TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

VOICE FOR THE DEFENSE

VOLUME 51 NO. 1 | JANUARY/FEBRUARY 2022

Voir Dire

MARCH 10-11, 2022 • THE WHITEHALL, HOUSTON, TX

Preservation of Error.....Allison Clayton
Intoxication Crimes in Voir Dire.....Brent Mayr
The Art of Communication.....Joshua Karton
Voir Dire.....Robert Hirschhorn
Sexual Assault.....Heather Barbieri
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Voice for the Defense (ISSN 0364-2232) is published monthly, except for January/February and July/August, which are bi-monthly, by the Texas Criminal Defense Lawyers Association Inc., 6808 Hill Meadow Drive, Austin, Texas 78736. Printed in the USA. Basic subscription rate is $40 per year when received as a TCDLA member benefit. Non-member subscription is $75 per year. Periodicals postage paid in Austin, Texas. Dues to TCDLA are not deductible as a charitable contribution. As an ordinary business expense the non-deductible portion of membership dues is 25% in accordance with IRC sec. 6033.

POSTMASTER: Send address changes to *Voice for the Defense*, 6808 Hill Meadow Drive, Austin, Texas 78736. *Voice for the Defense* is published to educate, train, and support attorneys in the practice of criminal defense law.

VOICE
FOR THE DEFENSE

Volume 51 No. 1 | January/February 2022

Available online at www.tcdla.com
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TCDLA CLE & Meetings:

Note: Schedule and dates subject to change. Visit our website at www.tcdla.com for the most up-to-date information.
Register online at www.tcdla.com or call 512-478-2514

February

February 3
CDLP | Mental Health
Austin, TX

February 3
CDLP | Veterans w/ SBOT Military and Veterans Section
Austin, TX

February 4
CDLP | Capital Litigation
Austin, TX

February 4
CDLP | Appellate - Raising the Bar
Austin, TX

February 9
TCDLA | JTIP w/ TIDC: Raising Race in Juvenile Cases
Webinar

February 9-13
TCDLA | President's Retreat
New Orleans, LA

February 10-11
TCDLA | Federal Law Gumbo
New Orleans, LA

February 11
CDLP | Indigent Defense
Dallas, TX

February 18
TCDLA | JTIP w/ TIDC: Padilla in Juvenile Cases
Webinar

February 24
TCDLEI | Board Meeting
Zoom

February 26
CDLP | Career Pathways
Zoom

February 28
CDLP | Mindful Monday
Webinar

March

March 4
TCDLA | JTIP w/ TIDC: Kids are Wired Differently
El Paso, TX

March 10-11
TCDLA | Voir Dire
Houston, TX

March 11
TCDLA | Legislative & Executive Meetings
Houston, TX

March 12
TCDLA | CDLP Committee & TCDLA Board Meetings
Houston, TX

March 20-25
CDLP | 45th Tim Evans TCTC
Huntsville, TX

March 24-25
TCDLA | 28th MSE with DUI/DWI w/ NCDD
New Orleans, LA

March 28
CDLP | Mindful Monday
Webinar

April

April 1
CDLP | Getting Game Day Ready!
Longview, TX

April 8
CDLP | Women's Defenders
TBD

April 22
CDLP | Race in Criminal Justice
TBD

April 25
CDLP | Mindful Monday
Webinar

May

May 6
TCDLA | 15th DWI Defense Project
Arlington, TX

May 23
CDLP | Mindful Monday
Webinar

June

June 14
CDLP | Chief PD Training
San Antonio, TX

June 15
CDLP | PD Training
San Antonio, TX

June 15
CDLP | Capital Litigation
San Antonio, TX

June 15
CDLP | Mental Health
San Antonio, TX

June 16-18
TCDLA | 35th Rusty Duncan Seminar*
San Antonio, TX

June 17
TCDLA Executive & CDLP Committee & TCDLEI Board Meetings
San Antonio, TX

June 18
Annual Members Meeting
San Antonio, TX

July

July 1
TCDLA | Declaration Reading
Austin, TX

July 13
CDLP | Trainer of Trainers
S. Padre Island, TX

July 13-17
TCDLA | Members Trip
S. Padre Island, TX

July 14-15
CDLP | Game Day Ready!
S. Padre Island, TX

July 16
TCDLA | CDLP & TCDLEI Orientation
S. Padre Island, TX

July 25
CDLP | Mindful Monday
Webinar

August

August 4
CDLP | Innocence for Lawyers
Austin, TX

August 12
TCDLA | 20th Top Gun DWI
Houston, TX

August 22
CDLP | Mindful Monday
Webinar

September

September 8
TCDLEI Board
Zoom

September 15-16
TCDLA | Post Pandemic Trial Prep
Round Rock, TX

September 16
TCDLA Exec. Committee Meetings
Round Rock, TX

September 17
TCDLA Board & CDLP Committee Meetings
Round Rock, TX

October

October TBD
CDLP | Innocence for Students
Ft. Worth, TX

October TBD
CDLP |19th Annual Forensics
Ft. Worth, TX

November

November 3-4
TCDLA | 18th Stuart Kinard Advanced DWI
San Antonio, TX

November 10
CDLP | Mental Health
S.Padre Island, TX

November 11
CDLP | Capital Litigation
S.Padre Island, TX

December

December 1-2
TCDLA | Sexual Offenses
Dallas, TX

December 2
TCDLA Executive Committee Meetings
Dallas, TX

December 3
TCDLA & TCDLEI Boards & CDLP Committee Meetings
Dallas, TX

December 9
CDLP | 15th Jolly Roger w/ DCCLA
Denton, TX

*Seminars sponsored by CDLP are funded by the Court of Criminal Appeals of Texas. Seminars are open to criminal defense attorneys; other professionals who support the defense of criminal cases may attend at cost. Law enforcement personnel and prosecutors are not eligible to attend. TCDLA seminars are open only to criminal defense attorneys, mitigation specialists, defense investigators, or other professionals who support the defense of criminal cases. Law enforcement personnel and prosecutors are not eligible to attend unless noted "*open to all."*

SCHOLARSHIP INFORMATION: *Texas Criminal Defense Lawyers Educational Institute (TCDLEI) offers scholarships to seminars for those with financial needs. Visit TCDLA.com or contact desquivel@tcdla.com for more information.*

President's Message

MICHAEL C. GROSS

Situation at the Border

In 2021, the Texas governor initiated Operation Lone Star in an attempt to arrest people who had illegally entered into Texas in the general area of Val Verde and Kinney counties. This is a multi-billion dollar operation which involved deploying approximately one thousand DPS troopers and Texas National Guardsmen in support with about 70% deployed to Val Verde and Kinney counties. https://www.texasmonthly.com/news-politics/operation-lone-star-kinney-county/. The governor authorized these individuals to arrest migrants for trespassing and other similar charges. *Id.* There have been over 2500 arrests as a result of this operation with approximately 8% of these cases as felonies and 2.5% accused of those felonies being alleged migrants. Approximately $29 million was allocated by the Texas legislature to pay for attorneys, investigators, and other individuals to represent these individuals.

The Neighborhood Defender Service (NDS) of Harlem opened this month an office in San Antonio, Texas to provide legal services to migrants who have been arrested as a result of Operation Lone Star. https://neighborhooddefender.org/locations/san-antonio/. These NDS services are funded by the Texas Indigent Defense Commission (TIDC). Texas RioGrande Legal Aid has also been providing legal services to these accused persons and has also been provided funding by TIDC for these services. The remainder of these accused persons are represented by panel attorneys.

To handle this large amount of cases, the Presiding Judge of the Sixth Administrative Judicial Region appointed three judges to ensure timely bail decisions and rule on other issues arising in these cases. The defense attorneys who are attempting to provide the best representation possible for these clients have obtained several dismissals for various reasons or bail release for delay pursuant to Article 17.151 of the Texas Code of Criminal Procedure. These appointed judges were the judges ruling on these cases. The defense attorneys did excellent work in representing these clients before these judges and obtaining appropriate relief.

Last month, however, on December 8, 2021, the Kinney County Judge fired these three judges appointed by the Presiding Judge of the Sixth Administrative Judicial Region. *See Petition for Mandamus in In re De La Cruz - De La Cruz*, No. 04-21-00577-CR, San Antonio Fourth Court of Appeals. In this mandamus, it is alleged by our own Keith Hampton, Angelica Cogliano, and Addy Miro, that the Kinney County Judge ordered the termination of these three judges. *Id.* It is also alleged that the Kinney County Judge ordered that his court coordinator had sole authority to set court dates and docket cases for Kinney County. *Id.* The relator in this mandamus action, as of December 22, 2021, had spent 56 days in jail for Criminal Trespass, a Class B misdemeanor. *Id.* The issue in this mandamus is whether or not a county judge may *sua sponte* fire judges appointed by a presiding district judge of an administrative judicial region and prevent those judges from controlling their dockets. *Id.* As a result of the firing of these three judges, the relator remained incarcerated in the TDCJ Segovia Unit for a misdemeanor offense for which bond is authorized yet there is no setting on this case and his release on bond has been unreasonably delayed. *Id.* One has to wonder about the reason for the firing of these three judges. Hopefully, the reason for the firing of these three judges will be revealed during the course of this mandamus. Kudos to these TCDLA attorneys for their diligent representation of their client.

As Operation Lone Star continues to play out in Val Verde and Kinney Counties, we are confident that defense counsel will continue with such diligent representation of the more than 2500 people charged with criminal trespass and other such offenses and ensure that bail considerations are met along with other proper resolution of these cases.

CEO's Perspective

MELISSA J. SCHANK

A New Year

"An optimist stays up until midnight to see the new year in. A pessimist stays up to make sure the old year leaves."

—Bill Vaughan

2022 is here! I am hoping you had the chance to take some time off and reenergize. After hunkering down for two years, my family went on vacation during the holiday break. Wow, did it feel good to see people and try to regain some semblance of normality. It felt so good to disconnect. Still, it was a little scary trying to take every precaution and preventive measure—masking up and liberally applying hand sanitizer all the while. But I am glad we were able to spend time together. The time off was welcome and proved enjoyable. When is the next holiday?

TCDLA has hit the ground running in 2022. The Ethics Committee has reviewed and prepared a letter for the State Bar Committee on Disciplinary Rules and Referenda regarding the proposed changes to Texas Disciplinary Rule of Professional Conduct 3.09. The Bylaws Committee is clarifying verbiage regarding terms and application requirements. The Amicus Committee voted on several cases presented. The Membership Committee has planned several social events so members can reconnect, bringing along friends and family.

The TCDLA Codes have also been updated, along with several revised publications per the 87th legislative session. In addition, we have a new app coming out, which will include quick links to our resources and members-only section. You will be able to check your membership status and renew, register for a seminar or access seminar material, and shop for publications. You will also have access to the Member Directory Search, TCDLA Listserv, and podcast. The TCDLA podcast bank has been growing (download it!), and if you want to be part of the this, email mschank@tcdla.com.

The *Voice* editorial committee continues to work hard to provide you with monthly issues. If you are interested in writing an article, please do consider submitting. Articles can run anywhere from 500 to 2500 words. The website has guidelines and videos to help get you started. A team reviews all submissions. Looking for a past article? All the *Voice* issues since its inception in March 1972 can be searched.

Looking forward, a number of events are upcoming, as shown on the website, and you can attend them in person or virtually. Course directors and speakers are busy filling out lineups for the year's schedule. We are building on-demand CLE as well, if you're looking to fill a specific need for CLE. On tcdla.com, go to CLE/Events → Webinars on Demand.

Reminder too: We have a host of resources on the members-only section of the website. Several committees maintain specific pages with additional resources—COVID Task Force, Law School, Client Mental Health, Memo Bank, Amicus, Veterans, DWI, Juvenile, Wellness—incorporating how-to videos, motions, and numerous other resources. If you are interested in Operation Lonestar, you can find information, training material, and such as well. TCDLA's 35-plus committees are here to assist, and you can find them listed on the website under the About tab. As work with officers on this year proceeds, we are already sifting through grant applications for *next* year.

On the home front, staff started the first week of January with two grant-funded programs, heading off to Lubbock. Together with the Lubbock Criminal Defense Lawyers Association, they put on the Prairie Pup Nuts & Bolts and the 41st Annual Prairie Dog. Next up are preparations for 26 scheduled seminars, beginning with site visits then work on marketing and registration, publications, and the new app.

Our accounting team is currently huddling with auditors to complete the FY21 audit. As we approach the midway point in the fiscal year, we are looking at how we fared in our budgeting to ensure we end the year on track. This is an important tool in helping us plan for FY23—which is just around the corner!

Never forget that we are here to serve and assist you. If there is anything we can do for you, our members, please let me know. Let TCDLA be part of your starting the new year off in a positive direction: Let's be the optimists with half-full cups!

Editor's Comment

JEEP DARNELL

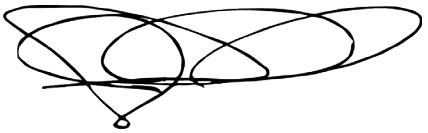
The Law School Committee

If you are looking to get involved with TCDLA please look no further than the Law School Committee and their now annual Interactive Career Pathways Event, which will be held this year on February 26, 2022, via Zoom. For all the work that can be done by any of the members to help make TCDLA a stronger organization, this committee may be the most rewarding and it's fun. The Law School Committee is chaired by Anne Burnham. She has worked to put together an event that connects current law school students and current attorneys who have been practicing for five years or less and interested in entering criminal defense, with our own criminal practitioners. The format of the event is really the best part because it allows those students and young lawyers to get to break out into small groups and talk to TCDLA lawyers about practicing in a specific geographical area and also about handling specific types of cases. I, not surprisingly, am the odd ball of the Committee as I volunteered to be the liaison for my law school alma mater, the University of Oklahoma. But, every single one of the Texas law schools has a liaison on the Law School committee as well, and those liaisons are in charge of recruiting students from the respective law schools to attend the event by working with the criminal law faculty, the career development staff, or any criminal clinic attorneys.

I have to admit, I was a little bit worried about getting in contact with some of my former professors and giving them my song and dance routine about who I was, if they didn't remember, and why I was contacting them. To my surprise it was easy. Many of them remembered me, and making contact again was neat enough. But the real reward was getting to reach out and connect with law students who have a hunger for the work that we do every day and giving them a pathway to a career in this wonderful work. Although I was really only signing up to help Anne with recruiting students for last year's event, it has turned into a mentor-type program with many of the students who signed up from OU. I have been able to give real-world career advice to those students who aren't going to practice at the big law firms. Getting to assist in creating the excitement in finding career placement for students has been such a pleasant surprise and brings me my own sense of helping to build the future of TCDLA.

We all went to law school, and I would imagine we all have some contact at our respective law schools. Most importantly, we can all provide assistance and advice to students who have an interest in criminal defense. Don't be shy, please reach out to the TCDLA home office and get involved with the Law School Committee.

Be safe



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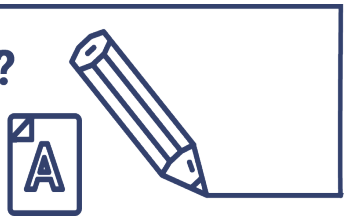
Submit an article to the Voice!

Email jedarnell@jdarnell.com or rkeith@tcdla.com



Ethics and the Law

JESSICA LIECK
& PAT METZE

Safeguards to Prevent Juveniles from Incompetent Representation

Juveniles are the most vulnerable among clients who are facing criminal liability for their actions. As attorneys, we have an ethical obligation to zealously advocate for all our clients, but can our lack of understanding regarding child development impact our ability to zealously advocate and provide effective assistance of counsel to juveniles? The American Bar Association published an article in October 2021 discussing this issue which can be located at https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/empowering-youth-at-risk/to-be-a-competent-childrens-attorney/. The ABA contends that

[w]ithout a foundation in understanding child development, the child's attorney or advocate . . . is not equipped to [determine a child's position] in order to provide competent representation. The onus is on the lawyer to acquire the skills necessary to be an effective advocate, which, if you are representing a child, means having a foundation in child development.

Childrens' prefrontal cortexes are not fully developed until well into their twenties. While in the criminal justice system, juveniles are not as developed physically, cognitively, socially, and emotionally. A background in child development would give lawyers the skills necessary to effectively communicate with children, as well as listen effectively to children. Communication is key when explaining the judicial process, client's rights, preparation needed for court, and the consequences of certain decisions to any client, but especially to a child who is not fully developed and who may not be able to control their emotions or verbalize what their needs are.

The Texas Disciplinary Rules of Professional Conduct provide that when determining whether a matter is beyond a lawyer's competence, relevant factors can include the relative complexity and specialized nature of the matter, the study the lawyer will be able to give the matter, and whether it is feasible to refer the matter to a lawyer with established competence in the field in question. Tex. Disciplinary Rules of Pro. Conduct, 1.01 cmt. 1–2. Following the ABA's guidance, it can be inferred that juvenile issues are specialized in nature, and those attorneys familiar with the Texas Family Code have seen the complexities of the juvenile system within the State of Texas. A juvenile has a constitutional and statutory right to the effective assistance of counsel in a juvenile proceeding. *See In re K.J.O.*, 27 S.W.3d 340, 342 (Tex.App.—Dallas 2000, pet. denied); *See also In re R.D.B.*, 102 S.W.3d 798, 801 (Tex. App.—Fort Worth 2003, no pet.). The effectiveness of counsel's representation in a juvenile proceeding is reviewed under *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See In re K.J.O.*, 27 S.W.3d at 342. *In re F.D.*, 245 S.W.3d 110, 114 (Tex. App.—Dallas 2008, no pet.). However, with juvenile lawyers already being scarce throughout the state, how do we ensure that attorneys will complete the necessary study to become competent in child development without dissuading attorneys from practicing juvenile law because of the additional study required?

First, we must hold judicial officials to a higher standard of mitigating incompetence. Juvenile judges witness firsthand an attorney's competence and preparedness in the courtroom. If a judge suspects that an attorney is ill-prepared, perhaps allowing a continuance long enough for the attorney to become competent in child development should be allowed. This protects the best interest of the child and does not subject the attorney to any discipline, but simply increases the amount of time an attorney has to familiarize themselves with the basics of child development. *See* Tex. Disciplinary Rules of Pro. Conduct, 1.01 cmt. 3–4.

Next, attorneys must hold each other accountable. As advocates, it can be inferred that we all want the best possible outcome for our clients, and the protection of children is something that resonates with most attorneys on a basic human level. Accountability is necessary in ensuring that the best interests of a child are met; we must help each other to help these children. One way to achieve this could be to have local bar associations keep lists of attorneys who have a background in child development, ensuring that others can defer to those attorneys for insight and resources while studying to become more competent in juvenile law themselves.

Lastly, another way to achieve competence and possibly more attorneys willing to take juvenile cases altogether, is to offer more continuing legal education courses regarding child development and its impact on effective assistance of counsel, as well as other

juvenile law issues. Juvenile law can be an intimidating field because of what is at stake and more diverse continuing legal education courses could help alleviate any worry an attorney may have regarding juvenile law. The Texas Criminal Defense Lawyers Association has done an excellent job providing juvenile law continuing legal education courses, including partnering with the Texas Indigent Defense Commission and Juvenile Training Immersion Program to host these courses. However, our work to provide the best legal counsel to the most vulnerable can always continue to be improved, made more accessible, and cover more topics within the juvenile justice system.

To conclude, if the State of Texas and TCDLA really want to keep juveniles' "best interests" at the forefront, more child development, competency, continuing legal education, and accountability are essential to ensuring juveniles have a safe, fair, and equitable juvenile justice system.

