesting problem with charging people with "concealing" evidence.

By Clinton Morgan
Assistant District Attorney in Harris County

If the State is charging a defendant with tampering with evidence by "concealing" it,[2] in all likelihood we eventually found the evidence. Otherwise it would be very hard to prove the charge.

But if we found the evidence, that means at some point the defendant *failed* to conceal it.[3] Ordinarily if there is evidence showing the defendant tried but failed to commit the charged offense, he would be entitled to a jury charge on the lesser offense of criminal attempt. Does that mean that a defendant charged with concealing evidence is entitled to an instruction on the lesser just because the State eventually found the evidence?

Ransier says no. If the evidence shows a defendant successfully concealed evidence for a period of time, the fact that he later failed to conceal it is not evidence that he never concealed it.

The slide and the syringe

According to the opinions, Trooper David Kral was on patrol when he noticed a children's slide on the side of the road. When he drove by the slide later, it had been moved a little and a truck was parked near it. Kral stopped and asked the truck's occupant, Charles Robert Ransier, if he could search the truck. Now there's a lot more to the search than what the opinions mention, but those facts—while extraordinary—aren't legally important so I'll bury them in an endnote.[4]

Ransier was nervous about letting the trooper search, but he agreed to remove items from his truck. As he was doing so, Kral noticed there was something in Ransier's right hand that he was trying to shove under the driver's seat. Kral moved to a different spot and leaned over; he saw the object was a syringe. Kral asked him what was in his hand, at which point Ransier tried to break the syringe and shove it under the truck seat. Kral escorted Ransier to the ground, and the syringe landed a couple of feet away with the needle part broken off.

Ransier was charged with tampering with evidence and possession of less than a gram of a controlled substance that was found in the syringe. The tampering indictment alleged Ransier had altered, destroyed, and concealed the syringe. The jury convicted on both counts and, based on his criminal history, assessed the maximum possible punishment for both: life for the tampering charge and 20 years for the drug charge.

"Partially concealed"

On appeal, Ransier claimed the trial court erred in denying his request for a lesser-included instruction on attempted tampering. A divided panel of the Fourteenth Court agreed and reversed.[5]

For a defendant to be entitled to a lesser-included instruction, there must be evidence in the record that, if believed, would let a jury decide he was guilty of the lesser offense but not the charged offense.[6] When the State charges multiple manners and means, the evidence for the lesser must negate every charged version of the offense. For instance here, where the State charged tampering by altering, destroying, and concealing the syringe, to be entitled to a lesser for attempted tampering, Ransier needed to point to evidence showing he tried, but failed, to do all three of those things.

Writing for the Fourteenth Court majority, Justice Spain held that Ransier had done just that. The majority believed the jury could have found Ransier attempted but failed to "alter" or "destroy" the syringe because the evidence was ambiguous as to when the syringe got broken: Perhaps Ransier broke it before Kral started his investigation, or perhaps it broke when Ransier threw Kral to the ground.

Regarding concealment, the Fourteenth Court noted that Kral said he saw the syringe in Ransier's hand; therefore, it was "only partially concealed." After conducting the sort of perfunctory harm analysis that applies to the erroneous denial of a lesser-included instruction,[7] the Fourteenth Court reversed.

Justice Jewell dissented. Justice Jewell pointed out that there was no affirmative evidence the syringe was broken before Kral's arrival, and Kral's testimony that Ransier had his finger on the "tip" of the syringe—where a needle would ordinarily be—showed Ransier broke it during the investigation. In the absence of affirmative evidence that Ransier failed to alter the syringe, Justice Jewell would have affirmed the verdict of guilt.

Partial concealment doesn't negate full concealment

The Court of Criminal Appeals granted review and, in a 6–3 decision, reversed the Fourteenth Court. Writing for the majority, Presiding Judge Keller focused exclusively on the issue of concealment.

She acknowledged Kral's testimony that when he saw the syringe, it was only "partially concealed." However, Kral also testified that before he saw the syringe it *had* been concealed.

These two bits of testimony flow logically from the definition of "conceal": If you can see an object, it's not concealed, but in proper circumstances it might be reasonable to infer that it had been concealed before you saw it. That was the case here, where Kral did not initially see the syringe, but during his investigation he saw it and saw that Ransier was trying to conceal it.

The fact that Ransier failed to conceal the syringe at one point in the investigation was not "evidence negating full concealment" at another point in the investigation. Thus, there was no rational basis for a jury to believe Ransier was "guilty only" of attempted tampering, and he was not entitled to a lesser.

Narrowing *Bullock*

Presiding Judge Keller distinguished *Bullock v. State*,[8] a case that has made lesser-included cases much more difficult since it came out in 2016. In *Bullock*, witnesses testified that the appellant got into a truck that wasn't his, started the engine, and, with his hands on the steering wheel and his foot pressing the throttle, tried to drive off but was thwarted because he couldn't disable the air brake. He was charged with theft of the truck. Bullock testified he got into the cab to steal some personal items; he denied intending to steal the truck, touching the steering wheel, turning it on, or touching the throttle.

Despite his testimony denying that he attempted to steal the truck, the Court of Criminal Appeals held he was entitled to a lesser-included instruction on attempted theft of the truck. This was so, the Court held, because the jury could 1) believe he was in the truck without consent; 2) infer an intent to steal from the fact he fled the scene; 3) believe his testimony that he never touched the pedals or steering wheel and did not start the truck; and 4) *disbelieve* his testimony about his intent to steal only personal items.

Bullock threw a wrench into the law of lesser-includeds because it involved piecing together bits of different witnesses' testimony to create a version of events that contradicted every witness's testimony. Despite the well-established rule that the mere disbelief of evidence cannot entitle a defendant to a lesser, the holding of *Bullock* hinges on believing one part of the defendant's testimony while disbelieving another.

In *Ransier*, Presiding Judge Keller distinguished *Bullock* by noting that the caselaw states a lesser cannot be based on disbelief of evidence "establishing commission of the greater offense," but *Bullock* involved disbelief of exculpatory evidence.

Concurrence and dissents

There are three side opinions, one concurring and two dissenting. Judge Walker dissented without opinion.

Judge Keel concurred to note that she "appreciate[d] and endorse[d]" the Court's "narrowing" interpretation of *Bullock*. She noted that the Court's "caselaw on requiring lesser-included-offense instructions is still muddled," and she hoped the Court would one day clear it up.

If you can see an object, it's not concealed, but in proper circumstances it might be reasonable to infer that it had been concealed before you saw it. That was the case here, where the trooper did not initially see the syringe, but during his investigation he saw it and saw that Ransier was trying to conceal it.

Judge Yeary dissented for the same reason he dissented earlier this year in *Chavez v. State*:[9] He believes defendants should be allowed to get lesser-included instructions if a jury could rationally disbelieve the enhancing elements of the greater offense.

Judge Newell dissented for the same reason he gave in his concurring opinion in *Chavez*: He believes defendants should be entitled to an instruction on any offense that is legally a lesser of the charged offense, just as the State currently is.

Takeaways

The happiest takeaway from this case is about the nature of concealment. Just because an item isn't currently concealed doesn't mean it wasn't concealed in the immediate past. Indeed, the way that an item is partially concealed—here, in a hand—can create an inference that it was fully concealed shortly before.

The less happy takeaway is that the law of lesser-included offenses remains, as Judge Keel said, "muddled." Ever since *Bullock*, I have cautioned prosecutors against opposing lesser-included instructions because the results of these cases are not predictable. The Court's narrowing of *Bullock* could, in theory, severely limit its application—how often are you going to have a case where a lesser-included is raised by the disbelief of exculpatory evidence?[10]

A prosecutor could, in good faith, argue that *Ransier* leaves *Bullock* a fact-bound nothingburger. I would wish that prosecutor good luck with such an argument, but I would not risk a significant case on it if I did not need to. *Ransier* does more to clarify the nature of concealment than the law of lesser-includeds. ❇

The happiest takeaway from this case is about the nature of concealment. Just because an item isn't currently concealed doesn't mean it wasn't concealed in the immediate past. Indeed, the way that an item is partially concealed–here, in a hand–can create an inference that it was fully concealed shortly before.

Endnotes

[1] ___ S.W.3d ___, No. PD-0289-20, 2023 WL 4224609 (Tex. Crim. App. June 28, 2023).

