

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

VOICE

FOR THE DEFENSE

VOLUME 51 NO. 8 • OCTOBER 2022

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TCDLA CLE & Meetings: 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

October

October 5-9

CDLP | Advanced Trial Academy Roundtop, TX

October 13-14

CDLP | Prison, Parole & Related Issues Austin, TX

October 14

CDLP | Journey to Justice Amarillo, TX

October 17

CDLP | Mindful Monday Webinar

October 19

CDLP | Innocence for Students w/ IPOT Ft. Worth, TX

October 20-21

CDLP | 19th Annual Forensics Ft. Worth, TX

October 26

CDLP | Journey to Justice McAllen, TX

October 27

CDLP | Mental Health S.Padre Island, TX

October 28

CDLP | Capital Litigation S.Padre Island, TX

November

November 3-4

TCDLA | 18th Stuart Kinard Advanced DWI San Antonio, TX

November 21

CDLP | Mindful Monday Webinar

December

December 1-2

TCDLA | Defending Sex Crime Allegations Dallas, TX

December 2

TCDLA | Executive & Legislative Committee Meetings Dallas, TX

December 3

TCDLA & TCDLEI Boards & CDLP Committee Meetings Dallas, TX

December 9

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

December 19

CDLP | Mindful Monday Webinar

January

January 4

CDLP | Prairie Pups w/ LCDLA Lubbock, TX

January 5

TCDLA | 41st Annual Prairie Dog w/ LCDLA Lubbock, TX

January 20

TCDLA | 10th Annual Lone Star DWI Austin, TX

January 27

CDLP | New Lawyer Webinar

January 27

CDLP | Journey to Justice Waco, TX

February

February 2

CDLP | Veterans Houston, TX

February 2

CDLP | Appeals Houston, TX

February 3

CDLP | Capital Houston, TX

February 3

CDLP | Mental Houston, TX

February 15-19

TCDLA | President's Trip Las Vegas, NV

February 17

CDLP | Indigent Defense Dallas, TX

February 23

TCDLEI | Board Meeting Zoom

March

March 2-3

CDLP | Voir Dire & Cross Exam Houston, TX

March 3

TCDLA | Executive & Legislative Committee Meetings Dallas, TX

March 4

TCDLA Board & CDLP Committee Meetings Dallas, TX

March 26-31

CDLP | 46th Annual Tim Evans Texas Criminal Trial College Huntsville, TX

March Continued

March 30

TCDLA | 29th Annual Mastering Scientific Evidence DUI/DWI New Orleans, LA

April

April 1

TCDLA | 29th Annual Mastering Scientific Evidence DUI/DWI Co-Sponsored with NCDD New Orleans, LA

April 14

CDLP | Journey to Justice Tyler, TX

April 20

CDLP | Women's Austin, TX

April 21

CDLP | Race Austin, TX

May

May 5

TCDLA | 16th Annual DWI Defense Project Irving, TX

May 15

CDLP | Mindful Monday Webinar

June

June 13

CDLP | Chief PD Training San Antonio, TX

June 14

CDLP | PD Training San Antonio, TX

June 14

CDLP | Mental Health San Antonio, TX

June 14

CDLP | Capital Litigation San Antonio, TX

June 15-17

TCDLA | 36th Annual Rusty Duncan Advanced Criminal Law Course San Antonio, TX

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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."

President's Message

HEATHER J. BARBIERI



Lost and Found

I remember the day like it was yesterday. I was devastated. I poured my heart and soul and over a year's worth of work into this case. I was sure we were going to win. But when the jury foreman announced the verdict, I was crushed: "GUILTY." He said it with such glee and seemed to relish the moment and take pride in proclaiming it. Like he was presenting a lifetime achievement award at a banquet.

Later that evening I was at home. I must have been visibly sulking because my son, Brogan, who was about three years old at the time noticed I was not myself asked me: "what's wrong, mommy?" I responded that I had lost a case. Without missing a beat, he responded: "Don't worry, mommy, you'll find it tomorrow."

Out of the mouths of babes. He just continued to play with his toy cars and I couldn't help but smile.

But let's face it, we hate to lose trials. And as euphoric as it is to achieve victory for our clients, the reality is that we hate to lose more than we enjoy winning. In our profession, losing is magnified more than most other professions because when we lose, our client's lives are usually destroyed – often permanently. So, the temptation we face when we experience a defeat in the courtroom is to bury it. Forget it ever happened, sweep it under the rug and move on as quickly as we can.

As strong as the urge is to fail fast and scrub the bitter stench of defeat from our minds there is value for us as professionals in processing the unwanted suffering that is ushered in each time a courtroom echoes with the nasty word: "GUILTY."

Perhaps part of the reason why the joy of victory is so fleeting, but, despite our best efforts, the agony of defeat stays with us for days, weeks, and sometimes longer is that our subconscious is imploring us to process and learn from the loss. So, the scenes from the trial linger around, sitting patiently in the waiting room of our minds for us to fully embrace them, process them, learn from them, and become even better lawyers and people.

The trick is setting aside our pride, finding that time, and extracting the lessons learned we know in

our heart of hearts exist within each painful loss. We all know that the best learning process usually involves some degree of failure, failing is instructional. Experts say that after a failure there are certain steps we should take, a "postmortem." Steps like looking back at the trial and acknowledge the mistakes we made in pre-trial and during the trial and owning them. Remember we are human too. Next, analyze what went wrong. Then, plan for next time. If we don't figure out how not to make the same mistakes again, we're going to find ourselves right back in the same regrettable position.

So, the next time you have a defeat in the courtroom – or in life – remember the words of the great Ruth Bader Ginsburg: "So often in life things that you regard as an impediment turn out to be great good fortune." At the end of the day, it's not about us. It's about the souls of the men and women entrusted to us. RBG was right. So was Brogan. The only thing worse than losing a case today is not finding the lessons learned to use in the cases we'll find tomorrow.



CEO's Perspective

MELISSA J. SCHANK

"PRICING POWER IS IMPORTANT IN BUSINESS. YOU WANT YOUR BUSINESS TO HAVE THE FLEXIBILITY TO RAISE PRICES AS NEEDED, ESPECIALLY WITH REGARD TO INFLATION." "IN BUSINESS, ALL EXPENSE PROJECTIONS AND ALL REVENUE PROJECTIONS MUST ACCOUNT FOR INFLATION."

-HENDRITH VANLON SMITH JR, CEO OF MAYFLOWER-PLYMOUTH

Inflation & Staffing

As we start our new fiscal year, we are faced with continuing inflation. At times, staying within budget and dealing with the challenges of excessive increases across the board seems overwhelming. We see these increases on all fronts which directly affect TCDLA's staffing, planning, and services provided to members.

An example is a shortage of paper. The *Voice for the Defense Magazine's* cost to print has doubled since last fiscal year. Our printer was trying to purchase as much paper as allowed and was hit with "limited quantities." We use several printers for our brochures and publications, and they are facing the same challenges. This is the message from another one of our vendors: "Due to paper shortages and supply chain issues, some paper stocks will not be available for the time being. Turn times will vary per job; the average turn time is 5-7 days. Please advise if you need by certain dates, and we will do our best to accommodate." As consumers we see these same types of challenges everywhere we see signs in the grocery store for popular items "limited quantity two – save some for your neighbor."

Do not panic; we will still print our *Voice for the Defense Magazine*. We know this is a member benefit and we are not considering taking it away. We will continue to look at other printers and temporary paperweight changes to get us through this period.

Another increase in cost is food – we all have seen a rise in food at restaurants and grocery stores. Hotels are no different and are facing the same increases which are passed on to us. Often there are still shortages. Hotels who customarily provided banquet orders for events several weeks in advance are now waiting until the week before or even the day before the event. Hotel contracts that were previously signed years in advance are being put on hold in hopes that prices will decrease. Another challenge with the hotels is dealing with new staff not knowing the required layout or A/V needs. We find ourselves explaining and scheduling a pre-conference meeting a week before the event only to find out the hotel employee we had been in communications with is

no longer employed with the hotel. All of these scenarios cause additional stress for everyone involved. The hotel staffing industry no longer has the same loyalty and relationships that we've built over time. Most of the time the new hotel contact worries more about the bottom line than our relationship, and there is no room for negotiation. The notion of creating repeat business is no longer an incentive for the new hotel contacts. The audio-visual companies have doubled or even tripled their prices, and hotels are using third-party companies because they cannot find staff or have staff that is knowledgeable in A/V.

Many associations are facing these issues and looking at increasing rates; we are focused on providing education and services during these difficult times and looking at other ways to tighten our budgets without price increases to our members.

Staffing and the great resignation continue to take a toll among small and large businesses. I see some of my favorite stores in the mall or restaurants closed with a sign "no employees, come back tomorrow." So, what is the great resignation? It started at the beginning of 2021; employees had a feel of what it was like to be at home and reevaluate everything revolving around the workforce – this resulted in employees voluntarily resigning from long-term positions. Some reasons for resignation related to wages, increased cost of living, job dissatisfaction, options to try different fields, work remotely, safety concerns of the pandemic, personal values not aligning with position, and unwillingness to give up family/personal time for work. The days of loyalty to a company for 20+ years and hard work ethic to stay late and come in on the weekends is disappearing.

Working remotely has caused lots of influx. Employers are no longer competing with companies in their local area – they are competing nationally due to the availability of remote work. During this time, employees and employers have had to adapt to what is needed at the moment. During the great resignation, people go back and forth to different work atmospheres to see what they

prefer. Some find they need a social connection and want to come to the office. Being at home with roommates or other distractions is not successful for them. Others prefer to be in solitude or have the flexibility of a work/remote schedule. Employers find tracking the employee's time hard, and trust is needed. Communication is also vital for tasks and deadlines. The pros and cons for both can go on and on.

TCDLA is not immune to this; putting on over 50 live seminars requires in-person travel for all staff. In order to remain competitive, we also have to look at ways to retain our employees. Turnover is time-consuming; training a new employee takes over a year due to all the various tasks completed routinely. Investing in employees you hope will stay takes away from the trainer's time to complete their tasks, putting everyone behind. We do this with the understanding that it will be disastrous if we do not invest the time necessary for training in the long run. Mental health and wellness also have a considerable impact, which we must stay on top of and address.

Employers who have no option except to offer in-person work are faced with having to increase salaries, close business when not staffed, or close completely. Travis County Commissioners Court recently voted to raise the minimum wage to \$20 for Travis County employees in hopes of retaining and hiring entry-level staff.

In order to help us mitigate challenges and plan accordingly, we have implemented a project management task software to track and keep up with numerous deadlines. We have written procedures for every job function, task and process for each duty in the event we have someone leave. We have changed our email to outlook exchange which allows everyone to access anywhere. Staff are set up with laptops to have access remotely. After much trial and error, we have changed to a new zoom phone system that has given us much more options than a regular phone. Faxes are received via email. These are some of the things we have changed. If we can assist with any of the items mentioned above, feel free to reach out. At the end of the day, it is necessary to adapt and embrace change (which is difficult at times for me) and to find a balance that meets everyone's needs to be successful and productive.



Texas Criminal Defense Lawyers Association

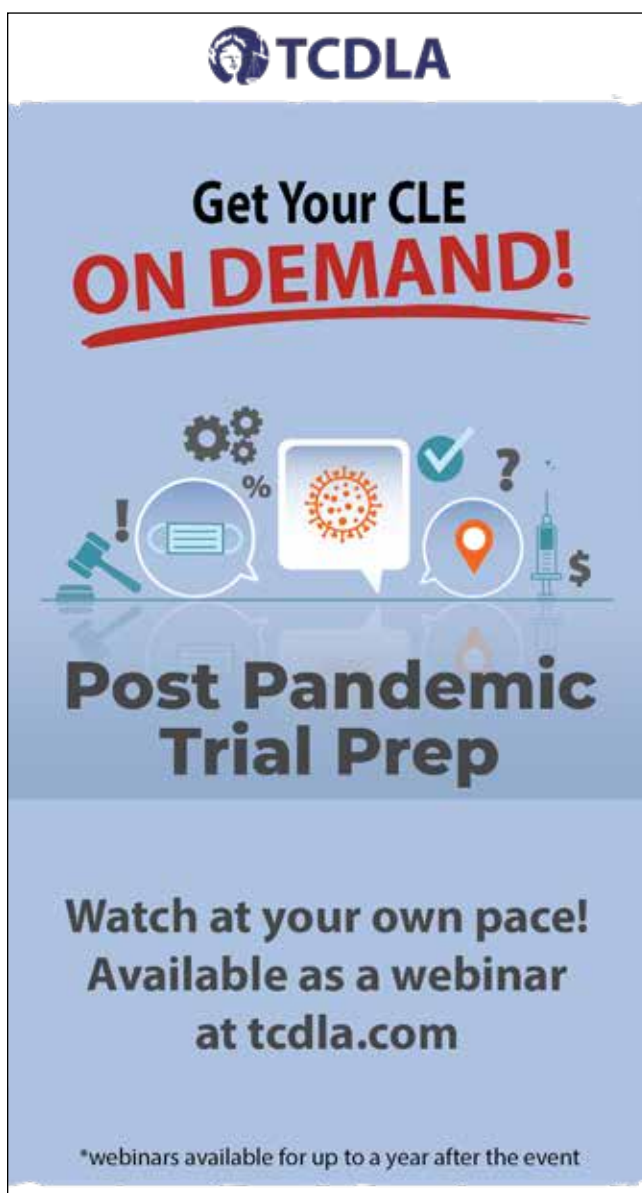
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Editor's Comment

JEOP DARNELL

Fall is upon us, or so I am told, as it is still hot out. I am writing this article as I fly back from my trip to Austin for the fall TCDLA Bboard meeting. By the time I get home, my wife Meghan will have decorated the entire house like Halloween is next week. Aside from the ghosts and goblins, fall is one of my favorite times of the year because of college football. I played at a small school in Mississippi named Millsaps College, and college football is one of the loves of my life, whether playing or watching. Sometimes I wonder why I love it so much when my Oklahoma Sooners leave me heartbroken every year.

However, the more I think about it, the more I am convinced that the camaraderie of college football is what draws me to it even since I hung up my cleats and pads. The camaraderie doesn't just include finding like-minded people who choose correctly and root for the same team as me, but it is-minded people who choose correctly and root for the same team as me, but also the spirited conversations with folks who choose wrong too. I spent much of the weekend talking trash with friends about whose team is better this year and it dawned on me just how many different teams are represented within our Board and our Organization.

Former TCDLA President Kerri Anderson Donica and future President David Guinn, Jr. both chose to root for Baylor. I forgive them but don't think for a second I don't remind them who I cheer for when OU wins and they likewise reminded me they finally got to be Big 12 champs last year. Current President Heather Barbieri is a Kansas State fan, much to my crimson-blooded chagrin recently.

My friend and future President John Hunter Smith is an Auburn fan and I can't wait to remind him that Auburn is of little consequence in the college football world when OU joins the SEC in the near future. Future President Clay Steadman, former President Bobby Mimms, former President Gerry Morris and Suzanne Spencer, former President Sam Bassett, former President Betty Blackwell, and Gene Anthes (all close friends) cheer for the school in Austin who may still play football, I'm not quite sure. They are both reminded almost yearly who dominates (dominated?) The Red River Rivalry. And then there are all my friends in and from Lubbock

who cheer ever so loudly and obnoxiously for the Red Raiders (former President Tim Evans, Lance Evans, former President Mark Snodgrass, Sarah and Rusty Gunter, Justin Underwood, Laurie Key, Lisa Greenberg, Dwight McDonald, and Sara Smitherman, to name a few).

If I had to think back to how many times I've yelled at a TV over the years when the Big 12 referees have screwed up a game it is almost always when OU is playing Texas Tech. There are too many of my friends to list in this article who cheer for Tech, and they are lucky I still call them friends. Just remember Baker Mayfield graduated up to OU and his Heisman Trophy. But, that's not all, schools from west to east are represented within the Organization; my brother from another mother, Cris Estrada from UTEP, Mark Thiessen from TCU, Thomas Wynn from SMU, Jani Maselli Wood from the University of Houston (for her law degree), Sean Hightower from Stephen F. Austin, Mario Olivares for Texas A&M, and former President Grant Scheiner from Trinity University, among many others.

Aside from using this platform to assuredly piss off almost every friend I have in TCDLA, I want to remind everyone to think about something other than the law on occasion. If you attend a TCDLA CLE, or a board meeting, or other event, branch out from the normal, "I have this case . . ." conversation. We are competitive folks by nature and it doesn't end at the courtroom doors. Enjoy the brotherhood (sisters included) that we have to mix it up and talk some shit to your fellow members. But, don't ever forget there will only ever be one king of the Big 12 so long as OU is a member and it's the team that plays in the Palace on the Prairie. And for those of you who chose right in your team, let us hope to hear on many occasions on the radio this year, "You can unhitch the wagons and put the ponies in the barn." Boomer Sooner.

Be safe,

Jeep Darnell



TCDLA Ethics Hotline

Are you a TCDLA lawyer member experiencing an ethical dilemma? We can help. Speak up today.
512.646.2734 • ethics@tcdla.com

Ethics and the Law

How to Avoid a Grievance When an Attorney-Client Relationship Ends

LAURA POPPS

All attorney-client relationships come to an end at some point. However, the process of terminating the attorney-client relationship is rife with the potential for disciplinary rule violations. The irony is that you may have provided exceptional representation and received a great result for your client, but may still wind up defending yourself against a grievance.