Jessica Lieck *is a 2L at Texas Tech University School of Law. She is originally from Austin, Texas and attended Texas State University for undergrad where she graduated summa cum laude with a Bachelor of Arts in Political Science. She is currently the President of Tech Law's Criminal Law Association. After completing law school, she hopes to practice criminal defense in the Austin area.*

Pat Metz *earned his BA from Texas Tech University in 1970, then his JD from the University of Houston three years later. Currently, Professor Metze is employed as a Professor of Law, with tenure, and Director of the four Criminal Defense Clinics at the Texas Tech University School of Law. In addition to his clinical duties, Professor Metze teaches Texas juvenile law and a seminar on capital punishment.*

Metze is also a former Secretary, Board Member and Bail Bond Board representative for the Lubbock Area Bar Association; Former Board Member and Past President of the Lubbock Criminal Defense Lawyers Association; Ethics Committee member, Former Associate Board and Board member for the Texas Criminal Defense Lawyers Association; Member of The Pro Bono College of the State Bar of Texas, The College of the State Bar of Texas, and a Life Fellow of the Texas Bar Foundation.

This April, Professor Metze will celebrate 48 years practicing law in Texas and continues to practice until he gets it right.

Chapter & Verse

ALLISON MATHIS

Hearsay Part 2

Dear and Beloved Colleagues, After our date with John Wigmore (or was it more of a one-night stand? Hmmm? I'd see him again, but does he want to see me?) last issue, I was thinking about how we should get into the reality of this hearsay thing. It's so much! Have I finally bitten off more than my big mouth can chew? Fear not dear reader, for I have the jaw muscles of a much younger woman.

I suppose that the best way to tackle this thing, now that we know what hearsay is, is to talk about admissible hearsay, exception by glorious exception. I can't wait. Turn now, if you will, to Texas Rule of Evidence 803 and read along with me,

"EXCEPTIONS TO THE RULE AGAINST HEARSAY—REGARDLESS OF WHETHER THE DECLARANT IS AVAILABLE AS A WITNESS

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it."

Ok, let's stop there and evaluate this first exception: "present sense impression." We are told in our law school evidence classes that the exceptions to the hearsay rules are time-honored traditions, truisms passed down throughout human existence that supply sufficient "indicia of reliability." But that's kind of bull, isn't it? What does that mean, exactly? That it's some kind of ancient Roman maxim that we all recognize the inherent truth in? If that's the case, why don't we also admit hearsay statements made under the influence of alcohol, since in vino, veritas, after all?

It turns out that the origins of some hearsay exceptions are not much more complex than just that. Present Sense Impression, along with some of the other exceptions we will look at in future columns, comes from trying to tease some sense out of the "res gestae" rule, which had, at the end of the 19th century, become a veritable dumpster fire on which judges burned the rights of defendants. In Latin, "res gestae" means "things done." For our purposes, it basically means the story of the crime. We still use "res gestae" in legal Latin for other reasons, "the police said he made a 'res gestae' statement" (usually meaning that it was a voluntary utterance from someone at or near the time of the offense- "I shot that guy because he was coming at me!") but just general "res gestae" itself as a whole blob of concepts doesn't work as a hearsay exception anymore.

So back in the days when smarter folks than your dearest correspondent sat down to puzzle things out, they decided to try and define what, specifically, made statements that were otherwise hearsay credible, other than just being sloppily categorized as "res gestae." In 1898, James Thayer, a Harvard law professor, issued his "A Preliminary Treatise on Evidence at the Common Law." Yes, dear reader, it was as fascinating as it sounds, and beat out my own beloved John Wigmore's evidentiary edicts by about six years. It was a big thing at the time, but if you look up the digitized copy that the Cornell library keeps on hand, it hasn't been checked out since 1993. Boo. Hiss.

Thayer identified the present sense impression as a distinct type of res gestae statement with unique reliability. He indicated that the reliability of the present sense impression came largely from its proximity in time to the event that was being described, and clarified that the requirements for admissibility of such statements were that they were: spontaneous statements describing the event, made at the time of the event, and witnessed by another person who also witnessed the event.

Ok. So that's a lot of requirements. Texas law doesn't require the witness who also witnessed the event, instead teasing apart the elements thusly: "a statement must (a) describe or explain an event or condition, (b) be expressed by the person who made the observation, and (c) be made contemporaneously with or immediately after the observation."

If you go digging Lexis or Westlaw for some cases about present-sense impression, you will find sadly very little. That said, there is some really interesting stuff on there that defense lawyers ought to be aware of.

"The rationale underlying the present sense impression is that: (1) the statement is safe from any error of the defect of memory of the declarant because of its contemporaneous nature, (2) there is little or no time for a calculated misstatement, and (3) the statement will usually be made to another (the witness who reports it) who would have an equal opportunity to observe and therefore check a misstatement." *Fischer v. State,* 252 S.W.3d 375 (Tex. Crim. App. 2008).

In *Fischer*, a trooper stopped defendant's vehicle with the intention of citing defendant for failing to wear a seatbelt, and the trooper subsequently discovered that defendant had been drinking and arrested him for DWI. During the stop, the

trooper contemporaneously dictated his observations on to his patrol car videotape. On appeal of the appellate court's decision that the trooper's taped observations were not admissible as a present sense impression hearsay exception under Rule 803(1), the court affirmed. The evidence showed that the trooper calmly walked back and forth from his patrol car to defendant several times, and that he carefully and deliberately narrated the results of his DWI field tests and investigation. The trooper's statements were testimonial and reflective in nature, and they were the type of statements that were made for evidentiary use in a future criminal proceeding; therefore, they were not the sort of spontaneous, unreflective, contemporaneous present sense impression statements that qualified for admission under Rule 803(1).

One of the things I think we ought to be mindful of in this modern era is the use of social media as essentially present-sense impression machines. Twitter, Facebook, Instagram…aren't they all just saying what we're doing and feeling at any given time? If I were arguing against admission of a social media post, I might suggest that written statements are more calculated than oral exclamations, no matter how speedy the typist, and that the calculation and reflection sufficient to put something on social media defeats at least the spontaneity element. But the times, as they say, are a' changin'.

I am hopeful that by understanding the underpinnings of the hearsay exceptions, the things that historical men with historical mustaches have thought made them as reliable as a live cross-examination would have, we can contest things that are not so reliable. The key to understanding is dissection. Next time, we will evaluate the EXCITED UTTERANCE, which I find fascinating since the utterance I am most likely to make as I'm witnessing a catastrophic event is usually a superlative expletive, which, if taken literally, are not accurate descriptions, unless such events are scatological or reproductive in nature. Until then, sweet reader, I remain,

Yours,
Allison

TCDLA Award Nominations Deadline

5 pm on February 25th

Please visit tcdla.com and navigate to the awards page under the About tab to view qualifying criteria for the awards listed below:

The TCDLA Hall of Fame Award... honors a qualified lawyer for membership in the Hall of Fame who meets the criteria. The investigation of the nominee shall be under the direction of a director from the membership district in which the nominee resides. That director shall submit to the TCDLA Hall of Fame Committee a full investigation report at the committee meeting. The Hall of Fame Committee shall, by unanimous decision, vote to submit a nomination to the Board of Directors. The Board of Directors by three-quarters majority by members present and voting at a board meeting may elect a nominee to the Hall of Fame.

The Charles Butts Pro Bono Lawyer of the Year Award... honors an individual attorney who has provided outstanding pro bono work. The recipient of the award must be a member in good standing of the Texas Criminal Defense Lawyers Association (TCDLA) and the State Bar of Texas. The award is named after Charles D. (Charlie) Butts, President of TCDLA (1987–88) and member of TCDLA's Hall of Fame, in recognition of his over 64 years of service as an attorney.

The Percy Foreman Lawyer of the Year Award... honors the individual attorney who has provided outstanding legal representation. The recipient must be a member in good standing of the Texas Criminal Defense Lawyers Association (TCDLA) and the State Bar of Texas. The award is named after Percy Foreman, the renowned Criminal Defense Lawyer, TCDLA Charter Member, and his almost 60 years of service as an attorney.

The Rodney Ellis Award... was named after Rodney Ellis for serving as the voice and/or advocate to TCDLA. The recipient is a non-attorney who has gone above and beyond in demonstrating and supporting TCDLA.

Email your completed form to mschank@tcdla.com or fax to the home office at 512.469.9107 by 5 pm on February 25th.

LATE APPLICATIONS WILL NOT BE ACCEPTED.

The Federal Corner

ROBERTO & CLAUDIA BALLI

Saving the Confrontation Clause

The Confrontation Clause

One of the greatest trial rights and protections owned by a criminal defendant is the Sixth Amendment right to confront and cross-examine witnesses at trial. The Sixth Amendment of the United States Constitution states that:"*In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him;"*

- U.S. Const. amend. VI.

The Confrontation Clause and the rule against hearsay found in the rules of evidence protect similar interests. However, in *California v. Green*, 339 U.S. 149 (1970), the United States Supreme Court held that the 6th Amendment's right to confrontation and the hearsay rule in the rules of evidence are not the same. In doing so, the Court stated the following: "While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law."

The distinction of the confrontation right and the hearsay rule is significant. Constitutional protections carry more weight than evidentiary rules in trial courts and on appeal. Further, the hearsay rule's many exceptions do not apply to the confrontation clause. *California v. Green*, 339 U.S. 149 (1970); See *Barber v. Page*, 390 U.S. 719 (1968); *Pointer v. Texas*, 380 U.S. 400 (1965).

Crawford v. Washington

In 2004, the United States Supreme Court issued an important opinion in confrontation litigation, *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, husband, Michael Crawford, and wife, Sylvia Crawford, were charged related to the stabbing of a man. Both Michael and Sylvia gave recorded statements to the police at the police station regarding the incident. Michael admitted to stabbing the man in self-defense, but Sylvia's statement to the police was inconsistent with Michael's defense. At Michael's trial, the State could not compel Sylvia to testify against Michael due to the spousal privilege rule in Washington. Therefore, the State introduced Sylvia's prior recorded statement under the "statement against interest" exception to the hearsay rule over the Defense's objection that the recording violated the Confrontation Clause. The Supreme Court in *Crawford* held that the introduction of Sylvia's statement at trial without Sylvia appearing to testify in court violated the Confrontation Clause and was inadmissible. The Court held "that any out of court declaration that is testimonial in nature, is inadmissible if the declarant does not testify at trial and the Defendant has not had a prior opportunity to cross examine the witness."

Opening the Door Exception to Confrontation

In *Hemphill v. New York*, 2022 WL 174223 (2022), the Supreme Court had to decide whether the statutory exception to the Confrontation Clause violated the Sixth Amendment. The Confrontation Clause was under attack by New York, which had created an exception to the confrontation clause: "Opening the Door."

Facts of the Case

A two-year old boy traveling in vehicle was killed by a stray 9-millimeter bullet shot by a person involved in a street fight. Police suspected that either Nicholas Morris or Darrel Hemphill was the shooter. A search of Morris' apartment yielded 9-millimeter ammunition only and a .357-magnum handgun. Morris was initially charged with the murder of the child, but later was offered and agreed to plea to a charge related to possession of the .357-magnum handgun and dismissal of the murder charge.

Hemphill was then charged with the murder of the child. During Hemphill's trial, Hemphill used a third-party culpability defense, blaming Morris for the murder. During opening statement, Hemphill's counsel told the jury that a search was conducted of Morris's apartment hours after the shooting, and the police had recovered 9-millimeter ammunition, the same caliber ammunition that had been used to shoot the boy.

To controvert the Defense's opening statement, the prosecution sought to introduce the plea colloquy transcript from Morris' plea hearing in which Morris had pleaded guilty to possession of the .357-magnum handgun. The State cited to the *Reid Rule*, as a judicially and legislatively created exception to the Confrontation Clause in New York that allowed the trial court to admit evidence at trial for the prosecution that would be otherwise inadmissible if the court determines that the defense has "opened the door" to the evidence by creating a misleading impression with the jury. The Defense objected that the testimony sought by the prosecution (the plea transcript) violated the Confrontation Clause and *Crawford v. Washington*, because Morris was unavailable to testify and the defense had not had a previous opportunity to cross-examine him.

The trial court found that Hemphill's attorney "opened the door" during opening statements by telling the jury about the 9-millimeter ammunition that was found in Morris' apartment on the night of the murder. Therefore, the trial court allowed Morris' plea colloquy

transcript from the possession of the .357-magnum handgun charge into evidence to correct a "false impression" created by the defense.

Question Presented

Whether New York's "opening the door" rule to the Confrontation Clause is a violation of the Confrontation Clause. The rule allows the trial court to admit evidence for the prosecution at trial that would be otherwise inadmissible if the court determines that the defense has "opened the door" to the evidence by creating a misleading impression with the jury.

Background

The Court first analyzed some of the history of Confrontation Clause Jurisprudence. In 1980, the Supreme Court held in *Ohio v. Roberts*, 448 U.S. 56 (1980) that the Confrontation Clause did not bar the admission of statements of an unavailable witness, so long as the statements bear an "adequate 'indicia of reliability,'" meaning that they fell "with a firmly rooted hearsay exception" or other "particularized guarantees of trustworthiness."

However, in *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court abrogated *Ohio v. Roberts*. The Court held "that any out of court declaration that is testimonial in nature, is inadmissible if the declarant does not testify at trial and the Defendant has not had a prior opportunity to cross examine the witness."

State's Arguments on Appeal

In its arguments to the Court, the State conceded that Morris' plea colloquy was testimonial, meaning the Confrontation Clause was implicated. However, the State argued that New York's "opening the door" rule was not an exception to the Confrontation Clause. Instead, the State argued that the "opening the door" rule was a procedural rule, like failing to object to the confrontation clause violation, and thus there was no violation.

The Court has approved procedural rules and allows the States and the Government to adopt procedural rules related to objections to testimonial evidence. For example, in *Melendez-Dias v. Massachusetts*, 557 U.S. 305 (2009), the Court approved "notice and demand" statutes. These statutes require the State to give notice that it plans on introducing testimonial evidence (such as a lab report) without a sponsoring witness and the defense is given a deadline by which to object to the introduction of the evidence. Failure to object is considered a waiver of the right to confront the witness.

The Court's Analysis – Procedural Rules

First, the Court emphasized that it approves of procedural rules that allow for admission of testimonial evidence. The Court reiterated its approval of the "notice and demand" statutes discussed in *Melendez-Dias*. The Court also approved the rule stated in *Illinois v. Allen*, 397 U.S. 337 (1970), which allows for removal of a criminal defendant from his trial when despite repeated warnings, he has become so disorderly, disruptive, and disrespectful in court that his trial cannot be cannot be carried on with him in the courtroom.

The Court's Analysis – Substantive Rules

However, the Court held that New York's "opening the door" rule was not a procedural rule, but instead it was substantive. In other words, the "opening the door" rule was a substantive rule like the one in *Ohio v. Roberts*, 448 U.S. 56 (1980) that allowed the testimonial statements of an unavailable witness, so long as the statements bear an "adequate 'indicia of reliability,'" meaning that they fell "with a firmly rooted hearsay exception" or other "particularized guarantees of trustworthiness." However, *Ohio v. Roberts* was rejected in *Crawford v. Washington*, 541 U.S. 36 (2004). In rejecting *Ohio v. Roberts*, *Crawford* stands for the principal that judges are barred "from substituting their own determinations of reliability for the method the Constitution guarantees." In other words, a judge should not substitute her wisdom about reliability for the reliability of cross-examination.

Similarly, the Court held that New York's "opening the door" rule was substantive, requiring the trial court to weigh evidence. "It was not for the judge to determine whether Hemphill's theory that Morris was the shooter was unreliable, incredible, or otherwise misleading in light of the State's proffered, unconfronted plea evidence. Nor, under the Clause, was it the judge's role to decide that this evidence was reasonably necessary to correct that misleading impression. Such inquiries are antithetical to the Confrontation Clause."

The Holding

Because New York's "opening the door" rule was substantive, requiring the trial court to weigh evidence, the rule violated the Confrontation Clause. Judges are not allowed to weigh the reliability, credibility, or misleading nature of testimony as a substitute for cross-examination.

The Authors' Thoughts

The Court properly distinguished between procedural and substantive rules. Procedural rules like Texas' Article 38.41 (Certificate of Analysis) which allows the State to give notice that it intends to introduce a laboratory report without a sponsoring witness, are approved because the defense has an opportunity to object to the evidence. However, rules like New York's "opening the door" rule rely on judge's weighing the credibility, reliability, or weight of evidence are substantive in nature, and thus violate the principles set out in *Crawford*.

This case is a significant opinion, because the Court did not take a step back from *Crawford*. This is and 8-1 opinion. *Crawford* is still the rule of law and confrontation continues to be one of the most important and protected trial rights for a defendant.

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Claudia V. Balli *is a Board Member of TCDLEI, practicing State and Federal Criminal defense in Laredo, Texas while parenting. Claudia has nine years of experience in criminal defense, both at the trial and appellate levels.*

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From the Front Porch

JOE STEPHENS

Patches of humanity: a writer, his ranch, and the art of storytelling

In 1974, John Graves published Hard Scrabble, a wide-ranging series of essays about his ranch near Glen Rose. The writing – "observations on a patch of land," as he described it – meanders his property beautifully. He offers some armchair history, a lay of the land itself, and spends his time showing you the trees and describing all the birdsong and guessing at why the creek runs differently now than it did before. You're walking with him, really, and trusting the gentle clip of your nicely-paced tour guide – happy that he seems particularly adept and knowing when to chat and when to let the world speak for itself.

Fourteen years earlier, Graves did something similar in Goodbye to a River. It was his homage to a portion of the Brazos River that he had known and loved quite intimately, one that appeared ready to change course with the construction of a series of dams. So, he took his dog, hopped in a canoe, and spent a few weeks traveling. You're with him as he hunts, you feel the chill of autumn and the warmth of his fire – it's as if he handed you a paddle, too, and asked for a little help from time to time.

He did it all again a few years later in From a Limestone Ledge, which, on its cover, was described perfectly: a celebration of "the casual but constant observation of detail, the noticingness of rural life." More essays, more description, more questions, more thoughts. It was almost as if Graves spent his life quietly watching and hearing, comfortably quiet in his pauses between books, and offering up what I would consider to be the most magical writing about "place" I have come across.

When I moved to rural Texas (Beeville, more specifically) to begin my work as a public defender – what Graves may describe as when I "put my boots to earth with a mingled set of feelings" (Hard Scrabble, p. 44) – I was continually searching for the words that seemed to flow so easily from Graves. I was trying to understand a world I hadn't known before, and his sentences became the soundtrack to my curiosities – it was as if he had decided to do something that felt resonant: tip the balance in favor of listening and looking and wondering.

On people: "There were cattle kings and horse thieves and half breeds and whole sons of bitches and preachers in droves and sinners in swarms." (Goodbye to a River, p.200).

On the lovely dynamic between rain and land: "Hence, it depends not only on rainfall year by year but also on the way the land receives and handles the rain." (Hard Scrabble, p.53).

On aging and time: "'Maybe it is, at that,' said his grandfather, nudging dark loose earth with his toe and feeling in old hurts the certainty of rain. 'We feed the dirt, and the dirt feeds us.'" (Hard Scrabble, p. 139).

Rural Texas mystique is (and always will be) a mine for creative plundering. There is a fierce identity to it, and a romance that accompanies its exploration. And, I firmly believe that defense lawyers whose practice carries them into the hard scrabble of Texas, will do well spending time with the likes of John Graves. He is not there to give you the answer, but he does prod you along to truly soak in what's around.

His genius is to give the lesser known a profound, authentic, feeling identity. With him, you are not between other places, not described in reference to elsewhere, not on a road between somewhere you might know (Fort Worth) and somewhere else you might know (Abilene) – you are in Somervell County, and being there is just right. There is a depth of humanity that exists in each of Graves' paragraphs, and with a level of simplicity that is reassuring. We, as lawyers, are also at our best when we can take in the complexities that lie before us and speak about them with some combination of plainness and straightforwardness and minimalism.

That Graves writes about rural Texas – and, therefore, the idea that his writing is applicable to it alone – is to miss out on what he teaches about the ways in which we can all find identity (and, in turn, humanity) no matter where our place is. In her brilliant collection On Photography, Susan Sontag offers a mission that defense lawyers can certainly borrow: "There is one thing the photograph must contain, the humanity of the moment." (p. 122). The humanity of the moment, the humanity of our client – the re-insertion of these photographs into a process built upon its proficiency at stripping away those very things – that is our non-stop mission.

