TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

# VOICE

## FOR THE DEFENSE

VOLUME 52 NO. 1 • JANUARY/FEBRUARY 2023

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*Voice for the Defense* (ISSN 0364-2232) is published monthly, except for January/February and July/August, which are bi-monthly, by the Texas Criminal Defense Lawyers Association Inc., 6808 Hill Meadow Drive, Austin, Texas 78736. Printed in the USA. Basic subscription rate is $40 per year when received as a TCDLA member benefit. Non-member subscription is $75 per year. Periodicals postage paid in Austin, Texas. Dues to TCDLA are not deductible as a charitable contribution. As an ordinary business expense the non-deductible portion of membership dues is 25% in accordance with IRC sec. 6033.

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

# VOICE
FOR THE DEFENSE

Volume 52 No. 1 | January/February 2023

## Features



## Columns



***Available online at www.tcdla.com***
***Volume 52 No. 1 | January/Februay 2023***

**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**

## February

***February 2***
CDLP | Mental Health
Houston, TX

***February 2***
CDLP | Setting Up the Appeal
Houston, TX

***February 3***
CDLP | Capital
Houston, TX

***February 3***
CDLP | Veterans
Houston, TX

***February 15-19***
TCDLA | President's Trip & CLE
Las Vegas, NV

***February 17***
CDLP | Indigent Defense
Dallas, TX

## March

***March 2-3***
TCDLA | Voir Dire & Cross Exam
Houston, TX

***March 3***
TCDLA | Executive & Legislative Committee Meetings
Houston, TX

***March 4***
TCDLA Board & CDLP Committee Meetings
Houston, TX

***March 26-31***
CDLP | 46th Annual Tim Evans Texas Criminal Trial College
Huntsville, TX

***March 30-31***
TCDLA | 29th Annual Mastering Scientific Evidence DUI/DWI w/ NCDD
New Orleans, LA

## April

***April 14***
CDLP | Journey to Justice
Marfa, TX

***April 14***
CDLP | Juvenile
Austin, TX

***April 15***
CDLP | Juvenile Training Immersion Program
Austin, TX

***April 20***
CDLP | Women in the Law
Austin, TX

***April 21***
CDLP | Race in Criminal Justice
Austin, TX

***April 21***
CDLP | Journey to Justice
Tyler, TX

## May

***May 5***
TCDLA | 16th Annual DWI Defense Project
Dallas, TX

***May 15***
CDLP | Mindful Monday
Webinar

## June

***June13***
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

## July

***July 12 - 16***
TCDLA | Member's Trip
South Padre Island, TX

***July 12***
CDLP | Trainer of Trainers
South Padre Island, TX

***July 13-14***
CDLP | Journey to Justice
South Padre Island, TX

***July 15***
TCDLA & TCDLEI & CDLP | Orientation
South Padre Island, TX

***July 17***
CDLP | Mindful Monday
Webinar

## August

***August 11***
TCDLA | 21st Annual Top Gun DWI
Houston, TX

***August 17***
CDLP | New Lawyers
Webinar

***August 17-18***
CDLP | Innocence Work for Lawyers
Austin, TX

***August 21***
CDLP | Mindful Monday
Webinar

***August 31***
TCDLEI | Zoom Board Meeting
Livestream

## September

***September 7-8***
TCDLA | Criminal Defense
Dallas, TX

***September 8***
TCDLA Executive & Legislative Committee Meetings
Dallas, TX

***September 9***
TCDLA Board & CDLP Committee Meetings
Dallas, TX

## October

***October 4-8***
TCDLA | Round Top
Round Top, TX

***October 11***
CDLP | Innocence for Students
Austin, TX

***October 12-13***
CDLP | 20th Annual Forensics
Austin, TX

***October 19-20***
CDLP | Post Conviction
Austin, TX

***October 26***
CDLP | Mental Health
Dallas, TX

***October 27***
CDLP | Capital Litigation
Dallas, TX

## November

***November 2-3***
TCDLA | 19th Annual Stuart Kinard
San Antonio, TX

## December

***November 30 - December 1***
TCDLA | Defending Those Accused of Sexual Offenses
Round Rock, TX

***December 1***
TCDLA Executive & Legislative Committee Meetings
Round Rock, TX

***December 2***
TCDLA & TCDLEI Board & CDLP Committee Meetings
Round Rock, TX

***December 15***
CDLP | Jolly Roger
Denton, TX

## Scholarship Information:

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

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

### Our Beautiful (Legal) Minds

What accolades are on your resume? What shiny awards are on your wall? The ones you've built upon since law school? Perhaps, like me, they make you feel proud; like maybe you really made it. So, it's no wonder the last thing we want to do is talk about the fact that we aren't so perfect after all. That, believe it or not, we lawyers are human beings; susceptible to hurting, cracking, and sometimes even breaking—just like everyone else. And the numbers behind the mental health crisis that is impacting our legal community don't lie.

A recent ABA article[1] based on a self-reporting mental health survey of legal professionals conducted by Law.com and ALM Intelligence found the following:

- One-fifth of respondents considered suicide at one point in their careers;
- 67% of the respondents reported anxiety;
- 35% reported depression and 44% reported isolation; and
- 1 in 10 report problems with substance abuse.

Again, this is *self*-reporting – to say we are facing a grave problem is an understatement. I then wondered what the numbers might say if we all responded with complete honesty and with absolute anonymity. While we lawyers are human beings like everyone else, we tend to embrace accolades and shiny awards as signs of achievement, of excellence, of perfection. And as criminal defense lawyers, how many of us subconsciously (or even consciously) correlate perfection with case outcomes? My value and my life's worth must somehow mirror all my Not Guilty verdicts, my winning record, my perfect reputation. And it doesn't take much thought to realize how we can fall into that unhealthy trap.

Our clients expect us to be perfect. The State Bar of Texas expects us to be perfect. And, let's be honest, we expect ourselves to be perfect – physically and mentally – which is an exercise in futility . . . because it's simply unattainable. And if we don't do something about the mental health crisis in our community, we are going to keep losing our friends to this invisible monster that is permeating our industry daily. So, it's up to us to do something about it right now.

Revisiting our homepage with this article in mind, I found new meaning in the first sentence on the TCDLA website: "The Texas Criminal Defense Lawyers Association (TCDLA) is the largest state association for criminal defense attorneys in the nation." I believe the word ***for*** is the most important word in that very first sentence on our website regarding TCDLA. TCDLA is *for* criminal defense lawyers. We are the only ones who truly know what we are going through. We are the only ones who know the lingering pain of a loss, dealing with the complaints of clients, trying to keep the lights on, bringing our workplace problems home to our families – turning to unhealthy means of coping. At our quarterly TCDLA board meetings, it becomes painstaking to hear of another sister who drank herself to death, or another brother who took his own life, as we sit in that moment of silence afterwards wondering if there was anything that we could have done as an individual or an organization to intervene. Were there words of encouragement? Sadly, the answer is oftentimes that we will never know.

But, as friends and colleagues, we are the ones who *can* be there for each other. We are the ones who *must* be there for each other. So maybe as we head into this new year of 2023, let's take the time to devote to our own mental health, whether it be meeting with a traditional therapist, trying mindfulness or meditation, or researching one of the many psychotherapies out there. The National Alliance on Mental Illness is a resource that provides an endless number of ideas. But first and foremost, we have to reject the stigma associated with mental illness, be committed to nurturing our mental health, and empower our friends and colleagues to do the same. It's beneficial to us individually, and as an organization. So let us humble ourselves to ask for help when we need it and let us be committed to lifting up a brother or sister who may be in need. Let's do what we say we will do as this truly united association and let's be there ***for*** our fellow criminal defense attorneys.

**********

**Resources:**

TCDLA Wellness Committee Co-Chairs

- Savannah Gonzalez | attorney@savannahgonzalez.com
- Mark D. Griffith | mark@griffithlegal.com

Ethics Hotline

- ethics@tcdla.com
- 512-646-2734

SBOT TLAP Contact

- 1-800-343-8527

1 https://www.abajournal.com/news/article/19-of-surveyed-lawyers-and-staffers-said-they-considered-suicide-at-some-point-in-careers

# CEO's Perspective

## MELISSA J. SCHANK

***"At this very moment just believe in yourself that you can change someone's life for the best with the gift of the power of kindness. Start doing your best to make this earth a better place."***

***-Kemmy Nola***

### 2023 is Here - Are You Ready?

2023 is here – whether you're ready or not. 2022 seemed like a blur and each year seems to be going by faster and faster. In December, we had several meetings in conjunction with our Sexual Offenses seminar. It was a great seminar – if you missed it, you can watch it on demand.

Staff came back from the holidays and hit the ground running. We work extremely hard to take some time off and then work even harder to catch up when we return – I can imagine many of you know this feeling.

Below are highlights of our business and items we will be working on.