The third most common grievance for lawyers involves mistakes made while terminating the attorney-client relationship. This is surprising considering that the representation is largely over at this point. I suspect that is exactly why it happens - most lawyers do not recognize the importance of these seemingly minor details in parting ways with a client. These details are often delegated to staff and forgotten as the lawyer moves on to new clients and new matters. But just as doctors with poor bedside manner receive disproportionately high numbers of malpractice claims,¹ lawyers who do not take the time to attend to the client's needs - especially as the representation is ending - will face higher numbers of grievances and malpractice lawsuits. -

There are several issues surrounding withdrawal and proper termination of representation, including the timing of the withdrawal and whether good cause exists for withdrawal. Such issues require a detailed factual analysis and are beyond the scope of this article. For our purposes, we will assume that either the case

is over, that it is the client's decision to early terminate the representation, or that the lawyer has appropriate grounds for withdrawal and the timing will not prejudice the client. This article will focus on mistakes made during the *process* of withdrawal that result in a large number of grievances.

Providing the Client File Upon Request

The first issue that comes up in an astonishing number of disciplinary cases is a simple failure to provide the client's file upon request. Texas Disciplinary Rule of Professional Conduct 1.15 (d) states, "[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled[.]"

Rule 1.15(d) violations usually result from providing no file, an incomplete file, or not providing the file quickly enough. The rules do not specify what constitutes a reasonable amount of time in which to comply with this request, but I have personally seen cases sent into the grievance investigation stage where the attorney had not been given more than a couple of weeks to comply. The bottom line: the file must be provided *promptly*, and while the definition of "promptly" may be debated, you will need to justify even slight delays in providing the client his or her file. One can avoid a grievance altogether by establishing procedures to provide the file to the client within a week or less of the request.

It may sound elementary, but the first step to accomplishing this goal is to keep a client file and to update it in real time. Whether electronic or paper, it is imperative that there be a file assigned to each client in which all pleadings, orders, notes, correspondence, and other documentation is placed as the case progresses. As I am writing this article, one of my lawyer clients has yet to provide me his client file on a case that I requested over two weeks ago. This type of delay is frequently the result of having to create or substantially update a file after the fact. With a busy practice, it is easy to neglect non-urgent matters like file maintenance. But this makes it monumentally more difficult to prepare and provide the file after the case is over. Do yourself a favor and

1 - Statistics printed by the Commission for Lawyer Discipline rank it as the number four reason, behind rules addressing integrity. However, the integrity rules incorporate 8.04(a)(1), which includes any violation of the disciplinary rules. The inclusion of this rule skews the data so, in reality, mistakes involved in terminating the attorney-client relationship rank as the third most common basis for an upgraded grievance. See https://www.texasbar.com/AM/Template.cfm?Section=Content_Folders&Template=/CM/ContentDisplay.cfm&ContentID=54492

2 - <https://www.natlawreview.com/article/bad-bedside-manner-or-medical-malpractice>

make sure that files are maintained in real time. It will make the process of providing the client file seamless and will avoid an unnecessary grievance, which would be much more costly and time-consuming than the effort it takes to keep the file updated.

A second issue that lawyers run into with providing the client file is not knowing what exactly to provide. The short answer: provide *everything*. Many lawyers still believe that their work product and case notes do not belong to the client. This is incorrect. With very limited exceptions, a lawyer's notes and work product must be provided to the client.² Moreover, the client is entitled to the original documents filed with the Court. If you, as a lawyer, wish to retain a copy of the file, it is your duty to make a copy for yourself but to supply the original file to the client. All copying expenses are borne by the attorney, not the client.

Criminal defense attorneys are frequently concerned about receiving a grievance for not providing discovery received from the prosecution under Texas Code of Criminal Procedure, Article 39.14(f).³ This is something that the State Bar of Texas' Classification Attorneys are aware of and have been trained to consider when reviewing a grievance alleging that portions of a file were not received. If you have provided the file to the client upon request, but have withheld discovery under Article 39.14(f), be sure to include a letter explaining why that information cannot legally be provided. Sometimes the client will include the letter as part of their grievance materials, thinking it proves that they are not receiving everything. In fact, if a classification attorney reviews a letter indicating that everything has been provided except discovery under Article 39.14, it will virtually ensure that the grievance based on same will be dismissed.

Another problem arises when the lawyer destroys the client file too soon. If the client comes back at some future date to request the file and the lawyer is unable to provide it because it has been destroyed, the lawyer could be facing a sanction if the file was not retained for a reasonable amount of time. But what is a reasonable amount of time? The unsatisfying but true answer: it depends on the case.

The disciplinary rules do not explicitly tell attorneys how long they must keep client files after resolution of the matter.⁴ Professional Ethics Committee Opinion 627 acknowledges this void and resorts to "guiding principles" to determine the appropriate considerations for file retention. For our purposes, the primary consideration is the lawyer's continuing obligation to not harm the interests of a former client. This requires a lawyer to thoughtfully consider whether the client could reasonably need the file at any future point. As we

know, in criminal cases, a client's potential need for the file may vary wildly depending on the type of case, how it was disposed of, the availability of future appeals, etc. There is not a one-size-fits-all answer for the criminal practitioner. Therefore, you will need to put some reasonable policies in place that vary depending on the nature of the case and its disposition. Alternatively, and more common these days, is to keep electronic files for each client and to retain them indefinitely. This ensures the file can be provided if needed for an appeal or any post-conviction issue.

One final note on this issue - the rules *do* require a five-year retention of client trust account records.⁵ If you are not retaining client trust account records for at least five years or, even worse, you do not put advance fee payments into your trust account or even have a trust account—you are violating various disciplinary rules. Each of the above issues may come to light if a client files a grievance for failure to supply their file. It is critical that you understand the rules governing the proper handling of fees and that you are maintaining proper trust account records for each client.

In terms of *how* to deliver the file to the client, this can require a more unique approach in criminal cases, particularly when the client is incarcerated. Generally, it is sufficient to tender a client's file to be picked up at the lawyer's office by the client or a designated representative.⁶ It is also normally permissible to provide the file as it is maintained in normal course of business, which may be in digital format.⁷ But for the incarcerated client, unless you are in agreement otherwise, it will usually be necessary for you to print out a hard copy of the file and mail it directly to the client. This can be expensive and time-consuming, but not nearly as expensive and time-consuming as defending a grievance. If there are certain items that cannot be provided in this manner, you will be in compliance with the rules if you are working with the client and making reasonable efforts to get the information to them or a representative.

Failure to Refund Unearned Fees

When an attorney-client relationship ends prior to resolution of the legal matter for which the attorney was retained, you can bet the client will be asking for a refund of some or all the fees. How you respond to this request will play a huge factor as to whether that client decides

6 See Tex. Disciplinary Rule Prof'l Conduct 1.14(a). Moreover, in a recent grievance case I was defending, the Bar took the position that Rule 1.14(a)'s reference to "property" included the client file, thus making the 5-year rule applicable to the *entire* client file and not just trust account records. Although I do not personally agree with this interpretation of 1.14(a), it may be the safest bet to adopt a 5-year **minimum** file retention policy on all files.

7 See Tex. Prof'l Ethics Comm., Opinion 657 (2016).

8 *Id.*

3 See Tex. Prof'l Ethics Comm., Opinion 570 (2006).

4 See Tex. Prof'l Ethics Comm., Opinion 657 (2016).

5 See Tex. Prof'l Ethics Comm., Opinion 627 (2013).

to grieve you.

Many criminal practitioners charge fixed fees and, if fired prematurely (particularly without good cause), will take the position that the fee was earned upon receipt and that no portion of it need be returned. Sometimes there is language in the fee agreement specifically stating that the fee is earned upon receipt and is non-refundable.

Not only is refusing a refund on this basis one of the quickest ways to get a grievance filed against you, but it is an incorrect statement of the law. A fixed fee is not earned upon receipt, even if language in the fee agreement indicates that it is.⁸ The fee is not earned until the legal work for which the fee is paid is completed. Theoretically, this means until the case is resolved. But many practitioners, rather than waiting until completion of the case to consider the fee earned, will use a graduated fee agreement to delineate what portions of the fee are earned upon completion of certain tasks in the case. This is perfectly fine, and even preferable. It leaves less room for misunderstanding by the client about how and when the fees are earned, and allows the lawyer to be paid as the case and workload progresses.

When the State Bar receives a grievance alleging that a lawyer refuses to refund fees, they first attempt to determine whether there is a legitimate fee dispute - a valid disagreement about how much of a fee has been earned - versus a flat refusal to refund fees that clearly have not been earned. This can be difficult to discern from the face of a grievance, but if it appears that the lawyer is refusing to consider any refund even though a case ended prematurely, it is more likely to be upgraded for investigation. If this happens, the State Bar will often check to see if you have a trust account and may even subpoena your trust account records to see if the fee was deposited into the trust account when received.

The State Bar investigator will typically ask the lawyer to provide invoices justifying the fee or, if it is a fixed fee case, to essentially create an invoice estimating the hours billed multiplied by the hourly rate. If the lawyer is unable to justify keeping the entire fee, the case will likely be set for an investigatory hearing, after which the lawyer may be offered a sanction for violation of Rule 1.15(d).

If you want to avoid this time, money, hassle, and mark on your professional reputation, the time to negotiate with a client about a refund is **before** a grievance is filed - i.e., when the client first raises the issue. I have many lawyer clients who, after a grievance has been filed and they have hired me to defend them, tell me they are more than willing to refund some of the fee to resolve the matter. But once a grievance is pending, it is too late to negotiate directly with the client. Not only is there no way to "settle" a grievance at this stage,⁹ but such

⁹ *Cluck v. Comm. for Lawyer Discipline*, 214 S.W.3d 736, 740 (Tex. App. - Austin 2007, no pet.).

¹⁰ The first opportunity to settle a case in the

overtures, even when genuine, can appear to disciplinary counsel as an attempt to bribe the complainant or tamper with their participation in the proceeding.

There may be times when the client is being wholly unreasonable - demanding a full refund despite substantial work on the case. Only you can decide whether it is worth it to stand on principle and face a possible grievance, or attempt to work something out that may resolve the issue. It is perfectly fine not to pander to insulting or irrational demands. Just ensure that you can fully justify the amount of the fee you have retained before sending a client away empty-handed. And for the clients who are not being unreasonable but with whom you legitimately disagree about the fee - just know that sitting down with the client to discuss the matter and returning a portion of the client's money could save you an exponential amount of time, money, and legal trouble down the road. Sometimes it is not all about the money. It often is the client's need to feel heard and treated fairly that will make all the difference.

In conclusion, resolving an attorney-client relationship on a positive note should be given the same priority in your practice as bringing in new clients. Maybe even more. Not only can it save you the stress of defending a grievance, but it is the lasting impression you leave with clients that will build your reputation over time. The time and effort it takes to put the right processes and training in place up front will pay high dividends over the course of your professional career.

disciplinary system comes after an investigatory hearing before the grievance committee. Bar Counsel has no authority to settle a case directly with a respondent attorney prior to that time.



Laura Popps practices in Austin, Texas in the areas of attorney ethics, attorney grievance defense, and criminal appeals. She has been board certified in criminal law for over twenty years. Laura is a member of the TCDLA Ethics Committee. A former prosecutor with the Texas Attorney General's Office, Laura traveled the state assisting local district attorneys with complex cases ranging from capital murder to white collar offenses. In 2009, Laura was recruited to head up the Austin Region of the State Bar's Office of Chief Disciplinary Counsel, where she directed litigation, investigations, and grievance administration for that region and served as lead counsel in some of the Bar's more difficult and high-profile litigation. She can be reached by email at laura@poppslaw.com or by phone at (512) 865-5185.

From the Front Porch

DEAN WATTS



Learned Treaties: An obscure law school evidence question or a powerful weapon for the rural practitioner to use at trial?

We rural practitioners have many advantages over our more urban criminal defense brothers and sisters. Less stress (in theory), less traffic, better lifestyle... wait, I will not go into everything because I do not want any more city lawyers to move here! But one thing we do not have is access to expert witnesses. For example, if you google expert witnesses Dallas, you can find scores of experts who will testify about seemingly every issue you can think of. Hell, some consulting firms are even looking to hire more. However, if you have ever tried to ask one of them to come, say to Nacogdoches, their response is likely to be, "Where's that?" followed by a huge fee. In all fairness, who can blame them? It will take several days away from the office for them to come to rural places.

So, what is an honest, hard-working rural practitioner to do? My advice? Grab one of those dusty evidence books from law school and look up the learned treatise exception to hearsay. Texas Rules of Evidence Rule 803 (18) states that "Statements in Learned Treatises, Periodicals, or Pamphlets are not hearsay if a) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination, and b) The publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice. What does all that mean as a practical matter? You have the State's witness testifying against some issue to the detriment of your client. You do not have an expert witness. But you can have the best book, manual, article from the world's leading authority on the subject. How do you get this information before a jury? You call that to the attention of the expert witness on cross-examination, then have them admit that is reliable. Once your book, article, manual passes legal muster, you get to read it to the jury.

I can hear the naysayers mumbling already. What if the State's expert does not recognize that book, article, manual as a reliable authority? The State's expert may say something like "I've never heard of it!". The framers of this rule must have seen that excuse coming. So as a safeguard, they put it that you can ask the Judge to take judicial notice of your expert materials. What if the Judge will not take judicial notice of it? Make an offer of proof. As a practical matter, that gives Judge's something to worry about. They may change their position and let it in. At the very least, you may have an excellent issue for appeal. And you do not need to pay \$5k for an expert to come to your rural location. You may only have to pay for the book or print out the article. This is one way in which we can all educate ourselves as experts, and this is a reasonable alternative on a rural court-appointed attorney's budget! So, the next time you are faced with an issue that requires expert witness testimony, do not despair. Get busy and do the research and find that learned treatise that provides the argument you're searching for. When you have met the evidentiary burden for using a learned treatise in trial, you can then convey to the jury in your style the substance of that information and why they should consider its value in their deliberations. You do not have to drone on. Nowhere in the rule does it say you cannot read it with enthusiasm and charisma! Another upside to this is you do not have to worry about your expert witness being a gun for hire or someone who does not know what he is talking about. Also, let us not forget that the jury has observed your attention to detail and preparation on your client's behalf. The information being given to the jury has received the court's blessing and should be argued as having an expert's seal of approval.



How to Leverage Client Management Software as a Criminal Practitioner

BENSON VARGHESE

“Law practice management software is too expensive.”

“I’m getting by just fine without it.”

“My practice is too small to justify using law practice management software.”

“I’m just not tech-savvy.”

“I don’t want to have to learn a new system or software.”

These are just some of the reasons fellow criminal defense practitioners have given me as to why they are not using software to help organize their practices, communicate with their clients, and save their files.

I have spent countless hours talking to all the leading law practice management software companies to know that there is no “perfect” piece of software out there - at least not yet. Despite that, in this article, I hope to lay out the reasons why you should consider using law practice management software.

I define Law Practice Management Software (LPMS) as a **“unitary cloud-based platform that allows lawyers to manage their cases, clients, and practices while**

providing a secure method for communication, billing, and file storage.” Some software providers offer more, but none worthy of your consideration can do or be less than that.

Let’s break down my definition and take a look at how each of these essential components can assist you in your practice.

Cloud-based Program

First, any software you are considering in 2022 and beyond should be cloud-based. This means instead of storing files and data locally on your computer, or on an in-office server, your data is stored in “the cloud.” So, does the cloud mean a server somewhere else? Not quite. When it comes to storage for LPMS data, most software developers are going to host your data securely and redundantly through data storage services provided by companies like Google and Amazon. Your data will be encrypted both at rest and while being transmitted through the cloud. This data is not located on a single server and is instead duplicated over several instances at various locations. This has several advantages. First and foremost, you won’t have a single point of failure or possible data loss. Second, you have greater protection against threats like ransomware. Third, you will have



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access to your data from anywhere - the office, home, on the road, or even on vacation. Fourth, your data will be quickly accessible regardless of where you or your client is accessing the data from.

Unitary

Rather than cobbling together solutions for various problems, an LMPS ideally offers the platform as the single solution to a number of problems. I highly recommend that as you are looking for an LPMS, you look for one that not only has the features outlined in this article, but also does so natively. In other words, an LPMS that was built from the ground up to offer these features is going to be superior to one that requires multiple log-ins or has been pieced together by a company who purchased other smaller companies to add features, rather than coding the new features themselves.

Manage Your Cases

Law Practice Management Software allows you to manage everything about a case. An LPMS can track your leads so you know which ones convert to clients and which ones you need to follow up on or close out. Once a lead has been converted to a case, the electronic case file stored in the LPMS becomes the repository for everything about the case. You can build out contacts related to the case - the client, family members, billing contacts, witnesses, the list goes on. It becomes the place to make case notes and updates, which you can access anywhere from any device that has an internet browser and connection.