[2] Penal Code §37.09(a)(1) makes it an offense to, among other things, "conceal" an item with the intent to impair its use in an investigation.

[3] Conceal: "To keep from being observed or discovered; hide." *The American Heritage Dictionary of the English Language*, 5th ed.

[4] The opinions make it sound like a state trooper was investigating a children's slide for no particular reason. That seemed odd, so I dug a little bit. The following is based on facts in the State's brief, some of which were adduced at punishment.

When Kral first saw the slide on the side of an access road, he thought it was abandoned and he might pick it up at the end of his shift for his own children. Later, he noticed the slide had been moved and a truck was parked next to it. What the appellate courts called an "investigation" seems to have started off with the trooper wanting to ask the truck's occupant about the slide. The first thing the truck's occupant, Ransier, said to Kral was, "I defecated myself"–though he might have used a different word than "defecated." Ransier told Kral he had outstanding warrants. Inside the truck Kral saw a wig on the passenger's seat, a little girl's swimming suit spread out on the floorboard, and some personal lubricant. There was a candle, and Ransier–who was shirtless–had candle wax on his chest.

So *that's* why Kral asked to search the truck. Items eventually found in the truck included duct tape, rope, condoms, baby oil, children's toys, "iced-down cucumbers," candy, balloons, and "male enhancement" products.

[5] *Ransier v. State*, 594 S.W.3d 1 (Tex. App.–Houston [14th Dist.] 2019).

[6] *Ritcherson v. State*, 568 S.W.3d 667, 676 (Tex. Crim. App. 2018).

[7] When a trial court errs in denying a defense request for a lesser-included and there is no lesser-included instruction at all, courts will infer some harm from the fact that the jury convicted when the only options were to acquit or to convict on a greater offense they did not believe beyond a reasonable doubt. That is, the appellate courts presume juror misconduct. I am unaware of any other harm standard that presumes juror misconduct; appellate law ordinarily presumes jurors follow instructions. See, e.g., *Paster v. State*, 701 S.W.2d 843, 848 (Tex. Crim. App. 1985) (where nonresponsive answer implicated capital murder defendant in two other murders, trial court's instruction to disregard rendered error harmless beyond a reasonable doubt).

It strikes me that this harm standard for the denial of a lesser included is a manifestation of the problem of the seen and the unseen. Because the State cannot appeal an acquittal, appellate courts will never see a

case where the defendant did not get an instruction on a lesser-included and the jury acquitted on the charged offense but would have convicted on a lesser. Because appellate courts have never seen such a case, they presume it doesn't exist.

[8] 509 S.W.3d 921 (Tex. Crim. App. 2016).

[9] 666 S.W.3d 772 (Tex. Crim. App. 2023).

[10] In *Chavez*, released just two months before *Ransier*, the Court explicitly noted that "the disbelief of evidence is not evidence." Yet the Court here acknowledges that in *Bullock* it was the disbelief of the defendant's exculpatory testimony that raised the lesser included.

Photos from our Advanced Trial Advocacy Course in July

Photos from our Fundamentals of Management Course in August

An introduction to what child protection prosecutors do (cont'd from the front cover)

and civil procedure! And you are not dealing with just one party (the defendant). It isn't unusual to have a mom and two or three dads in a case, each entitled to representation, along with the child's attorney ad litem and guardian ad litem. There is a great deal of interfacing with the local bar while maneuvering through the life of a DFPS case.

On any given day, a child protection prosecutor may be fielding emergency emails and phone calls from caseworkers on current cases, advising child protection investigators on emergency removals in new cases, presenting new removals to the court within a couple of hours of notice, appearing in court for scheduled statutory review hearings, prepping and appearing for contested trials and hearings, participating in mediations, and generally trying to keep up with daily case management tasks. It can be a challenging position because there are children's safety issues arising daily that demand our attention—all while managing a planned calendar and ensuring you are not missing any critical deadlines.

Practice Tip: If you need copies of DFPS' records for one of your criminal cases, contact DFPS at www.dfps.texas/gov/policies/Case_Records/professional_duties.asp.

Who represents DFPS

The governing statute for representation of DFPS in Texas family courts is found in the Family Code, which says the county attorney shall represent DFPS but the district attorney has the right of first refusal.[1] In some smaller counties, neither the CA nor the DA provides representation, but instead DFPS-employed regional attorneys manage the caseloads (DFPS has divided the state into 11 regions).[2] DFPS also has statutory authority to contract with private attorneys to handle its cases as long as the Attorney General approves.[3] In counties with a population of 2.8 million or more, the caseload *must* be carried by the county or district attorney's office.[4] Just based on experience, it does appear the majority of Texas counties have dedicated prosecutors from either its county or district attorney's offices managing these cases.

The two DFPS divisions child protection prosecutors work with are Child Protective Investigations (CPI) and Child Protective Services (CPS).[5] CPI manages child abuse and neglect cases during the investigative stage, while CPS manages the conservatorship stage of the case after legal removal of the child from the home. CPI and CPS were not always separate divisions; the investigation and conservatorship functions used to both be a part of the CPS program until a few years ago. Regardless of the recent division, some counties still use the old-school term, CPS prosecutors, to refer to those of us who handle child protection cases. Some counties refer to us as DFPS prosecutors (as CPI and CPS both fall under this department), while some counties may say child protection prosecutors. There is no right or wrong here, merely preference, and I will use the term "child protection prosecutors" in this article.

Child protection prosecutors and DFPS maintain an attorney-client relationship; the same privileges apply to their communications as in any attorney-client relationship. Although the child protection prosecutor may be privy to confidential information maintained by DFPS, the prosecutor's office does not own DFPS's records, just like a private attorney does not own the records of its corporate client. DFPS records are subject to many confidentiality laws pertaining to release, and a prosecutor does not have the authority to circumvent these laws.

By the numbers

During DFPS's 2022 Fiscal Year (September 1, 2021–August 31, 2022), there were 310,848 allegations of child abuse or neglect made to CPI. Out of those allegations, CPI conducted 166,187 investigations. Out of those investigations, CPI made the following dispositions:

- Reason to Believe (RTB): 37,081
- Ruled Out (RO): 109,768
- Unable to Complete (UTC): 1,858
- Unable to Determine (UTD): 17,480

(Sidebar: DFPS is the king of acronyms. The department has acronyms for people, departments, stages of the case, service providers, types of foster homes, and on and on. If you are new to this world, just know it gets easier with time and cheat sheets are recommended!)

RTBs confirm abuse or neglect by a preponderance of the evidence; ROs confirm that abuse or neglect did *not* occur by a preponderance of the evidence; UTC means a determination could not be made because of an inability to gather enough facts; and UTD means neither an RTB nor an RO could be confirmed by a preponderance of the evidence. Out of the 37,081 cases where a preponderance of the evidence resulted in an RTB, 5,271 investigations resulted in legal

removals. This can be translated to about 5,000 parental rights termination cases being filed in Texas family courts during DFPS's 2022 Fiscal Year.[6] Let's look at how that translates to four Texas counties—two small and two large, from two different DFPS regions:

County	CPI Allegations	CPI Investigations	RTB Finding	RO Finding	UTC Finding	UTD Finding	Legal Removals*
Tarrant	24,697	13,286	3,622	8,235	263	1,166	327
Hood	712	457	130	299	3	25	17
Harris	43,259	23,468	3,835	14,997	375	4,261	339
Chambers	410	232	38	174	1	19	6

* It is important to note that not all prosecutor offices handle DFPS representation the same. I caution counties against comparing number of CPS prosecutors in one county against another county to justify staffing numbers based solely on the Legal Removal numbers represented in these statistics. For example, some counties may handle their own appeals while another may defer appeals to the DFPS state office. Some counties may file petitions for Orders to Aid in Investigation or for Court Ordered Services, in addition to termination cases, while others defer these types of cases to DFPS Regional Offices. So you could be comparing apples to oranges without more information.

This tiny snapshot gives some insight into how few allegations result in the legal removal of a child from the home. DFPS goes through great pains to prevent taking custody of children; there are numerous programs and efforts initiated by CPI to keep families together. The result is that it really is just the worst of the worst cases of child abuse and neglect that end up being filed by child protection prosecutors.