### TCDLA Board

- Contributing funds to a donor advised fund with Texas Criminal Defense Lawyers Education Institute in matching amounts.
- Audit starts January 3rd

### TCDLEI Board

- Awarded 100 scholarships in FY22
- Awarded 9 scholarships to date in FY23
- Charlie Butts $5000 scholarship to be awarded in December to a 3L
- Exploring fundraising ideas for the future

### TCDLA Committees & Task Forces

- **Awards | *Betty Blackwell and David Botsford*** – Award nominations are due.
- **Cannabis, *Joseph Hoelscher*** - Anyone wanting to write an article let him know, the April *Voice* will be a cannabis edition. Direct any questions or comments regarding marijuana to Joseph or the committee.
- **Capital Assistance | *Pat McCann*** - Reached out to everyone who has a death case or one set to come. John Wright is helping to rewrite motions. Rick helping on Capital publications. Committee members will be searching through old *Voice* articles and revamp to bring to current law. If anyone has a death case right now, please contact Pat, he will help.
- **Criminal Defense Lawyers Project, *Monique Sparks*** - Seminars: 15, Numbers Trained: 1,315 Course Directors: 28 Speakers: 109. Working on Trainer of Trainers in July – interested in speaking ? Email mschank@tcdla.com. Visit the website for the upcoming seminars and travel stipends available.
- **Crimmigration | *Jordan Pollock*** - Completed and approved our mission statement, first articles sent into the *Voice*. We highlighted legislation we are interested in exploring and what types of legislation we want to keep our eye on as the session begins. We're also monitoring pressing Crimmigration issues and how to be a support to criminal defense attorneys.
- **Executive Committee | *Heather Barbieri*** - Working with the Ethics Committee regarding SBOT changes to 3.09 Disciplinary Rules Update, working on partnerships, Long-term planning – finances and building, Media requests and social media, review committee requests.
- **Juvenile Justice | *Kameron Johnson*** - Juvenile content on website includes checklists on sexual registration, brief bank for state and defense, and juvenile experts on these types of cases. Will be working with Allen Place on laws affecting Juveniles. Shout out to Jeep Darnell for juvenile articles submitted and printed in the *Voice*.
- **Law School Students | *John Gilmore*** - Update on the St. Mary's wrongful convictions course. Involved in putting together the course was Aaron Diaz, Cynthia Orr, and John. Well attended by 100 students, professors, and alumni.
- **Legislative | *Allen Place*** - Starting work on the new session coming up. Shea Place is updating members with Legislative updates on legislative listserv.
- **Membership | *Sean Levinson*** - We have 3% of State Bar Membership. The committee wants to tackle the retention rate. Reach out and find out why they didn't renew. Dallas Social Events – Hockey Dallas Stars will be next week. The next event will be in March in Houston – Rockets v. Chicago Bulls. April 29th – New York Yankees at the Ranger Stadium. The goal is to get board members, members, and non-members to attend.
- **Memo Bank | *Tip Hargrove*** - Saving the best memos and reoccurring questions on the listserv under memo bank on the members only section. Please help and send in Voir Dire updates.
- **New Lawyers | *Patty Tress*** - Working on new in person CLE for new attorneys in August. Also, working with law school committee for New Career Pathways virtual program in January. If you know any new lawyers, send them our way to stay connected with TCDLA.
- **Nexxus | *Paul Tu*** – The committee has been meeting monthly to plan for future CLE's, gathering topics, format and locations.
- **Parole | *Bill Habern and Gene Anthes*** - Monitoring several new bills for the 88th Regular Legislative session as well as attending committee meetings.

We will also be coordinating with our lobbyists to discuss strategy during the upcoming session.

- **Podcast | *Aaron Diaz*** - If interested in being on the podcast, get in touch with Aaron. January's podcast will feature Laurie Key.
- **Prosecutorial Conduct | *Lance Evans*** - Reviewing and handling complaints as they come in and seeing how to proceed. Currently watching El Paso District Attorney case. Receptive to any issues you are having in your home counties, let the committee know.
- **Strike Force | *Nicole DeBorde Hochglaube*** - Keeping an eye on post Dobbs issues, with help from lobbyists: Allen Place, Shea Place, and David Gonzalez.
- **Strategic Plan | *Nicole DeBorde Hochglaube and Monique Sparks*** – Members have completed a survey, a two-day intense work group is scheduled for February 9-10, 2023 in Austin.
- **Technology | *Clifford Duke*** - Central office is putting together a skeleton database that we will begin filling in with officer information from 1-3 jurisdictions. We should be inputting data by the end of the next quarter. We are also continuing to work with central office to evaluate the benefit of the different Apps, either basic or advanced. We will be reviewing the focus group feedback gathered this last month, and options for different providers.
- **Women's Caucus | *Cynthia Orr*** - Cynthia reported that there will be another Women's program in April in Austin and that the committee is working on a roundtable as well at Rusty Duncan.
- ***Voice* for the Defense | *Jeep Darnell*** - Assistant Editors – Sarah Roland, Clay Steadman, Amanda Hernandez, Jeremy Rosenthal, and John Gilmore, all are working hard editing articles, submit one today.
- **Veterans | *Terri Zimmermann*** – Authored and sent out Veterans Day message and planning for upcoming Veterans Seminar February 2, 2023, in Houston.
- **Texas Forensic Science Commission | *Mark Daniel*** - The database that the commission has been working on is not operational yet, the information is still available but not nearly as easy to access as it will be one day.
- **SBOT Criminal Justice Section, | *Dwight McDonald*** - Offering a $750 travel Scholarship and tuition for Rusty. Melissa suggested the New Lawyers committee can work with SBOT Criminal Justice
- Center to speak at the schools – Dwight will communicate with the SBOT Justice Center to see if there is any interest.

We will monitor the legislative session and keep everyone up to date. We have an aggressive CLE schedule for the upcoming year and we have different formats to choose from: in person, virtual or on demand at your own pace. Visit our website for more details and register. Our signature event Rusty Duncan's early registration is open. Book your hotel room, our block filled early last year. If you need any assistance registering for any event, have questions or need anything, feel free to reach out to me or anyone on our main line 512.478.2514. We are here for you.

As I start out the new year one of my resolutions is to try to slow down a bit – when I interact with someone in person, on the phone or virtually I want that moment to be one to make someone's day not break it. I am going to try harder to be kinder. What are your resolutions this year?


# Gideon's Day

On March 18, 1963, the United States Supreme Court published a monumental unanimous decision that states are required under the Sixth Amendment of the U.S. Constitution to provide counsel to defendants in criminal cases who are unable to afford their own.

Join public defender offices across the country in celebrating the anniversary of this decision on Wednesday, March 18, 2023. Spend the day, or even just an hour, to reflect on the opinion, the differences it has made, and the work still yet to do. Don't forget to pat one another on the back and thank each other for all of the hard work goes into being a public defender or court-appointed attorney. You deserve it!

**Ways to Celebrate on March 18, 2023**

- Watch the documentary **"Defending Gideon: A Documentary,"** available on YouTube
- Watch **"Gideon's Army,"** available on Amazon Prime
- Watch **"Strong Island,"** available on Netflix
- Watch an episode or two of **"Time: The Kalief Browder Story,"** available on Netflix
- Discuss feel-good stories/cases
- Enjoy a potluck lunch with your team
- And more!

Show us how you celebrated! Send in a photo to athomas@tcdla.com of your office celebrating Gideon's Day for a chance to be featured on our social media and in the Voice!


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# Editor's Comment

JEEP DARNELL

## Be a Human, Be a Friend

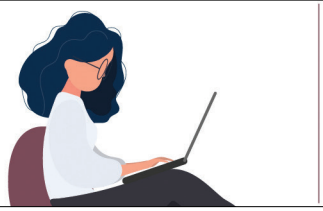
It is a strange bit writing the Editor's column for every issue of *The Voice*. Trying to figure out how to be timely and relevant a month or two in advance is not always easy. You see, we finish putting together all of the columns and articles, including mine, about a month before the magazines are printed and disseminated to all of our members and all State court judges across Texas. But, I don't always know what is going to happen in that intervening month that may be relevant to the majority of the readers, or relevant to me.

I'm writing this article just after Christmas for the February issue (actually, I'm late and I'm writing this much later but there are certain perks to being in charge). I finished my January column in December, way before Christmas, and I regaled in that article about how thankful I was for all of the members of this great Organization. Little did I know that my gratitude and patience for the people around me, aside from this Organization, would be tested in the time between finishing my column and Christmas. I won't go into details, but it probably would have made for a better column had I been able to use the trials and tribulations that I encountered in the month of December to say something wise (or wise-ish) that maybe one of those bored lawyers or judges who read my column might use for their benefit. So, I suppose I'll pass along my limited knowledge a little late in hopes that somebody can use it in the coming year.

We are all guilty of being lawyers or judges first. We may try to be better husbands, wives, fathers, mothers, brothers, sisters, sons, daughters, or friends, but we really do all suffer from the same fate of being lawyers and judges first. Working in the criminal justice system is hard, and if each of us care about the clients or defendants who we work with like we are supposed to do, then this job takes over our lives. I know I keep a pad of paper beside my bed to write down thoughts and ideas that strike me and wake me from my sleep at night. I know I catch myself thinking through issues in cases while I'm supposed to be listening to my kids read to me at night. I can't help it and I don't think I'm alone. These are not new phenomena, recently occurring in my life - they have existed for years. Sadly, I didn't think to try and be more present, to intentionally harbor my focus in my downtime until I was met with a crisis and needed to be something other than a criminal defense lawyer. My family is well, don't worry, but I had to wade through one hell of a mess to save someone close to me, and I should have been a better friend before I needed to be. Don't follow my footsteps, do better than me. Be present for those you love and care about.

Be safe,

Jeep Darnell



**Get Published!**

**Write an article for the *Voice for the Defense* & see your name in print! Submit work to voice@tcdla.com**

# Ethics and the Law

CAROL CAMP

**A Public Defender at Heart**

***"[F]EDERAL PUBLIC DEFENDERS DON'T GET TO PICK THEIR CLIENTS. THEY HAVE TO REPRESENT WHOEVER COMES IN AND IT'S A SERVICE. THAT'S WHAT YOU DO AS A FEDERAL PUBLIC DEFENDER: YOU ARE STANDING UP FOR THE CONSTITUTIONAL VALUE OF REPRESENTATION."***

***- U.S. Supreme Court Justice Ketanji Brown-Jackson, March 22, 2022.***

When I was a newbie criminal defense lawyer in Kentucky, my mentor, Gail Robinson, was the personification of the ideal public defender. Gail could (and had) literally done anything and everything from representing a juvenile client in a detention hearing to trying (and winning) a death penalty retrial after the Kentucky Supreme Court had unanimously vacated her client's conviction and death sentence on direct appeal (which she also litigated.) Slight in stature, somewhat shy, and soft-spoken, Gail was truly a force to be reckoned with. Before every hearing, no matter how big or small, she would always re-read the rules of evidence and make sure she knew the local rules of the jurisdiction in which she was appearing. No matter what a judge, prosecutor, or client threw at her, Gail was always polite, prepared, and persistent.

Although I aspired to be like Gail when I worked as a public defender, I often fell short of the high standard she set. Dealing with judges who refused to follow the law (one district court judge in Kentucky told me he did not have to comply with the federal Individuals with Disabilities Educational Act [IDEA] because it was "just federal law"), prosecutors who misrepresented the record in capital post-conviction proceedings, and clients who were sometimes less than cooperative took their toll on me. After spending most of my professional legal career representing indigent criminal defense clients, I decided it was time for me to opt for more money and fewer headaches—or so I thought.