Communicate with a Client

As criminal practitioners, we have all been there. You're reviewing a phone dump and you come across attorney-client communications - emails to and from an attorney or even text messages. More than attorneys in other practice areas, we have clients who may one day end up with devices that are in police custody. The benefit of using an LPMS for communication is the written messages you send are never stored on a local device, such as a cell phone, laptop, or desktop computer. It's exactly the same as checking your bank account through a browser window. When you log in securely, the information is always there and available for you to access, but the information is unavailable after the browser is closed or the logged-in session ends.

Communicating through the LMPS also provides the advantage of having every written communication at your fingertips, even years later. Have you ever tried to answer a grievance or claim of ineffective assistance of counsel years after you resolved a case? Imagine how much easier your response would have been if you had been using an LMPS that stores all of your messages, text messages, and letters in a single place. How about

the client who asks you the same question over and over - Wouldn't it be easier to point to the specific date and time or thread where that answer can be found? For the client who wants to claim that you failed to tell them something, having a unified location for every secure message, text message, and email means there's a much greater likelihood you have documentation of everything you told the client.

The ease of communication doesn't just apply to the client. If you want to share non-privileged information with a non-client (like mom who wants to know when the next court setting is), doing so is a breeze through an LPMS.

Streamline Billing

Whether most of your cases are billed on a flat fee or an hourly basis, it helps to have contemporaneous and accurate time records. An LMPS allows you to easily create invoices for flat fee cases, send them for payment, with or with a payment plan, and then track time even though the client (or court) is not being invoiced for the time entries. In this scenario, the time-keeping function is insurance against any future claims of ineffective assistance, or an allegation that you didn't earn your flat fee, or a request for a full or partial refund. In cases that are billed by the hour, the advantage of a centralized time-keeping system that can be converted to an invoice to a client with the click of a button is obvious. Using an LPMS means you can also get paid faster. You can set up payment plans, accept payments online, and send invoices that can be paid online from any device your client is on.

Storing Files

An LPMS also provides a secure location to save evidence. It is a great place to drop all of the discovery from the state. You control what a client has access to, and the default permission setting is that uploads are not shared with clients. This means you can safely upload discovery to store it for yourself. There are a number of advantages to this feature. First, you can access your discovery from anywhere. Second, you are no longer relying on the vagaries of the State's discovery portal or being tied down by a hard copy of evidence. Third, you will have access to discovery even after the case is over, whether or not the State retains the evidence.

What does the future hold?

I've spent countless hours talking to the major software vendors in the LPMS arena. For all the features that are available today, the future landscape is going to be truly remarkable. I know this because I am actively working on bringing the next generation of LMPS to

fruition. Here's what the future holds:

True Automation

Current LPMS offerings allow some basic automation functions such as the ability to create a specific task list in a case based on the case type. True automation is much more robust. Users have the ability to set up a series of actions - sending secure messages, texts, emails, and setting up future events, etc. This ability to automate certain functions means you can send clients updates periodically even when nothing has changed. These touchpoints make a meaningful difference to clients who otherwise feel forgotten as the wheels of justice turn slowly.

Advanced Document Assembly

Any LPMS will give you the ability to create documents by merging known data fields. Advanced LPMS offerings allow for logical document creation, meaning the software can use conditional fields to create documents that require little to no further revision. For example, instead of having five versions of an engagement letter, you could have a single engagement letter template where you can select "hourly" or "flat fee," the hourly rate or flat fee, "pre-trial" or "trial" the gender of the addressee, and generate a tailored document with the click of a button. You can also create appropriate pre-trial motions by making selections related to the nature of the case, the age of the alleged victim, and the types of evidence associated with a case.

KPI Tracking

KPIs stand for "Key Performance Indicators" that measure performance over a period. These KPIs are data points that give insight into how your business and employees are performing. Tracking data and understanding KPIs allow you to have focus and clarity about the state of the firm, measure progress, make decisions objectively, and make adjustments quickly. Leveraging the data kept within the LPMS allows you to create meaningful reports that tell you everything - from how much you have in accounts receivable and the likelihood of collection to the percentage of your cases that are set on the trial docket. As you are looking for an LPMS, you should consider the quality of KPI reports the system is capable of producing. For example, you should easily be able to see the numbers of hours billed by case type and associate. You'll quickly be able to identify your least and most profitable practice areas and adjust your advertising accordingly. You can also track the source of every lead to see what existing advertising efforts are most successful.

Optical Character Recognition of All Uploads

A modern LPMS will automatically recognize the text in all the documents you upload, including the documents in discovery. This creates a powerful tool to search through voluminous discovery. Imagine the ability to search through all your files quickly to locate an officer who just got added to a Brady list.

It can be hard to contemplate adopting new software.

You debate whether it is worth the investment in time and money. The reality is that in 2022, we have to adapt to meet the demands of modern technology and our clients' expectations. In doing so, we can create efficiencies revolutionizing how we practice law. Most LPMS offerings range from \$50 to \$150 per month per user. You will make that amount back in a single day through the implementation of such efficiencies. But there's more to this than just saving money. Consider the peace of mind that comes with a greater work-life balance - something that is possible when every aspect of your firm is running more efficiently.



Benson Varghese is a Board Certified criminal defense lawyer. He is the founder and managing partner of Varghese Summersett PLLC. He hung his shingle in 2014 and by 2018 was listed as the 782nd fastest growing business in the United States by Inc 5000 magazine. He attributes his success in large part of caring for clients as if they were family and leveraging technology in the practice of law. Benson can be reached at benson@versustexas.com or 817-203-2220.



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The Federal Corner

ERIC COATS

Conflict of Interest Arising from Dual Representation

***Sheperd I*: 27 F. 4th 1075 (5th Cir. 2022)**

***Sheperd II*: 44 F.4th 305, 2022 U.S. App. LEXIS 22357; 2022 WL 3274129 (5th Cir. August 11, 2022)**

In a couple of recent opinions, the Fifth Circuit Court of Appeals clarified the rules regarding ineffective assistance of counsel involving conflicts of interest. The decisions address the actions of an attorney who breached his duty of utmost loyalty and harmed a client. But, the decisions also raise the possibility that more ethical attorneys might make similar mistakes much more innocently.

Let's start at the end with a quick recap of the facts cited by the Court in the second case. Ann Sheperd, the owner of a home-health agency, was convicted of Medicare fraud. On appeal she complained that her Sixth Amendment right to effective assistance of counsel had been violated. Turns out, Sheperd's pretrial counsel was also representing one of the Government's star witnesses. The Court Remanded the case for an evidentiary hearing on whether Sheperd's lawyer's conflict of interest—a conflict the Government knew about—adversely affected his representation. The district court's answer: Yes. (*Sheperd II*).

Clearly, the position occupied by Sheperd's counsel is not one that a competent lawyer with a grasp of ethical principles and a casual understanding of conflict of interest would occupy. However, due to the complexity of the rules that address conflict of interest, defense counsel does not have to be oblivious to ethical obligations to occupy similar territory. In addition to being a firm reminder of the duty of utmost loyalty owed to a client, the case is important for how it addressed the second prong of the *Strickland* analysis (harm), and for the remedy available for this type of harm. If you ever thought about writing a writ, or just hope to avoid being the legitimate subject of one, read these cases.

I. THE *SHEPERD I*

A. The Facts

The facts of the case are set out brilliantly in *Sheperd I*. However, a little editing has been done for brevity, clarity, and to avoid further shaming of the lawyers. The quotes from both cases appear without the footnotes, citations, and quotation marks present in the opinions.

Ann Sheperd owned and operated a home-health agency. In June 2016, a grand jury indicted her (and several others) with conspiracy to commit healthcare fraud. Sheperd retained counsel. The district court set trial for August 2016. A month later, Sheperd replaced her counsel. The District Court declared the case complex, and relaxed the trial deadlines. Sheperd replaced her counsel again in February 2018. "Attorney A".

Two months after entering his appearance as Sheperd's counsel, Attorney A met with FBI agents and a federal prosecutor to discuss Sheperd's trial. But he was not there acting on Sheperd's behalf. Attorney A was there to act on another client's behalf—Okpara. Attorney A had helped Okpara secure a plea deal related to healthcare fraud in a different district court almost a year before. So why did Okpara need Attorney A at the meeting? Because Okpara was Sheperd's friend and business associate—a relationship the Government wanted to exploit by calling Okpara as a witness against Sheperd.

If representing both Sheperd and Okpara at the same time sounds zany to you, then you wouldn't be alone. The Government thought it sounded zany, too. In fact, it even pointed out to Attorney A that he had an obvious conflict. Attorney A replied that he hadn't noticed. Even so, the meeting continued since, according to Attorney A, Sheperd wanted to plead guilty and would do so by the next month, in May. Turns out, the meeting was a success ... for Okpara. Afterward, the Government amended Okpara's plea deal to include 5K1 consideration. That is, in exchange for Okpara having provided the Government with substantial assistance in the investigation or prosecution of another person who has committed an offense, the Government agreed to

permit Okpara to receive a reduced sentence.

Nobody told Sheperd about Attorney A's conflict. Nobody told the district court about it either. But that time was not wasted. The Government used it to bring six more counts of healthcare fraud against Sheperd. The grand jury returned a superseding indictment that charged Sheperd with all six counts. Attorney A, for his part, continued to receive -provided discovery. Not until August—with trial looming—did Attorney A start trying to address his conflict. He approached a former state Assistant Attorney General with experience prosecuting healthcare-fraud cases "Attorney B" about taking over Sheperd's defense. Attorney A had worked with Attorney B before, and Attorney B got involved, in his words, on August 14.

On August 20, Attorney A finally revealed to Sheperd his conflict and proposed solution. But Sheperd felt burned. She initially refused to retain Attorney B. The district court set a status conference.

The status conference took place on August 27, 2018. Attorney B was not present. Attorney A assured the court that Attorney B would be prepared for trial two weeks later. That same day, Sheperd changed her mind, agreed to let Attorney B represent her, and Attorney A then withdrew as counsel.

A few days later Sheperd's case was transferred to a new judge. The new judge held a pretrial conference on September 4. At the conference the judge asked the parties if they could move up the trial date. All parties represented they could not, pointing, in part, to Attorney B's recent appearance in the case. Counsel for defendants also flagged the conflict issue for the district court, but suggested that the trial could proceed so long as Okpara did not testify. After discussing the conflict, the judge stated that he had never seen this type of conflict. The district court then, to the surprise of all parties, moved the trial date up by three days—to Friday, September 7.

On September 6, the day before trial, Attorney B moved for a continuance, arguing, the unfortunate circumstances surrounding the status of Ms. Sheperd's counsel had denied him significant trial preparation time. He had only worked meaningfully on the case for approximately one week, despite having been involved for three. Alternatively, Attorney B moved to withdraw. That same day, all defendants also filed a joint motion, asking the court to, among other things, continue the trial and exclude Okpara's testimony. The court did not rule on the motions. Trial began the next day.

A few days into trial, the Government called Okpara as a witness. That brought the conflict-of-interest issue to a head. Defense counsel collectively reasserted the arguments from their pretrial motion: (1) Attorney A could have provided Okpara with privileged information to enhance Okpara's efforts to cooperate with the Government; (2) if Okpara testified, he could

share self-incriminating statements that Sheperd shared with Attorney A; and (3) the current indictment could have been based on tainted information from Okpara. Attorney A and Sheperd took the stand. The district court ultimately excluded Okpara from testifying.

At the close of trial, Attorney B renewed the defendants' joint pretrial motion, asking the district court to dismiss the case because of the conflict of interest. The district court denied the motion. The jury found Sheperd guilty on all counts. The district court sentenced her to 30 years in prison. Sheperd timely appealed, alleging several grounds to reverse based on Attorney A's conflict of interest.

B. THE COURT LAYS DOWN THE LAW - SHEPARD I

The Court began with a statement of the law, mainly citing *Strickland V. Washington*, 466 U.S. 668 (1984), when it wrote:

The Constitution guarantees criminal defendants the right to a fair trial. The Supreme Court has explained that one of the safeguards making trials fair is the right to counsel. In all criminal prosecutions, the Sixth Amendment declares, the accused shall enjoy the right to have the Assistance of Counsel for his defense. That's no hollow guarantee. The Counsel Clause does not countenance empty suits; it requires effective assistance of counsel—the presence of competence and absence of conflicts.

Unfortunately, not all representations meet that standard. At times a representation may suffer from actual ineffectiveness—one that so undermined the proper functioning of the adversarial process that the trial cannot be



relied on as having produced a just result. That standard is satisfied when the defendant can show that (1) her counsel's representation fell below an objective standard of reasonableness, and (2) that the deficiencies in counsel's performance were prejudicial to the defense.

United States v. Sheperd, 27 F.4th 1075, 1082-83 (5th Cir. 2022)(internal quotations omitted).

C. CONFLICTED REPRESENTATION REDUCES THE BURDEN – SHEPARD I

The Court then continued the legal foundation of ineffective assistance of counsel as related to conflicts of interest.

That two-pronged test has a special application when a defendant argues that her representation was infected with a conflict of interest. One of the most indispensable duties that any counsel owes his client is the duty of loyalty. Counsel breaches that duty when he labors under an actual conflict of interest. And if he breaches the bedrock duty of loyalty, then his representation will fall below the objective standard of reasonableness that the Constitution requires.

But what about prejudice? Defendants still need to show it in actual-conflict cases. They show it, though, in a special way—by showing that their case is subject to a limited presumption of prejudice. Whether it applies boils down to one question: Did the conflict adversely affect counsel's performance? That's a lighter burden for defendants. Proving prejudice directly means showing a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. On the other hand, the limited presumption of prejudice in actual-conflict cases turns on whether the conflict adversely affected the representation. One way defendants can answer that mixed question of law and fact is through evidence that counsel's judgment was actually fettered by concern over the effect of certain trial decisions on other clients.

The Government concedes there is no disputethat Attorney A operated under a conflict of interest. It also concedes that both it and Attorney A were obligated by rules of ethics to bring the conflict to the court's attention. Still, that's only the first half of Sheperd's burden. She still must prove that Attorney A's conflict adversely affected his performance. And on that question, on this record, we can't tell one way or the other. (Sheperd

I- 27 F.4th at 1083).

United States v. Sheperd, 27 F.4th at 83 (internal quotations omitted).

II. SHEPARD II

A. Results on Remand

On remand, the District Court was tasked with conducting “an evidentiary hearing on whether Sheperd's lawyer's conflict of interest—a conflict the Government knew about— adversely affected his representation.” *United States v. Sheperd*, 2022 U.S. App. LEXIS 22357, *1, 44 F.4th 305 (5th Cir. 2022). The District Court answered the question in the affirmative. The Fifth Circuit sought out to determine the proper remedy in the case. *Id.* The Appellate Court did not appear to be impressed by the Government's argument on the issue:

We ordered the parties to file letter briefs addressing any issues arising from the district court's findings and conclusions, as well as the appropriate relief if any. The Government now concedes that Sheperd's Sixth Amendment right to conflict-free counsel was violated and that some remedy may nonetheless be warranted. All that's left, then, is to craft that remedy. The Government points us to the Supreme Court's decision in Lafler v. Cooper, where the Court explained that Sixth Amendment remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests. The remedy must neutralize the taint of the constitutional violation, but not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution. For example, when a defendant declines a plea offer as a result of ineffective assistance of counsel and then receives a greater sentence as a result of trial, then the remedy could involve resentencing or ordering the Government to reoffer the plea deal, depending on the circumstances.

Applying those principles to this case, the appropriate remedy is to VACATE Sheperd's convictions and REMAND for a new trial. That remedy may well cause the Government to spend considerable resources. But it is not needless. As the Government admits, it never offered Sheperd a plea deal while she was represented by her conflicted pretrial counsel, or after. So there is no rejected plea deal to measure Sheperd's harm against. And while Sheperd did reject a plea deal well before her conflicted counsel began

representing her, the Government argues we cannot order it to reoffer that bargain without violating separation-of-powers principles. So we'll give the Government what it asks for, then, by avoiding any constitutional issue.

The constitutional right to counsel is perhaps the central feature of our adversarial system, as it helps make real the Constitution's other criminal procedure promises. And it is not lost on us that the Government knew Sheperd's pretrial counsel was conflicted yet delayed informing the district court about it—for months. The Government's proposed remedy—to keep the convictions intact but remand for new plea negotiations—wouldn't neutralize the taint of the constitutional violation. After all, what would encourage the Government to offer a reasonable plea when it could hold intact convictions over Sheperd's head? Nothing.

We VACATE Sheperd's convictions and REMAND for a new trial.

Id., pp. *1-4.

Clearly, the Fifth Circuit could not stomach the unethical practice of a lawyer representing a defendant and a snitch in the same case. You might think that this case would have no applicability to you. If you have read this far, you are probably incapable of engaging in the kind of unethical activities demonstrated by Attorney A in *Sheperd*. However, it is possible for far more noble counsel to find themselves in a similar predicament.

B. LESS OBVIOUS BUT MORE FRIGHTENING APPLICATIONS

Although the error made by Sheperd's lawyer might have sounded ethical alarms with almost all lawyers, it is not hard to imagine how good lawyers could innocently straddle the same ethical line. The defendant arrested today may very well be a snitch, or even a witness, down the road. Seeing the name of a current or former client in a new client's discovery is a common event. When that happens, all work on the case stops until the conflict question is resolved. As with most things legal, the starting point is the applicable rules.