Joe Stephens *is the Chief of the Concho Valley Regional Public Defender's Office in San Angelo – his office covers seven rural counties. Before that, Joe spent time at the public defender's office in both the Hill Country and Bee County. He has also worked on appellate and post-conviction issues under Justin Brown in Baltimore - an attorney most known for his work representing Adnan Syed from the "Serial" podcast. Joe went to UT Law, and received his undergraduate degree from Vanderbilt, where he was on scholarship. He is also an 11-time Ironman triathlete, a TCDLA Board Member, and can be reached at jstephens@cvpdo.org.*

Technology in the Modern Criminal Law Office

CRIS ESTRADA

If your office is anything like the office where I work, the end of the year is when we take a minute to look at what needs to be fixed or improved as we move into the next year. So, as we move towards the end of the year, I recommend to each of you to take an inventory of your office computer systems and, most importantly, your security. It should come as no surprise that as attorneys, and more specifically as criminal defense attorneys, our office computer or network security is paramount. The information that we receive and likely maintain on our networks or computers is not only protected by the attorney-client privilege, but also by privacy laws like HIPAA, FERPA, and other statutory protections. Accordingly, ethically we must do everything we reasonably can to protect all of that information, including our email communications.[1]

However, how do any of us have the time to maintain such an area of technical knowledge on top of our work as lawyers?

Despite the desire by many lawyers to do so, we cannot simply avoid technology all together in order to avoid this ethical requirement, as was seen during the COVID-19 pandemic. Many of our fellow criminal defenders across the State scrambled to catch up and figure out what they needed in order to attend Zoom hearings and keep their practices going. So, the questions arise: 1) what virtual office technology should every criminal defense attorney have, at a minimum, to ensure that he or she can continue to work in the hyper-evolving age while maintaining the safety of the privileged information they possess; and 2) how does each criminal defense attorney gain the necessary knowledge to answer question number one? I don't believe there is a single answer to the over-arching question of what technology each of us needs, but the answer to the second question is relatively simple; hire an information technology (IT) company to assist in developing, maintaining, and securing your office computer system. It is clear that the age of defying technology and remaining entirely in paper is gone and every criminal defense attorney must incorporate technology safely into their practice. Zoom hearings are here to stay in some form or fashion and the transfer of information will forever be almost entirely electronic.

Below is a starter checklist that I

1 As of 2019, the Texas Supreme Court has adopted an Ethical Duty of Technological Competence. Comment 8 of Rule 1.01 of the Texas Disciplinary Rules of Professional Conduct was amended, and now reads:

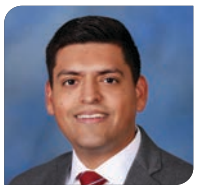
8. Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law, including the benefits and risks associated with relevant technology. To maintain the requisite knowledge and skill of a competent practitioner, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances. Isolated instances of faulty conduct or decision should be identified for purposes of additional study or instruction.

have developed in working to secure our office that I give each of you to consider and to speak with an IT advisor about as you modernize your office technology.

Top 10 Office Technology Checklist:

1. What are the hardware tools (computers to servers to scanners) I need to run a technologically efficient law firm?
2. What is the minimum internet speed I need to support Zoom or other videoconferencing services? Do I need increased internet capabilities to support a virtual office, which would allow me to be able to work remotely?
3. Should I utilize cloud computing for my virtual office or should I work entirely over a Virtual Private Network (VPN)?
4. What safety measures need to be in place in order for me to work remotely and not unethically expose my privileged materials to an attack?
5. How do I ensure that my email remains privileged and beyond the reach of a subpoena, especially email communications with clients?
6. How do I organize my virtual office so that it is easy for me to use? (I recommend setting it up to match your paper office).
7. Where is my network backed up, either to a local server or to the cloud?
8. What level of support is needed to assist and protect me as I move forward with my virtual office?
9. What programs should I utilize to integrate calendaring, email, and document production?
10. What are the best programs for me to utilize in order to review electronically produced discovery?

This checklist may lead to more questions, but the questions above are what led me to modernize our office and the answers to the questions allowed us to continue working, even at the worst of the pandemic. We always want our clients to ask for a lawyer before it's too late, please use the same thought in developing your office technology.



Cris Estrada *received his Bachelor of Arts from the University of Texas at El Paso (UTEP), and received his law degree from South Texas College of Law – Houston. Cris is licensed to practice in Texas and New Mexico and licensed to practice before the United States District Courts for the Western District of Texas, the District of New Mexico as well as the United States Court of Appeals for the Fifth Circuit. He can be reached at cestrada@jdarnell.com or (915)532-2442.*

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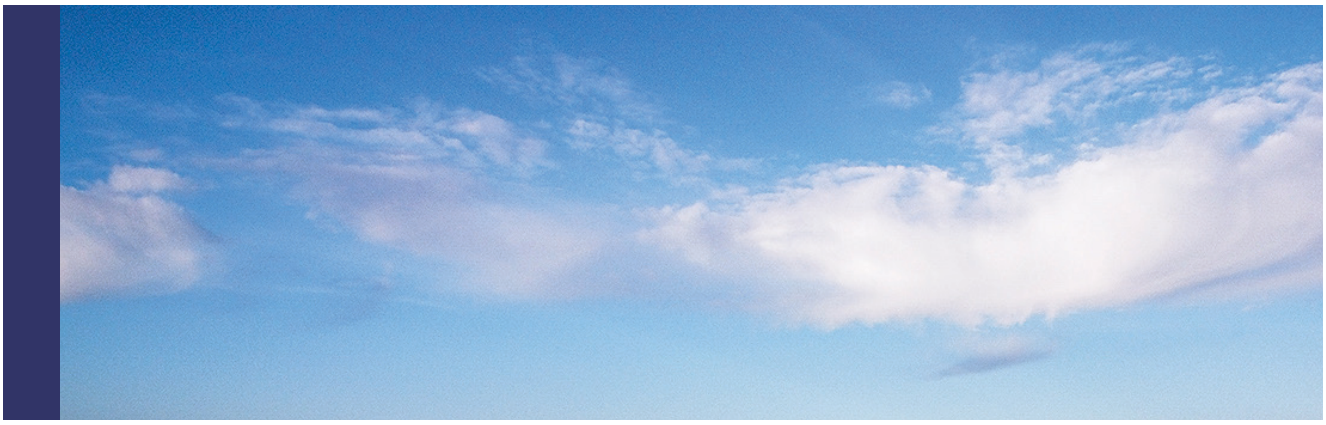


Remembering C.D.

CAROL CAMP

It was an ordinary Tuesday night. I glanced at my cell phone and noticed my former supervisor had forwarded an email to me about one of my former juvenile clients. His email message to me contained just two words: Sad news.

My former 18-year old juvenile client, C.D., passed away over Thanksgiving weekend.

I replied to my former supervisor back to see if he knew what happened and he replied he didn't have any information.

I sat there in shock, unable to believe that C.D., who to me was nothing more than a goofy kid, was dead. How was that possible?

I understand losing clients is a grim reality as a long-time public defender representing client's in capital cases. I remember visiting with a client on his last day here on earth and witnessed his state-sanctioned murder even as his mother and family members cried. As painful as that was, I was also comforted in remembering my client spent his childhood summers with his grandparents in Alabama fishing and eating his grandmother's homemade blueberry pie; the mother of his victim did not want him to be executed; his ex-wife loved and forgave him for nearly killing her; and his two adult sons were good men who loved him dearly.

But an 18 year-old? What chance had he had to live?

Despite his youth, C.D. was a beloved grandson, son, brother, nephew, and cousin. He was also an expectant father whose child will never know his love for his family, his infectious grin, and his fun-loving personality. He loved doing construction work and dreamed of being a builder and a real estate agent someday.

C.D. struggled mightily with abandonment and anger issues. His father was incarcerated in federal prison for bank robbery. His mother moved the family from Memphis to Houston, hoping to get a fresh start. Unfortunately, the change in scenery did not help C.D. deal with his problems. He began hanging out with a rough crowd and ended up in juvenile detention.

C.D. was incarcerated during the height of the pandemic. Juvenile detention was hardly an ideal setting for an active teenager, yet somehow he managed to stay out of trouble. We spoke regularly on the phone and I visited him when I was allowed to visit in person. More than anything, C.D. wanted people to understand he was not a bad person and he wanted and needed a chance to prove himself.

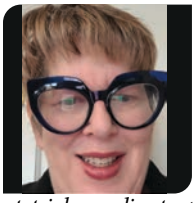
C.D. showed he could succeed when he had the right kind of structure and support in place. Tragically his ability to continue making progress on his own was limited and the bad habits he had worked so hard to correct soon resurfaced.

As public defenders, we sometimes tend to believe that once a case has been resolved, the matter has concluded. Sadly, however, the challenges our clients faced before we met them do not just magically disappear once their legal issues have been resolved. We must always be mindful life goes on for our clients with or without us and that many of our former clients need ongoing assistance and support to turn their lives around.

As their advocates, we must continue fighting for them.

C.D. deserved better. He deserved a chance to hold his newborn baby, to laugh with his family and friends, and to tell his mother that he loved her.

Hopefully, his unborn child will be able to do all of that and much more.



Carol Camp *is Senior Counsel at Clouthier Law, PLLC, a boutique firm located in The Woodlands, Texas, which specializes in criminal and civil appeals as well as state and federal habeas cases. Carol previously served as a long-time public defender representing juvenile and adult clients at trial, on direct appeal, and in state and federal capital and non-capital post-conviction proceedings. She received both her bachelor and master's degrees from the University of Notre Dame and her J.D. from the University of Texas School of Law. Carol can be reached at carol@clouthierlaw.com or at 601-673-1400.*

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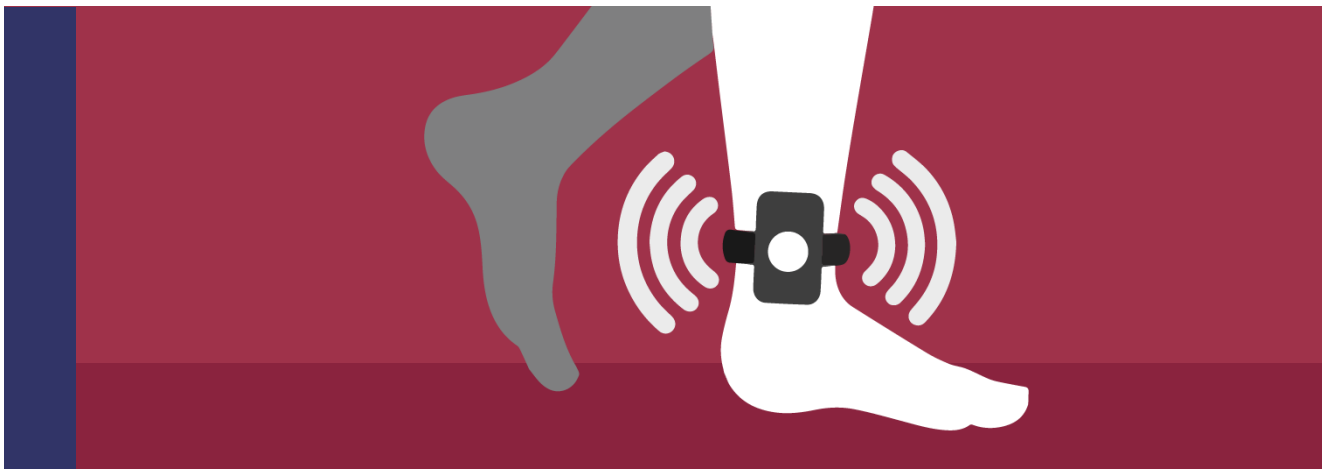

ABC's and 123's of Parole Law: *An Introduction to Parole Law Pt.3*

SEAN LEVINSON

This is a continuation of ABC's and 123s of Parole Law: An Introduction to Parole Law Pt.1 in the December 2020 issue of Voice for the Defense and ABC's and 123s of Parole Law: An Introduction to Parole Law Pt.2 in the January/February 2021 issue of Voice for the Defense.

For starters, let's review basic parole eligibility. Offenders convicted of aggravated offenses will serve ½ of their sentence before becoming eligible for parole. Good conduct time is not awarded to these offenders. Offenders convicted of non-aggravated offenses will be eligible for parole upon serving 25% of their sentence. This 25% **includes** actual custody time and good conduct time. For simplicity's sake, we calculate good conduct time as 1 day credited for each day in custody. Therefore, offenders are actually eligible for parole on non-aggravated offenses after serving just 1/8 of their sentence.

The Scenario

Let's say it's a leisurely Monday afternoon and a potential new client walks into your office. The client mentions that they were arrested for a misdemeanor DWI on Friday night and were given a PR bond the same day. You think to yourself, "Great, I've handled many DWI's in the past, I can't wait to get started." Then the client says, "Oh, by the way, I'm also on parole! I might have a Blue Warrant; can you get it lifted? If not, how long will I be in custody? What will happen if I am convicted of the new offense?" As you slump back in your chair, you realize, I need to speak to a parole attorney ASAP. Before you pick up the phone to call my office, this article will provide you a guide to some of the common issues presented in these situations.

The Basics

So, let's talk about parole revocations and how you can advise your client when presented with this scenario. Parole revocation caselaw starts with the landmark Supreme Court decision *Morrissey v. Brewer*, 408 U.S. 471 (1972). In *Morrissey*, the Court held that parole revocations are not part of a criminal prosecution and thus the "full panoply of rights does not extend to parole revocations". The Court did hold that parole revocation hearings do call for "some orderly process, however informal". The *Morrissey* holding establishes the following minimum rights of due process in parole revocation hearings:

- Written notice of claimed parole violations;
- Disclosure to the parolee of evidence against him;
- Opportunity to be heard in person and to present witnesses and documentary evidence;
- The right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
- A "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
- A written statement by the fact finders as to the evidence relied on and reasons for revoking parole.

Why Might a Blue Warrant be Issued?

First and foremost, all offenders are given parole conditions that they must abide by when released on parole/discretionary mandatory supervision ("DMS"). Failure to abide by of any of these conditions could result in a

violation being filed and a parole warrant (aka, Blue Warrant) being issued. Offenders who are on parole/DMS may be subject to Blue Warrants for technical or new offense violations. These Blue Warrants are NO BAIL.

Technical violations typically include:

- Failure to report;
- Delinquent parole fees;
- Positive drug tests;
- Failure to reside in an approved location; and
- Home monitoring/curfew violations

New offenses

- Class C and up offenses[1].

When will a Blue Warrant be issued?

Traditionally, a Blue Warrant will be issued anytime an offender is accused of a technical or new offense violation. Recently, there have been some changes to Blue Warrant issuance.

Technical violations will still continue to result in Blue Warrants. Those hearings will be conducted within 41 days of the blue warrant being executed.

New Offense violations are now subject to new rules. TDCJ-Parole Division ("Parole Division") will now issue Blue Warrants upon notice of a new offense under different parameters. They will no longer "automatically" issue Blue Warrants due to a new offense violation. Blue Warrants for new offenses will be issued according to a new tier system.

Offenses in the first tier (Murder, Sexual Assault, etc.) will result in Blue Warrants being issued automatically. Those cases will have both preliminary and revocation hearings within 41 days.

All other offenses will not result in an automatic warrant issuance. Instead, those offenders will be free to post bond on their new offense and resume parole supervision. Once those cases are indicted, the Parole Division may staff those cases to determine if a warrant shall be issued. If no Blue Warrant is issued, the offender will continue on supervision until the case is adjudicated. Upon adjudication, the Parole Division may issue a warrant and proceed to a hearing.[2]

Please be careful with these situations involving a Blue Warrant and a new criminal charge. Often, a client will bond out prior to the Blue Warrant issuance. This usually happens when an offender is arrested on a weekend and the Blue Warrant doesn't issue until Monday morning (for those offenses subject to automatic warrant). If the offender is later taken into custody on the parole hold, they will not be "in custody" on the new criminal case. A consideration should be made into raising their bond on the criminal case so the client gets credit for both the parole case and the new law violation.

Where will hearing take place?

Once a Blue Warrant is executed the preliminary/revocation hearing will take place in the county where the client is located, not necessarily where the violations occurred. That is, the county the warrant was executed in determines where the hearing will take place. So a client who is reporting to parole in Dallas but was arrested in Houston, will have their hearing in Houston. (If the basis for the Blue Warrant was for a new criminal offense, the client may be "bench warranted" back to the county where the criminal offense is pending.)

Who is present at the hearing?

Hearings are presided over by hearing officers, who are employees of the Texas Board of Pardons and Paroles ("Parole Board"), not the Texas Department of Criminal Justice ("TDCJ"). The hearing officers conduct hearings to determine whether a violation occurred and make recommendations to the Parole Board. In these hearings, the hearing officer presides over the case much like a judge in a courtroom. Hearing officers examine witnesses, rule on admission of evidence, and make rulings regarding motions and objections, among other duties.[3] The parole officer, employed by the Parole Division, acts much like a prosecutor in a courtroom. The offender is present at the hearing along with their attorney, if one has been appointed or retained. As mentioned earlier, the Hearing Officer may examine witnesses in addition to the parole officer and offender/attorney.

Who gets a Hearing and when are they informed about the Allegations?

Every offender accused of a violation is entitled to a hearing. The offender (and attorney if appointed/retained) must receive the hearing packet (aka, discovery) within 3 days of a preliminary hearing and 5 days before a revocation hearing. Prior to scheduling a hearing, the offender will be asked if they want to have a hearing or waive it. As a general rule, it is advisable to never waive a hearing.

Does the Offender have a right to Counsel?

While an offender may hire an attorney, there is no automatic right to counsel in parole revocation hearings. However, the Parole Board can appoint an attorney in certain situations. The Board may appoint an attorney based on the following factors:

1.Whether the offender is indigent;

2.Whether the offender lacks the ability to articulate or present a defense or mitigation evidence in response to the allegations; and

3.The complexity of the case and whether the offender admits the alleged violation.[4]

This request for an attorney can come from the offender, parole officer, or hearing officer. In my experience, the Parole Board errs on the side of caution and will not hesitate to appoint an attorney to an offender they believe cannot adequately represent themselves; this usually happens because of a low IQ or mental illness.

1 New Offenses do not need to be filed in court. Merely an allegation made to the parole officer of a criminal law offense may be enough to trigger a blue warrant.

2 As this new policy has recently taken place, we do not know under what conditions a Blue Warrant will issue after adjudication.

3 Texas Administrative Code, Title 37, Part 5, Rule 147.2.

4 Texas Administrative Code, Title 37, Part 5, Rule 146.3.

What types of hearings are there?

There are two types of hearings: preliminary and revocation.

A preliminary hearing will take place if an offender is accused of a new law violation. The burden to sustain an allegation is low: probable cause. If probable cause is found, the case is usually continued to a later date to hold a revocation hearing after the criminal case is adjudicated.[5] The client will remain in custody pending the outcome of the criminal case and the subsequent revocation hearing.

Revocation hearings are held for technical-only violations and for new offense violations that have been adjudicated in court. At this hearing, the burden is preponderance of the evidence. Please note, that just because a criminal case was dismissed, DOES NOT mean there will not be a revocation hearing. The burden is preponderance, not beyond a reasonable doubt!

What are the Preliminary and Revocation Hearing Procedures?

Both preliminary and revocation hearings have two parts, a fact-finding and an adjustment portion.

The first part is considered the fact-finding portion, much like a trial. Documentary evidence is submitted, and testimony is taken from witnesses who are subject to cross-examination. Likewise, objections can be made to introduction of documents or testimony. The offender can testify if they so chose.

In preliminary hearings, the parole officer usually submits the Probable Cause affidavit as evidence to support their burden. Clients should be warned that any testimony they give is under oath and can be used against them as impeachment at trial. Therefore, most of the time it is inadvisable for a client to testify at preliminary hearings.