In January 2022, I left the Harris County Public Defender's Office for the kind of lucrative job that I could have only dreamed of getting during law school with my average grades. This was going to be my big chance to show what I could do, make lots of money, and be wildly successful…or so I thought.

The offices were sleek and modern, and everything smelled new. Unlike my small, windowless interior office at the public defender's office, I had three large windows overlooking a lush terrace located just two floors below. I had limited interaction with clients and all I had to do was crank out writ after writ and writ after writ and meet my deadlines. It should have been easy, right?

Wrong.

I took the lucrative private firm job because I thought that I would be given the autonomy to determine whether and when I needed to retain expert witnesses, to figure out which claims to investigate and assert, and to advise my client of the pros and cons of the options available to them. Little did I know that in exchange for a higher salary, I was giving the most precious aspect of being a lawyer—my professional independence.

At first, it was relatively easy. My new boss and I generally saw eye-to-eye on things, so doing what she mandated was not unduly onerous.

Then, something happened. A very big something.

Unfortunately, I had been so busy trying to meet the many deadlines I faced and wade through a mountain of state and federal habeas cases that I had not considered what would happen if and when the inevitable conflict between my boss' ideas and mine surfaced. Would she be willing to listen to my analysis and why I thought a specific expert or argument was needed to substantiate a potential habeas claim? Could I convince her to pay the expert's fees, ask the client for more money, or seek additional funding from the court overseeing the case? Would she be willing to help me convince the client why the expert or argument was potentially significant in his or her case? And what would I do if she and I disagreed? Whose view would ultimately prevail?

The dealbreaker was a federal habeas corpus case involving the distribution of large quantities of a controlled substance. The Government's theory was that our client was a drug kingpin who occupied a high-ranking position within a well-known gang. Fortunately, I was able to identify two potential highly-qualified experts to assist us in refuting the Government's case.

That was the exact moment when the conflict reared its ugly head. After several discussions with my boss, it became clear that I had absolutely no authority to retain any experts, to reach out to the client or to the court to seek additional funds to pay for experts, or to assert the arguments I believed were needed to refute the Government's case against our client.

What could I do?

I found the answer to my dilemma in the Comments to the Texas Disciplinary Rules of Professional Conduct. Comment 6 to Rule 1.01 states that "[h]aving accepted employment, a lawyer should act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf. A lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness despite opposition, obstruction or personal inconvenience to the lawyer." Moreover, Comment 1 to Rule 3.01 confirms that "[t]he advocate has a duty to use legal procedure for the fullest benefit of the client's cause…"

Perhaps most significantly, Rule 5.02 reminded me that "[a] lawyer is bound by these rules notwithstanding that the lawyer acted at the supervision of another person…" As Comment 4 to Rule 5.02 make clear, a lawyer working under the direction of a supervising attorney may be placed

in an untenable position if she disagrees with her supervisor, namely, "accept[ing] the decision made by the senior lawyer or…resign[ing] or otherwise los[ing] the employment."

Knowing that both my law license and livelihood were on the line, I had to decide what to do…and fast.

Ultimately, I left the firm. With no immediate employment prospects, I felt overwhelmed and scared. But, at the same time, I knew myself well enough to know that I never wanted to be the kind of lawyer who wasn't willing to do everything I could do for my clients within the bounds of ethical and zealous advocacy.

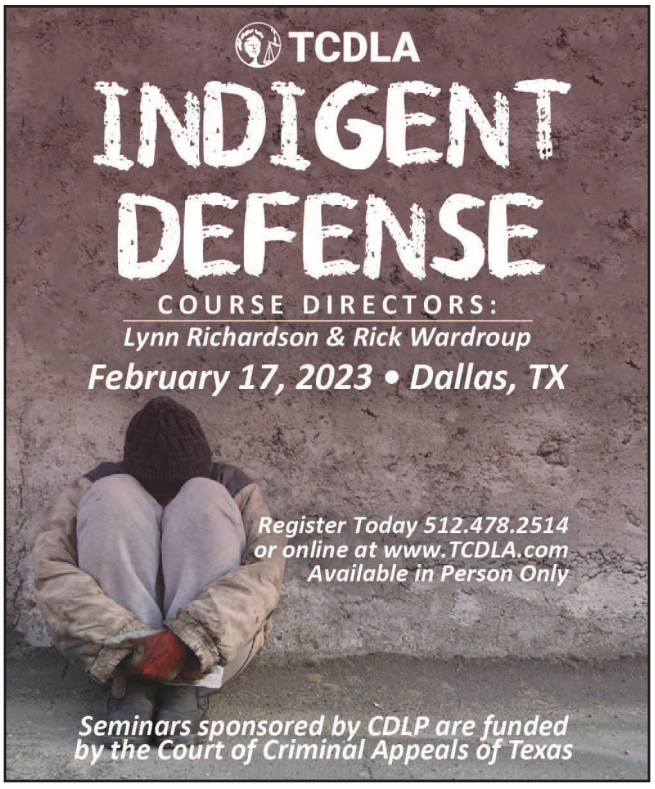
During my unemployment, as I re-watched Justice Ketanji Brown-Jackson handle herself with the kind of grace under fire that my former mentor Gail had always shown, I began to realize something: I missed being a public defender. I missed the camaraderie of the public defender's office, the banter with prosecutors, arguing before judges who sometimes followed the law, and even the phone calls from my former juvenile clients on holidays. When opponents criticized Justice Brown-Jackson's tenure as an assistant federal public defender, I felt angry. How dare they criticize someone who fought to uphold "the constitutional value of representation."

And that's when I realized something. At heart, I am a public defender who wants to fight with my fellow public defenders to uphold the constitutional values of which Justice Brown-Jackson so eloquently spoke during her Senate confirmation hearing, namely providing those who the Government accuses of criminal behavior the competent counsel that the Constitution requires. Although we frequently do not prevail, there is virtue in being willing to stand up and speak out against governmental intrusion upon our clients' constitutional rights and liberties.

So, like my mentor Gail Robinson before me, I will read and re-read the local rules, as well as the rules of evidence and procedure before I step inside a courtroom. I will strive to advocate zealously and respectfully, to stand my ground when challenged, and to "stand[ ] up for the constitutional value of representation."

I can't think of any other work that is more important to do…and I can't be more excited to do it.

**Carol Camp** *is an Assistant Public Defender with the Concho Valley Public Defender's Office. She has devoted her professional legal career to representing indigent juvenile and adult clients in civil and criminal proceedings. Carol has extensive experience litigating on behalf of men and women facing the death penalty and has represented capital clients in trial, state post-conviction, federal habeas corpus, and clemency proceedings. She has also worked on capital trial teams as a mitigation specialist, assisting in telling her clients' stories and persuading the State not to seek the death penalty against them. Prior to joining the Concho Valley Public Defender's Office, Carol represented capital clients in Nevada, Louisiana, Mississippi, Missouri, Nebraska, and South Dakota. As an Assistant Public Defender in the Writs Division of the Harris County Public Defender's Office, she successfully litigated two post-conviction state habeas petitions in state district court and the Texas Court of Criminal Appeals. She can be reached at ccamp@cvpdo.org or 325-229-4654.*

# The Federal Corner

ROBERTO BALLI & CLAUDIA V. BALLI

## Roving Border Patrol Stops

### Introduction

All border cities are surrounded by checkpoints on every highway leading out of the city, regardless of the fact that visitors from Mexico that enter legally were inspected at the port of entry prior to entering the country. To those of us who live on the border (the authors from Laredo) aside from the occasional bad experience, checkpoints , are normally a minor nuisance adding 10 to 30 minutes to our travel time. However, there are sometimes difficult moments when what begins as a routine inspection turns into a requested search or actual search. These moments can sour a local resident's perceptions and respect for the process or for Border Patrol.

In 1976, the Supreme Court held that permanent Border Patrol Checkpoints are legal, complying with Fourth Amendment protections. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). "While the need to make routine checkpoint stops is great, the consequent intrusion on Fourth Amendment interests is quite limited, the interference with legitimate traffic being minimal and checkpoint operations involving less discretionary enforcement activity than roving patrol stops." *Martinez-Fuerte*, at 543. Only brief questioning is allowed and any search that follows must be "justified by consent or probable cause." *Id.*

### Roving Border Stops

Aside from checkpoints, a motor vehicle cannot be stopped simply because it is found in the general vicinity of the border. *Almeida-Sanchez v. United States*, 43 U.S. 266 (1973). Roving border stops are much more intrusive than checkpoints. *Almeida-Sanchez*, *at* 266.Millions of Texans and Americans live along U.S.-Mexico border where the Hispanic population far outnumbers other groups and the great majority of people residing in these border communities are not undocumented immigrants. For example, 96% of the population of Laredo is Hispanic. In Texas, the Hispanic population is now the largest group in the state, outnumbering non-Hispanic whites, as of 2022. *https://www.texastribune.org/2022/09/15/texas-demographics-census-2021/*

In *United States vs. Brignoni-Ponce*, the Supreme Court was asked to decide whether a roving border stop can be conducted on the basis of proximity to the border and the "Mexican ancestry" appearance of a vehicle's occupants. 422 U.S. 873 (1975). The Court said no. Had the Court held otherwise, 96% of the people of Laredo, for example, would have no Fourth Amendment protections while driving in our automobiles at home. The *Brignoni-Ponce* Court allowed both Mexican ancestry appearance and proximity to the border to be considered as part of a reasonable suspicion analysis for a roving stop, but said that these two factors alone are not enough to stop an automobile. *Id.* These roving stops are *Terry* stops and require only reasonable suspicion. *Id.* See *Terry v. Ohio*, 392 U.S. 1 (1968). The Court limited the stops to asking questions about immigration status and suspicious circumstances and a vehicle search after the stop requires probable cause or consent. *Id.* From a practical standpoint, *Brignoni-Ponce,* is significant because the Supreme Court listed a series of a factors that are used to analyze the validity of these reasonable suspicion roving border stops. These are:

1. Characteristics of Area
2. Officer Experience
3. Proximity to Border
4. Traffic Patterns
5. Recent Illegal Activity in Area
6. Driving Behavior
7. Aspects of the Vehicle
8. Characteristics of Occupants

*Brignoni-Ponce*, at 873. Using the above factors, a "Border Patrol agent on roving patrol must be aware of 'specific articulable facts' together with rational inferences from those facts, that warrant a reasonable suspicion that the vehicle is involved in illegal activities, such as transporting undocumented immigrants." *United States v. Chavez-Chavez*, 205 F.3d 145, 147 (5th Cir. 2000). The holdings in *Chavez-Chavez*, and *Brignoni-Ponce*, are entirely consistent with and based on *Terry v. Ohio*, 392 U.S. 1 (1968) and as seen below, *Brignoni-Ponce* and its progeny of cases make perfect sense when viewed under the umbrella of *Terry*, but are simpler in practice. Not one factor under *Brignoni-Ponce* is determinative, the Court must look at the individual stop and consider the factors based on the facts articulated by the agent considering the totality of the circumstances. *United States v. Cortez*, 449 U.S. 411 (1981); *United States v. Arvizu*, 534 U.S. 266 (2002); see also *United States v. Inocencio,* 40 F.3d 716, (5th Cir. 1984).