A. What are the Rules?

1. **Federal courts defer to the State or District Bar Association in which the Court resides.** (See for example: Local Criminal Rule 57.8(e) Northern District of Texas, which defers to the Texas Disciplinary Rules of Professional Conduct for the definition of unethical conduct).

2. **Texas Disciplinary Rules of Professional**

Conduct

A. Rule 1.05. Confidentiality of Information

(a) Confidential information includes both privileged information and unprivileged client information. Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates. Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:

(1) Reveal confidential information of a client or a former client to:

- (i) a person that the client has instructed is not to receive the information; or
- (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.

(3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.

(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

B. Rule 1.06. Conflict of Interest: General Rule

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in

which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests

3. Texas Rules of Evidence

A. Rule 5.03 Lawyer-Client Privilege

(a)(1) A "client" is a person, public officer, or corporation, association, or other organization or entity-whether public or private-that:

(A) is rendered professional legal services by a lawyer; or

(B) consults a lawyer with a view to obtaining professional legal services from the lawyer.

The definition of "client" under Rule 503 of the Texas Rules of Evidence is broad enough to cover any potential client that discloses any fact relevant to the case. It is clear from these rules that a lawyer could easily get entangled by talking with two defendants regarding the same conspiracy. In that situation, a lawyer cannot use information disclosed by either client to the advantage or disadvantage of either client. The lawyer is unable to do his job.

The likelihood of such a conflict is greatly increased when all defendants are not arrested at the same time. A lawyer could talk to one client months before speaking with another client, with both clients having been charged in the same indictment. According to the Rule 503, it does not matter if the first potential client did not retain the lawyer. If the lawyer consulted with the person with a goal of getting hired, that person is a client.

A similar conflict could arise when a person arrested provides information that implicates others who are subsequently charged. This often occurs in traffic stop or controlled buy situations where the first person arrested is charged individually and then spills the beans on the rest of the gang. A lawyer often does not get the full details of the client's discussions with the Government until he receives discovery. At that point, the lawyer should have had several conversations with the client where confidential information would have been shared. Under one of these scenarios, a good lawyer could find themselves potentially in the same position occupied by counsel in *Sheperd*. This is a situation often encountered in smaller jurisdictions, but possible anywhere. Such a conflict affects retained counsel and appointed counsel equally. An appropriate action, declining representation or filing a motion to withdraw, to such conflict might financially burden the ethical lawyer, but the unethical

lawyer may suffer greater consequences.

TAKEAWAYS

1. The reduced burden to demonstrate harm under the Strickland analysis is an important distinction for clients who have suffered conflicted representation. It is a "lighter lift" to demonstrate that the conflict affected the representation than it would be to demonstrate that a defendant would have been exonerated or that a lower sentence would have been pronounced, but for the error.
2. The discussion of the remedy for a conflict of interest in *Sheperd II* is a wonderfully uncomplicated statement of the law. The remedy must neutralize the taint of the constitutional violation by going back to the point where the case was untainted.
3. The Government's lawyers took a scolding. All lawyers have a duty to report an ethical breach, and no party should benefit by abiding the infraction.
4. If you see a name that rings a bell at any point in the case, find out why before you move forward.
5. Screen potential clients for ability to pay prior to consultation. In a large conspiracy case, you only get one ticket. Don't waste it on someone that needs appointed counsel.
6. Having a client sign a waiver of conflicts is inadequate; it is a band aid on a severed artery.
7. Decline or withdraw when you should. Being an ethical lawyer may hurt your bottom line, but your bar card is worth more than one case.



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Understanding Bitcoin in Criminal Defense Cases

BETH A. MOHR

Whether counsel is defending a tax evasion case involving Bitcoin, or a case where Bitcoin was the currency allegedly used to buy or sell illegal goods or services, or Bitcoin was involved in allegations of money laundering, or the client allegedly committed a street robbery involving cash and Bitcoin, there is nothing mysterious about Bitcoin. Although there are a few prosecutors left who still think that Bitcoin is inherently criminal, the real-world use of Bitcoin readily proves otherwise. Bitcoin can be confusing as a concept and in real world use, but it doesn't have to be.

What is crypto-currency, and specifically what is Bitcoin? Why is it worth anything at all, never mind that it was worth upwards of \$50,000 per bitcoin within the past couple of months, and is still over \$36,000 per bitcoin? In this article, we'll discuss Bitcoin the network, as well as bitcoin, the crypto-currency, what bitcoins are, and why they have value. We'll also discuss the ways that Bitcoin intersects the real world, how that translates into criminal cases, and how criminal defense attorneys will likely encounter bitcoins. Finally, we'll discuss how recent legislation, and an uptick of enforcement by the IRS over "massive under-reporting of income" from Bitcoin transactions, among other concerns, will likely mean that lawyers see Bitcoin involved in many more criminal defense cases in the future. This article will not be a technical treatise on the blockchain and public ledger, but rather a nuts-and-bolts discussion of crypto-currency. This article is also not tax advice, nor is it investment advice, and nothing herein should be considered as such.

Bitcoin is crypto-currency, meaning that it is a digital store of value in which encryption techniques are used to regulate the generation of "coins" as well as to

verify the transfer of funds, operating independently of a central bank, and without the involvement of any government in the issuance of the currency. Bitcoin is actually two separate and distinct things. Bitcoin the network is a decentralized peer-to-peer (P2P) payment network that doesn't require a third party, such as a bank, to hold or transfer virtual currency. While Bitcoin is a network, bitcoins are individual units of virtual currency that may be "mined", purchased, traded for goods and services, purchased with or exchanged for fiat currency (US dollars, for example), and also held as an investment. (Bitcoin referring to the network is capitalized; bitcoins, referring to coins held as currency, is not capitalized.)

Bitcoins are stored in a "virtual wallet," and one user can send bitcoins to another user by using their "public key," much like anyone who has a bank account number can deposit money into that account. Users can also transfer bitcoins using a program on a smart phone with QR codes, and transfer value with a single click. Users may print their virtual wallets as a backup, or have them stored on their computer, which then makes them vulnerable to theft, as well as seizure by law enforcement.

The US Government has had a little trouble defining Bitcoin for the purposes of regulation; Bitcoin was essentially unregulated from its inception in 2009, until 2013 or so, as regulators began to grapple with it. The Anti-Money Laundering and Corporate Transparency Act of 2020 defines all crypto-currencies and digital currencies as "value that substitutes for currency or funds" and thus is considered legal tender by FinCEN. Meanwhile, the SEC says Bitcoin is a security, and the CFTC (Commodities Futures Trading Commission) says Bitcoin is a commodity. The IRS currently defines

Bitcoin as property, but is hinting that their definition might soon more closely track that of FinCEN, so that Bitcoin wallet accounts would fall under the IRS' FBAR (Foreign Bank and Financial Accounts) rules for the purposes of reporting and taxation. This is relevant, because the IRS has identified many Bitcoin owners who are US taxpayers, as we'll discuss later.

There are other crypto-currencies in addition to Bitcoin, these include Ethereum, Dogecoin (pronounced doggie coin), Litecoin and hundreds of others; each hopes to be the next Bitcoin, creating their own equivalent of the "Bitcoin Billionaire". There are also digital currencies that are not crypto-currencies, such as the SandDollar, a digital currency issued by the government of the Bahamas, which is directly tied to the Bahamian dollar. Many other governments, including Australia, are looking into issuing digital currencies, as it solves several problems created by the production and circulation of cash, especially in rural areas.

So why is Bitcoin worth anything at all, and why in the world would each bitcoin be worth \$50,000 or more? The answer is the same as the answer to the question "Why is the US dollar worth anything?" – the answer is: The Network Effect. The US first abandoned the gold standard in 1933, out of efforts to pull the US out of the Great Depression. The price of gold was artificially held at \$35 an ounce until 1971, when President Nixon announced that the US would no longer convert gold to dollars at a fixed value. Thus, the US dollar is only worth more than the paper it's printed on because people deem it to have value – that's the Network Effect. Bitcoins have value because people deem them to have value. The value of Bitcoin shot up from a few dollars to over \$50,000 in a few short years, buoyed recently by huge corporate investments.

We all already use virtual currency every day. The bank doesn't have a box of cash stored in their vault with your name on it; the bank stores the value of your account in little zeroes and ones in a computer. When you use your credit or debit card, wire transfer funds, or even write a check, that value is exchanged digitally between your bank and the merchant's bank. The majority of people in the US don't even carry cash anymore, and with the advent of the COVID-19 pandemic and concerns over passing around objects that might carry the virus, using cash has become even less popular.

In some ways, though, Bitcoin is like cash – once stolen, it's gone forever, transactions cannot be reversed or retrieved, and there are no fraud protections. Cash is fairly anonymous in that it is difficult to trace to a particular individual. Cash has been favored by criminal enterprise for all of these reasons, so it makes sense that

those individuals with criminal intent would seize on Bitcoin for some of these same reasons.

In other ways Bitcoin is like a credit or debit card. Transactions take place in the virtual world, the exchange may be managed by a 3rd party for a fee, value can be easily transferred around, payments can be made using a phone app or virtual wallet, and cash can be deposited or withdrawn using a Bitcoin ATM.

The volatility of Bitcoin makes it act like a stock, and is one thing that dramatically differentiates it from government-backed fiat currency, like the US dollar. Like a stock, people purchase Bitcoin for speculation on its future value. In fact, certain companies like MicroStrategy (\$MSTR) have invested so heavily in Bitcoin that people are buying that stock as a proxy for directly investing in Bitcoin, thus essentially turning MicroStrategy into a Bitcoin mutual fund. Tesla (\$TSLA) has invested heavily as well, recently reporting \$100 million dollars, or nearly a quarter of its profits directly attributable to their purchase and sale of Bitcoin. The market capitalization of Bitcoin is over \$1 trillion dollars, so it's not going away anytime soon, regardless of definition or regulation.

Even though Bitcoin shares some attributes with cash, credit cards, and stocks, it is also completely unique, like nothing before it. Bitcoin can be "mined" by individuals or corporations, who essentially do the work of the peer-to-peer network by solving cryptography problems in exchange for bitcoins (or fractions of bitcoins). Also unique to Bitcoin is the online ledger, which makes the details of each and every Bitcoin transaction available to anyone, anytime, anywhere. In fact, anyone can watch transactions happening live at <https://www.blockchain.com/explorer>. Bitcoin can be stored in networked wallets, with Coinbase being the largest wallet provider, or offline in a printed paper wallet (that if lost, is irretrievably gone).

Now that we know what Bitcoin is, and why it has value, where is criminal defense counsel likely to see Bitcoin in criminal defense cases? Bitcoin is involved in crimes from the extremely low-tech, to the extremely high-tech, and everywhere in between. Bitcoin robberies are occurring in all major cities, and are spreading to rural areas as well. Those who wish to buy or sell Bitcoins can do so from 3rd parties, but those are treated like money service businesses (MSB's) for the purposes of regulation, and those 3rd parties now perform due diligence on their customers, similar to opening a bank account. Thus, if someone wants to buy Bitcoin with cash, they can reach out to those individuals who wish to sell Bitcoin, via websites which match buyers and sellers, who set their own exchange rate. The most popular of these services is <https://localbitcoins.com/buy-bitcoins-online/us/>

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[united-states/cash-deposit/](https://www.fbi.gov/newsroom/speeches/2018/08/20180821-cash-deposit). The problem with carrying large amounts of cash to meet a stranger is, or should be, obvious, and it's no surprise that sometime those buyers instead become robbery victims, losing their cash, and sometimes their bitcoin, as well.

Bitcoin has also been used to buy and sell illegal drugs, child pornography, murder-for-hire, and has been a preferred medium of exchange for alleged criminals via Dark Web websites like the Silk Road. Some of these crimes are identified via software and research of the public ledger, but most are solved due to the intersection between Bitcoin in the virtual world and the physical world. Drugs can be bought via the Dark Web with Bitcoin, but the drugs have to be physically shipped and delivered to customers in the real world. Once law enforcement discovers the FedEx account used for the drug deliveries, all the customer's and seller's information become readily accessible to investigators, in one convenient place.

Bitcoin is pseudonymous, which is to say it is almost but not quite anonymous. Bitcoin physically touches the real-world individual and their identity via email, credit card transactions, shipment of goods, and delivery of services. Very few alleged criminals have the discipline to keep their Bitcoin transactions completely anonymous,

and it inevitably can be traced back to them. Even one single usage in the real world irrevocably links the individual to the public blockchain, where all their other transactions become traceable to each other, and to that individual. Federal agencies have technology and consultants who are quite adept at tracing Bitcoin ownership and usage to individuals, as well as having the ability to determine which users are US citizens. This ability becomes important in tax cases involving Bitcoin.

The IRS has served a series of John Doe Summons on the largest wallet holding companies, and has done so for several years in a row. Thus, the IRS now knows the identity and value held by many, if not most, US citizens who have Bitcoin valued at over \$20,000. The IRS recently sent "soft" letters to individual taxpayers who were identified in the summons. The letter suggests that the taxpayer might want to restate their taxes for prior years, since they evidently forgot to mention the Bitcoin. Anyone receiving that letter who failed to restate their taxes to include taxable Bitcoin transactions should anticipate hearing from the IRS in the near future, and should plan on seeing that letter as an exhibit at trial.

Software, consultants, and John Doe summonses aside, many Bitcoin cases involve more old-school investigation than anyone in law enforcement might wish to admit. The operator of the Silk Road drug website

was only successfully prosecuted because while he sat in a public library using the internet, one FBI agent distracted him and another agent literally grabbed his computer off the table and ran away with it, while it was open and turned on. Bitcoin frequently becomes involved in a criminal defense case as an artifact of an investigation into real world crime, rather than being the starting point for an investigation. The Silk Road case is *USA v. Ross William Ulbicht aka: Dread Pirate Roberts* (Southern District of NY 14-CR-68 (KBF) July 9, 2014).

A few lawyers accept Bitcoin for payment of services in a flat-fee case or for services already rendered; but even fewer will consider accepting Bitcoin into a retainer account. Dealing with bitcoins and IOLTA accounting is problematic, at best. There are also concerns that Bitcoin paid to defense attorneys will be clawed-back by the government if the Bitcoin is determined to be the proceeds of ill-gotten gain. As with all payments where claw-back is a concern, attorneys should consider getting assurance that the prosecutor has no plans to go after fees, or have a forensic accountant evaluate the funds as legitimate source income prior to accepting them.

Bitcoin isn't difficult to understand or use, as we have seen. However, criminal defense counsel may find it helpful to hire a consulting or testifying expert in Bitcoin cases, to help counsel with the understanding of the case or to assist the defense team in educating the judge and jury about Bitcoin. Bitcoin has a stigma in the minds of some jurors and judges, and an expert may be able to help to dispel that notion. Ultimately, Bitcoin is just another currency, and its involvement in a criminal defense cases is not that much different than any other currency allegedly involved in a crime.



Beth A. Mohr is Managing Partner of *The McHard Firm*, a firm dedicated to expert testimony, forensic accounting, investigations, and professional education. She can be reached at bmohr@TheMcHardFirm.com.

TCDLA STRIKE FORCE



...here to protect the defense function by assisting attorneys under attack for their role defending the accused.

Strike Force is in place to help all criminal defense attorneys who are appropriately representing their clients and who, as a result, find themselves under attack. Examples of circumstances where aid may be provided by Strike Force include threats of contempt of court or other sanctions or threats of sanction which may hinder the criminal defense attorney in fairly representing their client.

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TCDLA TEXAS PUNISHMENT

This manual facilitates a rapid review of the consequences beyond those of the Penal Code or the Code of Criminal Procedure which our clients will face if they are convicted or adjudicated. This manual wasn't updated after the 86th Legislature so the new material covers twice the legislation and common law of other volumes. Nobody can do without this manual!

Member Rate: \$80
Non Member Rate: \$180

By: Keith Hampton & Philip Wischkaemper
Updated 2022, By: Rick Wardroup





Shout-Outs!



Michael P. Heiskell grew up in the small central Texas community of Pelham. Formerly known as Forks of the Creek, Pelham was settled by ex-slaves in 1866 and had an estimated population of 75 families in the 1950s. He is a proud “Double Bear,” graduating from Baylor University in 1972 and Baylor Law in 1974. When he arrived at Baylor in the late sixties, he was one of just five Black students on campus. By the time he finished his undergraduate degree in 1972, that number had grown to nearly 100—largely due to his efforts. During his time at Baylor, Michael was the first president of Agiza Funika (“Blacks Involved,” in Swahili), a social-service club designed to give African-American students a social outlet while helping them become more deeply involved in campus and community life. Michael was also president of the political science club Pi Sigma Alpha, the Phi Alpha Delta Pre Law Society, and a member of both Baylor’s Student Foundation and Omicron Delta Kappa, a national leadership honor society.



Robert C. Hinton (left), Michael P. Heiskell (middle), and Ronald L. Goranson (right) at Baylor Lawyer of the Year Luncheon
Photo Courtesy of Nick Teixeira, Baylor Law

Following his graduation from Baylor, Heiskell enrolled at Baylor Law in 1972, was an active member of the Student Bar Association, and became the law school’s first Black graduate in 1974. Michael has remained an active Baylor alumnus and currently serves on the Baylor University Board of Regents.