Due to the low burden, success for offenders at preliminary hearings is generally low. However, the offender can call witnesses to the hearing. These witnesses could include law enforcement, eyewitnesses, and even the alleged victim(s). As all testimony is under oath and recorded, this could be useful for impeachment at a subsequent trial.

If the requisite burden is not met at either type of hearing, the case will not advance any further. This would be akin to a Directed Verdict at a trial.

If the requisite burden is met, the hearing will move on to the adjustment portion, which is akin to a sentencing hearing at a trial. During this part, the parole officer will testify as to the offender's adjustment during supervision. They will advise the hearing officer as to the offender's overall compliance with parole conditions, prior warrants, employment status, drug test results, and home plan verification.

Offenders can also testify, submit documents, and present live witness testimony during this stage. Most cases are won or lost at this stage.[6] Even though there may be a finding as to an allegation at a revocation hearing, the evidence presented at the adjustment portion may make the difference between a revocation and a less severe punishment. It is vital to present mitigating factors during the adjustment portion. This is the only opportunity the hearing officer will have to gather information about the offender's life, hardships, accomplishments, and lessons learned.

Mitigating factors might include:

- Client's character;
- Good moral standing in the community;
- Job skills;
- Employment history;
- Family;
- Education;
- Mental health concerns;
- Medical issues, etc.; and
- Future educational, professional, and personal goals.

At the conclusion of the hearing, the parole officer will make a recommendation. The hearing officer will then conclude the hearing without making a recommendation. The hearing officer will type up a report and send it to the local Parole Board with their recommendation. A Parole Board analyst reviews the file and makes their recommendation to the Board who then issues their decision. The Board's decision is later tendered to the offender in person.

What are the possible outcomes?

The Board has 30 days to issue a ruling on the case. A majority of the 3 voters is required for a ruling. The Board can then:

- Accept the findings of the Hearing Officer and Analyst, (most common)
- Overrule their findings; or
- Send the case back to the Hearing Officer for further development of factual or legal issues.

If the Board accepts the findings, they will then determine what sanction to impose. Generally, the Parole Board takes a graduated sanctions approach to violations. The possible outcomes from a revocation hearing are:

- Return to Supervision (possibly with new or modified conditions);
- Intermediate Sanction Facility (ISF)
- Substance Abuse Punishment Facility (SAFP); and
- Revocation

Can you appeal the results?

An offender can only appeal a Board's decision if the vote was to REVOKE. If so, then the offender has 60 days from the Board's decision to file a Motion to Reopen. This motion must be based on:

- Newly discovered evidence,
- Findings of fact that are not supported by preponderance of credible evidence or are contrary to law, or
- Procedures followed in the hearing are violative of the law or Parole Board Rules.[7]

What happens after the Parole Board's decision?

If offender is returned to supervision, they will be released from custody and resume parole supervision. If ordered to

5 In the case of "automatic" Blue Warrants, the Revocation Hearing will be scheduled immediately after the Preliminary Hearing within the 41 day time frame.

6 Adjustment testimony is taken during preliminary hearings even though there will likely be a revocation hearing taking place later. In most situations, adjustment testimony is therefore more important at the revocation hearing, as a decision whether to revoke or not is being made at that time.

7 Texas Administrative Code Title 37, Part 5, Rule 146.11.

go to ISF or SAFP, they will wait in the county jail until a bed opens and then be transferred. Upon completion of ISF or SAFP, the offender will resume parole supervision. Even though offenders ordered to attend ISF and SAFP will be housed in prison to complete their program, this is not considered a revocation. For offenders who are revoked, they will remain in the county jail until they are transferred to TDCJ.

What about street time credit for those who are revoked?

If the offender is sentenced to ISF or SAFP, they will eventually be returned to supervision upon successful completion of the program. If the client is revoked, however, the stakes are much higher. Most offenders are worried about losing their street time if revoked for parole. Certainly, offenders who are revoked will get credit for the time they spent in custody prior to being paroled and any time they spent in custody after the blue warrant was executed. However, they may not keep their street time.

To determine if an offender will keep their street time, we must look at two things: their criminal convictions and how long they have been on parole. Offenders will get credit for street time upon revocation if:

- They have no current or previous convictions for offenses in 508.149 of the Government Code (DMS disqualifying offenses), and
- They must have been on parole/DMS for at least ½ of their supervision term at the time the Blue Warrant was issued.

Being eligible for DMS is not as much of a concern for offenders going to prison but it has greater impact on revocations. Now you can see why although DMS has "lost its bite" for many offenders when up for review, it is crucial in determining street time credit.

To be clear, if an offender is currently on parole for or has ever been convicted of a 508.149 offense, they will NEVER be eligible to "keep" their good time upon revocation now or in the future!

Additionally, upon revocation any good conduct time the offender earned prior to being released on parole/DMS will be forfeited.[8]

8 498.004 Texas Government Code.

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Children Charged with Homicide

ABNER BURNETT

My Kids [These are fiction but derived from scenarios in cases I have defended.]

Story 1

Sherri, a 15-year-old high school student, drove a car filled with her teammates to an awards ceremony. Her soccer team had won a championship. The car belonged to the parents of a 16-year-old in the car. The parents had watched without saying anything as six teenagers in a celebratory mood piled into the car with their 16-year-old taking the driver's seat. When the girls got out of sight from the house, however, the 16-year-old let Sherri drive.

The girls were laughing, texting, listening to music, and kidding around. Sherri ran a stop sign going about 50 in a 35-mph zone and T-boned a sedan driven by an elderly woman. The elderly woman was injured but survived and recovered fully. All of the girls in the car driven by Sherri were taken to a hospital. One of them died. She had been in the front seat and had undone her seatbelt to turn around and talk to a teammate in the back. Sherri and that girl were co-captains of the soccer team and best friends forever. The girl was also an honors student. Her mother was the court coordinator for a local district judge. Sherri was a star at the high school and had come from a low-income family.

When Sherri was taken to the hospital in the ambulance, the two law enforcement officers that responded to the call on the accident followed behind. Once the attending medical personnel determined she had no serious injuries, they allowed the officers to go into the room where Sherri was. The officers questioned Sherri, telling her that she wasn't under arrest, but that she might not be able to go home with her parents when they got there if she didn't answer some questions first. When her parents showed up at the hospital, the officers arrested Sherri.

Claiming he was under a lot of political pressure, the district attorney said he couldn't handle the matter as an ordinary delinquency case. He decided to charge the case as manslaughter, but wouldn't handle it as a determinate sentence case. He was afraid a jury might return a verdict of guilt on the lesser included offense of criminally negligent homicide. Doing so would kick the disposition back into the ordinary delinquency category. *See* Tex. Fam. Code Ann. §§ 53.045 & 54.04(d)(2). He petitioned for discretionary transfer of the case to criminal district court to try Sherri as an adult pursuant to § 54.02 of the Texas Family Code. She was old enough. The transfer would solve the prosecutor's problem of ending up with a progressive sanctions disposition under Texas Family Code § 59.003.

The prosecutor gathered the materials necessary for his presentation, including the complete diagnostic study, social evaluation, and full investigation required by Texas Family Code § 54.02(d). He got an expert to opine on the four factors set out in Texas Family Code § 54.02(f). Sherri's lawyer got an expert to dispute the opinions of the State's expert, including, among other things, that (1) Sherri had the appropriate maturity and sophistication to try her as an adult, and (2) that the resources available in the juvenile justice system were not adequate to protect the public and rehabilitate. Sherri's statements to the police and written statements from the other girls in the car came into evidence during the hearing. The judged reasoned that guilt/innocence was not the issue in the hearing on discretionary transfer. Discretionary transfer of jurisdiction was. Neither the Fifth Amendment protection against coercive interrogation nor the Sixth Amendment right to confrontation of witnesses applied. *See e.g., B. L. C. v. State*, 543 S.W.2d 151 (Tex. Civ. App.—Houston [14th Dist.]1976, writ ref'd n.r.e.) and *Matter of P. A. C.*, 562 S.W.2d 913 (Tex. Civ. App.—Amarillo 1978, no writ).

The judge made the required findings of probable cause that Sherri committed manslaughter as alleged and that adult criminal proceedings were necessary to protect the community due to either the seriousness of the offense or Sherri's background as required by Texas Family Code § 54.02(a)(3). The judge kicked the case to the criminal district court pursuant to Texas Family Code § 54.02(h). Sherri's family made bond for her as allowed under Texas Family Code § 54.02(h-1) . The case proceeded in district court while appeal of discretionary transfer was pending because said appeals do not stay the proceedings under Texas Family Code § 56.01 (g-1). A year later, the appellate court delivered an

unfavorable ruling on the challenge to discretionary transfer. By then, the case had already been tried in district court.

At the district court, in a pretrial hearing on a Motion to Suppress, the judge ruled that the interrogation of Sherri at the hospital was not custodial. He ruled that there had been no violation of the statutes upon which Sherri's lawyer relied in the Motion to Suppress, Texas Family Code §§ 51.095, 52.01, and 52.02. Her statements could be admitted before the jury. Settlement negotiations didn't succeed, and the case went to trial. A Jury rejected the manslaughter charge, convicted on the lesser of criminally negligent homicide, and gave Sherri the maximum sentence of two years in a state jail facility. Sherri Appealed. The trial judge let her stay out on bond during the appeal. Sherri finished high school while the appeals were pending. When the appellate process played out against her, Sherri surrendered to begin her sentence. After 75 days, she applied for Shock Probation under Texas Code of Criminal Procedure Article 42A.558. The trial judge granted the application.

Story 2

Wendell was a 13-year-old chess whiz. He was also a victim of bullying at school, particularly harassed by a fellow named Max that came from a wealthy family and was probably the best football player ever to attend the small-town high school. Wendell had a crush on the girl that Max considered his girlfriend. She was a cheerleader, but like Wendell, she came from a low-income family. Max found out that the girl and Wendell had been talking after school. He caught Wendell after school and beat him silly. When asked who beat him up, Wendell wouldn't snitch. Then, Max slapped the girl around and neither the school nor the cops did anything about it. Wendell got himself a shotgun and lay in wait for Max. When Wendell caught Max in a secluded spot, he blew his head off.

Since Wendell was only 13, he couldn't be certified as an adult under Texas Family Code § 54.02(a)(2)(A). The district attorney sought and gained approval from a grand jury for prosecution under the determinate sentence statute, Texas Family Code § 53.045. A juvenile determinate sentence case could be tried in a county court at law, a district court, a criminal district court, or family district court. *See* Tex. Fam. Code Ann. §§ 51.04 (b) and (c). In Wendell's small hometown, it would be the district court.

Wendell was entitled to a trial by a jury both at the guilt/innocence stage and at the disposition, should the State convince a jury beyond a reasonable doubt that Wendell had engaged in delinquent conduct or conduct indicating a need for supervision and that the allegation against him was true. *See* Tex. Fam. Code. Ann. §§ 54.03(f) and (h). A jury [or judge should he prefer] could sentence him up to 40 years. *See* Tex. Fam. Code Ann. § 54.04(d)(3)(A)(ii). Eventually, he agreed to a plea bargain for a determinate sentence of 20 years and the trial judge accepted the plea pursuant to Texas Family Code § 54.03(j).

Unless a sentence is probated (*See* Tex. Fam. Code 54.04(q)), determinate sentencing requires a minimum stay in a secure facility operated or approved by the Texas Juvenile Justice Department (hereinafter TJJD). *See* Tex Hum. Res. Code § 245.051(c). After that, TJJD may release the juvenile into an accepted setting of supervision. Wendell served his 3-year minimum sentence at TJJD. *See* Tex. Hum. Res. Code §245.051(c)(2). He participated in rehabilitation programs, started a chess club, and otherwise behaved impeccably. He was never referred to the juvenile court for a review under Texas Human Resources Code § 244.014. An unfavorable ruling from the court in such a hearing would have sent Wendell to prison to complete his sentence. *See* Tex. Fam. Code. §54.11(i)(2). When Wendell turned 18, the TJJD did an assessment according to Texas Human Resources Code § 244.015. Then, the Department referred Wendell to the juvenile court for a hearing under Texas Human Resources Code § 245.051(d) and Texas Family Code § 54.11. Having the options of either sending Wendell back to TJJD with approval for release or without such approval, the judge chose the latter, saying that the severity of the offense overrode the positive reports of Wendell's behavior while in the TJJD facility. *See* Tex. Fam. Code §54.11(j)(2). On his 19th birthday, Wendell was transferred to the custody of the Texas Department of Criminal Justice to serve the remainder of his sentence on parole as provided by Texas Government Code § 508.156 and Texas Human Resources Code § 245.151(e).

Story 3

Warren came from a very affluent family. Big fish in a small pond. Very powerful locally. He had no criminal history at age 16. He had decent grades in high school and was generally well-liked by students and teachers. He was a decent football player.

But Warren chafed at the image of unearned privilege that came with his family's affluence. He aspired to be a Hip Hop rapper. He started drinking alcohol and smoking marijuana. He took up with some other wannabees. One of them fancied himself to be some sort of gangster. He had started accumulating an increasingly violent juvenile criminal history.

Warren got in a car with that kid. The kid told Warren that they were going to go smoke some weed. They stopped at a smoke shop to get some smoking paraphernalia. While in the store the other kid tried to shoplift some stuff. When the shop-owner saw him, he yelled and pulled out his cell phone. The kid pulled a gun out of from a jacket pocket and shot the shop-owner dead. The two boys ran out of the shop to the car and sped away. Within a few days, they had left a sufficient trail of school yard chatter and social media allusions to lead law enforcement to them. Both were arrested.

The district attorney came to Warren's attorney and made an offer. If Warren testified against the shooter, who had just turned 17 when the shooting occurred, the State would not seek a determinate sentence or discretionary transfer. They would let him plead true to the allegation of murder in juvenile court without grand jury approval of a determinate sentence request. The agreed disposition, subject

to the Court's approval, would be to serve time in a secure facility of the Texas Juvenile Justice Department for a period of time to be determined by the Department. *See* Tex. Fam. Code § 54.04013; Tex. Hum. Res. Code §§ 243.002 & 245.101. By using a copy of a TJJD form CCF-040, Warren's attorney determined that Warren would probably be assessed for a minimum of 24 months in custody. The alternative would be to take his chances of either a determinate sentence of up to 40 years, or certification as an adult, a capital murder conviction, and life with possibility of parole. Warren accepted the deal. The juvenile court judge indicated approval of the arrangement and, by agreement of all parties, stayed the adjudication and disposition proceedings until after Warren fulfilled his obligation as a witness against the adult defendant.

Children Charged with Homicide – Part Two
Selected Cites with Scant Commentary

This outline maps some places of interest that one may want to visit when touring the world of Texas Criminal Jurisprudence in juvenile homicide cases. It is not detailed topography.

I. Elements Common to Juvenile Homicide Cases

A. Pretrial Detention – Unless jurisdiction over the Child has been relinquished by the juvenile court Under Tex. Fam. Code §54.02, the detention provisions under Tex. Fam. Code §§51.12 & 54.01 govern:

1. Ordinary Delinquency Proceedings,
2. Determinate Sentence,
3. Discretionary Transfer; unless and until transfer is ordered, at which time the child gets treated like a grownup. Tex. Fam. Code Ann. §54.02(h-1)

B. Interrogation

1. Tex. Fam. Code
   i. §51.095 Admissibility of a Statement of a Child [This is the foundational statute by which custodial interrogation of a juvenile should be scrutinized.]
   ii. §§52.02 and 52.025 [regarding law enforcement handling of detained juveniles, generally.]
2. Tex. Code Crim. Proc. Art. 38.22 & 38.23
3. United States and Texas Constitutions

C. Procedure at the Time of Arrest - For scrutinizing and litigating propriety of detention, arrest, and interrogation of a child, one should familiarize the self with §§51.09, 51.095, 52.01,52.02, 52.025, and 52.04 of the Tex. Fam. Code. These statutes and the case law interpreting them address the way law enforcement should conduct detention, arrest, and interrogation, where they should be doing it, what efforts should be made to involve parents, and what the role of a magistrate should be.

D. Constitutional Protection against illegally obtained evidence. Tex. Fam. Code §54.03(d) & (e)

E. Burden of Proof for State at Trial Beyond a Reasonable Doubt. Tex. Fam. Code §54.03(f)

F. Procedural Rules and Rules of Evidence. Tex. Fam. Code Ann. § 51.17 [the general rule unless and until discretionary transfer occurs]. Generally, the Rules of Civil Procedure apply, but this statute states exceptions. The rules of criminal evidence and criminal discovery apply. The burden of proof regarding guilt is beyond a reasonable doubt. The statutes pertaining to determinate sentence proceedings incorporate other rules from the Texas Code of Criminal Procedure. If a court waives jurisdiction and exercises discretionary transfer of a case, procedural and evidentiary rules are generally those from the Texas Code of Criminal Procedure and the Texas Rules of Evidence. **An important exception is that "The admissibility of a statement made by a juvenile is governed by section 51.095 of the Texas Family Code." *Meadoux v. State*, 307 S.W.3d 401, 408 (Tex. App.–San Antonio 2009), aff'd, 325 S.W.3d 189 (Tex. Crim. App. 2010).**

Note that federal and state constitutional rights traditionally afforded adults in criminal cases are generally considered also available to juveniles. "Even though a juvenile does not have a right to a jury under the federal constitution and may not have such a right under the state constitution, the legislature has given a right to jury trials to juveniles; because Texas has chosen to grant that right, it must also act in accordance with due process." *In re* C.H., 412 S.W.3d 67, 75 (Tex. App.—Fort Worth 2013, pet. denied).