### The Reality of Border Stops

Roving Border stops and searches can be highly subjective. For example, the authors were once stopped by a trooper on IH-35 North about half-way between Laredo and San Antonio. This road has very few communities along the Laredo-San Antonio stretch; but it is a very busy stretch as far as traffic. The trooper asked for consent to search the vehicle, and when questioned about the reason for the desired search, the trooper said, "you are coming from Laredo." Our response: "everyone on this road is coming from Laredo and NO, YOU CANNOT SEARCH." Literally almost everyone on the highway is coming from Laredo because I-35 begins at mile-marker 0 in Laredo. Of course, using a plate reader, this trooper knew that we were from Laredo before he even initiated the stop. This is life on the border; we all have stories like this, run-ins with troopers or bad experiences at the checkpoint are common.

Not surprisingly, in the criminal practice on the border we see lots of bad stops and bad searches that are later justified in offense reports and motion to suppress hearings by strange, ironic, nonsensical and often untrue facts: "The

driver was driving slow," "he was going too fast," "I got behind him and he slowed down," "I drove next to him and he did not acknowledge me," "he was white-knuckling the steering wheel," "the vehicle was registered out of Brownsville," "they did not look like commuters," "they had no luggage," "I didn't see coffee cups," "I saw fingerprints on the cargo door," "the vehicle was too clean," "the vehicle was too dirty," and list of ridiculous excuses (or "justifications" as they call them) continues.

As the Fifth Circuit noted, "We cannot help but note that the government has variously relied on both sides of the factor, on some occasions contending that it is suspicious for a person to look and on other occasions insisting that it is suspicions not to look. We are persuaded that in the ordinary case, whether a driver looks at an officer or fails to look at an officer, taken alone or in combination with other factors, should be accorded little weight." *United States vs. Moreno Chaparro*, 180 F.3d 629, (5th Cir. 1999). These roving stops are a racket, and there are some agents that specialize in the reasonable suspicion business, literally writing reports designed to address the *Brignoni-Ponce* factors. Federal prosecutors too can perpetuate this conduct in how they prepare the agents for the suppression hearing. Accordingly, defense lawyers must be ready to beat them at their own game, understanding and arguing that the *Brignoni-Ponce* factors favor granting of a suppression motion.

## Application: Rangel-Portillo

The one case that serves as primer on roving stops and is a real winner for the defense is *United States v. Rangel-Portillo*, 586 F.3d 376 (5th Cir. 2009). *Rangel-Portillo* analyzes a roving patrol stop going through the *Brignoni-Ponce* factors. Ironically the *Rangel-Portillo* Court does not cite to *Brignoni-Ponce*, instead crediting the factors to another Fifth Circuit case, *United States v. Chavez-Chavez*, 205 F.3d 145 (5th Cir. 2000), which cites to *United States v. Morales*, 191 F.3d 602 (5th Cir. 1999), which does credit the factors to *Brignoni-Ponce*. Nonetheless, *Rangel-Portillo* is the perfect example of a winning *Brignoni-Ponce* factors case. The most important aspect of *Rangel Portillo* is how the Court disregarded the Border Patrol agent's nonsensical "officer experience" reasons for the stop.

Facts: In *United States v. Rangel-Portillo*, a Border Patrol Agent saw a vehicle which Rangel-Portillo was driving exiting a Wal-Mart store parking lot in Rio Grande City, Texas. 586 F.3d 376, 378 (5th Cir. 2009). The Wal-Mart store was only 500 yards from the Mexican Border and was known to the agent for drug-smuggling and alien-smuggling. *Id.* Rangel-Portillo's vehicle and another vehicle were exiting the parking lot at the same time. *Id.* The agent believed that it was suspicious that as the agent's vehicle approached, the driver looked directly at the agent, but the passengers looked straight ahead, paying no attention to the agent. The agent also felt that it was suspicious that everyone in the vehicle was wearing a seatbelt as the law required. *Id.* The agent also noted that because his vehicle sat higher than Rangel-Portillo's SUV, he could see no Wal-Mart shopping bags in the SUV, the passengers were not speaking with one-another and were sweating "pretty bad." *Id*., 378-79. Based on his observations, the agent activated the emergency lights to his patrol vehicle and pulled the vehicle over without incident. Some of the occupants of the vehicle were undocumented and the driver, Rangel-Portillo, was charged with transporting undocumented people. *Id.*

Rangel-Portillo moved to suppress the stop, which the district court denied. *Id*. at 378. Rangel Portillo appealed the denial of the suppression motion. *Id.* On appeal, the Fifth Circuit analyzed the district court's ruling at Rangel-Portillo's suppression hearing using the *Brignoni-Ponce* factors and found that the stop lacked reasonable suspicion. *See generally Rangel Portillo*, 586 F.3d 376. In its analysis of the *Brignoni-Ponce* factors, the Court made the following findings:

**Characteristics of the Area**: The agent testified that the Walmart store was known to the agent for drug-smuggling and alien-smuggling. *Id*., at 378. Although the District Court had considered it as a factor in its analysis favoring the Government; the Fifth Circuit did not address it directly, conflating the factor with recent activity in the area, which there was none. *Id*. Therefore, this favored the Defense.

**Proximity to Border:** The Walmart that Rangel-Portillo was exiting was only 500 yards from the border. Therefore, this factor weighed against Rangel-Portillo. *Id*. at 380.

**Aspects of the Vehicle:** The vehicle had no unusual characteristics. The agent's suspicion that the two vehicles were exiting the parking lot at the same time and somehow must be connected was not given any weight by the Court since the Government failed to show that there was connection between the vehicles other than exiting a busy store at the same time. *Id*., at 381-82.

**Characteristics of Occupants:** As to the characteristics of the occupants, the fact that the passengers were alleged to have been sweating was given no weight because the sweating could not be connected to anything else. *Id*., at 382. The Court also disregarded the agent's testimony regarding eye contact, finding this to be of no consequence, especially given the obvious contradiction in the agent's suspicions regarding too much eye contact by the driver and not enough eye contact by the passengers. *Id*, at 381. Finally, the Court failed to find any reasonable suspicion in the fact that the "passengers in the vehicle wore seatbelts, sat rigidly, refrained from talking to one another, and had no shopping bags," *id*., as "no rational reason to conclude that law-abiding citizens are less likely to wear their seatbelts or exit a Wal-Mart parking lot sans shopping bags." *Id.*

The agent provided no evidence regarding unusual or suspicious **Traffic Patterns**, **Recent Illegal Activity in Area** or unusual **Driving Behavior** by Rangel-Portillo; therefore, these factors were against the Government. *Id*., at 382-83.

**Officer Experience:** Although officer experience is a factor, the Court noted that in this case the officer's observations did not reasonably connect the conduct with criminal activity. *Id*., at 381.. The Court took aim at giving an agent's experience weight when the testimony makes little or no sense. "And while this Court certainly recognizes the deference due to an agent's expertise in patrolling the border, the Fourth Amendment requires that this Court draw the line at reasonableness. This Court cannot, in good conscience, conclude that the aforementioned law-abiding factors constitute adequate reasonable suspicion to warrant such an intrusion on individual's Fourth Amendment rights. Individuals do not shed their constitutional rights with the click of a seatbelt." *Id.* Thus, the Government's request for deference to the agent's suspicions was unreasonable, especially with regard to the use of seatbelts being suspicious conduct. *Id.*

The *Rangel-Portillo* Court relied on other Fifth Circuit cases, including *Moreno-Chaparro,* in pointing out the Government's contradictions. *Id*., at 381-82. In *Moreno-Chaparro*, the Fifth Circuit wrote that, "We cannot help but note that the government has variously relied on both sides of the factor, on some occasions contending that it is suspicions

for a person to look and on other occasions insisting that it is suspicions not to look. We are persuaded that in the ordinary case, whether a driver looks at an officer or fails to look at an officer, taken alone or in combination with other factors, should be accorded little weight." *United States vs. Moreno-Chaparro*, 180 F.3d 629, 633 (5th Cir. 1999).

### Our Thoughts

*Brignoni-Ponce* is disappointing because the Court allowed a person's "Mexican" appearance to be a factor in a roving stop. However, it's unlikely that a Court would give any weight to "Mexican" appearance in 2022 in a border community like Laredo that has a 96% Hispanic population. As a matter of fact, most judges would probably frown on this. In practice, the authors have never seen an agent use "Mexican" appearance as a factor for a stop in any report, criminal complaint, or suppression hearing in any border cases.

*Brignoni-Ponce* is the *Terry v. Ohio* for the border. The reasonable suspicion analysis in every roving stop suppression hearing will follow the *Brignoni-Ponce* factors for traffic stops. The silver-lining in *Brignoni-Ponce* is that the Court gave us the eight factors to follow and argue in the analysis of a roving stop. It's a simple process. However, *Rangel-Portillo* is true gold. *Rangel-Portillo* tells us that the Court should not merely accept officer experience on its face and should consider whether the suspicious conduct that the officer relies on for the stop would make a person more likely to be engaged in criminality and whether it makes sense or is contradictory to other cases that the Government has previously argued. Therefore, at suppression hearings involving roving stops, we must argue to the Court that the officer's testimony regarding circumstances that raised the officer's suspicions toward our clients are merely coincidental, nonsensical, contradictory or occur with the same likelihood in law-abiding citizens and non-law-abiding citizens. *United States v. Rangel-Portillo*, 586 F.3d 376 (5th Cir. 2009).