“Michael exemplifies every quality of a Baylor Lawyer. He is a fierce yet compassionate advocate for his clients and has an unwavering dedication to improving the quality of our justice system while maintaining the highest ideals of the legal profession,” stated Baylor Law Dean Brad Toben. “He is an outstanding lawyer and a truly authentic person. His career and life bear testimony to his richly deserving this honor.”

Michael was one of the three founding partners of Johnson, Vaughn & Heiskell. He now serves as the firm’s senior attorney. Before founding the firm in 1984, he served as an Assistant District Attorney for Galveston County from 1975 to 1980, and as an Assistant United States Attorney in the Northern District of Texas from 1980 to 1984.

A big round of applause for **E.G “Gerry” Morris**, of Austin, TX. He received the *Robert C. Heeney Memorial Award* from the National Association of Criminal Defense Lawyers (NACDL) at the Association’s annual meeting in Palm Beach, FL on August 13. The *Robert C. Heeney Memorial Award* is given annually to the criminal defense attorney who best exemplifies the goals and values of the Association and the legal profession. **Congratulations, Gerry!**

Kudos to **Allen Ross** of Rusk, TX and **Jeff Herrington** of Palestine, TX. They received a NOT GUILTY on Capital and lesser included Murder. This case previously ended in a mistrial when evidence was not properly disclosed by the Sheriff’s Office. The State’s only evidence was an alleged confession of the then 17-year-old, in Sheriff’s custody. The Defense attacked this confession as involuntary and pointed out potential culprit for the murder. The client was 17 years old when he entered the jail, and 21 years old when he walked out with an acquittal thanks to Allen and Jeff. **Outstanding job!**

Shout Out to **Mitch Adams** who won his burglary of a building case in the 4th District Court. This case also ended in a mistrial because Mitch’s client was hospitalized. The State’s only piece of evidence was a traffic citation left in a car that was the alleged getaway vehicle. The citation listed demographic details contrary to an eyewitness’s description of the female suspect. Mitch pointed out the discrepancies and won the day for his client. **Great job, Mitch!**

Amazing work by attorney **Beverly Melontree**, who won her Assault Causing Bodily Injury juvenile case in CCL3. This was a bench trial in front of the County Court at Law No. 3 Judge Getz. Victories in front of that Court are very seldom, so she was advised not to move forward in this manner. They were proven wrong when the Judge found the assault not true and stated Beverly had proven self-defense for her juvenile client. **Tremendous work, Beverly!**

Congrats to **Joseph Esparza**, who won a general court martial for an USAF NCO client accused of multiple sex offenses, rape, sexual assault, and an assault and battery involving two alleged victims at JBSA Lackland in San Antonio. He prepped the case hard and was able to show in cross examination that both alleged victims had their own reasons to fabricate their claims against his client and that, further, they colluded to bring their accusations against his client. Client testified in his own defense and multiple character witnesses testified after him as to his excellent character for truthfulness. The verdict after a 4 day trial was NOT GUILTY on all charges. **Amazing work!**

Pat on the back to **Mark Griffith** for a Not Guilty charge Client was arrested for DWI and blood test procured that came back over the limit. At the scene, officers were made aware that client was on the Autism Spectrum but ignored the fact that he had a neurological disability on the scene and in their testimony. Expert for defense described behavioral and mental issues that can appear due to being on the spectrum. The defense empowered the jury to stop

Shout-Outs!

disregarding disabilities. The verdict was the beautiful two words. **Way to go!**

Shout Out to **Dean Watts** for a case dismissal by reason of insanity for a felony evading case in Nacogdoches. Accomplished after 2 years and countless hours of hard work. **Fantastic job!**

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Staff Highlights: *The New Voice Behind the Voice*

Alicia Thomas



Title: Communications Coordinator **Native State:** South Dakota
Zodiac Sign: Leo **Favorite Color:** Teal **Loves:** Crafting & Exploring

Alicia Thomas started with TCDLA in March of 2021 as the Media Specialist and has recently been promoted to Communications Coordinator. In her time at TCDLA she has gotten to know many of the members and enjoyed working with the staff. Before TCDLA, Alicia has had a variety of jobs ranging from working at an ice cream shop to customer service in IT. She graduated from South Dakota State University with a BFA in Graphic Design in May of 2020. In June of the same year, she and her high school sweetheart, David, got married, packed up, and moved to Texas. In her free time, Alicia can be found doing a variety of graphic design projects, playing with her dogs, crafting, or watching The Office.

Tim Evans Texas Criminal Trial College Registration • March 26-31, 2023**Completed Applications must be received by 5:00 pm on Dec 20th**☐ Male ☐ Female Bar Number: _____ Name: _____

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Type of practice and years in practice (general description): _____

Other Training or Experience:

Law school: _____ Date graduated: _____

Other trial training courses taken: _____

Former Prosecutor: ☐ Yes ☐ No

If yes, how long, when did you leave, and what experience did you have?: _____

Public defender: ☐ Yes ☐ No

If yes, what office?: _____



The Case to Repeal § 12.42(f) of the Texas Penal Code

WARREN WOLF

I first became acquainted with §12.42(f) of the Texas Penal Code¹ when I reviewed an indictment with a repeat offender paragraph. As I read the repeater paragraph, I could not believe the State could enhance an adult charge by using a juvenile case. I went to the code and saw this provision became effective January 1, 1996. Why should this law be permitted to exist?

Juvenile law is rooted in civil law. The Texas Juvenile Justice Code is found in Title 3 of the Texas Family Code. Despite its civil roots, due process protections have been extended to juveniles by the United States Supreme Court over the years. In *Kent*, the Supreme Court determined that children in juvenile proceedings “should not be denied procedural rights given to adult criminal defendants merely because juvenile proceedings are characterized as civil.” *Hidalgo v. State*, 983 S.W.2d 746, 750 (Tex. Crim. App. 1999) (quoting *Kent v. United States*, 383 U.S. 541 (1966)).

Furthermore, in *In re Gault*, 387 U.S. 1 (1967), the Supreme Court held that the Fourteenth Amendment’s Due Process clause applied to juvenile proceedings “entitling children to notice of charges, defense counsel, the privilege against self-incrimination, confrontation of

and cross examination of witnesses.” *Hidalgo* at 750–51 (quoting *In re Gault* at 49); see also *In re Gault* at 13 (“[N] either the Fourteenth Amendment nor the Bill of Rights is for adults alone.”).

The Supreme Court has also determined that, as opposed to adults, children under eighteen (18) years of age lack maturity, have “an underdeveloped sense of responsibility,” and are “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.” *Roper v. Simmons*, 543 U.S. 551, 569 (2005).. In the *Roper* majority opinion, Justice Kennedy further noted that “[t]hese qualities often result in impetuous and ill-considered actions and decisions” by a child. *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). Moreover, the Court explained that children “have less control, or less experience with control, over their own environment” and their character is not as well formed as that of an adult. *Id.* Their personality traits are “more transitory, less fixed.” *Id.* at 570. Based on these differences, the Court found suspect any conclusion that a child falls among the worst offenders because a child’s “irresponsible conduct is [simply] not as morally reprehensible as that of an adult.” *Id.* at 570; see also *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (“[T]he Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult . . . [i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of . . . her conduct while at the same time . . . she is much more apt to be motivated by mere motion or peer pressure than as an adult.”).

1 TEX. PENAL CODE § 12.42 (f) reads as follows:

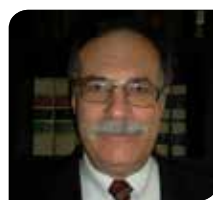
(f) For the purposes of Subsections (a), (b), and (c)(1), an adjudication by a juvenile court under Section 54.03, Family Code, that a child engaged in delinquent conduct on or after January 1, 1996, constituting a felony offense for which the child is committed to the Texas Juvenile Justice Department under Section 54.04 (d) (2), (d)(3), or (m), Family Code, or Section 54.05(f), Family Code, or to a post-adjudication secure correctional facility under Section 54.04011, Family Code, is a final felony conviction.

Furthermore, because proceedings in juvenile court are *quasi-criminal* in nature, they are subject to numerous due process restrictions mirroring those at play in an adult criminal trial. *In re A.J.S.*, 442 S.W.3d 562, 565 (Tex. App.—EI Paso 2014, no pet.); *see also In re M.A.F.*, 966 S.W.2d 448, 450 (Tex. 1998); *Smith v. Rankin*, 661 S.W.2d 152, 153 (Tex. App.—Houston [1st Dist.] 1983). A child “is guaranteed the same constitutional rights as an adult in a criminal proceeding because a juvenile-delinquency proceeding seeks to deprive [him] of his liberty.” *State v. C.J.F.*, 183 S.W.3d 841, 847 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); *see also Matter Of, M.S.*, 940 S.W.2d 789, 790 (Tex. App.—Austin 1997) (“A juvenile proceeding, which may deprive a child of his liberty for a number of years, is comparable in seriousness to a criminal prosecution . . . [F]or that reason, many of the due process protections applicable to criminal proceedings apply also to juvenile proceedings, such as the right to appeal and the right to assistance of counsel.”); *see, e.g., Tex. Fam. Code* §§ 51.10, 56.01.

Texas courts have also recognized that children are different from adult criminal defendants and warrant additional protections. *See In re Hall*, 286 S.W.3d 925, 927 (Tex. 2009) (“The Legislature enacted the Juvenile Justice Code as a separate system for the prosecution, adjudication, sentencing, and detention of juvenile offenders to protect the public and provide for the wholesome moral, mental, and physical development of delinquent children. This separate system often provides enhanced procedural protections to juvenile offenders, who, because of youth, ordinarily lack the mental and emotional maturity needed to . . . maintain an adequate defense.”); *Henderson v. State*, 962 S.W.2d 544, 562 (Tex. Crim. App. 1997) (“[The] state has a legitimate, and in fact compelling, interest in protecting the well-being of its children . . . Children are deemed to warrant protection because of their inexperience, lack of social and intellectual development, innocence, and vulnerability.”); *Lanes v. State*, 767 S.W.2d 789, 791–800 (Tex. Crim. App. 1989) (providing historical discussion of juvenile justice policy and noting “rehabilitation and child protection remain as the pervasive and uniform themes of the Texas juvenile system”); *In re S.G.R.*, 496 S.W.3d 235, 238 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (“Children ordinarily are not subject to criminal proceedings like adults.”); *Matter of J.G.*, 905 S.W.2d 676, 680 (Tex. App.—Texarkana 1995), writ denied, 916 S.W.2d 949 (Tex. 1995) (“[A] juvenile is not similarly situated to an adult . . . [T]he juvenile justice system is arranged with a special emphasis on the welfare of the child . . .”); *Matter of E.Q.*, 839 S.W.2d 144, 145–146 (Tex. App.—Austin 1992, no writ) (“The [S]tate has an interest in providing for the care, protection, and

development of its children . . . The civil juvenile justice system was established in part to insulate minors from the harshness of criminal prosecutions, to promote rehabilitation over punishment, and to eliminate the taint of criminal conviction after incarceration by characterizing such actions as delinquent rather than criminal.”); *see also Tex. Fam. Code* § 51.01 (establishing purposes of Texas’ Juvenile Justice Code, including “provid[ing] treatment, training, and rehabilitation that emphasizes the accountability and responsibility of both the parent and the child for the child’s conduct” and “provid[ing] for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions”). Thus, “[t]he transfer of a [child] from juvenile court to criminal court for prosecution as an adult should be regarded as the exception, not the rule; the operative principle is that, whenever feasible, children and adolescents below a certain age should be protected and rehabilitated rather than subjected to the harshness of the criminal system[.]” *Moon v. State*, 451 S.W.3d 28, 36 (Tex. Crim. App. 2014) (overruled by *Ex parte Thomas*, 623 S.W.3d 370 (Tex. Crim. App. 2021), reh’g denied (June 23, 2021)); *see also Lanes* at 796 (“The Texas juvenile system . . . seeks to avoid the taint of criminality in order to prevent recidivism and promote rehabilitation. The best method of avoiding attachment of a criminal taint is keeping the child completely out of the [criminal] system.”).

If we want to keep children out of the criminal justice system, why do we use a juvenile restorative process at Texas Juvenile Justice Department [TJJD] as an adult punishment factor? As a matter of course, I never agree to send a child to TJJD because of this unspoken collateral consequence. If the legislature truly believes that its juvenile system should not be attached to the criminal system, then § 12.42(f) of the Texas Penal Code should be repealed.



Warren Wolf earned his juris doctorate from St. Mary’s University in 1975. He’s been a member of TCDLA since 1983, and served as a board member from 2005 to 2013. He is a member of the TCDLA juvenile, mental health, and memo bank committees. Wolf is also a member of the San Antonio Criminal Defense Lawyers Association, where he served as president in 2015.



How Incarceration Affects Eligibility for VA Disability Benefits and Using the Information in Sentencing

COLONEL (RETIRED) RICK ROUSSEAU,
CRISS & ROUSSEAU LAW FIRM

“The Bureau of Justice Statistics reports there are approximately 107,400 Veterans in state or federal prison. Following release, these Veterans are at increased risk of homelessness, suicide and death by drug overdose – that’s why it’s vital to reconnect Veterans to VA (“Veteran’s Affairs”) care and benefits to which they are entitled, post-incarceration.”¹

Almost all criminal defense attorneys represent clients that are Veterans, but many are not familiar with the potential impact of criminal convictions on U.S. Department of Veterans Affairs (VA) benefits. In addition, many criminal defense attorneys have not considered how to present the impact of some criminal convictions on a Veteran’s VA benefits to assist the court in deciding on an appropriate sentence. Finally, many criminal defense attorneys have wanted to obtain copies of their client’s military service records or VA records but

did not know how to go about getting the records. The purpose of this article is to provide a brief primer on assisting a Veteran client facing these issues.

Many Veterans are receiving some type of benefits from the VA. These benefits can include VA disability compensation for service-connected conditions, pension for non-service-connected conditions, educational benefits, and health care benefits. This article primarily focuses on VA disability compensation and pension for non-service-connected conditions, and to a lesser extent on educational benefits.

VA service-connected disability compensation is a monthly monetary benefit for Veterans with a current medical condition that is “at least as likely as not” linked to their military service.² It is not “means tested” (the income of the Veteran does not matter). For 2022, it can range from \$152 a month for a 10% rating to \$3,456 per

¹ U.S. Department of Veterans Affairs News Release, *VA ingenuity afford formerly incarcerated Veterans valuable resources for rehabilitation*, April 6, 2022, found at <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5780>.

² 38 U.S.C. § 101(2), 1110, 1131. <https://www.va.gov/disability/>.

month for a 100% rating.³ Additional amounts may be paid monthly for spouses, children, disabled children, and for various special monthly compensation issues that may apply to the Veteran.⁴

Some Veterans may qualify for non-service-connected pension, which is a monthly benefit for low-income wartime Veterans who are totally and permanently disabled or elderly.⁵ The term “VA pension” benefits are not retirement benefits, but a needs based program for Veterans with war-time service who are either totally disabled or over age 65. Non-service-connected pension is means-tested. The rates are based on the difference between the Veteran’s countable income and a rate set by Congress.⁶

VA disability compensation payments are limited if a Veteran is convicted of a felony *and* imprisoned for more than 60 days.⁷ A felony is defined as “any offense punishable by death or imprisonment for a term exceeding one year, unless specifically categorized as a misdemeanor under the law of the prosecuting jurisdiction.”⁸ The VA General Counsel has opined that a felony conviction resulting in a sentence of “community control with conditions” does not amount to “incarceration.”⁹ The sixty-first day is determined as sixty-one days after guilt is pronounced by a judge or jury *and* the Veteran is incarcerated in a penal institution because of the determination of guilt.¹⁰

The limit on the payment of VA disability compensation benefits to a Veteran that is incarcerated does not actually lower the Veteran’s service-connected disability rating level. It is only the amount of the monthly disability compensation payment to the Veteran that changes. If a Veteran is convicted of a felony *and* imprisoned for more than 60 days, and the Veteran is rated 20% or more by the VA they are limited to receiving a 10% disability payment instead of their actual awarded disability compensation rating. Veterans whose disability rating is 10% receive a reduction by one-half. For example, if a Veteran is receiving a 100% VA disability compensation rating (\$3,456 per month) is convicted of a felony *and* imprisoned for more than 60 days, his VA disability

3 38 U.S.C. §1114; See also <https://www.va.gov/disability/compensation-rates/veteran-rates/>.

4 38 U.S.C. § 1114, 1115, 1135 <https://www.va.gov/disability/compensation-rates/special-monthly-compensation-rates/>.

5 38 C.F.R. § 3.271, 3.272, and 3.275; See also <https://www.va.gov/pension/eligibility/>.

6 38 C.F.R. § 3.271, 3.272, and 3.275; See also <https://www.va.gov/pension/veterans-pension-rates/>.

7 38 U.S.C. § 5313; also see <https://www.benefits.va.gov/persona/veteran-incarcerated.asp>.

8 38 C.F.R. § 3.665(b).