So, who are the Texas prosecutors stepping up to handle these child abuse and neglect cases? I have discovered there is no simple way to tally how many child protection prosecutors there are in Texas. Below are some stats about how few such prosecutors there are compared to criminal prosecutors, referencing the same counties as in the previous table: [7]

County	Total Prosecutors	CPS Prosecutors
Tarrant	184	8 in the CDA's Office
Hood	6 in the DA's Office 3 in the CA's Office	1 in the DA's Office 0 in the CA's Office
Harris	359 in the DA's Office 120 in the CA's Office	0 in the DA's Office 32 in the CA's Office
Chambers	6 in the DA's Office 5 in the CA's Office	0 in DA and CA offices (CPS cases are handled by DFPS Regional Attorneys)

Types of DFPS suits related to the safety of children

There are a handful of civil suits DFPS has the authority to file. Counties may handle all or some of these suits, depending on their agreement with DFPS. The following four actions may be implemented to prevent the legal removal of a child from the home:

Petition for Orders in Aid of Investigation:[8] This suit is filed against a parent who is interfering with DFPS's right to effectively investigate allegations of abuse or neglect. The relief is a court order that may include giving DFPS access to a child's school or shelter, access to a child's medical records, and the right to have a child examined by a medical doctor, including drug testing and psychological exams.

Petition for Court Ordered Services:[9] This suit is filed against a non-compliant parent to whom DFPS is offering services to alleviate the effects of abuse or neglect that has already occurred, to reduce the continuing danger to the health and safety of a child, or to reduce the risk of abuse or neglect to a child. The goal in these cases is to prevent legal removal of the child while requiring the parent to engage in tailored services to assist in being a safer parent, such as drug and alcohol education and mental health assessments and appointments.

Protective Orders:[10] Protective orders can be useful tools to protect a child from being a victim of domestic violence in the home or witnessing domestic violence between parents in the home. A protective order may address many issues that, if left unresolved, could lead to the legal removal of a child from the home.

Petition for Removal of Alleged Perpetrator:[11] Much like a protective order, this kick-out order can be an effective means of protecting a child from an abuser if the removal of the abuser from the home is all that is necessary to protect

the child. This situation requires the caregiver in the home to be protective and report any attempt by the perpetrator to return to the residence.

Termination of parental rights cases

The Child Protection Suit is a suit affecting the parent child relationship (SAPCR) that is filed by DFPS when a child is legally removed from the home. These suits are governed by Chapter 262 of the Family Code (Suit by Governmental Agency to Protect Child); they are initiated by filing the Original Petition for Protection of a Child (OP); and they often end with a final trial terminating parental rights.

Termination of Parental Rights cases run on strict statutory timelines. For prosecutors interested in learning about the life of a child protection case, here is a timeline and summary of the hearings that drive these cases, sprinkled with a few practice tips and anecdotes.

Practice Tip: Make sure you know a few really seasoned child protection prosecutors that you can text on short notice for advice on how to handle last minute surprises in court.

Day 1: Removal. Once CPI exhausts its efforts to prevent the removal of a child from the home, it submits a request to the prosecutor to start the legal process that allows DFPS to keep or take emergency custody of the child. The prosecutor must review the facts of the removal and address any questions and concerns with the investigator. The petition and its supporting affidavit have to be drafted and filed, and an appearance must be made in front of the court. Removal requests come up unplanned and immediate, and the process moves extremely fast. Typically, it all takes place the same day—within a couple of hours. Removals aren't picky, either: They happen on your busiest days and your catch-up days. As child protection prosecutors, we have to be able to shift gears as soon as we hear the words, "We just got a removal." Sometimes there is more than one in a day!

Without a court order. When DFPS takes possession of a child without a court order, because there isn't enough time consistent with the health and safety of the child to get in front of the court, you have one business day to file the OP and request emergency relief from the court, or by law CPI must return the child home.

The burden CPI must meet to keep emergency custody of a child it has taken into its possession without a court order is sufficient facts to satisfy a person of ordinary prudence and caution that:

- there was an immediate danger to the physical health or safety of the child;
- the child was the victim of sexual abuse or trafficking;
- the parent or person who had possession of the child was using a controlled substance and the use constituted an immediate danger to the physical health or safety of the child; or
- the parent or person who had possession of the child permitted the child to remain on premises used for the manufacture of methamphetamine; *and*
    - * continuation of the child in the home would have been contrary to the child's welfare;
    - * there was no time consistent with the physical health or safety of the child for a full adversary hearing; and
    - * reasonable efforts consistent with the circumstances and providing for the safety of the child were made to prevent or eliminate the need for the removal of the child.[12]

With a court order. When there is time consistent with the health and safety of the child to file an OP, a child protection prosecutor will appear before the court the same day to request an emergency order, which then allows CPI to remove the child from the home.

The burden CPI must meet to take custody of a child with a court order is sufficient facts to satisfy a person of ordinary prudence and caution that:

- there is an immediate danger to the physical health or safety of the child or the child has been a victim of neglect or sexual abuse;
- continuation in the home would be contrary to the child's welfare;
- there is no time, consistent with the physical health or safety of the child, for a full adversary hearing; and
- reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for the removal of the child. [13]

Whether it's a removal with or without a court order, this initial hearing is an *ex parte* proceeding between DFPS and the court. If the court determines DFPS should keep or take emergency custody of a child, it will grant an emergency protective order (EPO) setting the case for an Adversary Hearing within 14 days. Parents must be notified of the removal and the Adversary Hearing. When DFPS takes emergency custody, the

child is placed outside of the home with family or fictive kin if appropriate; if not, then into the foster care system he goes. (Fictive kin are not legally related to the child, but these are people with whom the child has an emotionally significant relationship—family friends, baby-sitters, school staff, etc.)

If upon review we determine a request for removal doesn't meet the legal burden, as the prosecutor, you have a choice. You can simply deny the request, drink your coffee while it's still hot, and carry on with your planned day. Or you can stop what you are doing and immediately contact the investigator to dig deeper into the investigation. A lot of times I find that the burden really is met, but that the investigator just needs some guidance on which facts are relevant to the removal and how to best articulate those facts in their affidavit. Practice Tip: Create a template removal affidavit form with sections for each topic that must be addressed by CPI in the removal. For example, we are adding a Reasonable Efforts section based on the new requirement coming out of the 88th Legislative Session that the affidavit must describe all reasonable efforts made to prevent or eliminate the need for the removal of the child.[14]

Day 14: Adversary Hearing. This is when a parent can challenge the legality of the removal and when DFPS asks the court to upgrade its emergency possession status to temporary managing conservatorship (TMC) of the child. You can imagine parents are pretty hot, as their child has been physically removed and placed outside of their custody for a couple of weeks by now. As this hearing occurs pretty fast after removal, it can really test a prosecutor's ability to pull evidence together quickly. There is no exception to the application of the Texas Rules of Evidence—the rules apply, short notice or not. And these hearings often look like full-blown final trials with subpoenaed witnesses such as schoolteachers, police officers, family members, and custodians of record.

The burden at this hearing is sufficient evidence to satisfy a person of ordinary prudence and caution that:

- there is a continuing danger to the physical health or safety of the child caused by an act or failure to act of the person entitled to possession of the child, and continuation of the child in the home would be contrary to the child's welfare; and
- reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for the removal of the child.[15]

If DFPS does not meet this burden, the child is returned home. If DFPS does meet its burden, DFPS maintains temporary custody while it works with the family to reunify the child with the parents.[16] I am personally surprised by how many parents agree to give DFPS temporary custody of their children at this stage. I mean seriously: The State has taken your kids and you have a court-appointed attorney—what have you got to lose by fighting DFPS? Regardless, we get a lot of agreed temporary orders. Certain cases are almost always contested at this early stage, though, and those are the "broken baby" cases—physical abuse cases of infants where one or both parents are under criminal investigation for child abuse.

Day 60: Status Hearing. At this hearing, the court is required to review two issues: 1) the status of service of the lawsuit on the parties, and 2) the "service plan" developed for the family.