II. Three Options in Juvenile Homicide Case

A. Proceeding With Petition in Juvenile Court

1. Juvenile Court Jurisdiction Generally- Tex. Fam. Code §51.04

The court of juvenile justice jurisdiction is designated by a Juvenile Board. It may be a District Court, County Court at Law, Constitutional County Court, Domestic Relations Court [Family], or Statutory Juvenile Court. Tex. Fam. Code Ann §51.04(b)

2. Pleadings – Tex. Fam. Code § 53.04
3. Jury in Juvenile Court ordinary Delinquency Proceeding – Tex. Fam. Code §54.03(c) and Tex. Code Crim. Proc. Art. 33.01; For felonies 6 if county court, 12 if district court
4. Jury Verdict on Guilt/Innocence

   Regarding guilt or innocence, the finding initially is whether the child did engage in delinquent conduct or conduct indicating a need for supervision. If the verdict return reads, "We the jury find that the child,_____ did not engage in delinquent conduct or conduct indicating a need for supervision", then the jury has done its work and the judge must dismiss the case with prejudice. Tex. Fam. Code §54.03(g)

If the verdict signed read's "We the jury find that the child,_____ did engage in delinquent conduct or conduct indicating a need for supervision", then the jury should enter a verdict of "True" or "Not True" on each offense presented to the jury. Tex. Fam. Code §54.03(h)

If the finding is that the child did engage in delinquent conduct or conduct indicating a need for supervision and the jury has stated which of the allegations in the petition were found to be established by the evidence, the court sets a date and time for the disposition hearing. Tex. Fam. Code §54.03 (h)

5. Disposition and Punishment If Verdict of True on Offense(s).
   a. In ordinary delinquency proceeding, on for which the prosecutor has not submitted to a grand jury for approval of a determinate sentencing proceeding, the Judge does the disposition hearing. Tex. Fam. Code §54.04(a)
   b. Look at Progressive Sanctions statutes Sanction Level Assignment Model, Tex. Fam. Code §59.003(a)(3) [state jail felony] through (a)(7) [capital]
   c. Commitment to TJJD, See § 54.04013, also 29 Tex. Prac., Juvenile Law and Practice § 22:3 (3d ed.)
   d. Minimum Time TJJD, Establishment of Minimum Length of Stay, Tex. Hum. Res. Code § 243.002, Check out sample TJJD Minimum Stay Worksheet CCF-040
6. Right to Appeal- It is generally governed as a civil case. There is a list of specific decisions that may be appealed. Tex. Fam. Code § 56.01

B. Determinate Sentence

1. Laundry List of Eligible Offenses at Tex. Fam. Code Ann. § 53.045(b)
2. Adjudication Proceeding with a Jury
   a. Court of Jurisdiction –county court at law, district court, criminal Tex. Fam. Code §51.04(b)
   b. Jury size 12. Tex. Fam. Code §54.03(c),Same number of peremptory strikes as afforded in district court under Tex. Code Crim. Proc. Art. 35.15(b).
   c. Verdict – Initially, the question is whether or not there is delinquent behavior in need of supervision, same as in ordinary delinquency proceeding. If any of the findings of true are on offense approved by the grand jury for determinate sentencing, the disposition proceeding is to the court or the jury. If the jury finds delinquent behavior but only on an offense not approved by the grand jury, the disposition statute says that the court proceeds without the jury to a disposition hearing as would occur in an ordinary delinquency proceeding. Tex. Code Ann.§54.04(a)
3. Disposition – The child has a right to jury if notice given before voir dire. The child may change his [her] mind later if there is finding of delinquent conduct. Permission from State must be gotten. Tex Fam. Code §54.04(a). However, as stated above, there is no right to jury on disposition if no finding on covered offense in multi-count petition.
4. Range of punishment for Homicide case Capital Murder under Tex. Penal Code §19.02 and, 1st degree felony murder under Tex. Penal Code §19.03 = up to 40 years
   2nd degree felony murder under Tex. Penal Code §19.02(d) and Manslaughter under Tex. Penal Code Ann. §19.04 = up to 20 years Tex. Fam. Code 54.04(d)(3)
5. Probation if the sentence is 10 years or less. Tex. Code §54.04(q) suspension of sentence, §54.05 modification or revocation of probation.
6. Right to Appeal
   a. Respondent Appeal in determinate case is the same as an ordinary delinquency case. Tex. Fam. Code §56.01 (c)(1)(C)
   b. The State's right to appeal is covered by Tex. Fam. Code §56.03(b), same as Tex. Code Crim. Proc. Art. 44.01

C. Discretionary Transfer to District Court

Waiver of Jurisdiction and Discretionary Transfer to Criminal Court Tex. Fam. Code §54.02

1. Criteria for eligibility

There must be a Felony allegation Tex. Fam, Code Ann. §54.02(a)(1)

The Juvenile's minimum age is

14 if the alleged offense is capital or 1st degree;

15 if the alleged offense is for 2d, 3rd, or state jail felony,

Tex. Fam, Code Ann. §54.02(a)(2) A & B

There must be a full investigation and a hearing. To waive jurisdiction and transfer the case the juvenile judge must find:

a. "there is probable cause to believe that the child before the court the offense alleged" and
b. "that because of the seriousness of the offense alleged or the background of the child, the welfare of the community requires criminal proceedings.

Tex. Fam, Code §54.02(a)(3)

2. Procedure of discretionary transfer hearing for a juvenile under 17 at time of the hearing is covered by Tex. Fam. Code §§54.02 (b) – (h).

<u>Highlights</u>

a. No Jury for Discretionary Transfer Hearing, Tex. Fam. Code § 54.02 (c)
b. The judge will order what is described as "a complete diagnostic study, social evaluation,

and full investigation of the child, his circumstances, and the circumstances of the alleged offense." Tex. Fam. Code § 54.02(d)

c. The list of material that the judge will review and the issues the judge will consider for making a decision are explained in Tex. Fam. Code §54.02(e) & (f).

d. The judge must retain or transfer jurisdiction on all charges included from the petition based on a particular criminal episode. The statute uses the word "transaction". There is an exception that seems to refer to a situation where a transaction has already been ruled on and someone's death later provides the missing element for a homicide charge. Tex. Fam. Code § 54.02 (g) & (g-1). However, a case jiggles the apple cart. It states that what the judge transfers is not necessarily the offenses identified in the petition, but rather the conduct encompassed. *Livar v. State*, 929 S.W.2d 573 (Tex. App.—Fort Worth 1996, pet. ref'd). There is also *Tatum v. State*, 534 S.W.2d 678, 680 (Tex. Crim. App. 1976), stating the juvenile court's transfer order needn't apprise appellant of the specific crimes for which he might be charged in criminal court. If the "transaction" is a complicated one, it might be good practice to get the State to specify the scope of conduct in the "transaction" and the judge likewise as to what he or she transfers.

e. The judge should deliver specific written reasoning for a decision to waive jurisdiction and transfer a case. Tex. Fam. Code § 54.02(h), but this law has been heinously watered down. *Ex parte Thomas*, 623 S.W.3d 370, 372 (Tex. Crim. App. 2021), reh'g denied (June 23, 2021); overruling *Moon v. State*, 451 S.W.3d 28, 31 (Tex. Crim. App. 2014).

f. Discretionary Transfer Punishment Ranges
   i. Capital – Life with parole possibility after 40 years. Tex. Pen. Code § 12.31
   ii. Murder – 5 to 99 with possibility of parole Tex. Penal Code §12.32
   iii. Manslaughter – 2 to 20 Tex. Penal Code §12.32
   iv. Crim Neg homicide – 6 months to 2 years State Jail Facility Tex. Penal Code §12.35

There are lawyers versed and experienced in juvenile justice law and lawyers versed and experienced in criminal defense of homicide cases. When considering the representation of a child charged with homicide, those lawyers fitting in one category should seek the guidance of a lawyer fitting in the other.

Abner Burnett *graduated from South Texas College of Law in 1987 and began his practice of law in Odessa, Texas. He closed his office in 2002 and moved to Mexico. After a couple of years, he returned to Texas and began practicing law again full time, hiring on to The Texas Civil Rights Project. In 2008, he moved to Texas RioGrande Legal Aid as a public defender. He continues to serve in the same capacity for that organization. He can be contacted at 956.393.6206 or by email at aburnett@trla.org.*

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Have you worked with an expert in any forensic discipline who you would like to see added to our list? Please complete the form in the link below or forward a copy of their CV and your recommendation to Rick Wardroup at rwardroup@tcdla.com. Any questions about this list or expert recommendations may be directed to Rick at the above email address.

Significant Decisions Report

KYLE THERRIAN

I hope everyone had a wonderful holiday season. I thought about everyone and how difficult it must have been to celebrate the new year without a January print edition of the Significant Decision Report. I've tried to step up my game here in the inaugural entry in Vol. XXXVII. So, what do we have this month? The Attorney General is now basically prohibited from prosecuting criminal offenses, we discuss comedian Jeff Ross, and we consider whether statements akin to "hulk smash" constitute assault by threat. Also, I've got a Hawaiian Punch joke, and you won't get it, but sometimes I got to do things for my own entertainment (this thing is 36 pages . . .).

TCDLA thanks the Court of Criminal Appeals for graciously administering a grant which underwrites the majority of the costs of our Significant Decisions Report. We appreciate the Court's continued support of our efforts to keep lawyers informed of significant appellate court decisions from Texas, the United States Court of Appeals for the Fifth Circuit, and the Supreme Court of the United States. However, the decision as to which cases are reported lies exclusively with our Significant Decisions editor. Likewise, any and all editorial comments are a reflection of the editor's view of the case, and his alone.

Please do not rely solely on the summaries set forth below. The reader is advised to read the full text of each opinion in addition to the brief synopses provided.

This publication is intended as a resource for the membership and I welcome feedback, comments, or suggestions: kyle@texasdefensefirm.com (972) 369-0577.

Sincerely,

United States Supreme Court

The United States Supreme Court did not hand down any published opinions since the last Significant Decisions Report.

Fifth Circuit

United States v. Ortega,
19 F.4th 831 (5th Cir. 2021)

Issue. Does a trial court improperly delegate a core judicial function to the probation office when it orders inpatient treatment lasting for a period of 4-12 months and a release date in that period to be determined by the probation officer?

Facts. Defendant pleaded guilty to possession of stolen mail in 2016 and went to prison. After completing her initial period of imprisonment, defendant violated her supervised release and the trial court sentenced her to an additional period of imprisonment as well as an additional year of supervised release. As a condition of defendant's future supervised release,

the trial court ordered defendant to "reside in a Reentry Center and successfully participate in a Residential Reentry Program for a period of at least 4 months to be released at the discretion of the probation officer."

Holding. No. The trial court may delegate the authority to determine "details" of supervised release but not the "core judicial function" of imposing a sentence. The trial court errs when it abdicates to the probation office "the final say on whether to impose a condition." The trial court does not err when it assigns to the probation office the task of supervising a treatment program's "modality, intensity, and duration." Here the trial court provided more specificity than in cases where this court has found an improper delegation of authority. Considering the trial court's order another way, it simply provided the probation office an 8-month window to determine when release is appropriate. This is hardly substantial enough to amount to an improper delegation of a "core judicial function."

Texas Court of Criminal Appeals

Middleton v. State,
No. PD-1236-20
(Tex. Crim. App. 2021)

Issue. "When a defendant is placed on deferred adjudication, and he is later charged with a new offense, and the punishment stage for both the deferred-adjudication offense and the new offense occur in the same proceeding, have the two cases been tried in the same criminal action for the purpose of determining whether the sentences can be stacked?"

Facts. A trial court placed the defendant on deferred adjudication probation for three theft offenses. During the period of probation, he committed two new thefts. The State filed two new charges and three motions to adjudicate the three earlier theft cases. After a hearing on all five cases simultaneously, the trial court found defendant guilty of each charge, sentenced defendant to two years confinement in each case, and stacked all five sentences. The court of appeals held that the sentences should run concurrently after concluding that they arose from a single episode and that the State prosecuted them in a single criminal action.

Holding. Yes. Penal Code § 3.03 mandates concurrent sentencing "[w]hen the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action." The definition of "same criminal episode" includes "the repeated commission of the same or similar offenses." "Because all of Appellant's offenses were thefts, they constituted the repeated commission of the same or similar offenses under the statute." The definition of "single criminal action" includes a consolidated punishment hearing on two or more separate offenses regardless of when a plea is entered. "Criminal action" refers to a trial or plea proceeding. A plea proceeding is not concluded until punishment is assessed. The fact that a defendant was on deferred adjudication is significant, as well. The language of the deferred adjudication statute "contemplates a pause, as if the case were taken under advisement. . . . If [the defendant] fails, and the trial judge later finds a violation of probation and decides to adjudicate guilt, the proceedings continue where they left off: [the proceedings continue as if adjudication of guilt had not been deferred]."

Regular probation is different. A sentence received upon revocation of regular conviction-based probation is stackable upon a new offense committed during the probationary period. But deferred adjudication probation differs from conviction-based probation in enough ways to justify different treatment here. A deferred felony probationer remains eligible for regular probation in a future case because he is not considered to have a final felony conviction. This is not true for the regular felony probationer. A deferred probationer is subject to the full range of punishment upon revocation. This is not true for the regular felony probationer. A deferred defendant adjudicated guilty may file a post-adjudication motion for new trial to undo the conviction. This is not true for the regular felony probationer.

Comment. The court gives a very open-ended definition to "same criminal episode." In *Ex parte Ferris*, No. 05-19-00835 (Tex. App. Dallas, Oct. 2, 2020)(en banc) the Fifth Court of Appeals concluded that 2015 DWI conviction and a 2019 DWI acquittal were not part of the same criminal episode for purposes of denying an expunction of the 2019 DWI acquittal. In that case the trial judge stated, "I've never seen a case where, after the first case is disposed of via a plea and the second crime occurs after the first case is disposed of, that that is described or included within the phrase 'same criminal episode.'" *Ferris* is now before the Supreme Court of Texas (expunction appeals are civil in nature). Though the length of time between the commission of the two offenses in Ferris is longer than it is here, this case presents a potential for disagreement between the Supreme Court and the Court of Criminal Appeals on what constitutes a "same criminal episode."

Brooks v. State,
No. PD-0703-20
Tex. Crim. App. 2021)

Issue. Does the statement "I need to hit" constitute a threat?

Facts. The State charged the defendant with aggravated assault family violence. The State alleged in their indictment that the defendant "threaten[ed] [the victim] . . . with imminent bodily injury by telling her that he was going to end her life, and the defendant did use or exhibit a deadly weapon during the commission of the assault, to wit: a piece of wood." According to the victim, the defendant choked her, hit her with a board, and stated "I need to hit." The Court of Appeals found the statement "I need to hit" insufficient to establish an assault-by-threat.

Holding. An appellate court reviews sufficiency of the evidence in the light most favorable to the prosecution, and that "ordinarily means resolving any ambiguities in the evidence in the prosecution's favor." When considering the defendant's statement in the context of what was occurring, it is fair to resolve the ambiguity in favor of maintaining the conviction. "Appellant beat her, told her 'I need to hit,' and beat her some more."

Comment. I'm not sure why the State didn't indict him for physical assault instead of verbal assault. Also, I found this line funny: "Appellant cites several cases in which the phrase 'I need to hit' was included in a defendant's statement as examples of the phrase being a verbal threat . . ." I'm over here banging my head against the wall trying to figure out "how much proof is probable cause" and this lawyer lucks out on several (several?) cases in which a defendant said: "I need to hit." How weird is that?

Inthalangsy v. State,
No. PD-1000-20
(Tex. Crim. App. 2021)

Issue. A murder in the course of kidnapping is capital murder. (1) Where a defendant kills two victims—only one of which he kidnapped—is evidence that he ultimately killed the kidnappee admissible in the capital murder prosecution for killing the non-kidnappee under Texas Rule of Evidence 404(b) (extraneous offense limitations)? (2) Is it under Texas Rule of Evidence 403 (substantial prejudice)?

Facts. A jury convicted the defendant of capital murder for a murder he committed in the course of kidnapping. Defendant killed two people after $70,000 worth of drug profits went missing. The victims were a couple (boyfriend-girlfriend) who the defendant and his accomplice believed stole that money. The State alleged that the defendant killed the boyfriend and in the same transaction kidnapped the girlfriend and killed her later. The State wanted to present evidence of both killings in the prosecution for murdering the non-kidnappee. The trial court permitted this after overruling defendant's extraneous offense and Rule 403 objections. The court of appeals reversed. The court of appeals explained that the girlfriend's death did not make the kidnapping more or less probable, and the probative value of the second murder was substantially outweighed by unfair prejudice caused by the violent nature of the offense.

Holding. (1) Yes. Kidnapping was an element of proof in the prosecution of capital murder for the killing of the non-kidnappee. One way to commit the offense of kidnapping is by using or threatening deadly force. The fact that defendant shot the kidnappee to death is evidence that the kidnappee was restrained in exactly such a manner. "[T]here is a logical connection between the violent death of Cassie and the kidnapping charge. Thus, the fact that Cassie was killed is a fact of consequence in the action." Not only was this evidence of the charged offense, but it also constituted same-transaction contextual evidence which "illuminate[d] the nature of the crime alleged." The jury needed to know about the girlfriend's death. "A juror would naturally wonder . . . why [the kidnappee] did not testify about what happened to her on May 7." (2) Yes. While the jury could have been confused about who the defendant is on trial for murdering and even become inflamed by the fact that the defendant murdered two people, the State had a moderate need for the evidence of the second victim's death. The State needed to show that the kidnappee was restrained by deadly force.

Comment. I agree with fact that the girlfriend's death is evidence probative of the kidnapping. I think the analysis could have ended there. I'm not sure I agree with the need to dispel the potential curiosity of a juror about why a victim isn't present to testify as basis for admitting same-transaction contextual evidence of her murder. The jury receives instructions to only consider evidence presented in court. Defendants must live by the strength of such admonishments every day, why can't the State?

Lerma v. State,
No. PD-0075-19
(Tex. Crim. App. 2021)

Issue. Under the penalty of dismissal, Texas Rule of Evidence 508 requires disclosure of an informant's identity when disclosure is "necessary to a fair determination of guilt or innocence." When officers feign ignorance as to the informant's identity in a 508 hearing, may the trial court use this as evidence sufficient to order a dismissal?

Facts. Using a confidential informant, narcotics officers conducted a controlled buy from a drug dealer ("Dealer") and that drug dealer's roommate ("Roommate"). Officers knew both Dealer and Roommate worked together to sell drugs from their home. Several months after the controlled buy, defendant and his friends tried to rob Dealer and Roommate. During the robbery, Dealer shot and killed Roommate and shot and wounded several of the robbers. The State charged defendant with the capital murder of Roommate. Even though Dealer was the only person to fire a gun during the robbery, the State declined to charge Dealer. During the capital murder prosecution, defense counsel learned that the State also declined to charge Roommate in connection with the earlier controlled buy. Counsel suspected that Roommate was the earlier confidential informant and Dealer used the robbery as an opportunity to kill Roommate. Defendant sought an order requiring the State to disclose the identity of the confidential informant. The trial court granted defendant's request. While mandamus was pending, the parties agreed to conduct a Rule 508 hearing in the trial court whereby the trial court would determine whether identity of the informant must be disclosed under threat of dismissal.

At the Rule 508 hearing the prosecutor informed the trial court that the State had expected officers to identify the informant for purposes of an in-camera evaluation, but the officers suddenly forgot the identity of the informant before the hearing. Several

officers took the stand and told the trial court under oath that they could not remember and did not document the informant's identity. They also admitted the possibility that the informant, whose identity they couldn't remember, might possess exculpatory information. "Combined with the fact that the State utilized every means available to resist disclosure of the informant's identity, the trial court found that the Task Force officers' claim that they simply did not know the informant's identity lacked credibility." After defense filed a motion to dismiss under Rule 508, the task force commander told the prosecutor that the officers did in fact know the identity of the informant, but that they would refuse to disclose it to defense counsel. The trial court, having quite enough, dismissed the case. The State appealed. The court of appeals reversed.

Holding. Yes, probably, but there was additional evidence here. Texas Rule of Evidence 508 makes the identity of a confidential informant privileged. It also provides that, in a criminal proceeding, it must be disclosed "if the court finds a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence." The State's persistence in refusing disclosure after such a finding triggers a mandatory dismissal of charges under the Rule. "Since the defendant may not actually know the nature of the informer's testimony . . . he or she should only be required to make a plausible showing of how the informer's information may be important. . . . The Rule 508 burden is not a high one, and Appellee met his burden to make a plausible showing of how the informant's information may be important." Here, the defendant showed: (1) the existence of an informant, (2) the non-charging of the shooter's accomplice drug dealing roommate, (3) the drug dealer shot and killed his roommate during the robbery, (4) the vigorous fight to prevent disclosure, (5) the agreement to have a hearing about disclosing the identity and sudden amnesia of law enforcement, (6) the task force's policies and procedures, and (7) the admission that exculpatory information was possible, (8) the post-hearing disclosure that officers lied from the witness stand. Even if the trial court had relied on the officer's lying and scheming, this could amount to evidence in some contexts. In civil cases "A party's intentional destruction of evidence may . . . be sufficient by itself to support a finding that the spoliated evidence is both relevant and harmful to the spoliating party."

Dissent (Keller, P.J.). If the confidential informant is the roommate, the roommate is now dead and unable to testify. If the confidential informant is a third person, that third person is not a confidential informant to the capital murder. Moreover, the State must disclose Brady evidence notwithstanding Rule 508.

Comment. This was a tooth and nail fight about whether narcotics officers must disclose the identity of their informant. It included a district court hearing, a gag order, a mandamus petition to the court of appeals, a mandamus petition to the court of criminal appeals, a motion to hold that appeal in abeyance, the granting of the abeyance, plans to conduct a 508 hearing. This all culminated in the police saying "whoops we forgot who the informant was, na-na-na-na boo-boo, we can lie on the witness stand in a jurisdiction where the prosecutor lets us do what we want." (not a direct quote). Some shady stuff is going down in Hays County. A stronger-than-useless prosecutor would have dismissed the case on his own motion rather than bothered the Court of Criminal Appeals with his quest to fight for narcotics agents who felt entitled to play games with the court system. *See* Texas Code Crim. Proc. art. 2.01; Tex. R. Disciplinary Procedure 3.03.