9 VA. Gen. Coun. Prec. 59-91 (June 24, 1991).

10 VA. Gen. Coun. Prec. 3-2005 (February 23, 2005).



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compensation would be limited to 10% (\$152 per month) on the 61st day in confinement. For that Veteran, each twelve months of confinement after the 61st day of confinement following a felony conviction would result in a loss of VA disability compensation of \$39,648 (\$3,456 per month for 100% - \$152 for 10% = \$3,304 x 12 months = \$39,648 per 12 months). If the court is considering an appropriate sentence, the potential loss of VA disability compensation benefits to the Veteran and his family should be factored into the sentencing equation. The Veteran and their family will suffer a significant financial loss if the Veteran is convicted of felony and sentenced to more than 60 days in jail. In our example, the Veteran and his family would have financial loss of VA disability compensation benefits that would be almost \$40,000 per year.

After a Veteran is released from prison, disability compensation payments may be reinstated based on the severity of the service-connected disabilities at the time. Also, VA disability compensation payments are not reduced for Veterans participating in work release programs, residing in halfway house (including residential re-entry centers), or under community control. These types of alternative sentences should be proposed by the defense attorney and considered by the court to

enable the Veteran to serve their sentence but also for the Veteran and their family to continue to receive VA disability compensation.

Veterans should be made aware that if they fail to notify the VA of their incarceration beyond 60 days, not only will the VA eventually stop the payment of VA disability compensation but will commence to recoup the overpayment.¹¹

The rules for VA non-service-connected pension are slightly different. Unlike disability compensation, the VA completely halts or stops VA pension payments to incarcerated Veterans.¹² VA pension benefits are stopped for any type of conviction (felony or misdemeanor) that results in incarceration.¹³ Veterans receiving VA pension will have pension payments terminated on the 61st day after imprisonment for any type of conviction.

The VA does have a process where all or part of these VA *disability compensation* benefits that are not paid to an incarcerated Veteran may be apportioned to a Veteran's spouse, children, or dependent parents based upon their need.¹⁴ Likewise for *pension benefits*, those benefits may be apportioned to family members.¹⁵ VA apportionment is not automatic. Like most VA benefits, the Veteran and their family must apply for the benefit on VA Form 21-0788.¹⁶

Incarceration also impacts the ability to receive some VA educational benefits. Veterans that are incarcerated for convictions that are not felonies can receive their full monthly VA educational benefits for which they would normally be entitled. Veterans that are convicted of a felony, but residing in a halfway house, residential re-entry center, or participating in work-release program can also receive the full VA educational benefits for which they would normally be entitled to receive. Veterans that are incarcerated for a felony conviction cannot receive the monthly VA educational living subsistence allowance but can be paid by the VA for the costs of tuition, fees, books, and supplies if they are not receiving payment for these items from another Federal, state, or local program.¹⁷

When a Veteran is facing sentencing, it is important to make the court aware of the potential benefits that could be lost from a conviction *and* confinement over 60 days. For these Veterans, a sentencing case may be crafted to present information and evidence to the court on the impact of certain sentences on VA benefits. In

preparing for sentencing, the Defense Attorney should obtain various documents from the Veteran that will be helpful to present to the court. This includes a copy of the Veteran's discharge paperwork, known as a DD214.¹⁸ The Veteran can download a VA Benefit Summary Letter. This is also called a VA award letter which shows the Veteran's VA disability rating and the amount they are receiving each month from the VA.¹⁹ Current VA disability compensation rates can be found online and be used to show the court the difference in the Veteran's benefit if he was limited to a 10% rating due to confinement beyond 60 days.²⁰ The VA provides a Fact Sheet on incarcerated Veterans that can be used to explain to the court the impact of a conviction and confinement over 60 days.²¹ In summary, present evidence and educate the court on the financial impact on the Veteran per month or per year based upon the loss of VA disability compensation or pension. A sentence of ten years or more could result in almost half a million dollars in lost VA benefits. If possible, argue for a sentence that is less than 60 days confinement or includes work release to allow the Veteran and their family to continue to receive VA benefits at their regular scheduled rate.

Within the past year, the U.S. Court of Appeals for the Federal Circuit addressed the issue of whether a Veteran being held in a State Hospital was in confinement for purposes of 38 U.S.C. § 5313(c), which limits the payment of VA disability compensation to persons that are incarcerated for a conviction of a felony. In *Philbrook v. McDonough*, F.3d, No. 2020-2233 (October 8, 2021)²², the Veteran was remanded to the custody of the Oregon State Hospital. Initially, the VA, the Board of Veterans Appeals, and the Court of Appeals for Veterans Claims found that the Veteran was "incarcerated" in a "correctional facility" per the statutory language prohibiting an award of VA disability compensation. The Federal Circuit held that the plain language of 38 U.S.C. § 5313(c) did not apply to the Veteran's confinement in a "mental institution". It held the Veteran was not confined to a "penal institutional or correctional facility." The court held that a "correctional facility" cannot encompass a hospital that treats civil patients, and a hospital cannot be a correctional facility for some patients and not others. The Court held that the Veteran was not barred

11 38 U.S.C. § 5314.

12 38 U.S.C. § 1505(a); 38 C.F.R. § 3.66.

13 38 C.F.R. § 3.66.

14 38 U.S.C. § 5313(b); 38 C.F.R. § 3.665(e).

15 38 U.S.C. § 1505(b); 38 C.F.R. § 3.666.

16 <https://www.va.gov/find-forms/about-form-21-0788/>.

17 38 C.F.R. § 21.276

18 <https://www.archives.gov/personnel-records-center/dd-214>.

19 <https://www.va.gov/records/download-va-letters/>.

20 <https://www.va.gov/records/download-va-letters/>.

21 <https://www.va.gov/HOMELESS/nchav/resources/docs/justice-involved/incarcerated/incarcerated-VBA-fact-sheet.pdf>.

22 <https://www.govinfo.gov/content/pkg/USCOURTS-ca13-20-02233/pdf/USCOURTS-ca13-20-02233-0.pdf>.

from receiving VA disability compensation.

In representing a Veteran, it is often helpful to obtain various documents about their military service, military service treatment records, VA medical records, and VA claims records. Below are some useful links to obtain these documents.

The Veteran's Official Military Personnel File can be requested online at <https://www.archives.gov/veterans/military-service-records> or by submitting a Standard Form 180 to the National Personnel Records Center.²³

The Veteran's military service treatment records can be obtained by submitting a DD Form 2870 to the military treatment facility that provided the medical services.²⁴ If the Veteran received Alcohol and Drug Treatment you need to specifically request those records. Each service has a separate form for those specific records. For the Army, it is DA Form 5018-R.²⁵

The Veteran's VA medical records can be obtained from each VA Medical Center seen by the Veteran at no cost, usually within a few weeks. If the Veteran was seen by various VA medical centers, a request needs to be submitted to each one. The records can be requested by the Veteran, or the attorney can request with written consent of the Veteran. The Veteran can request his own records by using VA Form 10-5345a.²⁶ The Veteran's attorney can request the medical records with the Veteran's consent using VA Form 10-5345.²⁷

The Veteran's complete VA Claims File can be obtained by using VA Form 3288.²⁸ However, be aware that due to shutdowns during COVID-19, requests for VA Claims Files were backlogged. If the VA Claims File is needed, submit the request as soon as possible.

Finally, when requesting records from the military services and the VA, be aware that they will not recognize a state court subpoena unless it is signed by a Judge. As a general rule, the military services and the VA will not produce employee witnesses or experts unless the subpoena has been processed through the VA Office of General Counsel.²⁹ However, the VA can provide business records affidavit if requested for VA medical records.

In conclusion, by being familiar with the basic rules that impact VA benefits, the Defense Attorney can properly advise their client about the potential impact of a criminal conviction on those benefits. By factoring in the potential impact of a criminal conviction on VA benefits and presenting the information to the court during sentencing, the Defense Attorney can possibly obtain a more favorable sentencing result for the Veteran.

Colonel (Retired) Rick Rousseau is a partner in the *Criss & Rousseau Law Firm*. He served on active duty for 27 years as a U.S. Army Judge Advocate until his retirement in 2015. Rick served in various positions while on active duty, including twice as a Staff Judge Advocate (Senior Legal Advisor) for Fort Hood, Regional Defense Counsel,

prosecutor, Special Assistant U.S. Attorney, and legal assistance attorney. He was a full-time law professor at The Judge Advocate General's (JAG) School in Charlottesville, Virginia, where he taught veterans & survivor benefits. He deployed three times as part of Operation Iraqi Freedom and Operation Enduring Freedom. Today, the focus of his practice is VA disability appeals and he is VA accredited attorney. He can be reached at rick.rousseau@crissrousseau.com or 254-699-9999.



²³ <https://www.archives.gov/personnel-records-center/military-personnel/ompf-archival-requests>.

²⁴ <https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd2870.pdf>.

²⁵ https://armypubs.army.mil/ProductMaps/PubForm/Details.aspx?PUB_ID=50264

²⁶ <https://www.va.gov/find-forms/about-form-10-5345a/>

²⁷ <https://www.va.gov/find-forms/about-form-10-5345/>.

²⁸ <https://www.va.gov/find-forms/about-form-3288/>.

²⁹ See link for contact information for VA OGC: <https://www.va.gov/OGC/DistrictOffices.asp>.

Course Directors: Don Flanary & Justin Kiechler

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Significant Decisions Report

KYLE THERRIAN

I've begun giving a significant decisions CLE presented in interactive trivia fashion using a program called Slido. It's about as much fun you can have with case law (outside of reading the SDR, of course). It's been an eye-opening exercise of how unpredictable our case law outcomes can be, even to well-trained lawyers. Answers often evenly split among multiple choice options on how courts ruled on a particular issue. I think it is an indictment of the common law aspects of our criminal justice system. Perhaps it's not living up to lofty ideals. Let's try one here: how many days in a year? I highly doubt you will get this one right. Keep reading to get mad.

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 significant or published opinions since the last Significant Decisions Report. See my comment above.

Fifth Circuit

[U.S. v. Harbarger, 46 F.4th --- \(5th Cir. 2022\)](#)

Issue & Answer. Is a 7.5-inch piece of bamboo with a fuse that is designed to blow up beaver dams an illegal explosive device? **No.**

Facts. Defendant possessed a 7.5-inch piece of bamboo with a short fuse that apparently explodes when lit. It is used to help him remove beaver dams. The U.S. Attorney for the Eastern District of Texas indicted him for having an explosive device. After the Government proved these facts together with conclusory statements that the device has no commercial application, the defendant moved for a judgment of acquittal. The trial court denied the defendant's motion.

Analysis. The National Firearms Act prohibits the possession of an unregistered firearm. This includes a destructive device, defined as "any explosive, incendiary, or poison gas . . . bomb." However, excluded from this definition is "any device which is neither designed nor redesigned for use as a weapon." When there is doubt whether the device has some social value and legal use, there must be proof of scienter (defendant's intent or knowledge) or proof the device can only be used for illegal purposes in order to sustain a conviction.

Comment. I mean why are we going after the beaver dam guy? I have clients in EDTX being shipped to northern Oklahoma for jailing. If holding beaver dam guy locally is the reason . . .

Texas Court of Criminal Appeals

[Haskell v. State, No. AP-77,091 \(Tex. Crim. App. 2022\)](#)

Issue & Answer. A party who loses a motion to suppress is entitled to findings of fact upon request. When a party makes a request but fails to inform the trial judge his findings were overdue, has the party forfeited this

right? Sort of. It's a failure to preserve error rather than forfeiture.

Facts. The State secured a sentence to kill the defendant. The defendant lost his suppression hearing and requested findings of fact. Two months after his request the trial court sentenced the defendant without making the requested findings. Five months later the trial judge lost his primary election. Ten months later the trial judge left the bench. Appellate counsel (presumably appointed after sentencing) took no steps to secure findings until after the trial judge left the bench.

Analysis. The case providing for remand upon a trial judge's failure to issue requested findings of fact and conclusions of law is *State v. Cullen*, 195 S.W.3d 696 (Tex. Crim. App. 2006). *Cullen* turns on a civil rule. The civil rule requires a party requesting findings to notify a trial judge that the findings were past due within ten days after they were due. "But we need not adopt and apply the balance of that civil rule today and hold that the *Cullen* request here has been forfeited. More basic principles of error preservation come into play." When a judge makes a favorable ruling, a party must object when that ruling is not enforced. Here the trial judge's agreement to issue findings was a favorable ruling and the defendant needed to object when the trial judge did not issue them.

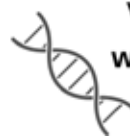
Comment. More judge protection rules in a system supposedly designed to strike a balance between the interests of society and the interests of individuals. Someone tell Thomas Hobbes and Jean-Jacques Rousseau they had the social contract all wrong; they forgot about the judges.

[Ex parte Richardson, No. PD-0284-21 \(Tex. Crim. App. 2022\)](#)

Issue & Answer. A jury could have convicted a defendant of murder under a theory of party liability but didn't. The facts established that the defendant's associate opened fire on Victim 1 and Victim 2 at two different locations. Victim 1 died but the evidence did not show which shooting caused the result. After a jury acquitted the defendant of all offenses relating to Victim 1, was the State collaterally estopped (under double jeopardy) from

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prosecuting the defendant for aggravated assault upon Victim 2? **No.**

Facts. Defendant and a guy named Polk met with two guys at a gas station to sell them a gun (Victim 1 and Victim 2). Unbeknownst to Victim 1 and Victim 2, Defendant and Polk had sold the gun to another buyer before arriving at the gas station. Polk converted the meeting into an armed robbery. It was unclear whether the defendant knew Polk planned to rob the victims, but the defendant did hand Polk a gun before the two got into the backseat of the victims' car. After successfully taking the victims' money, Polk shot Victim 1 through the back. The defendant freaked out and ultimately offered to have the victims follow him to the nearest hospital. Trial testimony provided some indication that Victim 1 had died before the group departed for the hospital. All the same, they never made it. The defendant slowed his vehicle down somewhere in a residential area and Polk opened fire on the victims' vehicle. Victim 1 received another bullet wound through the head and thigh. First responders found Victim 1 deceased upon arrival and took Victim 2 to the hospital where he eventually recovered from Polk's gunfire. The State charged the defendant

and Polk with capital murder (of Victim 1), murder (of Victim 1), and aggravated robbery (of Victim 1). A jury convicted Polk of capital murder but acquitted the defendant on all three charges (as a principal and as a party). After trial the State charged the defendant with aggravated robbery and aggravated assault of Victim 2. The defendant filed a pretrial writ of habeas corpus challenging the later prosecution on collateral estoppel double jeopardy grounds. The court of appeals reversed and held that “because [Victim 1] received fatal gunshot wounds during both shootings, to acquit, the jury must have found that Appellant was neither the shooter nor a party to either of the shootings.” In other words, the defendant argues that the jury necessarily found that he was merely present for all shootings.

Analysis. Protection against double jeopardy includes collateral estoppel. “[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” The court “must first determine whether the jury determined a specific fact, and if so, how broad—in terms of time, space and content—was the scope of its finding.” Because jury verdicts are general, the court must examine the pleadings, evidence, charge and other relevant matter.” If the record reveals a possibility that the jury based its verdict on an issue other than what the defendant seeks to foreclose from consideration, there is no collateral estoppel problem. The touchstone case is *Ashe v. Swenson*, 397 U.S. 436 (1970). In *Ashe*, the State accused the defendant of robbing a poker game. When a jury acquitted Ashe of robbing one of the poker players the state brought charges against Ashe for robbing one of the other poker players. The logical issue before the jury in *Ashe* was whether the defendant was the person who committed the robberies, and so the State was collaterally estopped from trying to prove identity in a subsequent trial after a jury previously acquitted him. This case is slightly different than *Ashe*. Here, the State *would be* collaterally estopped if the jury found that Victim 1 was still alive when Polk opened fire in the residential neighborhood (the second shooting). Under this theory the jury would have acquitted the defendant as a principal or party to all the assaultive conduct resulting in the death of Victim 1. But the jury could have potentially found that Victim 1 had died before Polk opened fire in the residential area and treated the second shooting as superfluous information. In this scenario the jury’s acquittal would have been a finding absolving the defendant only of assaultive conduct occurring at the first location.

Comment. Did the State have an epiphany after

trial that shooting someone with a gun is aggravated assault with a deadly weapon? Doubtful. I think this kind of strategic crap should be poured out on speedy trial grounds. Try the case and let justice prevail. It seems the State chose to delay the new prosecution for no other reason than to have a second bite at the apple if they lost the first case.