Executing service can get tricky and must be in strict compliance with the Texas Rules of Civil Procedure; the failure to properly serve a parent or alleged parent can delay resolution or open a door to a credible appellate complaint. There are rules for serving legal parents, missing parents, unknown fathers, and alleged fathers. Even when you think you have everyone properly served, there are still surprises. I once had a caseworker make one last attempt to contact a missing father on the eve of trial—in her mind this was necessary to testify to the fact she had made diligent efforts to find him—and he answered her call at a number that hadn't worked throughout the entire case! Relevance, you ask? We now have located an alleged father who is entitled to notice that we have not personally served. There are procedural ways to handle these surprises, but you have to be careful not to jeopardize a case by extending beyond its deadlines.

The Service Plan is governed by Chapter 263, Subchapter B of the Family Code. It must be filed by DFPS no later than 45 days from the date the temporary order is granted.[17] It is the plan of action created by DFPS, with the parents' input, that will (we hope) rehabilitate the parents and allow them to become safe parents. Failure to

Practice Tip: If a parent refuses to sign a temporary order at this stage because there are criminal charges pending or possible, refer his or her counsel to §262.013 of the Family Code, which says a parent's agreement to give DFPS temporary custody of their child is not an admission that they engaged in conduct that endangered the child. I've always been curious if criminal prosecutors see Motions in Limine to keep out agreed temporary orders from child protection cases. It seems like this little statute isn't well known but could be pretty favorable to a parent facing criminal charges.

comply with a court-ordered service plan is a ground for termination,[18] but with a parent's commitment, it is the vehicle that results in the return of their children. Service plans must be tailored to each family's circumstances and needs; common services included in these plans are drug and alcohol assessments and treatment, psychological assessments and mental health treatment, individual counseling, domestic violence counseling, family therapy, and requirements of housing and employment stability. DFPS has the burden of making reasonable efforts to reunify the family; and creating a tailored, effective, workable service plan is part of this requirement. In my experience, this isn't always easy. For example, finding a Spanish speaking domestic violence counselor who accepts payment from the State can be nearly impossible. If DFPS can find one, the wait list to get in is longer than the life of the case. I can't tell you how many times I've seen caseworkers report that a parent has not complied with a service plan only to find out later that the reason for the noncompliance is DFPS's inability to locate a provider.

Practice Tip: As the prosecutor, make sure you understand these nuances before the review hearings so you can guide your client (DFPS) to what is "reasonable" with respect to service plan requirements. You don't want this testimony to unfold in front of the judge because DFPS will lose its credibility.

There are a few "aggravated circumstances," when, if approved by the court, DFPS is not required to create a service plan or make reasonable efforts to reunify the family.[19] A few examples of aggravated circumstances include a parent who abandoned a child without any means for identification, a parent who inflicted serious bodily injury or sexual abuse on a child, and a parent who engaged in criminal conduct against the child, such as possession of child pornography or trafficking. In these cases, you can set your final trial pretty quick, terminate parental rights, and, let's hope, progress the child towards permanency in a safe, loving home.

Day 180: Initial Permanency Hearing. This hearing is when the court reviews DFPS's permanency goal for the child to ensure that the case is on track for a timely, final resolution. By this time, DFPS should be ready to announce whether it is moving for parental termination or if there is another goal, such as family reunification or conservatorship to a relative. The court also reviews the appropriateness of the child's placement; whether the child's physical, medical, and emotional needs are being met; and the compliance of the parents with their service plans.[20]

Practice Tip: Some counties require mediation while others do not. Regardless, once your permanency goal is established, a case should be ripening for mediation. Mediation can be especially beneficial in cases where all you really have left are custody arguments and not safety concerns. So, if a case is starting to look like a custody battle instead of a child protection case, set it for mediation.

Day 300: Second Permanency Hearing. After the Initial Permanency Hearing, and before the final trial, the court must hold an additional permanency hearing every 120 days. Cases finalizing within one year will have only two permanency hearings, but cases in extended timelines may have another one or two permanency hearings before final resolution of the case.

After Day 270 and Before Day 365: Final Trial. DFPS prosecutors must ensure proper procedures are in place so their final trials are heard before the one-year mandatory dismissal date. Case management is so incredibly important. If a case hits that drop-dead date and the parties haven't requested and received an extension order, the case gets dismissed and the legal status of the child returns to what it was before DFPS took temporary custody. Simply put, the child goes home, and that's every child protection prosecutor's fear.

As with criminal cases, CPS trials can be jury or bench trials. These cases are often hotly contested and involve multiple parties. As stated earlier, parents and children have the right to be represented by attorneys, and indigent parents are entitled to court-appointed attorneys. So it's not unusual to have a pretty full courtroom with four or more represented parties at a final trial.

The burden to terminate parental rights is clear and convincing evidence. The State must prove at least one statutory ground for termination. There are several grounds, and one of the most common sought is that the parent has "engaged in conduct or knowingly placed the child with persons who engaged in conduct, which endangered the physical or emotional well-being of the child."[21] In addition, DFPS must prove that termination is in the child's best interest. Sometimes this best interest piece is actually the harder point to prove. For example, if a child is having severe behavioral issues in care and is bouncing from placement to placement, adoption may not be a realistic outcome for that child. So instead of severing the parent child relationship, would it be better for the child if DFPS took permanent custody without terminating parental rights in the hopes the parents are able to rehabilitate themselves down the road?

In termination cases, DFPS is named as the child's permanent managing conservator (PMC), and the State essentially becomes the child's parent. Sometimes DFPS is named PMC and parental rights aren't terminated (such is in the example above). DFPS may not have PMC long in some cases, such as those where children are placed right off the bat with foster parents who want to adopt them. But in some cases, DFPS' PMC status lasts for years, even up to when a child ages out of foster care at age 18 or 21.

Permanency Hearings after Final Trial. By statute, the court is required to review PMC cases after final trial at least once every six months. The harsh reality of two reviews a year is that DFPS, and even children's attorneys, may allow children's needs to go unmet as there is little legal accountability during these six-month intervals. This could look like a child not getting a driver's license when she turns 16 (translation: not having the same opportunities as every other kid in her class); a young adult aging out of care without having his original birth certificate and Social Security card (translation: not being able to get a state ID or employment); or a child remaining in a placement that is more restrictive than her needs (translation: the child missing out on normal childhood activities).

Impact by criminal cases

When a parent endangers or abuses a child, a criminal investigation may occur in conjunction with the CPI investigation. We often see these joint investigations in cases where children go to the hospital for unexplained traumatic injuries, sexual abuse, endangerment reported by citizens to law enforcement, or even child death cases. We don't typically see criminal investigations pending in cases where children are removed for neglect—for example, when parents are using meth and not meeting the needs of their starving, dirty, lice- and flea-infested children.

In cases that have criminal investigations pending from the facts of the removal, a DFPS prosecutor should be tracking the criminal investigation to see if and when charges are filed; if and when there is an arrest; whether the parent gets indicted; and how the criminal case is resolved. Remember the child protection prosecutor's burden at the two main contests in the case? At the Adversary Hearing there must be sufficient evidence to satisfy a person of ordinary prudence and caution, and at the termination trial the trier of fact must find clear and convincing evidence. A detective's testimony that probable cause existed to charge and arrest a parent and/or a certified copy of a filed indictment can be really helpful at the adversary hearing in meeting this burden. And later down the road, a guilty plea and judgment of conviction can support clear and convincing evidence that a parent engaged in conduct which endangered the physical or emotional well-being of the child.

Some of the toughest cases child protection prosecutors face are physical abuse cases where criminal charges are not filed, both parents are in the abuse timeline, and the investigation has halted because there isn't enough evidence to eliminate one of the parents as the perpetrator. Often by the end of the child protection case, both parents have cooperated fully with their service plan tasks, yet they are both denying physical abuse occurred. Even when the parents have checked all the boxes on their service plans, DFPS may still see these cases as high risk for reinjury due to the lack of accountability by either parent, in combination with the significance of the injuries sustained, and often still seeks termination due to that risk. But it can be hard to secure termination when the only ground the prosecutor has is endangering conduct based on the one instance of abuse and there are no arrests, indictments, convictions, or admissions to show who the abuser was.

Conclusion

To the criminal prosecutors who have gotten this far, I want to say thank you for reading this article and taking the time to better understand what your colleagues are doing in the family courts. Go check out a contested adversary hearing or termination trial when you can. If you really enjoy the challenging nature of these cases, maybe even consider joining our ranks!