**Roberto Balli** *is a board member of CDLP and practices State and Federal Criminal defense in Laredo, Texas, but travels to Federal Courts thought the State and Country. Roberto has significant criminal trial and criminal appellate experience. He is a former First Assistant District Attorney in Webb and Zapata Counties. Roberto is Board Certified in Criminal Law by the Texas Board of Legal Specialization and by the National Board of Trial Advocacy.*

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

**Roberto Balli and Claudia V. Balli** *are married to one another and are law partners at Balli & Balli Law Firm, LLP, in Laredo, a firm dedicated to Federal and State criminal defense and criminal appeals. Roberto can be reached at robertoballi@sbcglobal.net or (956) 712-4999. Claudia can be reached at claudiavballi@yahoo.com or (956) 712-4999.*

# Welcome New TCDLA Members!

## *November 16, 2022 - December 15, 2022*

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Claudia Avalos - Richmond
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Glann Harwood - Midland
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# Save the Date!

## Register for Rusty Duncan by February 15th to get the Early Rate!

# Rusty Duncan Sponsorship
# June 15-17, 2023

## Members' Party Sponsorship

☐ **$500 (Tony Level)**
- Listed in Rusty Duncan Program
- Rusty Commercial Slide
- Two Party Tickets

☐ **$1,000 (Emmy Level)**
- Listed in Rusty Duncan Program
- Rusty Commercial Slide
- Four Party Tickets
- Small Sponsor Sign at the Party
- Reserved Table Sign

☐ **$1,500 (Oscar Level)**
- Listed in Rusty Duncan Program
- Rusty Commercial Slide
- Medium Sponsor Sign at the Party
- Six tickets
- Two Reserved Tables

☐ **$2,000 (Golden Globe Level)**
- Listed in Rusty Duncan Program
- Rusty Commercial Slide
- Table Sponsor Signs
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- Ten Tickets
- Two Reserved Tables
- Select Your Choice of Reserved Seating

*Help raise funds for scholarships and receive a great deal of foot traffic. Donate a bottle of wine or an Item and have your name listed on the Silent Auction Event Flyer.*

## TCDLEI Wine Pull

☐ Donate Bottle of Wine ($20+)*

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Number of Bottles: _____

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Item: _____

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Email to: ksteen@tcdla.com

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☐ **Golf Hole Sponsor = $100**

1. Company Name Sponsor Sign on Golf Bays at Top Golf
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## Payment Option: Please Type or Print:

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Card: (Visa, MC, Discover, or American Express)

Card Number: _____

Exp: _____ Authorized Signature: _____

# From the Front Porch

MICHELLE OCHOA

# On the front lines—Defending Smuggling cases in Texas State Court

Since the advent of Operation Lone Star, there has been an increase in prosecutions under the poorly written statute: Texas Penal Code 20.05. The punishment range for this statute can range from a third-degree felony up to first-degree felony, depending on whether there was a pending disaster declaration, the smuggling was done for pecuniary benefit, there was an attendant serious bodily injury, or a juvenile was smuggled. There are two main ways the attorneys on the front lines handling smuggling cases are seeing the State of Texas prosecute individuals under this statute; namely, using a motor vehicle to conceal an individual from a peace officer or special investigator or using a motor vehicle to flea from a peace officer or special investigator attempting to lawfully arrest or detain the actor. .

There are many possible ways to fight these cases. Two of the biggest areas of attack are challenging the constitutionality of the statute or challenging the significant litigation issues that arise during trial.

## Challenging the Constitutionality

A pretrial writ of habeas corpus is the most effective way to challenge the smuggling statute as it allows for an immediate appeal. However, there that utilized a motion to quash.

Additionally, make sure the form for challenging the constitutionality of a statute is executed and filed with the trial court and the clerk's office notifies the Office of the Attorney General Challenges to the statute include:

1. The statute is preempted by federal law and therefore violates the Supremacy Clause;
2. The statute violates both equal protection and due process;
3. The statute facially violates the 4th amendment freedom from unreasonable seizure; and
4. The statute is facially void for vagueness.

For a thorough analysis of each of these principles see the brief filed by appellee.

## Trial Challenges

If you have a case that has bad facts, you might consider waiving the constitutionality issue (not wanting to create bad law) and proceed to trial. There is another smuggling case, from McMullen County, also pending in the 4th Court of Appeals with the following trial challenges. This case was a 13-count indictment for smuggling. Within the 13 counts there were two juveniles, and 6 females. 12 of the individuals were located hiding under blankets in the bed of the truck. One female was riding in the front passenger seat of the vehicle.

1. Confrontation

Federal practitioners are used to a material witness being detained for purposes of depositions which afford the accused the right to confront and cross examine the material witness. However, what is happening in State Court , is the driver being detained and charged, while all the "smugglees" are immediately removed and placed in the federal immigration system without prior opportunity to cross examine these witnesses. The passengers are not produced at trial. The names, date of birth and national origin of the suspected undocumented persons are testimonial in nature. The accused has a right to cross examine the 13 individuals. The State's attempt to identify the 13 individuals through a law enforcement agent fails to comply with Crawford. Object based, violation of Confrontation Clause, of the Sixth Amendment, , violation of Due Process and due course of law pursuant to the Fifth and Fourteenth Amendments and the Texas Constitution, and violation of compulsory process pursuant to the Sixth Amendment, on lack of personal knowledge.

2. Sufficiency of the evidence

Another unique issue for trial is the question of concealment**.** There is no definition of conceal in the penal code. The Court of Criminal Appeals has held that "actual concealment requires a showing that the allegedly concealed item was hidden, removed from sight or notice, or kept from discovery or observation. When picking a jury talk about the difference between conceal carry and open carry, this is a great way to get the jury thinking about the issues surrounding these cases, especially in our rural counties. If someone is sitting in plain view within the cabin of the motor vehicle, do not concede that that person is concealed. Also watch whether the State has proved which count relates to people in the cab of the vehicle versus which counts relate to people who might be concealed in some other way.

3. Hearsay

Statements about name, date of birth, and national origin are hearsay. They are out of court statements being offered for the truth of the matter asserted. Be prepared for the State to argue that the witnesses are unavailable (due to the immediate placement in the immigration system) and the statements are not excluded because they are statements of personal and family history. Object to lack of personal knowledge, and violation of the rule against hearsay. The prosecution has the burden to affirmatively show that the witness is unavailable. The State must show good faith efforts they took to secure the attendance of the witness, it is insufficient to simply claim the witness is out of the country.

As you can see, state smuggling cases have their own set of unique issues. Our fellow warriors are doing fantastic work in fighting these charges in state court. Let's hope that the 4th Court of Appeals can give us some much-needed relief.

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1. *Credit to Abner Burnett and David Silberthau for the Motion to Quash in Duval County. Credit to Danice L. Obregon for the Appellant's brief out of McMullen County.*
2. *Penal Code 20.05 (a)(1)(A).*
3. *Penal Code 20.05 (a)(1)(B).*
4. *Nos. 04-22-00513-CR, 04-22-00514-CR, 04-22-00515-CR, 04-22-00516-CR, 04-22-00517-CR, 04-22-00518-CR, and 04-22-00519-CR.*
5. *Government Code 402.010(a-1), see also https://www.txcourts.gov/rules-forms/challenging-the-constitutionality-of-a-state-statute/*
6. *Steven Elsik v. State of Texas, 04-22-00333-CR.*
7. *Stahmann v. State, 602 S.W.3d 573, 581 (Tex. Crim. App. 2020).*
8. *Tex. R. Evid. 801, 802, and 804(b)(3)*





**Michelle Ochoa** *joined the Public Defender Program with Texas RioGrande Legal Aid in 2011, where she currently serves as a managing attorney (and felony trial attorney) in the Beeville office. Michelle is board certified in criminal law by the Texas Board of Legal Specialization. She is a past director of TCDLA but continues to stay active in the organization serving on the awards, nominations, and rural practice committees. As a former public school teach, Michelle enjoys teaching at the Tim Evans Trial College. She also served as a mentee in the inaugural class of the Future Indigent Defense Leaders.*

*Prior to becoming a Public Defender, Michelle was in private practice working in criminal defense in Corpus Christi and surrounding areas. After attending law school at St. Mary's University, she worked for several years in the District Attorney's Office of Nueces County. Originally from Carrollton, TX, she earned her bachelor's degree from The University of Texas at Austin and taught high school government prior to entering law school. Michelle is a proud parent of an amazingly autistic son Matthew.*

# TCDLA AWARDS NOMINATIONS

**Do you know someone worthy of a TCDLA award? Nominate them now!**
**Submit by February 25th, 5 pm**

## TCDLA HALL OF FAME

- Minimum of thirty (30) years have elapsed since engaging in active practice of law or the candidate is deceased;
- Substantial commitment to defense of persons accused of crimes on appeal or at trial (not to be based solely on won-lost record or publicity, but in court excellence); and
- Significant contributions to the profession.
- Nominations for the award must be on the included form and submitted to TCDLA by the deadline.

## TCDLA CHARLES D. BUTTS PRO BONO LAWYER OF THE YEAR

- Recipient must be a member in good standing of TCDLA and the State Bar of Texas; and
- Paid court appointments do not qualify except in extremely exceptional cases where the work done far exceeded the pay.
- Nominations for the award must be on the included form and submitted to TCDLA by the deadline.
- This award is not required to be awarded annually.

## TCDLA RODNEY ELLIS AWARD

- Recipient must be a non-lawyer; and
- Exceptional commitment to advocacy; demonstration of specific endeavors related to criminal defense; spreading awareness of TCDLA initiatives and endeavors; having a positive impact on criminal defense attorneys.
- Nominations for the award must be on the included form and submitted to TCDLA by the deadline.