[*Lynch v. State*, No. PD-1089-20 \(Tex. Crim. App. 2022\)](#)
(not designated for publication)

Issue & Answer. When a co-conspirator testifies and attempts to take full credit for drug possession, does a defendant open the door to the State’s use of the defendant’s prior convictions for drug possession under Rule 404(b)(limiting use of prior bad acts)? **Yes.** Is such evidence excludable under Rule 403 (unfair prejudice substantially outweighing probative value)? **Not here.**

Facts. When officers raided the defendant’s house and discovered a large quantity of cocaine, his girlfriend (“Girlfriend”) attempted to take responsibility. However, Girlfriend was unfamiliar with certain drug terms and ultimately implicated the defendant when she learned the potential penalty for the ownership she was attempting to claim. Girlfriend signed multiple post-arrest statements and ultimately testified at trial attempting again to take ownership of the cocaine. The trial court ruled that Girlfriend’s testimony opened the door to the State’s use of two of the defendants four prior drug convictions. The trial court agreed with the State that Girlfriend’s testimony advanced a defensive theory that the defendant did not have the intent to possess, nor did he know about the possession taking place in his own home. The court of appeals reversed the defendant’s conviction after finding the prior convictions substantially more prejudicial than probative. The court of appeals found it significant that the State waited to admit the prior convictions as standalone exhibits after Girlfriend testified rather than questioning girlfriend about the exhibits on cross-examination. Moreover, the court of appeals found that, without context, the convictions did little more than show that the defendant was a drug dealer, generally.

Analysis. Under Texas Rule of Evidence 404(b), evidence of prior bad acts is inadmissible to prove character conformity. But prior bad acts are admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. When a defendant opens the door, he does so by placing one of these issues into question. If evidence of a prior bad acts contributes even incrementally to proving an issue other than character conformity, the prior bad act is admissible. Relevant prior bad acts admissible under 404(b) may still be inadmissible under Texas

Rule of Evidence 403 if probative value is substantially outweighed by unfair prejudice. Trial judges are afforded broad discretion in making Rule 403 determinations. Contrary to the opinion of the court of appeals, the absence of context surrounding the prior bad acts worked to minimize the prejudicial impact of the evidence. The trial court also gave two limiting instructions to the jury prohibiting character conformity use of the evidence. This minimal prejudice existed against the backdrop of the State's need after Girlfriend essentially took the wind out of prosecution's sails. The trial court's admission of prior bad acts did not violate Rule 404(b) or Rule 403.

Concurring (Yeary, J.). The limited issue on appeal is whether the evidence was substantially more prejudicial than probative under Rule 403.

Comment. I mean at this point the only surefire way to not open the door is to abscond.

[Lang v. State, No. PD-1124-19 \(Tex. Crim. App. 2022\)](#)

Issue & Answer. Organized Retail Theft (ORT) does not require the State to identify an owner in the charging instrument—a conviction may rest on the mere possession of stolen property. With this being true, can ordinary theft (requiring proof of owner identity) serve as a lesser included offense of ORT? **Yes.**

Facts. The defendant stole items from HEB. The State charged her with organized retail theft (ORT). The indictment alleged that the defendant “conducted, promoted, or facilitated an activity in which she received, possessed, concealed, or stored stolen retail merchandise . . .” Evidence showed the owner of the merchandise was HEB, but the indictment did not allege an owner. Defendant acted alone and did nothing distinctive from committing typical shoplifting. Defendant previously appealed her conviction challenging the ORT statute as impermissibly allowing a conviction for “ordinary shoplifting of retail items by a single actor.” The Court of Criminal Appeals previously reversed her conviction upon a finding that the ORT statute must require some proof of activity distinct from an ordinary theft. Upon reversal the Court of Criminal Appeals instructed the court of appeals to consider whether her conviction could be reformed from ORT to ordinary theft. The court of appeals held that Theft is not a lesser included offense of ORT and this appeal ensued.

Analysis. The distinct question here is whether the appellate court, after finding an ORT conviction is inappropriate, can reform the judgment and convict the defendant of theft instead. The court sets out a four-step process for making this determination:

1. The reviewing court finds the evidence

insufficient to support the appellant's conviction.

2. The reviewing court determines that there is a lesser-included offense of the greater offense the defendant was convicted of.
3. The reviewing court determines that the trial court, in convicting the appellant of the greater offense, necessarily found every element required to convict the appellant of the lesser-included offense.
4. The reviewing court conducts a sufficiency analysis as though the appellant was convicted of the lesser-included offense at trial and finds the evidence sufficient to support the hypothetical conviction.

Whether an offense is a lesser-included of another requires a “cognate-pleadings approach.” This approach requires a comparison of the elements of the greater charged offense as stated in the indictment to the purported lesser-included offense. If the greater charged offense (1) alleges all the elements of the lesser-included offense, or (2) alleges elements plus facts from which all the elements of the lesser-included offense may be deduced, the purported lesser-included offense is appropriate. The elements of the lesser included offense need only be functionally the same as the allegations in the indictment. Appellant contends that because the name of the owner is an essential element of theft, the State having proven all elements of ORT does not necessarily mean they proved all elements of theft. But Appellant is using this court's standard for determining elements of an offense which applies to sufficiency of evidence challenges (the hypothetically correct jury charge). When conducting the cognate pleadings approach to determining a lesser-included offense, the elements of the lesser-offense are only those defined by the statute. Here, theft requires proof of appropriation and appropriation can be deduced from the ORT allegation of exercising control over stolen property. Here, theft requires proof of intentional deprivation and intentional deprivation can be deduced from the ORT allegation of exercising control over stolen property. Contrary to the reasoning of the court of appeals, to satisfy *the statutory elements* of theft the State must only prove an owner existed and not the identity of the owner. And here the existence of an owner can be deduced from the ORT allegation of exercising control over stolen property that came from a retail establishment.

Dissenting (Yeary, J.)

Comment. What a journey. When it takes 2-3 pages to explain what a lesser-included offense is and 29 pages to apply the facts to the law, I don't see how we can expect trial attorneys to adequately prepare for the eventualities

of trial. Imagine yourself sitting down with a client who says, “what are the risks of trial?” and the first thing out of your mouth is “well, under the cognate pleadings approach . . .”

1st District Houston

[Fields v. State, No. 01-20-00280 \(Tex. App.—Houston \[1st Dist.\], Aug. 11, 2022\)](#)

Issue & Answer. This is a capital murder for committing multiple murders in a single transaction. The defendant was a driver, and his accomplices were the triggermen. The State’s theory of the defendant’s guilt is his party liability for the murder occurring within the scope of the robbery he agreed to participate in. The indictment did not mention robbery. Was it proper for the trial court to instruct the jury on party liability to an unindicted robbery without giving the jury a definition or the elements of robbery? **No, but the error was harmless.**

Facts. A jury convicted the defendant of capital murder (for the death of more than one person in the same transaction). The State’s theory and the jury’s conviction rest on the defendant’s party liability to a robbery turned murder. The defendant was not the shooter, but he was the driver and was involved. The State did not indict the defendant for robbery nor did their indictment for capital murder reference robbery. The trial court instructed the jury it could find the defendant guilty on a theory of party liability to a robbery. The trial court denied the defendant’s request to include the elements of robbery and denied the defendant’s request to include a lesser-included offense instruction on robbery.

Analysis. Generally, when the State intends to rely on party liability to a robbery as the basis for capital murder, they either indict the person as having committed murder in the course of a robbery or they indict the person for capital murder and a separate count of robbery. What the state did here is weird. They indicted the defendant for murdering more than one person (a distinct ground of capital murder), did not refer to robbery, then relied on defendant’s party liability to a robbery to convict. Only two cases appear to exist where a trial court instructed the jury that it could convict on a primary offense based on party liability to an unindicted offense. In both cases, the trial court defined the elements of the unindicted offense. Given that it is the trial court’s obligation to “deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case,” the omission of a definition for robbery “derail[s]” the process. The court’s omission was charge error, but it did not cause harm. The defendant was clearly a party to robbery. Witnesses saw the three men at the scene of the murder,

the defendant admitted to planning a robbery, and counsel basically conceded the point in closing argument.

Comment. This case exposes how the rules of appellate review violate the Sixth Amendment (in my opinion). This was a trial before the appellate court. No juror determined whether the defendant committed robbery or was a party to a robbery—not even close. An appellate court just decided that he did in the name of an efficient judicial system.

[Ex parte Vieira, No. 01-21-00464 \(Tex. App.—Houston \[1st Dist.\], Aug. 16, 2022\)](#)

Issue & Answer. How many years is July 7, 2019 to July 9, 2021? **Exactly two.**

Facts. The State charged the defendant with aggravated assault by a public servant. Because the underlying offense is an assault, the statute of limitations is 2 years. The State alleged the offense occurred on July 7, 2019 and filed their indictment on July 9, 2021. Defendant filed a pretrial writ of habeas corpus asking that the case be dismissed and alleging that the prosecution was time barred. The trial court denied relief.

Analysis. Article 12 of the Code of Criminal Procedure governs limitations. The computation of time does not include the date of the offense or the date of the indictment or information. The limitations period here is 2 years. The alleged offense day is July 7, 2019, therefore the first day of the limitations period counted is July 8, 2019. So, the two-year date was July 8, 2021. The State was required to file their indictment by the end of the day on the next calendar day: July 9, 2021. They did this, the trial court properly denied relief.

Comment. A year is:

1. Twelve calendar months beginning January 1 and ending December 31. — Also termed calendar year. 2. A consecutive 365-day period beginning at any point; a span of twelve months.

YEAR, Black’s Law Dictionary (11th ed. 2019). 2 years is 730 days (365 x 2). July 8, 2019 to July 8, 2021 is 732 days. The State filed an indictment for an assault offense occurring on July 7, 2019 on July 9, 2021. That’s 734 days. Subtract 2 (first day and last day don’t count statutorily). That’s 732 days (or 2 years and 2 days). What am I doing wrong? Is there some exception written in the Mayan codices? Was the crime committed on a leap year?

[Thomson v. State, No. 01-20-00434-CR \(Tex. App.—Houston \[1st Dist.\] Aug. 18, 2022\)](#)

Issue & Answer 1. A defendant gave consent to an officer to access his phone and verify it cannot make a phone calls. Did the defendant’s scope of consent include

the assumption of risk that the officer might misnavigate to the images on the phone and discovery illegal activity? **Yes.**

Issue & Answer 2. When a jury suppression issue is raised at trial focusing on whether an officer intentionally accessed the photo gallery or misnavigated to the photo gallery, does the post-trial disclosure of the officer's prior termination from the district attorney's office for using a government database for unauthorized investigations of a personal nature require the granting of a new trial? **Yes.**

Facts. An officer stopped the defendant who was out after midnight. The defendant appeared to be over 40 years old, and he had a passenger in his vehicle that appeared to be a minor (actually 18). The officer quizzed the defendant and the passenger until their stories did not match. He removed the defendant from the vehicle, conducted a *Terry* frisk, and discovered a marijuana pipe and a cell phone. The officer searched the defendant's vehicle and discovered knives, duct tape, bungee cords, screwdrivers, binoculars, powdered Benadryl, bar soap, and another cell phone. The defendant told the officer he used these items working as a chicken farmer. The defendant told the officer that the second cell phone stored pictures only and that it did not have cellular service. The officer was suspicious of this claim because the home screen had a 3G icon as though it was connected to cellular service. The defendant unlocked his phone so the officer could confirm the phone was not working by attempting to make a phone call. The officer's body camera went silent for 15 seconds and then the officer confronted the defendant with the following statement: "Dude, I'm trying to shut your phone, and there's pictures of naked little girls and little girls in sexually explicit positions. What's up with that?" The officer testified in a suppression hearing that his personal phone was an iPhone with a center button that you press to go back to the home screen. Defendant's phone was an Android and didn't function the same way. The officer attempted to return the phone back to the home screen to store it and because it was an android it just pulled up all of the defendant's child pornography. Experts testified at trial regarding the operation of the defendant's phone. The experts explained how the stored images are accessed by hitting the gallery button located one row above where the officer may have been legitimately clicking to lock out the phone. The State's expert showed how the crack in the defendant's screen could permit access to the photo gallery by only clicking near the icon. The defendant's expert testified that the officer should have never been on the icon screen if all he was doing was making a phone call and then trying to lock the phone as the officer described. After trial, the district attorney discovered

Brady material pertaining to the officer. The officer had resigned from the Grimes County District Attorney's Office after being confronted about his unauthorized use of a government database to spy on his wife and his new girlfriend's lover during their divorce proceedings. The defendant moved for new trial and after a hearing the trial court denied relief.

Analysis 1. The trial court's ruling is best upheld by characterizing the defendant's consent as broad enough to include inadvertent misnavigation. An officer may inadvertently cause things to fall into plain view. Consent to use a certain function on the phone is consent to inadvertently misnavigate to other areas of the phone. Thus, the officer discovered images of child pornography within his legitimate plain view of the phone.

Analysis 2. Texas Code of Criminal Procedure Article 40.001 requires a trial court to grant a new trial "where material evidence favorable to the accused has been discovered since trial." Here, because the defendant requested and received a jury evidentiary suppression instruction under Texas Code of Criminal Procedure Article 38.23, the question of whether the officer truly stumbled upon the defendant's child pornography by accident was important. Evidence that he once perused a government database without authorization in the past was therefore material. Article 40.001 has additional requirements, though. The newly discovered evidence must be admissible. Here the parties focused their arguments on the permissible use of prior bad acts. Rule of Evidence 404(a) prohibits the use of character evidence to prove conduct conformity. The State argued in the trial court that the use of prior bad acts is limited by the Rule itself to proving bias, self-interest, or a motive to lie. The State further argued that the defendant may not rely on Rule 404(b) "for a pathway to admissibility independent of admissibility through Rules 607 through 609." The trial court erred to rely on this articulation of the rule. The State's analysis of the interplay between Rules 404, 607, 608, and 609 is unsupported in the law. It is true that Rule 404(a) provides a limited mechanism for the use of *character* evidence to prove certain things. That said, Rule 404(b) is a thing unto itself—it provides a mechanism for using prior bad acts to prove something other than character conformity. Here the evidence had probative value on a point in controversy: whether the officer's access of the defendant's pictures was truly inadvertent.

Comment. What kind of weapon feels like a marijuana pipe or a cell phone? I mean that's what a *Terry*

frisk is, right? To find weapons?

2nd District Fort Worth

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

3rd District Austin

[*Ex parte Bornhop*, No. 03-22-00033 \(Tex. App.—Austin, Aug 11, 2022\)](#)

Issue & Answer. Extradition rules require the production of certain documents supported by affidavit. Must the supporting affidavit comply with technical requirements of the Rules of Civil Procedure? **No.**

Facts. The defendant had warrants in Missouri for burglary and theft. When he was arrested in Austin, he demanded the State produce a governor's warrant for his extradition. The Texas Governor issued a governor's warrant upon the documentation provided by the State of Missouri. The defendant filed a writ of habeas corpus challenging the sufficiency of the documentation provided by Missouri. The defendant argued that the request by Missouri did not coincide with an affidavit sworn before a magistrate as required by Texas Code of Criminal Procedure Article 51.13 § 3.

Analysis. Article 51.13 § 3 describes the documents that the requesting state must send to the Texas Governor. The list includes things like an affidavit sworn before a magistrate and a copy of the indictment. The list is disjunctive, meaning the requesting state need not provide every item on the list. Here the State of Missouri provided certified copies of the felony complaints. The State of Missouri also included a statement of probable cause signed by an officer before a magistrate who notated his finding of probable cause. An affidavit is merely a sworn statement before a person authorized to administer oaths. The strict civil rule of affixing a seal of office by the oath administrator is not required here.

[*Borders v. State*, No. 03-21-00545-CR \(Tex. App.—Austin, Aug. 18, 2022\)](#)

Issue & Answer. When a defendant is engaged in both legitimate and illegitimate financial transactions over a long period of time, does an indictment which fails to identify the illegitimate transactions on which the State intends to rely provide sufficient notice? **No.** Does the State cure the lack of notice by appending a response to a motion to quash with specific transactions? **Yes.**

Facts. The defendant worked for the volunteer fire department. He had a fire department credit card. He used that credit card to purchase personal items and

to withdraw cash. The defendant admitted to using the credit card for cash withdrawals but explained to detectives that he used the cash for fire department purchases. Investigators discovered \$30,000 in cash deposits at the defendant's bank but estimated combined withdrawals and purchases for approximately \$45,000. The State alleged an aggregated theft amount of \$30,000 to \$150,000 and only generically explained the basis of its accusation (appropriated currency belonging to the fire department). The defendant filed a motion to quash. In his motion he conceded that the State need not allege every fact upon which it intends to rely. But the defendant argued that the discovery was voluminous, unorganized, and provided an insufficient basis for preparing his defense. The State took exception to this characterization. The State explained that it intended to focus on the debit card withdrawals during the relevant time period and attached to its response evidence contained within the discovery purporting to prove the allegation. The State also pointed to the bank records provided to the defendant in discovery with relevant transactions highlighted.

Analysis. Sufficient notice may be provided by means other than the indictment. Here the State responded in writing to the defendant's motion to quash and attached supporting documentation. The defendant contends that he should not have to "ferret out the illegitimate from the legitimate transactions" combined in the State's supporting documents. The State should be compelled to specifically list the illegitimate transactions on which they intend to rely. The defendant was correct to file a motion to quash. Case law supports the contention that a defendant accused of mixing legitimate financial transactions with illegitimate ones should not be forced to prepare a defense for every single transaction. But when the defendant filed his motion to quash the State pointed to the discovery it had provided the defendant and pinpointed the transactions it planned to prove were illegitimate.

Comment. Here's my beef with the rule that the State can provide notice through documents other than the indictment. The indictment serves many purposes, notice being one of them. But the indictment can serve (should serve) to limit the issues at trial and hone what the defendant must prepare for. If a defendant accused under a generic or broadly worded indictment cannot raise an objection to testimony adding incriminating conduct outside the scope of the discovery, then courts should not be able to point to the discovery and say "there's your notice."