To the child protection prosecutors who have made it this far, here's a reminder that in comparison to the number of criminal prosecutors across the state, we may be small in number, but the impact of our work on the lives of children is tremendous and long-lasting. I was reminded of this a few weeks ago when, by chance, I was able to observe the adoption of two boys from one of my prior cases. Theirs happened to be one of the hardest, longest, most contested cases I have handled. I had to wipe away my tears as these two young men high-fived the judge. What an amazing event to be a part of. ❇

Continued in the blue box on page 19

Practice Tip: Creating a PMC caseload handled by one prosecutor can allow the county to maintain consistent legal oversight of these cases. This prosecutor can stay knowledgeable about the cases even though DFPS caseworkers may change and request review hearings with the court as needed to ensure DFPS, the child's attorney and/or guardian ad litem, and other parties still involved in the case are held accountable in meeting the needs of the children living indefinitely in the foster care system.

Putting your health first

Maintaining the health of our prosecution staff should be a top priority.

By J. Brett Smith
Criminal District Attorney in Grayson County

Every prosecutor, investigator, legal assistant, and victim advocate is exposed to significant emotional stress on a routine basis. This emotional stress comes from the nature of our work, whether it is reviewing graphic crime scene photographs, sifting through child sexual exploitation material, interviewing victims of sexual or physical abuse, or meeting with family members whose loved one has been the victim of a violent crime. All these activities can create stress. Now add the pressures associated with conducting jury trials, managing jail populations, and attempting to control the burgeoning dockets in court in a system which, by its own nature, is highly adversarial.

As we all know, stress can be detrimental to our emotional well-being and can directly impact our physical health. Loss of sleep, high blood pressure, irritability, heart disease, fatigue, and a weakened immune system are just a few things that come to mind. It is well documented that stress can also reduce serotonin levels. Depletion of serotonin is known to cause mild depression, low energy, negative thought patterns, feelings of tension, sugar cravings, and reduced interest in sexual activity. Another effect of stress, which is less commonly known, is adrenal fatigue. This is believed to be brought about by long term exposure to stress, resulting in low cortisol levels which have many of the same symptoms mentioned above. Issues such as divorce, suicide, addiction, and depression plague high-stress occupations.

In recent meetings with a few friends who work in law enforcement, they told me that after years of working both in patrol and as investigators, they were "throwing in the towel" because of burn-out. I expressed my empathy, and I left those discussions evaluating my own experience. I have spent 20 years in prosecution, with 15 years as a front-line prosecutor, and I have spent a career dealing with violent crime. Now I am an elected DA who still stays active in the courtroom, and the stress of the job has by no means receded. I began to think that if my friends were feeling the effect of their jobs, what was happening to me and my fellow employees? So I set out on a journey.

I began to research wellness programs for law enforcement. It just so happens I have a few friends with significant experience in this area. One is Inspector Dustin Williams, a Deputy United States Marshal who is also a team leader in the Peer Support Program at the Marshal Service. The other friend is Captain Marty Hall at the Grayson County Sheriff's Office; he is the Peer Support Coordinator for his office. Both men are always available to lend me their ear, provide moral support, and just be there for me if needed. Through these two friends, I learned about the book *Emotional Survival for Law Enforcement* by Kevin M. Gilmartin, Ph.D. After reading the book, I have made it a point to pass it on to other law enforcement professionals who needed to read it.

I was also directed to a group called F1RST (more info at www.f1rst.org). F1RST stands for First Responder Stress & Trauma, and it is a comprehensive wellness program that addresses the impact of repeated stress exposure to first responders. The company has a multi-disciplinary team of mental health providers, therapists, and specialists, and most of the therapists have past experience in law enforcement or have worked in trauma-related healthcare—folks who have "been there and done that." My first therapy session was with a retired Chicago police officer, and I found the experience very beneficial. After I talked for a while as he listened, my therapist pointed out that while my daily workout routine was a great stress reduction tool, it was causing

an adrenal dump—a surge of adrenaline in my bloodstream. When I later returned to work for a trial, contested hearings, stressful events, time crunches, and deadlines, those events were also causing an adrenal dump. The emphasis was drilled home: my need for recovery and rest. In addition to the good talk, my therapist got me started on some supplements to help support my immune system and combat adrenal fatigue.

Our next step was to bring everyone together within our office and explain my experiences and outline the services available. We informed our staff that our health insurance would cover the cost of services. We encouraged them, if they desired, to investigate the services available through F1RST. We authorized them to take time, while at work, to shut their door and engage in a Zoom hearing or use sick leave for an in-person consult. Our goal is to keep employees healthy and happy, thereby avoiding burnout and perhaps increasing retention.

At the end of the day, it is always good to talk with your spouse, friends, family, significant other, spiritual leader, or even God about the stress of your work. However, they may not always be able to relate or provide good solutions to an issue or a problem. Oftentimes we just need someone to talk with about the stress associated with our profession and someone who can relate to what we deal with on a daily basis. It is OK to say that we need help and that we may not always be able to navigate through a stressful occupation without seeking the advice of a professional.

To that end, find a law enforcement-related peer support program and utilize those resources. Locate a group such as F1RST in your region. Make these resources available to you and your staff. Gather staff and encourage them to "dump the bucket." Give them the time and resources to place themselves first in a career that demands we put the needs of others before ourselves. We are only as strong as our weakest link. ❇

Endnotes

[1] Tex. Fam. Code §264.009(a).

[2] Tex. Fam. Code §264.009(e).

[3] Tex. Fam. Code §264.009(d).

[4] Tex. Fam. Code §264.009(f).

[5] "The Texas Department of Family and Protective Services (DFPS) protects children and vulnerable adults from abuse, neglect, and exploitation" through "five major programs" that include: Adult Protective Services; Child Protective Services; Child Protective Investigations; Prevention and Early Intervention; and Statewide Intake." www.dfps.texas.gov/About_DFPS/ default.asp.

[6] The stats in this section were gathered from the DFPS Data Book, specifically the CPI section located at www.dfps.texas.gov/About_DFPS/ Data_Book/Child_Protective_Investigations.

[7] These numbers were gathered from various sources and are not guaranteed to be exact.

[8] Tex. Fam. Code §61.303.

[9] Tex. Fam. Code §264.203.

[10] Tex. Fam. Code §82.002(d)(2). DFPS may file for the protection of any person alleged to be a victim of family violence.

[11] Tex. Fam. Code §262.1015.

[12] Tex. Fam. Code §262.105.

[13] Tex. Fam. Code §262.101.

[14] Tex. Fam. Code §262.101(b), amended by Acts 2023, 88th Leg. R.S. Ch. 672 (HB 968) §1, eff. Sept. 1, 2023.

[15] Tex. Fam. Code §262.201(j)(1)(2).

[16] Tex. Fam. Code §262.2015.

[17] Tex. Fam. Code §263.101.

[18] Tex. Fam. Code §161.001(b)(1)(O).

[19] Tex. Fam. Code §262.2015.

[20] Tex. Fam. Code §262.304.

[21] Tex. Fam. Code §161.001.

The evading arrest statute: confusion, cars, and cases

"I'm pretty sure evading arrest with a vehicle is just a state jail felony, right? You can't charge my guy with a third degree."

By Brandy Robinson
First Assistant District Attorney in Austin County

Have you ever heard this from a defense attorney during a plea negotiation before? If not, count yourself lucky.

If you have, you would be in good company with lots of other prosecutors. Many defense attorneys—and many defendants who got their law degrees from the prestigious school of hard knocks—will still occasionally insist that evading arrest with a vehicle can be charged only as a state jail felony rather than a third-degree felony.

The first time a defense attorney springs this argument on you, you might whip out your trusty Penal Code to quickly prove them wrong. You might also find yourself scratching your head as you try to decipher two seemingly contradictory versions of Texas Penal Code §38.04 published side by side. If this happens, fear not. Evading with a vehicle is indeed a third-degree felony—but proving it may take some explaining.