## TCDLA PERCY FOREMAN LAWYER OF THE YEAR

- Recipient must be a member in good standing of TCDLA and the State Bar of Texas.
- Nominations for the award must be on the included form and submitted to TCDLA by the deadline.

NEW!

## TCDLA RISING STAR AWARD

- Recognition of a lawyer licensed less than 10 years who has shown outstanding leadership in the past year – either in the representation of citizens accused and/or in his/her contribution to the efforts of TCDLA.
- Recipient must be a member in good standing of TCDLA and the State Bar of Texas.
- Nominations for the award must be on the included form and submitted to TCDLA by the deadline.
- This award is not required to be awarded annually.

Go to TCDLA.com to see full list of criteria. Nominees must meet all of criteria for consideration.

# Committee on Disciplinary Rules and Referenda Proposed Rule Changes 3.09

### Call of Action by Mike Ware

The State Bar Committee on Disciplinary Rules and Referenda (CDRR) was created by the 2017 Texas Legislature in Senate Bill 302. The committee is made up of seven members of the Texas Bar and two non-lawyers. Their website is at State Bar of Texas | CDRR (texasbar.com) . The website is easy to navigate and is informational, explanatory, and instructive. Their primary function, for our purposes here, is to oversee the initial process of proposing any new or amended Texas Disciplinary Rule of Professional Conduct. The CDRR meets, generally, once a month. The meetings are public, and can be viewed online. Their meeting schedule for 2023 is on their website.

In the fall of 2021, the CDRR initiated the process of amending Rule 3.09 ("Special Responsibilities of a Prosecutor"). The proposed amendments addressed what ethical prosecutors should do if they were to become aware of new and credible information that created a reasonable likelihood that a completely innocent person had been wrongfully convicted of a crime that they did not commit. Although such a situation is not uncommon, how prosecutors handle such situations varies depending on the office, and individual prosecutor. It is not addressed at all in the current Rule 3.09.

The Texas District and County Attorneys Association quickly formed its own committee to fight or at least mitigate any such new rule. Their organized and extensive written and oral opposition is archived on the CDRR website.

That effort notwithstanding, on February 2, 2022, the CDRR unanimously voted in favor of initiating the long process of amending Rule 3.09. The proposed rule was then published in the March 2022 Texas Bar Journal State Bar of Texas | Past Issues (texasbar.com). A public meeting in which any member of the public could appear by zoom and address what they believed to be the pros and cons of the proposed rule was held on April 6, 2022. The public meeting was videoed and archived (as are all of the CDRR meetings). State Bar of Texas | CDRR (texasbar.com). Many prosecutors and even one Court of Criminal Appeals Judge lined up and appeared live to fervently speak against the proposed amended ethical Rule. Frankly, many of those who spoke against the proposed rule obviously had not read it and/or did not understand it. In my opinion, some of their arguments were histrionic and some were nonsensical. Regardless, you can view them and decide for yourself.

The proposed rule itself was simply the ABA Model Rule since about 2012. Prosecutors from across the country were active in formulating the ABA Model Rule. Many states have adopted it or a version with minor changes. Yet, prosecutors from all over the State of Texas seemed ready to go on an organized strike if the proposed Rule, as written, was passed. Once again, their arguments are archived and you can view them and decide for yourself.

The point of this Rule is to help free genuinely innocent people who have been wrongfully imprisoned. It does not directly or indirectly purport to address the causes of why they were wrongfully convicted and does not point any fingers or assign any blame. It does not and is not intended to impugn prosecutors in any way. It does not create the sort of unmanageable burden many who spoke against the Rule seemed so fearful of, as it is already the ABA standard and has been adopted as the Rule in many states with no adverse consequences. What should have been a non-partisan issue was turned into an extremely partisan one.

That said, the CDRR evidently got the message. The TDCAA did not want the proposed Rule or anything like it. The CDRR pulled it back and started all over. At one point, the chair of the TDCAA opposition committee and I were appointed to a CDRR subcommittee. Then a new subcommittee was formed with only CDRR members.

Ultimately, the result is the following proposed amended Rule 3.09. This CDRR proposal is much weaker than both the proposed new Rule published in the March 2022 Bar Journal and the comparable ABA Model Rule. All the proposed rule requires of prosecutors is that they disclose significant new exculpatory evidence to others, including the court and ultimately the defendant – which is essentially what state procedural law already requires. It requires nothing more of prosecutors to ensure that they have not convicted an innocent person or to try to correct the situation if they conclude they have done so.

Thus, the current proposal eliminates two significant elements of both the proposed amended Rule published in Texas Bar Journal in March 2022 and the longtime ABA Model Rule that has been adopted by many states. First, this new proposal does not require prosecutors to investigate new, credible information creating a reasonable likelihood that a completely innocent person has been convicted of a crime they did not commit. Second, it does not require prosecutors to take reasonable steps to remedy a wrongful conviction even when they believe that there is "clear and convincing evidence" that an innocent person was convicted. Those two provisions were removed by the CDRR to satisfy the prosecutors. While the proposed Rule is better than what Texas has now, which is no Rule at all that addresses this issue, that is only barely true.

The current proposed amended Rule 3.09 will be published in the January 2023 Texas Bar Journal and on April 12, 2023 at 10:00 am there will be a CDRR meeting in which any member of the public can appear by zoom and comment. Anyone can submit written comments prior to then. See, CDRR website.

There are several steps and hurdles after the April meeting and public comments but, ultimately, if this Rule, or some version of it gets past the steps and hurdles, the entire active Texas Bar will vote on the proposed new ethical Rule establishing what prosecutors must do when they become aware of credible information or evidence creating a reasonable likelihood that an innocent person has been convicted.

I personally, and on behalf of the Innocence Project of Texas and on behalf of the innocent people sitting in Texas prisons, who otherwise do not have a voice, want to thank the CDRR for its hard work and to thank the Texas Criminal Defense Lawyers' Association for its strong support of our effort.

*******

*Republished from the Texas Bar Journal.*

### Rule 3.09 Special Responsibilities of a Prosecutor

*The Committee on Disciplinary Rules and Referenda, or CDRR, was created by Government Code section 81.0872 and is responsible for overseeing the initial process for proposing a disciplinary rule. Pursuant to Government Code section 81.0876, the committee publishes the following proposed rule. The committee*

*will accept comments concerning the proposed rule through April 13, 2023. Comments can be submitted at texasbar.com/CDRR. The committee will hold a public hearing on the proposed rule by teleconference at 10 a.m. CDT on April 12, 2023. For teleconference participation information, please go to texasbar.com/cdrr/participate.*

**Proposed Rule (Redline Version)**

### Rule 3.09. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

a. refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause;

b. refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

c. not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights;

d. make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

e. exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.

f. When a prosecutor knows of new and credible information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted, the prosecutor shall, unless a court authorizes delay,

1. if the conviction was obtained in the prosecutor's jurisdiction:
   - i. promptly disclose that information to:
     - A. the defendant;
     - B. the defendant's counsel, or if there is none, the indigent defense appointing authority in the jurisdiction, if one exists;
     - C. the tribunal in which the defendant's conviction was obtained; and
     - D. a statewide entity that examines and litigates claims of actual innocence.
   - ii. if the defendant is not represented by counsel, or if unable to determine whether the defendant is represented by counsel, move the court in which the defendant was convicted to determine whether the defendant is indigent and thus entitled to the appointment of counsel.
   - iii. cooperate with the defendant's counsel by promptly providing all information known to the prosecutor regarding the underlying matter and the new information.
2. if the conviction was obtained in another jurisdiction, promptly disclose that information to the appropriate prosecutor in the jurisdiction where the conviction was obtained.

g. A prosecutor who concludes in good faith that information is not subject to disclosure under paragraph (f) does not violate this rule even if the prosecutor's conclusion is subsequently determined to be erroneous.

h. In paragraph (f), unless the context indicates otherwise, "jurisdiction" means the legal authority to represent the government in criminal matters before the tribunal in which the defendant was convicted.

**Comment:**

**Source and Scope of Obligations**

1. A prosecutor has the responsibility to see that justice is done, and not simply to be an advocate. This responsibility carries with it a ~~number of specific obligations. Among these is to see that no~~ person is threatened with or subjected to the rigors of a criminal ~~prosecution without good cause. See paragraph (a)~~. A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that no person is threatened with or subjected to the rigors of a criminal prosecution without good cause, that guilt is decided upon the basis of sufficient evidence, that any sentence imposed is based on all unprivileged information known to the prosecutor, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standard of Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. ~~In addition a~~ A prosecutor should not initiate or


exploit any violation of a suspect's right to counsel, nor should he initiate or encourage efforts to obtain waivers of important pretrial, trial or post-trial rights from unrepresented persons. See paragraphs (b) and (c). In addition, a prosecutor is obliged to see that the defendant is accorded procedural justice, that the defendant's guilt is decided ~~upon the basis of sufficient evidence, and that any sentence imposed is based on all unprivileged information known to the prosecutor. See paragraph (d). Finally, a~~ A prosecutor is obliged by this rule to take reasonable measures to see that persons employed or controlled by him refrain from making extrajudicial statements that are prejudicial to the accused. ~~See paragraph (e) and Rule 3.07~~. See also Rule 3.03(a)(3), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.04. In many instances, it may be appropriate for a prosecutor to inform his or her supervisor about information related to the duties set down by this Rule.