Bahena v. State,
No. PD-0653-20
(Tex. Crim. App. 2021

Issue. Texas Rule of Evidence 803(6)(D) (business records exception) requires the testimony of sponsoring witness who is either: (1) the custodian of the record, or (2) another qualified witness. When the opponent of a business record objects and claims a sponsoring witness is not a custodian of records, has the opponent necessarily raised an objection and preserved error as to whether the sponsoring witness is another qualified witness?

Facts. A sheriff's deputy recorded defendant's jail calls. That deputy was unavailable to testify at trial, so the State called the deputy's sergeant as a sponsoring witness instead. The sergeant admitted he was not the one who collected and compiled defendant's recordings onto a disc. However, he testified about his tactical unit's practice of collecting recorded phone calls, the jail's procedures for linking phone calls to individual inmates, and the sheriff's office normal practice of retaining recorded phone calls. The sergeant also used defendant's inmate identification and phone codes to link the phone calls to the defendant. Defendant objected and argued that the Sergeant was not a true custodian of records under the Rules of Evidence. The Court of Appeals upheld the trial court's ruling on error preservation grounds; namely, that business records may be authenticated through a custodian of records or another qualified witness and defendant had only objected to the sergeant as a business records custodian.

Holding. Yes. "We take this opportunity to explicitly disavow and reject the notion that a defendant must specifically object to both prongs of 803(6)(D) [custodian or other qualified witness] to entitle him to a merits review of his hearsay objection. Nonetheless, the sergeant's testimony satisfies Rule 803(6)'s requirements. Specifically: (1) his testimony established that records were made at or near the time by someone with personal knowledge by automatic recording procedures and retrieval methods using inmate identification codes, (2) his testimony established that it was the regular course of business for the sheriff's office to keep these records, (3) his testimony established that it was the regular practice for the sheriff's office to collect these records, and (4) defendant did not show at trial or preserve any

argument that the calls lacked sufficient trustworthiness.

Comment. Clint Broden had a great article in 2018 on The "Business Duty" Rule for Business and Public Records. In it he explains the common law business duty requirement incorporated with the adoption of the Rules of Evidence. "Each participant in the chain which created the record—from the initial observer—reporter to the final entrant—must generally be acting in the course of the regularly conducted business." Broden also cites to a perfect analogy from the Court of Criminal Appeals in 2004:

"A delusional person might call Crimestoppers to report that George Washington was cutting down a cherry tree on the Capitol grounds. Although Crimestoppers has a business duty to accurately record all incoming calls and to keep the records as part of its business records, the caller had no business to report the duty accurately."

Garcia v. State, 126 S.W.3d 921, 929 n. 2 (Tex. Crim. App. 2004). To me, this is the better path to plow in cases like this. What duty did the sergeant have until there was a witness problem for the State?

State v. George,
No. PD-1233-19
(Tex. Crim. App. 2021)

Issue. When the State alleges conspirator liability in a capital-murder-in-the-course-of-robbery, a conviction is appropriate when murder is a foreseeable result of the planned robbery. Is a defendant entitled to a lesser-included offense instruction on robbery if he can produce some evidence that the initial plan did not include murdering the robbery victim?

Facts. A jury convicted defendant of capital murder based on his participation in a conspiracy to commit a robbery which ultimately resulted in murder. Defendant was a pimp and he conspired with others to rob a man in his hotel room after learning from two of his prostitutes that the victim had thousands of dollars in cash on him. Defendant planned the robbery. He used the prostitutes to distract the victim while he and another large man broke into the room. One or more of the conspirators bound the victim, severely beat him, and left him to die face-down in a pool of his own blood. Two of defendant's co-conspirators testified that defendant did not participate in the beating and only intended to rob the victim. Defendant requested a lesser-included-offense instruction on robbery. The trial court denied his request. "In upholding the refusal of the lesser-included-offense instruction, the court of appeals appeared to create a bright-line rule applicable to conspirator-liability capital-murder-in-the-course-of-a-robbery cases. It stated that 'when one decides to steal property from another, he should anticipate he or his co-conspirator might be confronted by that individual and that his co-conspirator might react violently to that confrontation."

Holding. No. Not here. Entitlement to a lesser-included instruction requires a two-step analysis: (1) is the offense legally a lesser-included, and (2) would the evidence permit a rational jury to find that if the defendant is guilty, he is guilty only of the lesser offense. The question here pertains to the combination of the second prong and the conspiracy statute's imputed liability for "anticipated results" caused by the participation in the conspiracy. The Court of Appeals' bright line rule that all co-conspirators must anticipate a murder when they agree to participate in a robbery was wrong. A jury considering conspirator liability in a capital-murder-in-the-course-of-a-robbery case could rationally find a defendant only guilty of a robbery. "For the jury to make such a finding, there had to be evidence refuting or negating the anticipation element for conspirator-liability showing that the defendant should not have anticipated the murder." Here, defendant attempted to show lack of intent, but that does not address the issue of what he should have anticipated. The witnesses attempted to exonerate the defendant of murder by showing it was not part of the initial plan, but they did not address whether circumstances eventually unfolded such that Appellant intended or could have anticipated a murder. Defendant planned for an altercation in a closely confined space, wore all black with black gloves, brought zip ties, had plans to cut the phone lines, and brought a large man with him as muscle. "Appellant 'just stood there' during the beating, the fact that Appellant calmly said and did nothing while [a co-conspirator] viciously beat [the victim] unconscious, bound him with zip ties, and left him face down on the bed in a pool of his own blood suggests that Appellant was not surprised by, and likely approved of, Range's actions.

Comment. I think this case is a close call. It makes sense that you cannot raise the issue of a lesser-included offense by only showing that the conspirators didn't initially plan the conspiracy to turn into a murder.

Hall v. State,
No. AP-77,062
(Tex. Crim. App. 2021)

Issue. Is Comedian Jeff Ross an agent of the government (when he goes into a jail and starts interviewing inmates for a Comedy Central special)?

Facts. Comedian Jeff Ross hosted a Comedy Central special inside of the Brazos County Jail where Defendant was detained before a jury sentenced him to death. Comedy Central agreed to pay for expenses associated with any need for additional staffing for the event. The jail agreed to host the special as a treat to inmates as consistent with its "Inmate Behavior Management" philosophy. Comedy Central required inmates to sign a release before appearing in the special. The jail promoted the event by posting flyers throughout the facility. During one segment, Ross sat with inmates inside their pod and engaged in conversation. Ross engaged in a 17-minute conversation with defendant in which he mocked his appearance and made jokes about his race. Defendant made remarks showing a lack of remorse for the brutal murder he committed. Upon learning the Ross interview produced useful punishment evidence, the State issued a subpoena and obtained the Comedy Central recording and ultimately

presented it at trial. Defendant filed a motion to suppress the recording and his statements under a theory that Ross was acting as a de facto agent of the government in conducting an interview without the presence of counsel.

Holding. No. The Sixth Amendment prohibits the use of a defendant's own incriminating words if they were elicited deliberately by the government without counsel present after the Sixth Amendment right to counsel has attached. This right is violated even when the government employs an agent to step into the shoes of the government in order to elicit such statements. But here there was no agreement between the State and Ross for Ross "to gather evidence." The State neither instructed nor encouraged Ross to collect incriminating evidence. Ross was not acting as an agent of the State when he spoke to the Defendant.

Edward v. State,
No. PD-0325-20
(Tex. Crim. App. 2021)

Issue. Does sufficient evidence support a family violence conviction when an arresting officer indicates that the non-testifying complainant reported a dating relationship, but the officer's body camera does not corroborate the officer's recollection?

Facts. A jury convicted defendant of an elevated third-degree assault family violence offense based on the "dating relationship" he had with the complainant and his prior conviction for the same offense. The complainant declined to testify at trial. The State sponsored the testimony of the investigating officers. One officer testified that the complainant told him that the defendant was her boyfriend when he initially arrived on scene. The officer's body camera footage did not depict this to be true. When counsel highlighted this fact in cross examination the investigating officer changed his testimony and indicated that the camera footage did not capture the entire interaction with the complainant.

Holding. Yes. Here it does. Even though the investigating officer initially stated that the complainant told him about the existence of a dating relationship when he initially arrived, when that fact proved to be untrue, the investigating officer became flexible enough in his recollection to sustain this verdict. When confronted about the discrepancy, the investigating officer indicated that he must have received the statement at a different time not depicted on the video. Some circumstantial evidence supports the family violence finding as well: defendant was found in complainant's bedroom sitting on her bed, the two had been alone together inside her apartment, and the complainant completed a family-violence form provided by the investigating officer.

Comment. The State also sponsored an EMT who testified about family violence from a report prepared by another EMT which may have been based on information provided by yet another person. Why on earth were all these people allowed to testify? What is going on here?

Bell v. State,
No. PD-1225-19
(Tex. Crim. App. 2021)

Issue. Is a trial court's error in explaining the requirement of sequencing of prior felony convictions for purposes of habitual offender enhancement a mere jury-charge error subject to harm analysis?

Facts. A jury found defendant guilty of failure to register as a sex offender. Defendant had two prior felony convictions. The trial court erroneously instructed the jury that they must enhance defendants sentencing range to 25-life if the State proved that Defendant's second prior felony became final after the commission of the first felony. Penal Code 12.42(d) requires both dates to be measured from the date of finality "a finding that the first conviction became final prior to the commission of the second felony." Notwithstanding the erroneous jury charge the prosecutor articulated the law correctly in closing "a person commits a felony offense, goes to prison for that offense, gets out, commits a new felony offense, goes to prison for that offense, gets out and commits another, the minimum is 25 years." The jury found the enhancements true and sentenced defendant to 50 years. The Court of Appeals found that "In the absence of a proper jury finding on the sequencing requirement . . . Appellant's fifty-year sentence was 'illegal' and 'void' because it exceeded the maximum punishment allowed for an unenhanced third-degree felony."

Holding. Yes. "An illegal sentence is distinguishable from a procedural irregularity." A trial court's failure to instruct on a sentencing factor or even on an element of the offense does not constitute structural error. It is subject to harm analysis. The evidence submitted to the jury proves the proper sequencing of prior convictions according to the correct law.

Concurrence (Slaughter, J.) To be clear, this case deals with a prior sentence and not some other elemental factor for which the defendant failed to receive jury consideration. When a jury is not asked to consider an elemental factor in sentencing it is constitutional error and subject to constitutional harm analysis under Apprendi. But enhancement by prior sentence is different. It is only subject to regular harm analysis.

Comment. When judicially created harm analysis replaces a jury's consideration of elemental fact or a sentencing factor, it is simply the court injecting itself into the role of the jury envisioned by our founders.

Avalos v. State,
No. PD-0038-21
(Tex. Crim. App. 2021)

Issue. Does the Constitution require an individualized consideration of punishment and thus prohibit an automatic life without parole sentence for an intellectually disabled person?

Facts. A jury convicted defendant of capital murder. The state waived the death penalty which resulted in an automatic sentence of life without parole. Defendant challenged the automatic sentence as unconstitutional

as applied to him because he is intellectually disabled.

Holding. No. The court explores Supreme Court precedent in this area and acknowledges a distinction between cases in which a particular punishment was categorically prohibited by the constitution and cases where the constitution merely requires an individualized assessment of mitigating circumstances.

- ***Eddings v. Oklahoma:*** a state cannot automatically impose the death penalty. A jury must consider "the character and record of the individual offender and the circumstances of the particular offense."
- ***Harmelin v. Michigan***: the individualized assessment requirement in death penalty cases do not apply to non-death-penalty cases.
- ***Miller v. Alabama:*** an individualized assessment is required before imposition of mandatory life without parole for juvenile offenders. The sentencer must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."
- ***Atikins v. Virginia:*** death penalty for intellectually disabled offenders is categorically prohibited. They are categorically less culpable than the average criminal. The national legislative trend is to prohibit it. Neither retribution nor deterrence is served.
- ***Roper v. Simmons:*** death penalty categorically banned for juvenile offenders. Supreme Court exercised its own judgment on disproportionality. Juveniles lack maturity and responsibility, are more susceptible to negative influence, and their undeveloped character traits are transitory rather than fixed. A death penalty for a juvenile denies the juvenile an opportunity to "attain a mature understanding of his own humanity."
- ***Graham v. Florida:*** automatic life without parole for non-homicide juvenile offenders is categorically prohibited. The national legislative trend is to prohibit it. Life without parole neither serves the goals of retribution nor deterrence. "[T]ransience of youth makes questionable any assumption that a juvenile will prove incorrigible."

Miller (individualized assessment before juvenile life without parole) is different than Atkins, Roper, and Graham which categorically prohibit certain punishments based on objective indicia of society's attitude. Though people with intellectual disability may have some of the same mitigating characteristics as juveniles (diminished impulse control and greater susceptibility to peer pressure), their characteristics are not transient like those of a juvenile. Whereas a juvenile offender may mature and become a well-adjusted member of society, an intellectually disabled person will remain intellectually disabled. Even though the intellectually disabled person is categorically less culpable, "[s]ociety has a substantial interest to protect itself from disabled murderers." Automatic life without parole is justified by a persisting need for incapacitation.

Comment. "It is not inconceivable to us that the Supreme Court might again ultimately say something similar [that individualized assessments are constitutionally required in life without parole cases] with respect to intellectual disability." I believe this is where the case is headed.

State v. Kahookele,
No. PD-0617-20(Tex. Crim. App. 2021)

Issue. If a state jail felony is aggravated to a third degree, is it subject to further habitual offender enhancements expressly inapplicable to state jail felonies?

Facts. The State charged the defendant in two indictments with the state jail felony offenses of possession of controlled substances. With defendant's prior murder conviction, the State was able to aggravate that offense to a third-degree ("aggravated state jail felony") offense pursuant to Penal Code 12.35(c). Then the State enhanced defendant's range of punishment to a habitual-offender range of 25-99 years or life using two sequential non-state-jail felony convictions. The trial court granted defendant's motion to quash challenging the legitimacy of the habitual offender enhancement as applied to an offense which began as a state jail felony.

Holding. Yes. Ordinarily a state jail felony cannot be enhanced to a 25-99 sentencing range in the same way as non-state-jail felonies using the habitual offender provisions of the penal code. The State can enhance an ordinary state jail felony in the following ways:

- to a third-degree felony when the State can show two previous state jail felony convictions.
- to a second-degree felony when the State can show two previous sequential non-state-jail felony convictions.

Section 12.35 of the penal code defines the sentencing range for state jail felonies. It also provides that a state jail felony may be aggravated to a third-degree by: (1) a deadly weapon, or (2) a previous conviction for enumerated serious offenses. The Penal Code specifically provides under Section 12.425 that an offense so-enhanced may be enhanced again to a second-degree by a prior non-state-jail felony. This is the extent to which the Code specifically provides special enhancement rules for state jail felonies. All non-state-jail felonies are subject to different habitual offender enhancements under the "normal rules." In particular, as it pertains to this case, two prior sequential felonies will enhance the sentencing range of a non-state-jail felony to 25 to 99 years or life. Here, when a state jail felony is aggravated in the way envisioned by Section 12.35, it becomes a non-state-jail felony and the legislature intended that it be treated as a non-state-jail felony subject to the normal habitual offender rules. The 25 to 99 or life enhancement was appropriate.

State v. Stephens,
No. PD-1032-20 (Tex. Crim. App. 2021)

Issue. May the Texas Legislature delegate to the Attorney General—a

member of the executive department—the authority to prosecute election-law violations in district and inferior courts?

Facts. Zena Collins Stephens is the elected sheriff of Jefferson County. After her election, the Texas Rangers learned of and investigated potential campaign finance violations. Specifically, they discovered that Stephens misreported cash contributions on her finance report. The Jefferson County District Attorney declined to prosecute and referred the Rangers to the Attorney General. The Attorney General presented the matter to a grand jury in nearby Chambers County and obtained a three-count indictment. Count I charged Stephens with tampering with government record by misreporting cash contributions. Counts II and III charged Stephens with accepting a cash contribution in excess of $100. Stephens filed a motion to quash the indictment and a pretrial writ of habeas corpus. She challenged the constitutionality of Texas Election Code 273.021 which delegates authority to the Attorney General to prosecute criminal offenses "prescribed by the election laws of this state." She claimed that such a provision violates the separation of powers and only a district attorney—a member of the judicial branch—has this authority. She further argued that such a delegation of authority, if constitutional, does not include the authority to prosecute Count I of the indictment, a Penal Code offense. The trial court granted Stephens' motion to quash on Count I and denied the pretrial writ of habeas corpus on Counts II and III. The court of appeals reversed the trial court's granting of Stephens' motion to quash and upheld the trial court's denial of Stephens' writ of habeas corpus.

Holding. No. Only district and county attorneys may represent the State of Texas in a criminal case. Our state constitution "expressly divides the powers of government into three distinct departments—legislative, executive, and judicial—and prohibits the exercise of any power 'properly attached to either of the others,' unless that power is grounded in a constitutional provision." Texas's separation of powers provision is even more potent than the implied separation under the federal constitution. The Attorney General's principal argument is that the Texas Constitution grants his office enumerated duties as well as "other duties as may be required by law." As he argues, the Legislature lawfully created "other duties" by enacting Election Code Section 273.021 and that provision grants him authority to prosecute election law crimes. But the law must conform to Texas's constitutional separation of powers, these "other duties" must be executive branch duties. "Simply put, the 'other duties' clause may not transform the judicial duty of prosecutorial power into an executive duty." The Attorney General's authority to act as an attorney in a criminal case is limited to cases where he has been asked for assistance by the local district attorney and deputized.

Dissent (Yeary, J.). Would read the "other duties" clause more broadly—as a "catch-all" and permit the Attorney General to represent the State in a criminal proceeding.

Comment. This is a huge deal. Incredible work by Russell Wilson II and Chad Dunn. I wouldn't suggest the Attorney General sometimes injects himself into cases for political reasons, but I might be persuaded to share another story. Okay you convinced me. In 2020, he took the wheel from Harris County District Attorney Kim Ogg who was required to represent the State when dozens of Texas representatives obtained writs of habeas corpus to protect them from the warrants issued by the Speaker of the House to establish a quorum. The matter was before both the Court of Criminal Appeals and the Texas Supreme Court simultaneously to decide the Attorney General's authority in habeas proceedings before it was rendered moot by the legislators returning to Austin.

Martin v. State,
No. PD-1034-20 (Tex. Crim. App. 2021)

Issue. Does unlawful carrying of a weapon by a gang member require proof that the defendant was among the individuals of the identified group (gang) who regularly or continuously committed gang crimes?

Facts. Defendant was riding his motorcycle and wearing a vest which read "Cossacks MC." An officer stopped him for multiple traffic violations. Defendant admitted he was a member of the Cossacks Motorcycle Club. Defendant also admitted he was carrying a firearm. The officer arrested defendant for carrying a firearm while being a member of a criminal street gang. At trial a special gang officer testified about the TxGANG database in which officers archive the existence of various criminal street gangs and their membership. According to the gang officer, the Cossacks organization was a recognized criminal street gang, and the defendant was a recognized member. Defendant had been entered into the database during previous law enforcement encounters. Evidence showed that defendant was an "enforcer" in the organization and was present at the Twin Peaks Waco shootout. Defendant testified that his Twin Peaks case was dismissed and that he did not participate in violence in that or any other case. He further explained that in Lubbock, where he lived, there were a total of six Cossacks who worked as mechanics and city employees.

Holding. Yes. The Statute makes it unlawful to possess a weapon when that person is a member of a criminal street gang. A criminal street gang is defined as "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities. The State contends that it is sufficient that some members of the group continuously or regularly associate in the commission of crime and that the State merely show that the defendant is a member of that group. The State's interpretation would lead to absurd and unconstitutional results. The State's interpretation "would allow for the conviction of a person who is unaware of the gang's criminal activities and who has not personally committed a

crime or associated in the commission of a crime." To hold a person liable as a member of a street gang because some members of the organization with which the person becomes a member associate in criminal activity violates the First Amendment. To avoid this, the statute is more logically read to require the defendant to be one of the individuals among the members who actually engages in criminal activity. "Though not a criminal for purposes of carrying a firearm, Appellant became one simply by riding his motorcycle and wearing his cut."