[*Melton v. State*, No. 03-21-00416-CR \(Tex.](#)

Issue & Answer 1. In a murder prosecution, when a defendant testifies that he did not mean to shoot the victim, did not know the gun was loaded, and did not put his finger on the trigger, is he entitled to a lesser-included instruction on criminally negligent homicide? **Yes.** Was the error harmless because the jury received and rejected an instruction on the lesser-included offense of manslaughter? **Yes.**

Issue & Answer 2. Self-defense is a confession and avoidance defense where the defendant must essentially admit to the conduct of the offense (though not necessarily every element). Is a defendant entitled to a self-defense instruction where he admits to retrieving and wielding a gun, but denies putting his finger on the trigger and maintains that the shooting was an accident? **No.**

Facts. The state charged the defendant with murder. The defendant and three other individuals were talking on his front porch. A fight broke out and, according to the defendant, the victim held a knife to him. The defendant explained that he went inside, retrieved a shotgun, pointed it at the victim, and told him to never pull a knife on him again. According to the defendant the shotgun went off and struck the victim in a “freak accident.” The defendant indicated that he did not intend to shoot, did not put his finger on the trigger, and did not personally load the gun. Witnesses at trial refuted the defendant’s story and law enforcement explained how they were unable to make the gun misfire in their investigation. The defendant and another member of the altercation testified that the shooting was accidental. The defendant requested but the trial court denied jury instructions on criminally negligent homicide and self-defense.

Analysis 1. “The key to criminal negligence is the failure of the actor to perceive the risk created by his conduct.” Here the defendant testified that the gun discharged accidentally, he never touched the trigger, that he did not check to see if the gun was loaded, that he did not think it was loaded, and that he did not intend to shoot the victim. “Evidence suggesting accidental discharge of a firearm does not necessarily raise the issue of criminally negligent homicide.” But there are several cases where a charge on criminal negligence was required. Here it was an error to deny the requested instruction. Typically, a denied lesser-included offense instruction will result in sufficient harm to warrant a reversal because it forces the jury to convict or acquit on the greater charge without the lesser third option. But here the jury was provided a third option, a lesser included offense with a culpable mental state between the one requested and the offense of conviction. Because the jury rejected the lesser offense

it was provided, there is no logical reason to conclude they would have accepted an even-lesser offense.

Analysis 2. Though the defendant testified that he felt he was endangered, he repeatedly and consistently denied shooting the victim. He also denied pointing the gun at the victim. He did not sufficiently admit to the alleged conduct.

Comment. I think the courts of appeal are lagging significantly behind the Court of Criminal Appeals’ trends in the area of confession and avoidance. Some on the high court have indicated in the past several years that they don’t hold the doctrine in the highest regard. Recently in Rodriguez v. State, No. PD-1130-19 (Tex. Crim. App. 2021) the court reversed the denial of a self-defense instruction where the a defendant claimed nearly the same thing as the defendant in this case - that he pulled a gun in the middle of a fight, he only meant to scare everyone away, but the gun went off by accident. I’m not sure this case holds up if PDR is sought.

4th District San Antonio

Martinez v. State, No. 04-19-00745-CR (Tex. App.—San Antonio, Aug. 31, 2022)

Issue & Answer 1. Investigators could not locate a murder weapon but two days before trial a witness disclosed information suggesting that it could have belonged to the father of the State’s key witness. Under these circumstances, was the trial court required to grant a continuance for purposes of defense investigation? **No.**

Issue & Answer 2. Is there probable cause for murder if you make a cell phone call to the murder victim moments before the murder? **Yes.** Is there probable cause to obtain 74 days’ worth of GPS location data? **No.** Is it harmless? **Yes.**

Facts. A jury convicted the defendant of murder. The State showed the defendant to be a heroin dealer who had conscripted the victim, a college student and heroin user, to help him finance his heroin business. The defendant’s friend Dalton testified that he picked the defendant up from the location of the murder shortly after it occurred. Investigators used cell phone location and call logs to link the defendant to the location of the murder and the victim herself. The defendant also met the vague description of an eyewitness who had seen a Hispanic male at the location of the murder moments before the murder occurred. During an interview with investigators, the defendant confirmed that he was a heroin dealer, that he sold the victim heroin, that he was friends with Dalton, and that the cell phone police were investigating belonged to him. Days before trial the prosecutor learned and disclosed to defense counsel that

the yet-to-be-recovered murder weapon may have belonged Dalton's father. The defendant requested and the trial court denied a continuance to investigate. The trial court asked counsel what he intended to investigate, and counsel requested to provide that information *ex parte* so as to not disclose his strategy. The trial court declined to conduct an *ex parte* proceeding. In a motion for new trial counsel revealed his intended strategy. He explained that "investigation of the information in the *Brady* notice was critical because it could either place a weapon of the same type used in the murder in Dalton's hands or, if the statement were proven untrue, impeach Dalton's credibility." Dalton's father testified at the motion for new trial hearing that Dalton is a liar and the bulk of what Dalton had told the prosecutor shortly before trial was untrue.

Analysis 1. The defendant raised the specter of the murder weapon potentially belonging to Dalton's father. The defendant contends that the trial court's denial of continuance denied him the ability to investigate. His argument follows "the inability to investigate could have had a significant impact on the trial because it could have shown that Dalton had physical possession of the type of weapon used in the murder." However, investigators determined that the murder weapon was a revolver and Dalton's father testified he had never owned a revolver. The defendant's denied investigation would not have been fruitful. Nor was he entitled more time to develop impeachment evidence of Dalton or Dalton's father. "[A] trial court does not abuse its discretion by denying a continuance to allow a party to discover impeachment evidence."

Analysis 2. There is no reasonable expectation of privacy in the numbers a person texts or calls as such information is disclosed to that person's cell phone provider. This disclosure belies a claim of privacy under the third-party doctrine. However, cell phone location data is not subject to such a waiver of privacy. Cell phone location data must be acquired pursuant to a warrant supported by probable cause. Here the investigating officer articulated phone calls between the victim and the defendant just before the murder occurred and nobody in the victim's family was familiar with the defendant's phone number. Defendant contends this is not probable cause, however "[t]he magistrate could have reasonably concluded there was a fair probability that the location of the device involved in those communications would provide evidence of the crime in the investigation of the murder described in the affidavit." Probable cause notwithstanding, the 74-day period of cell phone data was too broad and not supported by sufficient evidence. But still the warrant was too broad. This error was inconsequential, however. The investigator relied in good faith

on his warrant. At the time he applied, neither Texas nor the Fifth Circuit recognized a reasonable expectation of privacy in cell phone location data. Thus, the investigator was fine to obtain permission to seize evidence outside the scope of the probable cause he articulated. Moreover, the information obtained which exceeded probable cause was minimal. The investigator rightfully obtained information which put the defendant's cell phone at the scene of the murder. Any error in the court's denial of suppression was harmless.

Comment. This is a weak case for probable cause. And I can usually chalk opinions like this up to any number of agree-to-disagree reasons. But I become suspicious of potentially result-oriented judicial analysis when the judge describes the exclusionary rule (which has existed since 1789) as "the so-called exclusionary rule," or the "judicially created federal exclusionary rule" as Justice Chapa does in her opinion. None of the rules of error preservation or harmlessness used to reject the defendant's appeal were described in the opinion as "judicially created." Either tell us why the exclusionary rule shouldn't be a rule or just call it the "exclusionary rule." Otherwise, it just looks like you hate it and wrote an opinion to get around it.

[Traylor v. State, No. 04-21-00258-CR \(Tex. App.—San Antonio, Aug 31, 2022\)](#)

Issue & Answer. When the state impeaches a defendant's testimony using a prior conviction identical to the offense of prosecution and already has strong evidence supporting their allegation, does the trial court err when overruling the defendant's Rule 403 undue prejudice objection? **Yes, but harmless.**

Facts. A jury convicted the defendant of aggravated robbery. The defendant and his daughter testified that at the time of the robbery he was dropping his daughter off at school. The trial court permitted the State to impeach the defendant with a prior conviction for aggravated robbery over the defendant's Rule 403 undue prejudice objection. The State did nothing more with the defendant's prior aggravated robbery conviction than represent that it existed.

Analysis. Under Rule 609 a party can impeach a witness using a prior conviction to the extent the prior conviction is probative of truthfulness. The offense must be a felony or crime of moral turpitude. Rule 609 has an inverse Rule 403 balancing test where exclusion is favored over admissibility—probative value must outweigh prejudicial effect. Here the defendant only objected under Rule 403, but the trial court's ruling was error under either balancing test. Violent offenses are less probative of untruthfulness than those involving deception.

The impeachment offense being identical to the offense of prosecution raises some concern about the jury's improper use. But ultimately, the fact that the State had ample other evidence establishing guilt militated most strongly against admission. The State had the defendant's palm print at the scene of the offense, law enforcement discovered clothing matching the perpetrator's disguise at the defendant's home, the defendant gave a faulty alibi, and an eyewitness identified him. The fact that the State's case was so strong also made the trial court's Rule 403 error harmless.

Concurrence (Rios, J.). Wouldn't even entertain whether the trial court erred if it were harmless.

Comment. The opinion writes the final prong of a 403 balancing analysis out of existence: "the force of the proponent's need for the evidence." If the existence of already strong evidence cuts against admissibility but also renders erroneous admission harmless, then is it really even a factor for consideration anymore?

5th District Dallas

[Dies v. State, No. 05-20-00951-CR \(Tex. App.—Dallas, Aug 4, 2022\)](#)

Issue & Answer. When a State's witness had COVID-19 and both the State and the defendant moved for continuance before trial in response, does the trial court violate the defendant's confrontation rights by forcing him to confront his accuser by Zoom? **No. Not in this case.**

Facts. On October 15, 2020, the State announced at a pretrial conference that two of its witnesses could not testify in-person. The State's forensic interviewer had been exposed to and would later contract COVID-19. The State's extraneous abuse witness was 38 weeks pregnant and the State articulated concern for her health and safety. The court suggested Zoom testimony and the defendant objected. The State moved for continuance and the trial court denied the request. The trial court cited the need to "get the cases moving" and the defendant's right to a speedy trial which he did not appear to have even invoked. The defendant then moved for a continuance and expressly cited his need to preserve his right to conduct in-person confrontation. The trial court called its own technology witness who put on the record how amazing the technology in the courtroom was. Both witnesses ultimately testified via Zoom. The extraneous abuse witness covered the defendant up on her screen, so she did not have to see him completely. The forensic interviewer could not see the defendant at all.

Analysis. "[T]he right to a physical face-to-face

[confrontation] is not absolute and must occasionally give way to considerations of public policy and the necessities of the case." The Court of Criminal Appeals recently described face-to-face confrontation as not easily disregarded and a right which exists "at the core of the Confrontation Clause." But, applying the touchstone case of *Maryland v. Craig*, 497 U.S. 836 (1990), Texas Courts have permitted virtual testimony in the following scenarios: child witnesses, a witness on active military duty, a seriously ill witness, and a witness with high-risk pregnancy. Whether virtual testimony is "necessary" is a case-by-case determination. It must satisfy an important public policy interest and the "reliability of the testimony [must] otherwise assured." Here the public policy interest was sufficient. The pandemic was ongoing and a vaccine had not yet become available. Reliability was assured because the procedure for remote testimony met the "salutary effects" requirements of confrontation, namely: there was an oath, there was an opportunity for cross-examination, the factfinder could observe the witness's demeanor, and there was no increased risk of false accusation or identification. The defendant contends that there could be no necessity when a continuance could have cured the problem, but at the time there was no way to stay safe from the virus except by wearing masks, social distancing, and good hygiene. A vaccine would not be available to the public until two months later and the trial court had no way of knowing about the rollout of the vaccine.

Comment. In my opinion, the Fifth Court of Appeals just gets this wrong, as does probably several cases it cited in support. There can't be a necessity if there was another solution such as a continuance. That the witnesses partially or completely could not see the defendant was significant as well. The court relies on very thin logic to dismiss the defendant's contention that a continuance would have cured the necessity. The contention that trial courts in October of 2020 could not have known the vaccine would soon be available is just a legal fiction.

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

The Seventh District Court of Appeals in Amarillo did not hand down any significant or published opinions

since the last Significant Decisions Report.

8th District El Paso

[Carbajal v. State, No. 08-20-00069-CR \(Tex. App.—El Paso, Aug. 5, 2022\)](#)

Issue & Answer. If the State alleges two counts of sexual assault, committed in the same statutory manner, committed on the same on-or-about date, without distinguishing either count, does it violate double jeopardy for the State to convict on both counts? **Yes.**

Facts. The State prosecuted the defendant under a 13-count indictment. The jury convicted on all 13 counts. There appeared to be 4 offenses underlying the various counts: (1) continuous sexual abuse of a child under 14, (2) sexual assault of a child, (3) indecency with a child by sexual contact, and (4) sexual assault. As it related to two of these offenses, the State alleged the exact same offense on the exact same on-or-about date. Prior to trial the defendant filed a motion to quash the multi-count indictment and insisted the State be compelled to elect the which of the seemingly overlapping offenses it intended to rely upon for conviction. The trial court denied the defendant's motion.

Analysis. All but two of the State's 13 counts can be logically separated based on the age of the victim or the on-or-about date. However, the State alleged the same on-or-about date for two counts that allege the same offense. Because the State did nothing to distinguish these two offenses, both convictions cannot stand under double jeopardy.

9th District Beaumont

[Rafiq v. State, No. 09-20-00094-CR \(Tex. App.—Beaumont, Aug 31, 2022\)](#)

Issue & Answer. When officers seize a phone without a warrant and hold it pending acquisition of a search warrant, is the seizure analyzed as one requiring probable cause and exigent circumstances or as reasonable suspicion? **In the Ninth Court of Appeals, reasonable suspicion.**

Facts. A jury convicted the defendant of murder. Before trial the defendant filed a motion to suppress the seizure of his cell phone. Officers suspected the defendant and set up a missing person interview with him. During the interview the defendant gave a detective consent to look through his phone, requested it back, then gave it to the detective again at which point the detective declared he was seizing the phone. The detective testified he was not prepared to arrest the defendant during the interview and was concerned [based on the context

of the interview] the defendant would erase the contents of the phone. After seizing the phone, the detective obtained a search warrant to search the phone.

Analysis. The parties argued exigent circumstances at trial, but the seizure is not properly analyzed under the exigent circumstances exception. This was a brief seizure lasting only long enough to obtain a search warrant. The United States Supreme Court has “frequently approved warrantless seizures of property . . . for the time necessary to secure a warrant, where a warrantless search was either held to be likely or likely would have been held impermissible.” The detective only needed reasonable suspicion to seize the phone. Here they had an accusation against the defendant, the defendant confirmed some details of the accusation, the defendant nervously scrolled his phone when asked about his phone, and the defendant admitted he used his phone to communicate with a person the police believed to be a co-conspirator at or around the time of the offense.

Comment. The court acknowledges that not all courts of appeal follow this rationale. I don't think if the court analyzed the issue of exigent circumstances the seizure would stand. Police can't create their own exigency. Police had a witness who had accused the defendant of killing the victim. They ultimately found that witness credible and they corroborated details of that witness's accusation. They had probable cause to arrest the defendant at the same time they seized the phone. Also, by virtue of the State's exigent circumstances argument, the police had to have probable cause—probable cause is a necessary element of the exigent circumstances exception. The police created their own exigency by alerting the defendant they believed he was a suspect and then by not arresting him at the end of the interview.

10th District Waco

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

11th District Eastland

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

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

The Thirteenth District Court of Appeals in Corpus Christi / Edinburg did not hand down any significant or published opinions since the last Significant Decisions Report.

14th District Houston

[State v. Garcia, No. 14-20-00801-CR \(Tex. App.—Houston \[14th Dist\], Aug. 23, 2022\)](#)

Issue & Answer. Does a court of appeals have jurisdiction over a State appeal raising erroneous award of jail-time credit? **No.**

Facts. The defendant punched the head coach of the Houston Rockets [I think they mean New Orleans Pelicans] in the face during a game. The defendant entered a guilty plea and received a 365-day sentence with jail time credit for 365 days. According to the State, the State did not indicate in the plea paperwork that the defendant had 365 days credit, nobody represented to the trial court that the defendant had 365 days credit, and the defendant did not in fact have 365 days credit. The State filed a motion for judgment *nun pro tunc* but the trial court declined to rule. This appeal followed.

Analysis. Appellate court jurisdiction in State appeals is defined by statute. The State can appeal an illegal sentence, but this is not an illegal sentence. “A sentence is that part of the judgment, or order revoking a suspension of the imposition of a sentence, that orders that the punishment be carried into execution in the manner prescribed by law.” This includes the facts of the punishment itself, the commencement date, the duration, the concurrent or consecutive nature, and the fine if any. If the State is correct what the trial court did was unlawful. But here the appellate court has no jurisdiction. Credit for time served is a factor that affects the sentence, not the sentence itself.

Concurrence (Spain, J.) The State should have the ability to review a judgment and object.

Comment. Houdini!

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