Confusion

The road to hell, and hellishly perplexing laws, is paved with good intentions. More than 10 years ago, in the July–August 2012 issue of this journal, author John Stride expended admirable effort to explain the confounding and seemingly conflicting amendments to the evading law that the legislature passed during the 2011 legislative session.[1]

To those of us old enough to remember criminal prosecution during the 2000s (no one will ever convince me to call them "the aughties"), it comes as no surprise that a first-offense evading arrest with a motor vehicle used to be classified as a state jail felony. However, as Mr. Stride explained, the Texas legislature bumped the charge up to a third-degree felony when it passed SB 1416 in 2011. Seems simple enough, right?

Cars

The complication arose because another amendment to the evading arrest statute had already passed during the same session. In the 82nd Regular Session, SB 496 was passed to add watercraft into the felony evading statute, where the law had previously applied only to land-based motor vehicles. Later, the legislature also passed SB 1416, which increased the offense level for evading—whether with boats or cars—to a third-degree felony.

Unfortunately, Stride noted that book publishers at the time failed to either understand or properly apply statutory construction to reflect the new law. One would think that today, more than 10 years later, they would have come to a consensus on a better way to reflect these changes to the law. But if you pull a current Penal Code from its vaunted place beside your desk (or under a mountain of case files) and turn to §38.04, your version likely still contains both versions of the statute. Even online publishers of the Penal Code often publish both versions in their entirety rather than try to parse them out.[2]

This editorial decision leaves some defendants and their attorneys arguing that the tie should go to the runner (or to the evading driver, if you will). Such arguments rest on the incorrect assumption that because both subsections exist and are effective in their entirety, the State must pick between them and use the version most fa-

vorable to the defense. Multiple Texas courts have made their disagreement with that premise clear.

Cases

In 2012, shortly after the passage of SB 1416, the Court of Criminal Appeals went out of its way to address the then-current changes in a footnote on an unrelated evading case. The Court first noted that the case before it rested on an older version of the statute with a lower punishment range. The Court then remarked that per the 2011 legislative changes, "Now it is a third-degree felony if an offender used a vehicle or watercraft to evade arrest, regardless of whether he has a prior conviction for evading."[3]

Several lower courts that have been called upon to address the issue have followed suit. The Fort Worth Court of Appeals observed that every effort should be made to reconcile the two bills. That Court also pointed out that even if reconciliation were impossible, then the legislature's decision to raise evading to a third-degree felony in SB 1416 would prevail in any conflict, because the vote to pass SB 1416 constituted the last legislative vote on all three bills,[4] which is how the Code Construction Act[5] reconciles bills that change statutes in irreconcilable ways. Numerous other Texas appellate courts have since cited the case, agreeing with the Fort Worth Court's determination.[6]

Conclusion

The next time you handle an evading with a vehicle case, you may want to have one of these cases handy. You just might run into a defense attorney trying to convince the court to throw up a roadblock. At the risk of thoroughly wearing out the road-themed metaphor, I'll conclude by saying that the legislature may have driven the long way around to get us there, but the resulting caselaw has made the final destination clear: The first offense of evading arrest with a vehicle is a third-degree felony. ❇

Endnotes

[1] www.tdcaa.com/journal/texas-style-sausage-making-gleaning-legislative-history-and-legislative-intent.

[2] See, for example, https://statutes.capitol.texas.gov/Docs/PE/htm/PE.38.htm#38.04, where two versions of Subsection (b) coexist. It should be noted that publishers, including TDCAA, don't have the discretion to parse them out unless the legislature repeals them. The best they can do it offer explanatory notes–which TDCAA does in its annotated *Criminal Laws of Texas* book, for example. Both sections do exist–in the same way a statute found unconstitutional still exists on the books; it's up to litigators to argue one version controls.

[3] *Ex parte Carner*, 364 S.W.3d 896, 899 n.5 (Tex. Crim. App. 2012).

[4] *Adetomiwa v. State*, 421 S.W.3d 922, 927 (Tex. App.–Fort Worth 2014, no pet.).

[5] Tex. Gov't Code, §§311.025–.026.

[6] See *Watkins v. State*, No. 09-19-00123-CR, 2021 WL 261760, at *7 (Tex. App.–Beaumont Jan. 27, 2021, pet. ref'd); *Fulton v. State*, 587 S.W.3d 76, 78 (Tex. App.–San Antonio 2019, no pet.); *Warfield v. State*, No. 03-15-00468-CR, 2017 WL 2628563, at *11–12 (Tex. App.–Austin June 14, 2017, pet. ref'd); *Rodriguez v. State*, No. 08-18-00053-CR, 2019 WL 3283314, at *3 (Tex. App.–El Paso July 22, 2019, no pet.); *Bailey v. State*, No. 12-18-00096-CR, 2019 WL 1142459, at *2 (Tex. App.–Tyler Mar. 12, 2019, no pet.); *Moorhead v. State*, 483 S.W.3d 246, 248 (Tex. App.–Texarkana 2016, no pet.); *Jackson v. State*, No. 05-15-00414-CR, 2016 WL 4010067, at *7 (Tex. App.–Dallas July 22, 2016, no pet.).

A VAC's guide to navigating the appellate process

By Andrea Westerfeld
Assistant County & District Attorney in Ellis County

It's a common experience in courtrooms around the state and around the country:

The defendant is found guilty, the judge pronounces the punishment, and the defendant is led out of the courtroom to begin serving his sentence. The victims and their families heave a sigh of relief, knowing that the defendant will be facing justice and their ordeal in the criminal justice system is over.

But elsewhere in the courthouse, the appellate attorney is just getting started. To the public—and often to the other members of the DA's Office as well!—the appellate process is long, mysterious, and confusing. Victims who hear that their case is being appealed may be gripped with fear that the case will be overturned and uncertainty about what is going to happen next. They look to the victim assistance coordinator (VAC) to find answers, but often the VAC is just as confused about the process as they are.

In this article, I break down the appellate process so VACs can understand what is going on, and I've included a timeline of a case after the verdict comes in. Please note that this does not cover cases where the defendant received a death sentence—those have distinct rules and timelines. But all other criminal cases share the same timelines.

Notice of appeal

The first step to appealing is the notice of appeal. This is simply the defendant letting the courts know that he intends to appeal his case. It is filed with the court where he was convicted, referred to as the trial court.[1] Notice must be filed within 30 days from the date the defendant is sentenced in open court.[2] He can get up to an extra 15 days if he files a motion for extension.[3] If he does not file this motion in time, then he will not be able to appeal his case. If he timely files his notice, the defendant will now be known as the appellant.

At this point, the appellant can request an appellate bond from the trial court.[4] A person who was sentenced to more than 10 years in prison or was convicted of certain offenses is not able to get an appeal bond.[5] An appeal bond acts just like a pretrial bond, requiring the appellant to pay money and follow certain conditions while his appeal is pending.

Optional: Motion for New Trial

The defendant has another option within 30 days of his conviction. He can file a motion for new trial, which is a sort of mini-appeal directly to the trial court instead of the appellate courts.[6] If the defendant has new evidence of something, such as his attorney making significant errors or jury misconduct, he may have a hearing to have the issue resolved. But often, a motion for new trial is filed just to extend the appellate timeline if the defendant is not sure he wants to appeal. If a motion for new trial is filed, then the deadline to file a notice of appeal extends to 90 days from the judgment.[7]

Procedural matters

At this point, there are a number of different procedural matters that the appellant must do for

the appeal to go forward. He must file a docketing statement with the appellate court, which just gives the court basic information such as what type of case it is (criminal, civil, or family), the attorneys' contact information, the name of the judge and court reporter, etc.[8] This is not something for which the court will dismiss the case if it is not filed in time. It is just administrative.[9] The court will simply request that the appellant file it as soon as possible.