Concurrence (Yeary, J.). Is not sure that the State's interpretation makes the statute unconstitutional, but the Court's rejection of the State's interpretation is necessary to avoid unconstitutionality.

Comment. Think of how this would work if the State were correct. By their interpretation of the definition, all the following are criminal street gangs: Republicans, Democrats, members of professional sports teams, police officers, lawyers, doctors, and accountants. It would even require "the application of the term 'criminal street gang' to members of the Boy Scouts of America," as Judge McClure explains.

1st District Houston

Rivera v. State,
No. 01-20-00062-CR
(Tex. App.—Houston [1st Dist], 2021)

Issue. When a trial court excuses a juror after the parties exercise their strikes and challenges but before the jury is sworn, is the trial court required to permit the parties to reconsider their peremptory strikes?

Facts. During jury selection the trial court excused various jurors for financial inconvenience and work conflicts. After removing jurors with adequate excuses, the trial court granted challenges for cause. A potential pool of jurors remained upon which the parties exercised peremptory challenges. As the trial court called the names of jurors selected, it became apparent that the trial court failed to excuse one of the selected jurors based on her stated grounds for inconvenience. The trial court excused the juror and effectively expanded the group of potential jurors by one. Defendant requested the opportunity to redo peremptory challenges because he had not previously factored in potential service of the newly added member to the jury which resulted from the trial court excusing the service of an otherwise selected jury member. The trial court denied defendant's request and the new unexpected member of the jury was seated.

Holding. No. The defendant effectively argues "That he should have been allowed a do-over because the trial court had altered the pool of potential jurors by one after both sides had already made their peremptory challenges." Defendant argues he would have used a peremptory to exclude the one additional potential juror added to the jury pool. "[N]o statute or rule addresses this scenario." But this case can be resolved by reference to the consent of the parties in excusing the juror who the trial court failed to excuse before peremptory challenges were exercised. "[Expansion of the pool of jurors by one] was the natural consequence of the parties' consent." The defendant did not have to consent to the excusal of this juror. Moreover, the juror selected was among three jurors considered as an alternate juror. Neither side struck the newly selected juror as an alternate juror. This juror "had been qualified and accepted by the parties as an alternate."

2nd District Fort Worth

State v. Wood,
No. 02-19-00460-CR
(Tex. App.—Ft. Worth, Nov. 10, 2021)

Issue. Texas's felon in possession of a firearm statute prohibits firearm possession within five years of: (1) release from felony confinement, (2) release from felony probation, or (3) release from parole. Is a defendant entitled to an acquittal due to the variance which occurs when the State alleges one option but proves another?

Facts. The State charged the defendant with felon in possession of a firearm. Their theory was that the defendant possessed firearms during a period in which he was prohibited as a felon: within five years of his release from confinement. The State did not prove the release of confinement date at trial. They showed that he was convicted in 2006 and sentenced to 30 years confinement, that he was on parole at the time law enforcement found guns in his home, and that his parole would not end until 2036. Despite the trial court's instruction to the jury to convict only if they found that the defendant possessed firearms within five years of his release from confinement the jury found him guilty.

Holding. Yes. "[W]hen a statute lists more than one method of committing an offense or more than one definition of an element of an offense, and the indictment alleges some, but not all, of the statutorily listed methods or definitions, the State is limited to the methods and definitions alleged in the indictment." Sufficiency of the evidence is weighed against a hypothetically correct jury charge (not the one given or even the indictment itself). Not all factual allegations in the indictment need be considered as part of the hypothetically correct jury charge—only material ones (those which proof of alternative facts would give rise to a material variance). "As relevant here, variances involving statutorily enumerated elements are always material, and the corresponding indictment allegations always bind the State." Here, the statute permits the State to convict an individual if they possess a firearm within five years of: (1) release from felony confinement, (2) release from felony probation, or (3) release from parole . . . "whichever date is later." If the State alleges one of these options, it cannot sustain a conviction by proof of another. In this case the State alleged defendant possessed a firearm within five years of release from confinement but proved he possessed a firearm within five years of release from parole. This is a material variance, and the defendant is entitled to an acquittal.

Comment. I agree with this outcome. I think the Court of Criminal Appeals would, too. I don't see a PDR filed by the State, so I think it's safe to play devil's advocate for a minute.

What if Penal Code § 46.04 does not create three distinct units of time-based prosecution, but rather a single time-based element based on a calculation that produces the latest date? I feel gross, now.

Serrano v. State,
No. 02-20-00014-CR
(Tex. App.—Ft. Worth, Nov. 18, 2021)

Issue. (1) Is fleeing a lesser included of evading with a motor vehicle? (2) Does harmless but nonetheless reckless and dangerous driving provide sufficient evidence to sustain a deadly weapon finding in an evading arrest prosecution?

Facts. Defendant committed a traffic violation after leaving a drug house. Officers chased him without their headlights on and without activating their overhead emergency lights. Defendant fled. Eventually, when defendant reached the highway, officers turned on their overhead lights to formally conduct a traffic stop. Defendant did not pull over. Despite other motorists on the roadway and at least one pedestrian, defendant drove at a high rate of speed, drove recklessly, and drove in oncoming lanes of traffic. The chase spanned six miles of highways and residential streets. The State charged defendant with third-degree evading arrest, enhanced as a habitual offender.

Holding. (1) No. entitlement to a lesser-included offense instruction is a two-step process: (1) is the offense legally a lesser-included offense (does the lesser offense has elements included in those needed to prove greater offense), and (2) is there some evidence sufficient for a jury to find a defendant guilty only of the lesser offense? Here, the State would have to prove additional facts to obtain a conviction for fleeing; namely, that the officer was driving a police vehicle, that the officer was in uniform, and that the officer was giving a visual or audible signal to stop. "Because fleeing requires proof of elements that evading does not, fleeing is not a lesser-included offense of evading." (2) Yes. In an evading arrest prosecution, a motor vehicle constitutes a deadly weapon when the manner of use presents an "actual danger" of causing death or serious bodily injury. However, "[t]he evading arrest statute does not require pursuing officers or other motorists to be in a zone of danger, take evasive action, or require the appellant to intentionally strike another vehicle to justify a deadly weapon finding." Citing Drichas v. State, 175 S.W.3d 795 (Tex. Crim. App. 2005). Defendant relies heavily on body camera footage for his argument, but this footage shows cars having to slow down and stop to avoid collision. It also shows the defendant run stop signs and red lights with traffic nearby. This evidence was sufficient to sustain a deadly weapon finding.

Comment. The court indicated that defendant was enhanced once by a deadly weapon finding and a second time as a habitual offender (presumably two prior felony convictions). A deadly weapon finding only "enhances" a state jail felony (for other offenses it constitutes an affirmative finding impacting things such as parole eligibility). In the same legislative session, the House and the Senate passed amendments to the evading arrest statute. The House made the offense a state jail felony. The Senate made the offense a third-degree felony. The Governor signed the Senate bill last. Courts have consistently applied a legal equivalent of the LIFO inventory method to find that the Senate bill controls. In August 2021 the Court of Criminal Appeals declined to hear a challenge to this statutory chaos under the doctrine of lenity (tie goes to the confused defendant). Here, the fleeing statute cannot be a lesser-included offense because it requires proof of additional facts not required in an evading prosecution, namely that the officer attempting to stop the defendant was inside a police vehicle when attempting to effectuate the stop.

Massey v. State,
No. 02-20-00140
(Tex. App.—Fort Worth, 2021)

Issue. (1) When a defendant complies with an officer's instruction to "just go ahead and turn around, I'm going to pat you down," does his compliance constitute consent? (2) When that defendant, mid-pat-down, struggles and resists, has he disrupted the causal connection between the unlawful frisk and the ultimate discovery of evidence on his person?

Facts. An officer encountered defendant at a closed gas station. During the encounter, the officer turned the defendant around to conduct a pat down. The defendant sort of complied initially but when the officer went for his right pocket, a struggle ensued. The officer eventually won the struggle and discovered methamphetamine. Defendant moved to suppress this evidence. He argued that the officer did not have reasonable suspicion to believe he was "armed and dangerous, as is required to justify a protective frisk." The trial court found: (1) the officer did not have reasonable suspicion to frisk the defendant, but (2) the frisk was justified by the defendant's consent when he complied with orders to turn around and submit to a frisk, and (3) the defendant's own actions in improperly resisting disrupted the causal connection between the frisk and the discovery of methamphetamine.

Holding. (1) No. The trial court found that the officer's frisk was not justified by reasonable suspicion. "This determination is well supported by the record." The defendant was nervous and in an area where there had been drug arrests – this does not amount to reasonable suspicion that the defendant was armed and dangerous. Although consent can be shown nonverbally through an act of submission, where an officer issues a command, compliance is not the same as consent. Here the officer issued a command: "just go ahead and turn around, I'm going to pat you down just for my safety." The defendant's brief compliance was "acquiescence to an assertion of lawful authority." This is illustrated clearly when considering what happened next: defendant tried to pull away and a struggle ensued which resulted in the officer tasing the defendant and arresting him. "A struggle is not a hallmark of genuine consent to search." (2) No. Evidence

lacking a causal connection to illegal police conduct is "attenuated" and should not be suppressed despite the police infraction. In considering the doctrine of attenuation "we ask whether granting the establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." The courts are not in agreement on the impact of a subsequent criminal offense committed after an illegal search or seizure. But "if the crime is petty and relatively predictable as a product of unlawful detention or search, the evidence revealed is better viewed as an extended derivation of the illegal police action." Here, the defendant's resisting and evading was a result of the illegal frisk, they were petty offenses derived from the officer's unconstitutional search.

Comment. The trial court found that resisting an unlawful frisk was an intervening circumstance, but also the fact that he didn't resist the unlawful frisk initially amounted to consent. This was a bit of a "heads I win, tails you lose" analysis.

Sopko v. State,
No. 02-20-00162-CR
(Tex. App.—Fort Worth, 2021)

Issue. Does Article 39.14 of the Code of Criminal Procedure require the State to produce evidence relevant to the underlying criminal offense in the context of a probation revocation proceeding?

Facts. The trial court placed the defendant on probation for assault family violence and retaliation in 2019. Prior to doing so defendant received discovery from the State. Defendant violated probation five months later and the State filed a motion to revoke his probation. The trial court appointed a new revocation attorney who filed a discovery motion requesting a video of the assault and a copy of the complainant's written statement. The State declined to produce this evidence and the trial court denied the defendant's motion. The trial court held a hearing on the State's motion to revoke and the State called the complainant as a witness. When the complainant could not remember aspects of the underlying criminal offense, the State used the very witness statement they secreted from the defense to refresh the recollection of the witness. The trial court granted the State's motion to revoke probation and sentenced the defendant to seven years.

Holding. Dodged the question with harmless error. The State is required, upon a request, to produce all evidence material to the proceeding. Tex. Code Crim. Proc. art. 39.14. The failure to do so is subject to harm analysis on appeal. Assuming a violation of 39.14 occurred here, there was no harm. The defendant was not harmed because the State provided the defendant discovery when he initially pleaded guilty. The State actually exceeded its duties under Article 39.14 by providing the defendant electronic duplicates of documents instead of merely permitting him to come to their office and make his own copies (editorial note: sarcastic slow clap). The defendant was not harmed because it also appears that revocation counsel was aware that the video he sought "went viral" on social media and he was aware of its contents. Finally, the defendant was not harmed by the trial court's denial of the motion to compel discovery because Article 39.14 does not require a court order – the State's duty is triggered upon a request by the defendant, a trial court's refusal to enforce Article 39.14 in the face of a recalcitrant prosecutor cannot be harmful.

Comment. Article 39.14 absolutely entitles the defendant to discovery pertinent to the criminal offense in a revocation hearing. There is no need to assume it without deciding. I'm reasonably confident the Court of Criminal Appeals would enforce the prosecutor's duty instead of applauding their obstinance like the Second Court does here. But let's pick this apart a bit further.

The court of appeals unfairly imputes the previous attorney's receipt of discovery to Sopko. "It is undisputed that the State produced to Sopko all discovery materials required by Article 39.14 before he pleaded guilty . . ." Well, this is where it gits a bit tricky. Sopko didn't get his discovery. TDCAA fought hard to make sure the Sopkos of the world never actually receive the discovery after the State provides discovery to a defendant's attorney. In fact, most prosecutors make defense lawyers sign a condescending declaration that they have not violated this rule before submitting a plea recommendation to the trial court. What if the previous attorney has a file destruction policy and no longer has a copy? What if the previous attorney is a bum and won't provide it? Rather than making a point of what Sopko "received" maybe we just don't let the State play the "I have something you don't have" game. The State also makes an argument that defense counsel's request for discovery did not specifically invoke Article 39.14 of the Code of Criminal Procedure, which is a very Michael-Scott-declaring-bankruptcy understanding of the law.

A few constructive thoughts now that my rant is over. The Second Court is right to the extent they indicate that there is no need to obtain a trial court order. Seeking a trial court order is certainly an option, at least in places that are not the Second District. But there are other remedies available. These remedies begin with the appropriate groundwork though: e-file and e-serve an initial demand letter; follow the initial demand letter with an e-filed and e-served demand specifying what the State has failed to provide. If the State continues to hide evidence, the options for the defense include: (1) a trial court order to compel, (2) a motion to exclude State's evidence, (3) a mandamus directed at the district attorney.

3rd District Austin

State v. Serna,
No. 03-20-00087-CR
(Tex. App.—Austin, Nov. 17, 2021)

Issue. (1) May a frequent overnight guest claim Fourth Amendment protection in a carport located within a home's curtilage? (2) Is that overnight guest's expectation of privacy

diminished by his status as a parolee?

Facts. Officers had a warrant to arrest the defendant. They acquired an address at which defendant "frequently stayed." When officers approached the home and they saw defendant sitting in the driver's seat of a parked car beneath a carport abutting the home. Defendant was blocked in by cars parked behind him. The carport shared a roof with the home and was within a few steps of the front door. Officers confronted the defendant when he exited the car. Defendant locked the car and created a diversion so he could hide the keys inside the home. Officers removed him from the home and arrested him. After the defendant was placed in handcuffs, officers approached defendant's car to conduct a plain view through-the-window search. They discovered the firearm which formed the basis of defendant's instant felon in possession of a firearm prosecution. The trial court granted the defendant's motion to suppress, and the State appealed.

Holding. "The area immediately surrounding and associated with the home—its curtilage—is part of the home itself for Fourth Amendment purposes." Citing Florida v. Jardines, 569 U.S. 1, 6 (2013). Officers may seize evidence they discover in plain view when they are lawfully present where the object is plainly viewed. And officers may conduct a warrantless search of a vehicle under automobile exception when probable cause exists and the vehicle is readily mobile. But when the vehicle is parked within the curtilage of a home, the officer must obtain a warrant or other justification to search and seize evidence. (1) Yes. A person may claim Fourth Amendment protection in a place where he is an overnight guest even when he has no dominion, control, or right to exclude others. This extends to the curtilage of the home and persists as long as the host grants permission to the guest to be present. (2) Maybe but not here. Parolees can lose Fourth Amendment rights and have a diminished expectation of privacy in their homes. But cases of warrantless or suspicion-less searches of parolees all involve an explicit waiver of privacy rights by the parolee as a condition of parole. Here the State did not prove the existence of such a waiver.

Comment. The State's final argument is an interesting one—one which might distinguish this case from future fact patterns. There is nothing special about the vehicle in this case. The defendant's parking of the vehicle in curtilage essentially makes the vehicle part of the home for Fourth Amendment purposes. But officers may be present inside of a home without a search warrant or consent when there is sufficient evidence supporting the belief that the individual they are seeking to arrest pursuant to an arrest warrant is inside. Once inside the home, armed with an arrest warrant only, officers may seize evidence and contraband in plain view. Had officers walked past the vehicle on their way to effectuate the arrest and saw the firearm at that time, this case could have gone differently. But it was not until after officers had already taken the defendant into custody that they started looking around the vehicle.

Daniel v. State,
No. 03-20-00519-CR
Tex. App.—Austin, 2021)

Issue. Does a person commit a traffic infraction by drifting from his or her lane of travel without jeopardizing the safety of any person?

Facts. The State charged defendant with driving while intoxicated and the defendant challenged the constitutionality of the traffic stop leading to his arrest. The arresting officer stopped the defendant after completing a left turn at an intersection with two designated left-turn lanes. When the defendant made his left turn, he crossed the dotted line designating the curvature of the lane through the intersection. The officer testified at the hearing on defendant's motion to suppress that there were no other vehicles near defendant's when he purportedly failed to maintain a single lane of traffic.

Holding. No. Texas Transportation Code 545.060(a) requires that an operator: (1) shall drive as nearly as practical entirely within a single lane; and (2) may not move from the lane unless that movement can be done safely. It is the concurrence of both of these elements which constitutes a criminal offense. A person does not commit a criminal offense by drifting from his or her lane without a showing that such drifting was unsafe. This has been the law in the Third District (as well as two others) for decades. See Hernandez v. State, 983 S.W.2d 867 (Tex. App.—Austin 1998, pet. ref'd). A four-judge plurality of the Court of Criminal Appeals attempted to reject this construction of the Transportation Code in 2016. But plurality opinions are not binding precedent. [D]riving is an exercise in controlled weaving. It is difficult enough to keep a straight path on the many dips, rises, and other undulations built into our roadways." Citing State v. Cortez, 543 S.W.3d 198, 206 (Tex. Crim. App. 2018).

Dissent (Goodwin, J.). Given the plurality decision of the Court of Criminal Appeals rejecting this court's analysis here, the officer's conduct was an objectively reasonable mistake of law. This Court should reconsider its position en banc and the Court of Criminal Appeals ultimately decide the correct interpretation of the Transportation Code.

4th District San Antonio

The Fourth District Court of Appeals in San Antonio did not hand down any significant or published opinions since the last Significant Decisions Report.

5th District Dallas

The Fifth District Court of Appeals in Dallas did not hand down any significant or published opinions since the last Significant Decisions Report.

6th District Texarkana

The Sixth District Court of Appeals in Texarkana did not hand down any significant or published opinions since the last Significant Decisions Report.

7th District Amarillo

Clark v. State,
No. 07-21-00116-CR
(Tex. App.—Amarillo, 2021)

Issue. Is fingerprint evidence sufficient to establish the identity of an arsonist who sort of admits to being present in the home where he has no permission to be?

Facts. A jury convicted the defendant of arson of a habitation. Nobody saw who set the fire, but defendant's fingerprint was on a Hawaiian Punch bottle that smelled like gasoline. Defendant called his wife from jail and stated he "didn't go in there without no gloves on." Defendant's wife's sister was dating the same man as the homeowner-victim.

Holding. Yes. Fingerprint evidence, by itself, is probably not sufficient evidence to establish guilt of a crime. But where the State can add some circumstantial evidence, there is no sufficiency problem. Sufficient supporting evidence can include a showing of no other legitimate reason for the defendant's prints to be on the discovered object or no permission to be in the place where the discovered object was found. The State showed both of these things at trial and showed that the statements defendant made seemed to be an admission.

Comment. I would have been looking for a little guy with a weird red hat and a history of sucker punching people. I've shared this comment with a test audience, and nobody gets it. But I do. So, it stays.

8th District El Paso

The Eighth District Court of Appeals in El Paso did not hand down any significant or published opinions since the last Significant Decisions Report.

9th District Beaumont

The Ninth District Court of Appeals in Beaumont did not hand down any significant or published opinions since the last Significant Decisions Report.

10th District Waco

Brown v. State,
No. 10-19-00254-CR
(Tex. Crim. App.—Waco, Nov. 10, 2021)

Issue. Can the State convict a defendant of both occlusion (strangulation) assault and bodily-injury assault for injuries inflicted in the same criminal episode?