2. Paragraph (a) does not apply to situations where the prosecutor is using a grand jury to determine whether any crime has been committed, nor does it prevent a prosecutor from presenting a matter to a grand jury even though he has some doubt as to what charge, if any, the grand jury may decide is appropriate, as long as he believes that the grand jury could reasonably conclude that some charge is proper. A prosecutor's obligations under that paragraph are satisfied by the return of a true bill by a grand jury, unless the prosecutor believes that material inculpatory information presented to the grand jury was false.
3. Paragraph (b) does not forbid the lawful questioning of any person who has knowingly, intelligently and voluntarily waived the rights to counsel and to silence, nor does it forbid such questioning of any unrepresented person who has not stated that he wishes to retain a lawyer and who is not entitled to appointed counsel. See also Rule 4.03.
4. Paragraph (c) does not apply to any person who has knowingly, intelligently and voluntarily waived the rights referred to therein in open court, nor does it apply to any person appearing pro se with the approval of the tribunal. Finally, that paragraph does not forbid a prosecutor from advising an unrepresented accused who has not stated he wishes to retain a lawyer and who is not entitled to appointed counsel and who has indicated in open court that he wishes to plead guilty to charges against him of his pre-trial, trial and post-trial rights, provided that the advice given is accurate; that it is undertaken with the knowledge and approval of the court; and that such a practice is not otherwise prohibited by law or applicable rules of practice or procedure.
5. The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.
6. Subparagraph (e) does not subject a prosecutor to discipline for failing to take measures to prevent investigators, law enforcement personnel or other persons assisting or associated with the prosecutor, but not in his employ or under his control, from making extrajudicial statements that the prosecutor would be prohibited from making under Rule 3.07. To the extent feasible, however, the prosecutor should make reasonable efforts to discourage such persons from making statements of that kind.


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### Proposed Rule (Clean Version)

**Rule 3.09. Special Responsibilities of a Prosecutor**

The prosecutor in a criminal case shall:

a. refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause;
b. refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
c. not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post- trial rights;
d. make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
e. exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making

an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.

f. When a prosecutor knows of new and credible information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted, the prosecutor shall, unless a court authorizes delay,

   1. if the conviction was obtained in the prosecutor's jurisdiction:

      i. promptly disclose that information to:

         A. the defendant;

         B. the defendant's counsel, or if there is none, the indigent defense appointing authority in the jurisdiction, if one exists;

         C. the tribunal in which the defendant's conviction was obtained; and

         D. a statewide entity that examines and litigates claims of actual innocence.

      ii. if the defendant is not represented by counsel, or if unable to determine whether the defendant is represented by counsel, move the court in which the defendant was convicted to determine whether the defendant is indigent and thus entitled to the appointment of counsel.

      iii. cooperate with the defendant's counsel by promptly providing all information known to the prosecutor regarding the underlying matter and the new information.

   2. if the conviction was obtained in another jurisdiction, promptly disclose that information to the appropriate prosecutor in the jurisdiction where the conviction was obtained.

g. A prosecutor who concludes in good faith that information is not subject to disclosure under paragraph (f) does not violate this rule even if the prosecutor's conclusion is subsequently determined to be erroneous.

h. In paragraph (f), unless the context indicates otherwise, "jurisdiction" means the legal authority to represent the government in criminal matters before the tribunal in which the defendant was convicted.

### Comment:

### Source and Scope of Obligations

1. A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that no person is threatened with or subjected to the rigors of a criminal prosecution without good cause, that guilt is decided upon the basis of sufficient evidence, that any sentence imposed is based on all unprivileged information known to the prosecutor, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standard of Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. A prosecutor should not initiate or exploit any violation of a suspect's right to counsel, nor should he initiate or encourage efforts to obtain waivers of important pretrial, trial or post-trial rights from unrepresented persons. A prosecutor is obliged by this rule to take reasonable measures to see that persons employed or controlled by him refrain from making extrajudicial statements that are prejudicial to the accused. See also Rule 3.03(a)(3), governing ex parte proceedings, among which grand jury proceedings are included. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.04. In many instances, it may be appropriate for a prosecutor to inform his or her supervisor about information related to the duties set down by this Rule.

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3. Paragraph (b) does not forbid the lawful questioning of any person who has knowingly, intelligently and voluntarily waived the rights to counsel and to silence, nor does it forbid such questioning of any unrepresented person who has not stated that he wishes to retain a lawyer and who is not entitled to appointed counsel. See also Rule 4.03.

4. Paragraph (c) does not apply to any person who has knowingly, intelligently and voluntarily waived the rights referred to therein in open court, nor does it apply to any person appearing pro se with the approval of the tribunal. Finally, that paragraph does not forbid a prosecutor from advising an unrepresented accused who has not stated he wishes to retain a lawyer and who is not entitled to appointed counsel and who has indicated in open court that he wishes to plead guilty to charges against him of his pre-trial, trial and post-trial rights, provided that the advice given is accurate; that it is undertaken with the knowledge and approval of the court; and that such a practice is not otherwise prohibited by law or applicable rules of practice or procedure.

5. The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

6. Subparagraph (e) does not subject a prosecutor to discipline for failing to take measures to prevent investigators, law enforcement personnel or other persons assisting or associated with the prosecutor, but not in his employ or under his control, from making extrajudicial statements that the prosecutor would be prohibited from making under Rule 3.07. To the extent feasible, however, the prosecutor should make reasonable efforts to discourage such persons from making statements of that kind. TBJ

# THE UPDATED PERFORMANCE GUIDELINES IN CRIMINAL CASES: CONTINUING PROGRESS FOR TEXAS CRIMINAL JUSTICE

WRITTEN BY **JANI MASELLI WOOD**, **ANDREA MARSH**, AND **JEFF BLACKBURN**

*Republished from the Texas Bar Journal.*

The right to counsel is the most basic guarantee of our criminal justice system. Without a good lawyer, innocent citizens may be convicted of crimes they did not commit, people may remain in jail unnecessarily before they are even convicted of a crime, and people who need another chance may never get one.

## Performance Guidelines

The State Bar of Texas Board of Directors adopted the Performance Guidelines for Non-Capital Criminal Defense Representation in January 2011. The guidelines were drafted by the State Bar Legal Services to the Poor in Criminal Matters Committee to encourage defense attorneys to perform to a high standard of representation and to promote professionalism in the representation of individuals accused of crime.

In 2021, the committee updated the guidelines to reflect changes in the law over the past decade in areas including preservation of error and collateral consequences (such as immigration consequences and court costs). The board of directors approved the updated guidelines in September 2021. A draft version of the updated guidelines was circulated to the State Bar of Texas Criminal Justice Section and the Texas Criminal Defense Lawyers Association before the bar approved them.

The guidelines are a step-by-step guide to what lawyers should do in criminal cases. They remind attorneys that certain actions, like investigating facts before trial, should be considered in every case regardless of funding issues or local practice. At the same time, they remind judges and county officials that lawyers have work to do and steps to take that have to be paid for no matter how constrained counties feel about their budgets.

## The Guidelines' Structure

The guidelines provide a road map of potential courses of action and best practices for every stage of a state criminal proceeding from arrest through direct appeal.

## Potential Application of the Guidelines

The guidelines can be applied in many ways by both defense lawyers and county officials who want to improve public defense services in their jurisdiction.

Defense attorneys can use the guidelines:

- As a personal checklist that is useful for attorneys at every level of experience;
- As a tool to assist in the training of new criminal defense attorneys;
- As a tool for self-evaluation by defenders;
- As an objective tool for the internal evaluation of attorneys in a public defender's office or managed assigned counsel system;
- As a tool for advocating for additional resources for criminal defendants and/or defender offices; and
- As persuasive authority for arguing that a client did not receive effective assistance of counsel at an earlier stage of the proceedings.

Judges and local officials can use the guidelines:

- As a tool for improving attorney performance, by requiring attorneys to be familiar with and follow the guidelines as a condition for receiving court appointments; and
- As a tool judicial review panels can use to screen attorneys who apply to receive court appointments, supplementing the experience-based attorney qualifications in county indigent defense plans.[1]

## Conclusion

The updated Performance Guidelines for Non-Capital Criminal Defense Representation reflect changes in the law. Their use will help ensure that people accused of crimes will receive not just a lawyer, but a lawyer who is ready and able to do the job they should do under the law. **TBJ**

## NOTES

1. The Fair Defense Act, or FDA, requires counties to adopt objective qualifications that attorneys must meet in order to be eligible to receive court appointments but recognizes that these experience-based qualifications alone are insufficient to guarantee high-quality representation. Accordingly, the FDA specifies that attorneys who meet the qualifications also must be approved by a majority of the judges in their jurisdiction. Tex. Code Crim. Proc. art. 26.04(d).; See, *e.g., Davis v. Tarrant County,* 565 F.3d 214, 217–18 (5th Cir. 2009) (suit by criminal defense attorney alleging his application for inclusion on felony court appointment wheel was denied because he did not have good personal relationships with judges; dismissed on immunity grounds).

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was a previous chair of the Legal Services to the Poor in Criminal Matters Committee. He is a criminal defense and civil rights lawyer and co-founder of the Innocence Project of Texas.



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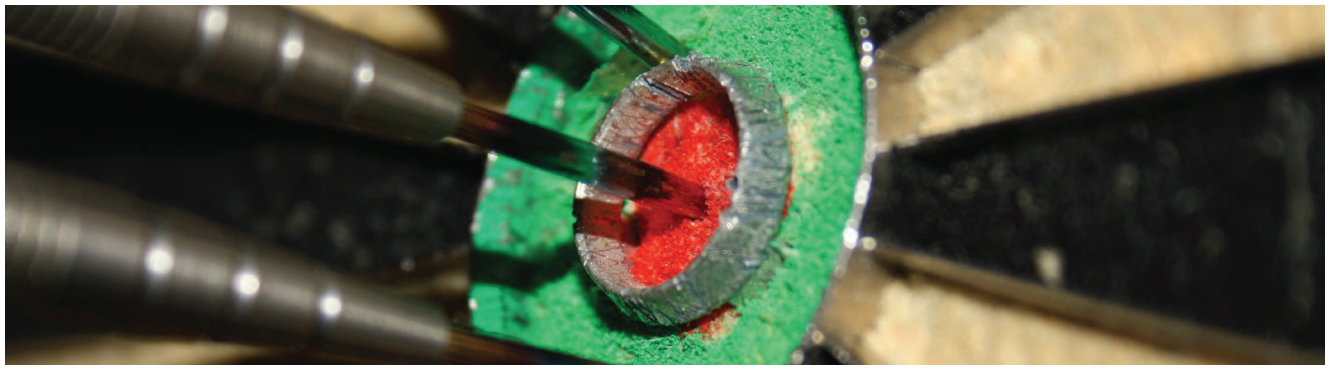

# Accuracy is Hard, Part 3

GREG KANE, MD

*For previous parts, visit the TCDLA Website Voice Archives*

Sloppy drunks are easy to spot, and that's how SFST validation works.