The appellant also has to file requests with the local clerk—district clerk for felonies, county clerk for misdemeanors—and the court reporter who handled the trial to prepare the clerk's and reporter's records.[10] The clerk's record is a collection of all the official papers in the case, such as the indictment, motions filed by either side along the way, the jury charge and verdict forms, and any post-conviction motions such as a motion for new trial and notice of appeal.[11] The reporter's record is a transcript of the trial itself. Sometimes an appellant will request a transcript of only the actual trial, while sometimes he may ask for all the hearings that were held before the trial started too. Nothing can be appealed unless there is a record to show what happened. The record must be filed within 60 days from the date sentence was imposed, or 120 days from the filing of a motion for new trial.[12] The clerk or reporter can request an extension if they need more time, such as if it was a very long trial with a lot to transcribe.[13] Again, this is not something that will get a case dismissed if deadlines are not met.[14] The courts will send reminders and may eventually hold a reporter in contempt, requiring her to finish in a certain time or even be jailed until she finishes in extreme cases. But if the appellant never pays for the records even after being reminded by the court, the appeal may be dismissed for want of prosecution.[15]

After the reporter's record is filed, the appellate court (also called an intermediate court or court of appeals) becomes the main court on the case. The trial court loses jurisdiction, meaning it cannot act unless the appellate court specifically asks it to (usually to hold a hearing because something was not done earlier) or the appeal is final.[16] There are 14 intermediate appellate courts in Texas. They are referred to by the city they're based in, although they cover a much broader area than just that city. For example, my cases from Waxahachie are all filed in the 10th Court of Appeals in Waco. Each court makes its own rulings and is not bound by what the other intermediate courts do. Sometimes cases are transferred between the different courts to even out the number of cases per court.

Appellant's and State's Briefs (30 days each)

After the records are filed, the clock starts ticking for the appellant's brief. This is a written document, usually 20–30 pages but sometimes longer, where the appellant explains everything he thinks went wrong in the trial. That may be evidence he thinks should not have been admitted, problems with closing arguments, witnesses who should or should not have been allowed to testify, problems with the instructions given to the jury, or any number of other issues. The appellant has 30 days from when the later of the clerk's or reporter's record was filed to file his brief.[17] However, he can request extensions.[18] A first extension of 30 days is very common in appellate cases. Longer extensions can be granted, but it depends on the court where the case was filed.

After the appellant's brief is filed, the State's timeline to file its own brief starts. This gives us the opportunity to explain why the appellant is wrong and there were no mistakes in his trial that require overturning the conviction. We have 30 days from when the appellant's brief is filed to file our brief.[19] Again, extensions may be granted depending on the court.

After the appellant's brief is filed, the State's timeline to file its own brief starts. This gives us the opportunity to explain why the appellant is wrong and there were no mistakes in his trial that require overturning the conviction.

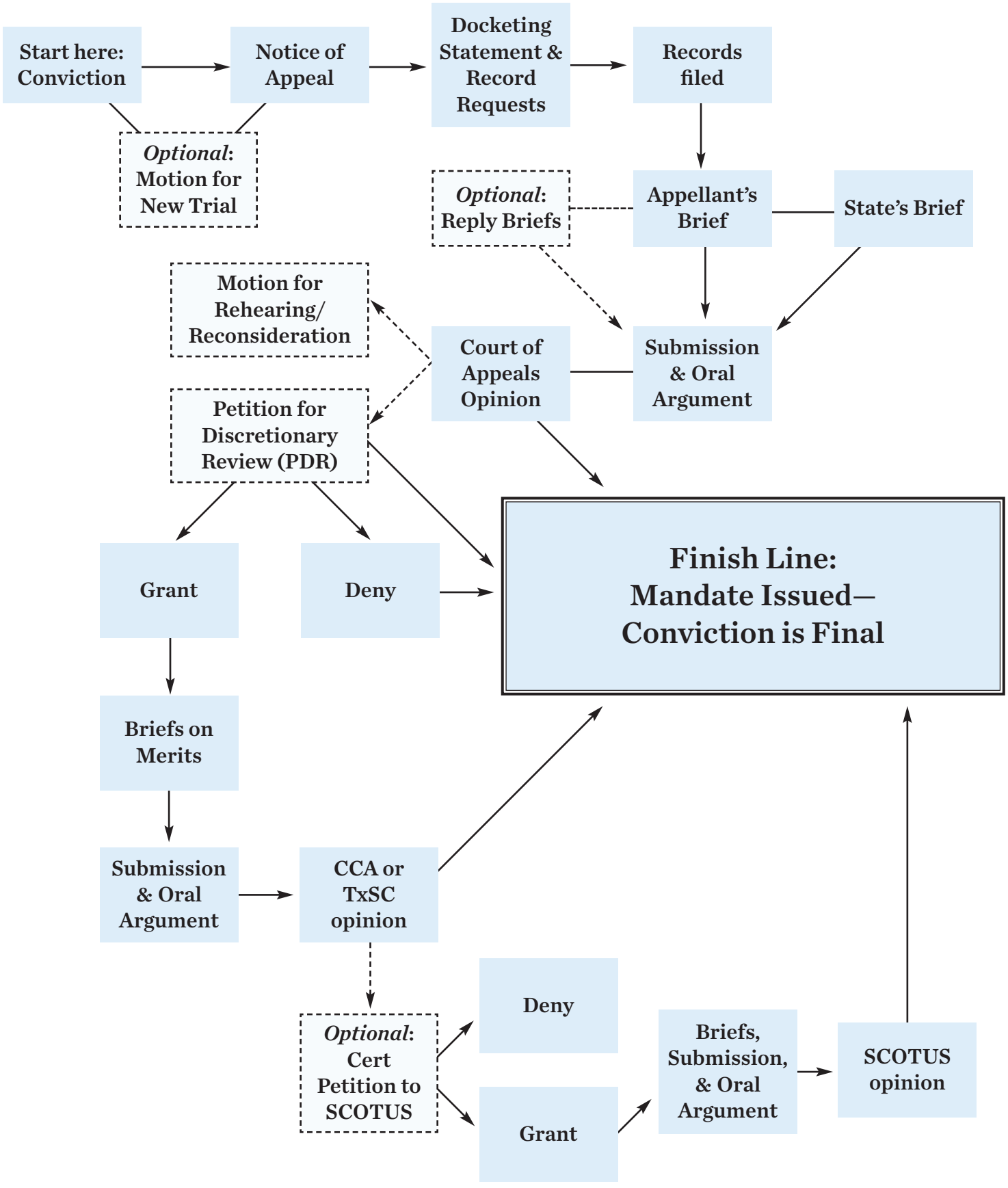
Optional: Reply briefs

Most cases are decided on just one brief from each side. But if the appellant decides the State's brief needs a response, he can file a reply brief. He has 20 days from the filing of the State's brief to file a reply.[20] In some cases the State may reply in turn, but any further reply briefs would be at the discretion of the court and would not extend any other deadlines.

Submission and oral argument

Submission is when the court of appeals officially receives the case and starts to consider it. The submission date can be set any time after the briefs are filed and the time has expired to file a reply brief, but how long it takes depends on the individual court of appeals. The court may decide that in addition to the briefs, it wants to hear oral argument from the attorneys on the case.[21] This

Flow chart of a case after conviction



is a chance for the attorneys to go before the court and explain their position in more detail, and an opportunity for the justices to ask questions about issues that concern them. If there is oral argument on a case, it is submitted as soon as the argument is finished. Some appellate courts grant oral argument more frequently, while others hardly ever grant it. Oral argument is not required to decide a case, so it is not done in every instance.

Court of appeals opinion

This is the part of an appeal everyone pays the most attention to, where the court of appeals decides what to do with the case. There are three basic outcomes—affirm, reverse and remand, or reverse and render.[22] An affirmance is what we all want to see on an appeal. It means the appellate court decided either that there was not error or that it was not so serious that the appellant deserves a new trial, so it upholds the conviction.

Reversing is what we do not like, because it means the court has decided that there *was* a serious error. Reversing and remanding means that the case is sent back to the trial court and the case can be tried again, this time without the error. The case could have a whole new jury trial, there could be a plea bargain, or the case can be dismissed, usually if crucial evidence was thrown out.

A reverse and render is much rarer, and it's for the most significant of errors where the court entirely throws out the conviction and issues an acquittal instead. This usually happens only when the appellate court decides the State did not prove a part of its case.

Regardless of how the appeal is decided, the court of appeals issues a written opinion where the judges explain why they decided each point of error that the appellant raised.[23] These can be a page or two long, or they can run hundreds of pages, depending on the complexity of the appeal.

Mandate

Technically all the other steps listed below are considered optional. They are chances for the losing side to ask someone to reconsider or review the case again in hopes of getting a different decision. But if no one files any of those motions, then the appellate court issues the mandate.[24] A mandate is a document that basically says the appeal is finished. Once there is a mandate, the appeal bond is revoked and the appellant begins serving his sentence (if his conviction was affirmed) or he is released from confinement or bond (if his conviction was reversed). Nothing happens in the trial court during an appeal unless the appellate court asks it specifically to do something or the mandate has issued.[25] The mandate is the State's finish line. But as you can see from the flow chart on the opposite page, this is only the first of many different ways a case can get to the mandate!