Facts. Defendant punched his girlfriend in the face, strangled or choked her on three separate occasions, threw her into a nightstand, kicked her in the stomach, pulled her hair, slammed her to the floor, burned her with a cigarette, and slammed her head into the wall. These separate attacks took place over the course of several hours. A jury convicted defendant of occlusion assault (strangulation) and misdemeanor assault by causing bodily injury.

Holding. Yes. Double jeopardy protection is inapplicable when distinct offenses occur during the same transaction. Double jeopardy does prohibit conviction on both a lesser and greater included offense. In Ortiz v. State the Court of Criminal Appeals held that bodily-injury assault is not a lesser-included offense of occlusion assault when the disputed element is the injury. 623 S.W.3d 804 (Tex. Crim. App. 2021). Occlusion (strangulation) assault and bodily-injury assault are both result-oriented or result-of-conduct offenses. "[A] defendant may be held criminally responsible for two or more result-of-conduct offenses, even if they occur during the same transaction, so long as each offense causes a different type of result."

11th District Eastland

Robertson v. State,
No. 11-19-00343-CR
(Tex. App.—Eastland, 2021)

Issue. When actual ownership of a vehicle is unclear, is it reasonable for officers to conduct a consent search when that consent is provided by a registered owner who had not possessed the vehicle for several months?

Facts. After parking his truck and noticing officers trying to get his attention, defendant took off running. While fleeing officers, defendant threw a small bag on the ground. Officers eventually arrested defendant and noted he looked and behaved like a person who was under the influence of methamphetamine. Officers seized the bag defendant threw on the ground and impounded his vehicle. The bag contained methamphetamine residue. Officers later learned that the vehicle driven by the defendant was registered to defendant's friend. Officers wished to open a locked toolbox attached in the bed of the pickup. They invited defendant's friend to the impound lot and obtained consent to remove the lock and open the toolbox. Defendant's friend told officers that he had given the vehicle to the defendant to use, that he had not been in possession of the vehicle for several months, that he was not the person who attached the toolbox to the truck, and that he did not have a key. Officers removed the lock from the toolbox and discovered methamphetamine and paraphernalia.

Holding. Yes. When an officer reasonably, but mistakenly, believes a third party has actual authority to give consent to search, a search is not invalid when it is later shown that the third party lacked actual authority. Even though the record presents uncertainty as to whether defendant's friend remained the actual owner of the vehicle at the time he consented to a search of the attached toolbox, the record did establish that he was the registered owner. These circumstances presented the searching officer with a reasonable basis to conclude that the friend had apparent authority to consent. In addition to being the registered owner of the vehicle, the friend contacted the police agency daily with inquiries on how to retrieve the vehicle. By law, the registered owner is the person who is entitled to retrieve a vehicle from an impound lot.

Comment. Defendant also raised a sufficiency of the evidence challenge asserting the State failed to establish affirmative links to drugs found days later in a locked toolbox. The court sets out fourteen different scenarios which have constituted affirmative links in

other cases. This is a good blueprint for arguing or deciding whether to argue affirmative links in drug possession cases.

12th District Tyler

The Twelfth District Court of Appeals in Tyler did not hand down any significant or published opinions since the last Significant Decisions Report.

13th District Corpus Christi/ Edinburg

State v. Torres,
No. 13-20-00101-CR
(Tex. App.—Corpus Christi -Edinburg, 2021)

Issue. Texas Family Code § 51.09 gives a magistrate the option of ordering officers to immediately return a recording of a juvenile interrogation for a determination of voluntariness. When officers fail to follow this return-and-review procedure are the statements provided by the juvenile defendant inadmissible?

Facts. Officers arrested defendant for murder. On the date of his arrest defendant was 16 years old. A justice of the peace provided Miranda warnings to the accused and indicated in writing that officers were required to return a recording of defendants recorded interview so he could determine whether statements were provided voluntarily. This admonition was in accordance with Texas Family Code § 51.09. The justice of the peace waited at the police station from 12:23 AM until 4:00 AM but a recording was never returned. At the time of the hearing on defendant's motion to suppress, the justice of the peace still had not reviewed the recording.

Holding. Yes. Texas Family Code § 51.09 provides that a child between 10 and 17 may waive any constitutional rights only under certain conditions. One way a child may waive Miranda rights under Section 51.09 is by a waiver after warnings are provided by a magistrate directly. When electing to secure a waiver of rights through this method, the magistrate may request officers to return the child after the interview and make a post-interview determination of voluntariness after reviewing the recorded interrogation. When a magistrate invokes this optional procedure, strict compliance is required, and failure renders the child's statement inadmissible. Here, the magistrate invoked the return-and-review procedure and waited all night for officers to comply. They didn't. And the state may not avail itself to other provisions of the Code which might otherwise show the child's statement admissible once the return-and-review procedure is invoked. "We note that this could lead to an unjust result, in that an incriminating statement which is voluntarily made—and thus passes constitutional muster—may nevertheless be excluded due only to the magistrate's invocation of the specific procedure set forth in the statute. Such a result, while required by the statute's language, would not advance the purposes of the statute. We urge the Legislature to amend the statute to reflect that a statement will be admissible if it is adjudged at any point to be voluntarily made . . ."

14th District Houston

Ex parte Fairchild-Porche,
No. 14-19-00445-CR
(Tex. App.—Houston [14th Dist], Nov. 16, 2021)

Issue. Does the 2017 version of Texas's revenge porn statute violate the First Amendment?

Facts. The State charged the defendant with unlawful disclosure of intimate visual material ("revenge porn") and the defendant filed an application for pre-trial habeas corpus relief challenging the facial validity of the statute under the First Amendment. The State narrowed its allegations under the revenge porn statute to disclosure of photographs depicting the complainant with his genitals exposed which defendant obtained under circumstances where complainant had a reasonable expectation that the photographs would remain private. The indictment further alleged that the disclosure harmed complainant because the defendant disclosed the photographs to his co-workers and said photographs revealed complainant's identity by depicting his face.

Holding. A statute targeting the content of speech is presumed invalid unless the State can show that the statute is narrowly tailored to serve a compelling government interest. The court may assist the State in discharging this burden by giving the statute a narrowing construction to avoid constitutional violation—but only when a narrowing construction comports with normal rules of statutory construction. In a similar case the Twelfth Court of Appeals found the revenge porn statute unconstitutional (see comment below). This case is distinguishable. Here the defendant obtained the photograph under circumstances where the depicted person had a reasonable expectation of privacy and the defendant herself revealed the identity of the depicted person rather than a third party revealing it. What ultimately cures this dispute is a construction of the statute which produces what the legislature intended when it created a statute targeting for criminal prosecution obscene pornography rather than non-obscene pornography. The statute must be read to include a requirement that the defendant acted knowingly or recklessly with regard to the depicted person's expectation of privacy. Furthermore, the statute must be read to include a requirement that the defendant acted knowingly or recklessly in revealing the identity of the depicted person.

Concurrence (Spain, J.). We followed the Court of Criminal Appeals' unpublished non-precedential opinion in Jones and then we published it. Why should this Court do the Court of Criminal Appeals' job for them?

> While dutifully stating that it is not relying on the authority of the unpublished per curiam opinion of the court of criminal appeals in *Ex parte Jones*, this court nonetheless follows the high court's opinion. See *Ex parte Jones*, No. PD-0552-18, 2021 WL 2126172 (Tex. Crim. App. May 26, 2021) (per curiam) (unpublished); see Tex. R. App.

P. 77.3 ("Unpublished opinions have no precedential value and must not be cited as authority by counsel or by a court.") (emphasis added). And who can legitimately blame this court when the high court writes 43 pages that effectively rewrite Penal Code section 21.16(b) to avoid constitutional infirmities created by another department of government, then takes no long-term responsibility for the rationale that supports the high court's judgment? The courts of appeals have no choice but to take responsibility for our opinions.

* * *

We pretty much know what the court of criminal appeals will do if we do not follow the unpublished Jones opinion, but I decline to participate in making Jones precedent through the back door. We do not have to publish . . .

Comment. I began this comment before reading Justice Spain's concurrence and realized what I had to say was what Justice Spain said (but with less pizazz). So, I leave you with this comment: Justice Spain is right.

Ex parte Contreras, No. 14-20-00397-CR (Tex. App.—Houston [14th Dist], Nov. 16, 2021)

Issue. When counsel demonstrates unfamiliarity with the discovery and his client's proficiency in the English language, does manifest necessity exist to declare a mistrial such that double jeopardy does not bar retrial?

Facts. The State charged the defendant with assault-family-violence. At trial defense counsel demonstrated his lack of familiarity with his client and the discovery in the following ways: (1) he released an interpreter not knowing his client's English was insufficient to proceed with trial, (2) he indicated that he had not received discovery from the State, (3) he indicated that he had received discovery but had not reviewed it all, (4) he indicated that he received and reviewed all of the discovery but several months ago and could not remember basics facts contained therein, (5) he indicated a need to recall a witness for cross examination on facts contained in a non-existent witness statement. On the second day of trial the court, sua sponte, declared a mistrial claiming that defense counsel was "not prepared for trial" and "not able to provide effective assistance of counsel to complete this matter at this time." Defense counsel objected to the declaration of mistrial. Before retrial defendant filed a "motion for writ of habeas corpus" challenging the second trial on double jeopardy grounds.

Holding. Yes. Jeopardy attaches in a jury trial once a jury is impaneled and sworn. "Accordingly, the premature termination of a criminal prosecution via the declaration of a mistrial—if it is against the defendant's wishes—ordinarily bars further prosecution for the same offense." This ordinary rule is inapplicable to cases where extraordinary circumstances present a "manifest necessity" to grant a mistrial. "[M]anifest necessity exists where the circumstances render it impossible to reach a fair verdict, where it is impossible to proceed with trial, or where the verdict would be automatically reversed on appeal because of trial error." The State has the burden to show manifest necessity and to disprove the existence of alternative courses of action less drastic than the declaration of mistrial. The facts establish that counsel was unfamiliar with his client and the basic facts of the case. This falls below a reasonable standard of effective assistance of counsel under Strickland. Moreover, it appeared to the trial court that the jury had become frustrated with counsel during the proceedings in a manner that may have prejudiced his client.

Dissent (Christopher, C.J.) The majority "imposes a standard that many lawyers could not meet, and fails to engage in a meaningful analysis of prejudice"

Comment. Chief Justice Christopher's dissent reflects a stereotype of criminal lawyers, and it is unfortunate. There's surely a lot going on behind the scenes that we don't know about, and Justice Christopher points some of those things out. I'm loath to jump to conclusions about an attorney's performance from an appellate opinion – but that counsel didn't know anything about the discovery is at least a basic premise of the majority and dissent. The implication of the dissenting opinion is that this is good enough for criminal defense and we shouldn't expect much more from lowly defense attorneys who struggle to live up to the meager expectations of Strickland. No. We should. We should be expected to have basic familiarity with the information contained in discovery which persists through the day of trial.

Crowell v. State, No. 14-20-00017-CR (Tex. App.—Houston [14th Dist], Nov. 18, 2021)

Issue. (1) When the state moves an inmate from the local jail to a prison during the period for filing a motion for new trial, has the state denied effective assistance of counsel? (2) Can an appellate court modify multiple judgments when a trial court attempts to stack several sentences but erroneously sandwiches a non-stackable offense between several other stackable offenses? (3) Can a trial court stack a 1997 sexual assault of a child sentence with other more recent stackable offenses?

Facts. The State charged the defendant with three counts of aggravated sexual assault of a child under 14, sexual performance by a child under 14, and possession with intent to promote child pornography. Defendant entered a guilty plea, and the trial court conducted a punishment hearing without an agreed punishment recommendation ("open plea"). The trial court sentenced the defendant to 295 years by cumulating sentences.

Holding. (1) Question avoided "As a prerequisite to obtaining a hearing on a motion for new trial, the motion must be supported by an affidavit, either of the accused or someone else specifically showing the truth of the grounds of attack." Conclusory allegations and sworn statements will not suffice. Here the defendant contends that providing

a sworn statement for counsel to file became impossible when the State prematurely moved him to a prison. But counsel's representation of this fact in the motion was conclusory and did not explain why some person other than the defendant could not have executed an affidavit. (2) Yes. The version of the stacking-eligibility statute applicable to defendant's offenses did not permit stacking of possession of child pornography. The trial court attempted to stack all of defendant's sentences, it did so by sandwiching defendant's child pornography sentence between his other stackable sentences. (3) No. In 1997 sexual assault of a child was not a stackable offense by the nature of the offense alone. To stack this 1997 offense the state had to meet two requirements either: (1) they did not prosecute the offense in the same criminal action, or (2) it did not arise out of the same criminal episode. Because "same criminal episode" has no temporal limitation, it was not shown that defendant's 1997 sexual assault of a child met this requirement.

Ex parte Temple,
No. 14-20-00156-CR (Tex. App.—Houston [14th Dist], Nov. 23, 2021)

Issue. Before 2005 the Code of Criminal Procedure required that a mistrial declared during the punishment phase of trial result in retrial starting from the guilt-innocence phase of trial. When a defendant committed an offense before 2005 but is prosecuted after 2005 and a trial court declares a punishment phase mistrial must the trial court apply the law applicable on the date the defendant committed the offense and grant a new trial on both guilt-innocence and punishment?

Facts. In 2007 a jury convicted the defendant for murdering his wife in 1999. Defendant's conviction and life sentence were reversed, and a new jury convicted him in 2019. After the jury delivered its guilt-innocence verdict, the trial court dismissed two of the four alternate jurors. During punishment deliberations the jury sent a note to the trial court indicating that two of the jurors refused to participate in deliberations. Defense counsel requested a supplemental instruction and opportunity for additional argument from the parties. The State objected and suggested the two jurors might be considered "disabled" for purposes of jury service. The trial court read to the jury an Allen charge and instructed them to go reach a verdict on punishment. The jury eventually sent a note back to the trial court telling the judge to declare a mistrial because "we believe it is a total fluke, a one and a thousand chance that this group of jurors was assembled . . . two jurors are not willing to budge at all. The trial court declared a mistrial. Defendant a writ of habeas corpus challenging the ex post facto application of the 2005 limited punishment retrial upon punishment mistrial statute. The trial court denied relief. The state filed a "motion to exclude exonerating or residual doubt evidence at punishment."

Holding. Issue dodged. Defendant's challenge to the amended Code of Criminal Procedure's limited retrial provision is an as-applied challenge to the statute's constitutionality. Unless you are the Governor and accused of a crime, you cannot raise an as-applied challenge through pre-trial writ of habeas corpus. *Ex parte Perry*, 483 S.W.3d 884, 895 (Tex. Crim. App. 2016) (yes that's actually law). Defendant argues that it would be unfair in light of the trial court granting the State's motion to exclude "residual doubt" evidence for a new jury to issue a determination on punishment – but the trial court can still reverse its decision after seeing what evidence the defendant might wish to present.

Comment. What the heck is a "motion to exclude exonerating or residual doubt evidence?" It sounds like "don't talk about how bad our case was to the new jury who doesn't know how bad it was." When a jury is asked to render a verdict on guilt and a verdict on punishment, they are not supposed to barter with one another and trade concessions on one verdict in exchange for another. But they do. And that they do is not only well-known but a protected part of the process. *United States v. Powell*, 469 U.S. 57 (1984). To have a new jury deliberate on a punishment that a previous jury saddled it with delivering but without hearing the weight of the State's evidence is problematic.

Null v. State,
No. 14-19-00839-CR (Tex. App.—Houston [14th Dist], 2021)(en banc)

Issue. Under Texas Rule of Evidence 702, may a lab analyst testify about the results of lab testing performed offsite when that lab analyst has knowledge of existing protocols at the off-site laboratory and can assume or deduce without personal knowledge that those protocols were followed? (2) Can a court take judicial notice that DNA evidence is widely accepted?

Facts. This is an en banc rehearing from a case appearing in the August edition of the Significant Decision Report. The facts are copied from the previous summary. The issues above are narrowed to those decided differently by the en banc court. Complainant was 16 years old when she came home in a confused state and told her mother she had been raped while out jogging. Later complainant revealed that the jogging story was a lie. Instead, her story was that she skipped school, got drunk, hung out with an adult friend, got more drunk, tried to walk home, passed out, found herself in a car with a man "pressing on top of her." Toxicology reports showed complainant had Xanax and marijuana in her system. Forensic evidence showed that Defendant could not be excluded as a suspect. At trial, complainant testified that she did not know the defendant, had never seen him before, and could not identify him as the attacker.

Holding. (1) No. Under Texas Rule of Evidence 702, the proponent of scientific evidence must, among other things, show by clear and convincing evidence that a reliable scientific technique was properly applied on the occasion in question. Here, an offsite laboratory developed DNA profiles by extracting DNA, quantification of DNA, amplification of DNA, and

graphing of DNA. The testifying expert did not supervise any of these steps and did not have personal knowledge that the testing was done properly. Sometimes a DNA analyst who does not personally perform relevant work may nonetheless establish scientific reliability in lab testing results. But such a witness must impart some personal knowledge that protocols were actually followed. The testifying analyst here was not able to state who performed the work at the off-site laboratory, whether the off-site laboratory actually followed the proper testing process, or whether the off-site laboratory had properly calibrated their instruments or stored their specimens. Moreover, the testifying analyst merely confirmed the accuracy of conclusions rendered by another analyst. "While the testifying expert can rely upon information from a non-testifying analyst, the testifying expert cannot act as a surrogate to introduce that information." (2) No. At least it cannot do so without notifying the parties and allowing argument from the evidentiary opponent. To uphold a conviction because a trial court could have taken judicial notice denies a defendant the opportunity to challenge the information upon which the trial court would purportedly rely to take such judicial notice. This would constitute a violation of due process.

Dissent (Christopher, C.J.). "The standard for en banc consideration has not been met." A lab analyst is not required to have personal knowledge as to whether a reliable technique was followed. It is sufficient that the analyst reviews the results of the work and be able to deduce that protocols were followed. To the extent that the testifying expert operated as a surrogate, it would present a Confrontation Clause issue, not a Rule 702 issue. Defendant waived any complaint under the Confrontation Clause by not objecting on that basis.

Comment. I'm surprised the 702 issue is where the en banc court reached disagreement with the panel. Defendant also raised legitimate issues with the sufficiency of evidence pertaining to penetration and venue. The panel's rejection of those arguments is undisturbed in this opinion on reconsideration.

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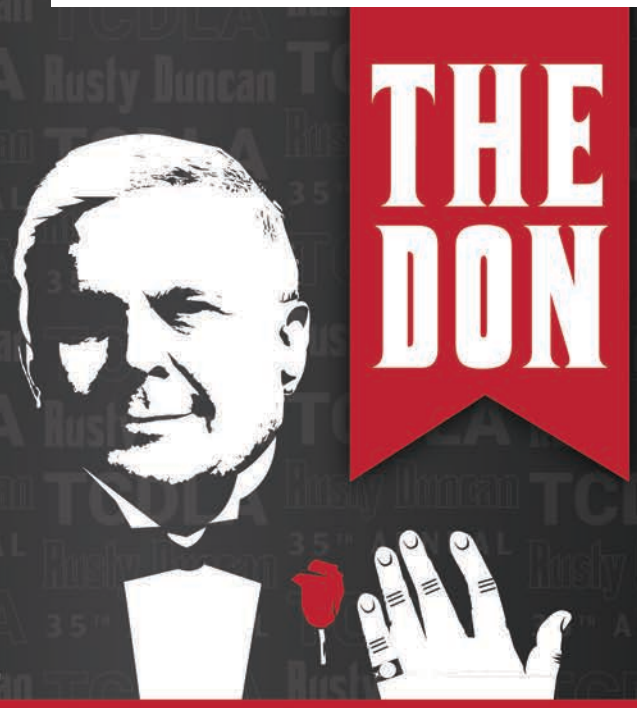

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