Motions for rehearing and reconsideration *en banc*

After the appellate court decides the case, whichever side lost may ask the court to look at the case again. Now, not all intermediate appellate courts are the same size. They all have at least three justices, but the largest in Dallas has 13 justices. When there are more than three justices on a court, a panel of three justices is assigned to hear each case.[26] In a motion for rehearing, the losing side asks the same panel that decided the case to reconsider.[27] This motion may point out an error that was made or sometimes a new case that just came out and should have been considered. If the court has more than three justices, the losing side can file a motion for reconsideration *en banc*, which means asking the entire court to look at the case. The losing party has 15 days after the opinion was issued to file a motion for rehearing or reconsideration *en banc*.[28] If that party chooses to file a motion for rehearing first, it has another 15 days after that is denied to still file a motion for reconsideration *en banc*.[29] Either of these may receive an extension within 15 days, making the deadlines effectively 30 days.[30]

Petition for Discretionary Review (PDR)

Unlike when the same court is asked to reconsider its decision, a petition for discretionary review, or PDR, is essentially a chance to ask the high court to grade the intermediate court's work. In Texas, all criminal appeals go to the Court of Criminal Appeals (CCA).[31] This court has nine judges and sits in Austin. It is the final word in Texas on criminal cases.

Reversing is what we do not like, because it means the court has decided that there was a serious error. Reversing and remanding means that the case is sent back to the trial court and the case can be tried again, this time without the error.

A big difference between intermediate appellate courts and the CCA is that the CCA has the discretion to take a case or not.[32] Intermediate courts *must* take an appeal as long as all deadlines are met and it is filed in the right place. But to convince the CCA to step in, the losing party on appeal must file a PDR. The party can do this regardless of whether it filed a motion for rehearing or reconsideration *en banc*.[33] The PDR lays out the reasons why this case is significant to the law of the entire state, not just of concern to the people involved in it. The losing party has 30 days from the intermediate court's opinion to file a PDR, with 15 days to request an extension if necessary.[34] The other side has 15 days after that to file a response.[35]

The CCA takes many fewer cases than are filed, so the odds are low that any given case will be accepted. If the CCA does not decide to hear the case, it sends the case back to the intermediate court within 15 days, and that court will issue the mandate.[36]

Proceedings in the CCA

If the CCA does decide to hear a case, then we start over at the briefing stage, meaning both sides write another brief to explain why the intermediate court's opinion was right or wrong.[37] This is referred to as a "brief on the merits," to distinguish it from the PDR that merely says why the case is important. After the briefs are filed, the case is set for submission and possibly oral argument.[38] Oral argument is granted more frequently in the CCA than in most of the intermediate courts, so it is often a part of the decisions.

The CCA takes many fewer cases than are filed, so the odds are low that any given case will be accepted. If the CCA does not decide to hear the case, it sends the case back to the intermediate court within 15 days, and that court will issue the mandate.

Unlike the intermediate courts, all nine CCA judges decide each case rather than sitting on smaller panels. That means there can be no later en banc reconsideration because the entire court has already heard the case. When they have reached a decision, they will issue a written opinion just like the intermediate courts to explain the reason for their decision.[39] They can either uphold the court of appeals or reverse it. Sometimes the CCA decides to send a case back down to the court of appeals, usually because it found an error and the lower court needs to reconsider its decision or other parts of the appeal because of that error. If that happens, there may be another intermediate court decision and potentially even another PDR.

Whenever the case is finally decided by the CCA, the lower court of appeals will issue the mandate once the timeline for all motions for rehearing are passed.[40] This means the CCA's opinion is now final.

Proceedings in the Supreme Court of the United States

One final path the losing party on appeal can take is asking the Supreme Court of the United States (SCOTUS) to hear the case. Like the CCA, SCOTUS is a purely discretionary court, and it takes an even smaller percentage of cases than the CCA does. That means most appellate prosecutors will go their entire careers without having a case taken up by SCOTUS.

The path to the Supreme Court is filing a petition for writ of certiorari, usually just called a cert petition. It must be filed within 90 days of the CCA's opinion or denial of PDR.[41] If SCOTUS decides to take the case, called granting cert, the briefing, submission, and oral argument schedule starts all over again, with 45 days from cert being granted to file the initial brief, and another 30 days for the response.[42] Then we wait for the nine SCOTUS justices to decide the case and issue a written opinion. Filing a cert petition does not stop the timeline for a mandate to issue, so a case is not affected by a pending cert unless the cert is granted. SCOTUS issues its own mandate 32 days after the entry of the judgment, and at that point the case is completely final.[43]

Conclusion

As you can see, the appellate process is a long one with many steps along the way. Unfortunately, while some things operate by a strict timeline, other things have no definite time by which they must be completed. That makes it very hard to gauge exactly how long an appeal will take. A simple one can be done in a few months, while others may take a year or longer.

The important thing is to be patient and keep in communication with whoever handles the appeals in your office. They can tell you more about your particular intermediate court of appeals and keep you apprised on what stage the appeal is at. Also remember that you can check the progress of an appeal yourself at the appellate court's website, www.txcourts.gov. ❇

Endnotes

[1] Texas Rule of Appellate Procedure 25.2(c)(1).

[2] Tex. R. App. P. 26.2(a)(1).

[3] Tex. R. App. P. 26.3.

[4] Tex. Code Crim. Proc. Art. 44.04.

[5] Tex. Code Crim. Proc. Art. 44.04(b). Offenses that are never eligible for an appeal bond include murder, kidnapping, most sexual offenses, and offenses involving a deadly weapon.

[6] Tex. R. App. P. 21.

[7] Tex. R. App. P. 26.2(a)(2).

[8] Tex. R. App. P. 32.2.

[9] Tex. R. App. P. 32.4.

[10] Tex. R. App. P. 34.5(b), 34.6(b).

[11] Tex. R. App. P. 34.5.

[12] Tex. R. App. P. 35.2.

[13] Tex. R. App. P. 35.3(c).

[14] Tex. R. App. P. 34.5(b)(4), 34.6(b)(3), 35.3(c).

[15] Tex. R. App. P. 37.3(b) & (c).

[16] Tex. R. App. P. 25.2(g).

[17] Tex. R. App. P. 38.6(a).

[18] Tex. R. App. P. 38.6(d).

[19] Tex. R. App. P. 38.6(b).

[20] Tex. R. App. P. 38.6(c).

[21] Tex. R. App. P. 39.1.

[22] Tex. R. App. P. 43.2.

[23] Tex. R. App. P. 47.1.

[24] Tex. R. App. P. 18.1(a). Mandate issues at least 10 days after the time has expired to file a PDR or motion for rehearing.

[25] Tex. R. App. P. 25.2(g).

[26] Tex. R. App. P. 41.1(a).

[27] Tex. R. App. P. 49.1.

[28] Tex. R. App. P. 49.1, 49.7.

[29] Tex. R. App. P. 49.7.

[30] Tex. R. App. P. 49.8.

[31] Civil and family appeals go to the Texas Supreme Court. These two courts are co-equal high courts, meaning each one is the final word in its area. Prosecutors only go to the Texas Supreme Court for a few cases, including termination of parental rights, juvenile cases, expunctions, and nondisclosures. The process works the same way, except the Supreme Court calls a PDR simply a petition for review.

[32] Tex. R. App. P. 66.2.

[33] Tex. R. App. P. 49.9.

[34] Tex. R. App. P. 68.2.

[35] Tex. R. App. P. 68.9.

[36] Tex. R. App. P. 69.4(a).

[37] Tex. R. App. P. 70.

[38] Tex. R. App. P. 75.1.

[39] Tex. R. App. P. 77.1.

[40] Motions for rehearing must be filed within 15 days, with an extension allowed within 15 days of that deadline. Tex. R. App. P. 79.1, 79.6.

[41] Supreme Court Rule 13.1.

[42] Supreme Court Rule 25.

[43] Supreme Court Rule 45.2.

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