In any proceeding that includes consideration of the accuracy or relevance of the SFST, your expert should be able to use Figure 5 from NHTSA's hallmark *Validation of the Standardized Field Sobriety Test Battery at BACs Below 0.10 Percent* (Stuster and Burns 1998) to show that:

1. The SFST's Horizontal Gaze Nystagmus, Walk and Turn, and One Leg Stand are very weak tests.
2. Most sober people fail the SFST's.
3. The small increment of accuracy gained by reliance on the SFST comes at the cost of many false convictions.
4. Validation study officers do not identify impaired drivers by administering the SFST, instead they use crude pretesting to pick out easy to find drivers who are obviously drunk.
5. The trained and experienced DUI officers who evaluated drivers in this hallmark study knew the SFST does not work. They changed its answers.
6. These officers did not actually arrest the drivers they "decided to arrest."
7. Instead, officers based drivers' actual arrests not on the SFST, but on the Portable Breath Test they administered to each driver.

## Tests don't create probabilities, they change probabilities

This article is Part 3 of a series about the accuracy of law enforcement's Standardized Field Sobriety Test. Part 1, in discussing the scientific accuracy of the SFST, cited documents confirming the importance of Stuster and Burns 1998 to the foundations of DUI officers' testimony about the SFST. Part 2 examined the layman's accuracy of the SFST (a statistic scientists call *positive predictive value*) and explained the importance of a control group to determinations of the accuracy of diagnostic tests like the SFST. In Part 3, this article, we apply your new understanding of control groups to NHTSA's hallmark Stuster and Burns 1998 SFST validation study.

The significance of control groups can be understood by considering the pneumonia-penicillin validation study from Part 2. During a hypothetical pneumonia epidemic, researchers found that when pneumonia patients were given penicillin, 80% survived. A layman's understanding of this result would be that the efficacy of penicillin is 80%. If you read Part 2, you know better. When further data was gathered from a control group of pneumonia patients who had not been given penicillin, the survival rate was 75%. The effect of penicillin is not to create an 80% survival rate. The effect is to change the survival rate from 75% to 80%. Penicillin does not create survival rates, it changes them. The efficacy of penicillin is not 80%, it is 80 - 75 = 5%.

Similarly, the SFST does not create probabilities, it changes them. In a validation study, the SFST changes the control group's before-the-SFST-is-done *pre-test probability* into the after-the-test's-results-are-known *post-test probability*. To figure out what a validation study determined about the diagnostic power of the SFST, you have to know both numbers. In this article we'll find these numbers in Figure 5 of Stuster and Burns 1998, and you'll learn what they tell us about this study's socalled "validation" of the SFST.

## DUI officers pretest drivers to identify drunks

But first a digression, starting with a plot line. Stuster and Burns' control group was distorted by the fact that officers administered SFSTs only to a skewed fraction of the drivers they evaluated. Drivers were selected to undergo SFST impairment testing only after preliminary screening showed they were probably impaired.

Let's be specific. Police SFST training splits the roadside DUI investigation, the "DWI Detection Process," into three phases, each discussed at length in the SFST training manual. In Phases One and Two officers look for what traffic police call "cues" of impairment. They use this preliminary evaluation to determine whether or not to administer an SFST.

Phase One, Vehicle in Motion training, takes up an entire chapter of the SFST training manual, 66 pages. Officers learn to look for driving cues that police believe "have been found to predict blood alcohol concentrations (BAC) of 0.08 percent or greater." These cues include, for example and without exclusion, weaving, lane departure, drifting, swerving, wide radius turns, stopping too far from the curb, jerky stops, abrupt stops, and "anything else."

Phase Two, Personal Contact training, has its own chapter, 28 pages. Officers learn to identify cues including, without exclusion, bloodshot eyes, admissions of drugs or alcohol, fumbling fingers, slurred speech, leaning on vehicle, odors, alcohol containers, drugs or drug paraphernalia, and "anything else."

In SFST validation studies, some drivers pass this preliminary Phase One and Phase Two evaluation and are released without an SFST. The studies record no data about these drivers. Other drivers fail their preliminary testing and are taken on to Phase Three. Police call this phase "Pre-arrest Screening." An Officer's "…first task in Phase Three is to administer three scientifically validated Standardized Field Sobriety Tests (SFSTs)."

## Stuster and Burns 1998

That's it for the digression. Now we return to Stuster and Burns Figure 5 to look for the control group's before-the-SFST-is-done *pre-test probability* and the study test's after-the-test's-results-are-known *post-test probability*. Using those, we will determine the contribution of the SFST to the final accuracy.

# TCDLA's
## Rural Practice Committee
### Rountable on Febrary 24th @ 4pm

**TCDLA's Rural Practice Committee has been establishing resources that are helpful for our rural practice members, including a listserv and some upcoming CLEs. Everyone is welcome to join!**

**Currently there are openings on our committee, and we welcome you. If you are interested in serving on the Rural Practice Committee, please contact Melissa Schank.**

**You may register online at tcdla.com or by calling the office at 512.478.2514. If you have any questions, please contact either of our committee co-chairs, Paul Harrell or Dean Watts.**


Stuster and Burns reports results of real SFSTs administered in the field by experienced DUI officers to real drivers in real DUI investigations. But you should understand that this study fails to report the diagnostic performance of the SFST itself. In place of the SFST, the study reports the layman's accuracy of DUI officers' unstandardized, unexplained personal estimates of drivers' BACs. These "estimates" are not reproducibly related to the driver's SFST; they are not useful to us in our quest to quantify the diagnostic performance of the SFST itself.

Stuster and Burns is helpful because it does report the diagnostic performances of the Horizontal Gaze Nystagmus (HGN), Walk and Turn (WAT), and One Leg Stand (OLS) tests. These results are in the study's Figure 5, on its page 21. The figure is reproduced here. It has three contingency tables (traffic police call them "decision matrices"), one each for HGN, WAT, and OLS. Contingency tables like this are widely used in science, where textbooks describing their mathematics run to many hundreds of pages. This article will skip the theory and just extract the results we need.

Look at Figure 5. Look at the table "Number of WAT Clues." The study's basic findings are recorded in the four large central boxes. Each driver who completed the Walk and Turn test was assigned to one of these boxes, depending on her two test results: WAT, pass or fail; BAC, high or low. The numbers in the boxes –16, 179, 36, 40– tally the number of drivers with the corresponding pair of results.

The numbers in the smaller boxes at the right and bottom add up each row and column. 16 + 179 = 195. 16 + 36 = 52. The bottom right cell, "N=271," adds up the total number of drivers who completed the WAT test. 16 + 179 + 36 + 40 = 271.

### 1. HGN, WAT, and OLS are very weak tests

Below the table Stuster and Burns' text reads, "82% accurate in 'yes' decisions." This number comes from Column 2. We see that 179 + 40 = 219 drivers failed the WAT test. Of those, 179 had a BAC that was high. Your calculator says 179 / 219 = 0.82. When the WAT test predicted "BAC high," the test was correct 82% of the time.

We began our project interested in two probability numbers that describe the performance of the validation study's WAT test. This 82% is one of those. It is the after-the-test's-results-are-known *post-test probability*. Once we know a driver in this study failed the WAT test, we know there is an 82% chance her BAC was high.

Does this mean the WAT test is 82% accurate? It does not. Recall the pneumonia-penicillin study. Our WAT's 82% is equivalent to that study's 80%. If you've read Part 2, you recognize it as the layman's accuracy of the WAT test.

Now let's use this table to find our other number. Look at Row 1. Notice the label at the left, "≥ 0.08%." This top row tallies just those drivers whose BACs were high. No driver with a low BAC was tallied in this row. Every driver who had a high BAC was assigned in one of the two boxes in this top row. In the Stuster and Burns validation study, 16 + 179 = 195 of all the drivers who completed the WAT had a BAC above the per se limit.

Recall that the total number of drivers who completed the WAT was 271. Your calculator says 195 / 271 = 72%. This is the other number we are looking for. This is the control group's before-the-WAT-is-done *pre-test probability.*

We can now mimic the calculation we did in the pneumonia-penicillin case, 80 - 75 = 5%, and determine the contribution of the WAT test to the layman's accuracy reported by Stuster and Burns. 82 - 72 = 10. The "accuracy" of the WAT test is not 82%, it is 10%.

You can repeat this calculation for the HGN and OLS tests.

HGN: layman's accuracy 87%. Control group: 209 / 290 = 72%. 87 - 72 = 15. The "accuracy" of HGN is not 87%, it is 15%.

OLS: layman's accuracy 85%. Control group: 198 / 273 = 73%. 85 - 73 = 12. The "accuracy" of OLS is not 85%, it is 12%.

If you plan to craft a DUI(D) defense that includes an attack on the SFST's scientifically proven inaccuracy, the methods and findings here are something you'll want to understand well enough to explain to other people. One way to do that is to introduce the question: *If the Stuster and Burns' DUI officers had stopped their evaluations right before they administered the SFST, what accuracy would they have achieved?*

Study officers used their Phase One SFST training to identify bad driving that suggested driver impairment. They pulled these drivers over and evaluated them with Phase Two. Drivers whose combined Phase One and Phase Two testing did not create suspicion of impairment were released, without having an SFST administered. Stuster and Burns records no data about them.

Drivers who failed Phases One and Two were judged to be maybe impaired. After that judgment had been made, each of these drivers went on to have an SFST administered. It is the results of these Phase Three HGN, WAT and OLS tests that are recorded in Stuster and Burns' Figure 5.

If Stuster and Burns' officers had stopped their evaluations just before administering the WAT test, what accuracy would they have achieved? Here's how your expert can use the WAT section of Figure 5 to answer that question.

Two-hundred seventy-one drivers failed Phases One and Two and then advanced to Phase Three, during which they completed the WAT test. The table shows that of these 271 drivers, 195 had a high BAC. Your calculator says 195 / 271 = 72%. If the officers had skipped the WAT, and simply ended their evaluations by arresting every driver who failed Phases One and Two, the accuracy of those arrests would have been 72%.

Without the WAT test, 72%. With the WAT, 82%. The WAT test contributed just 10% to final accuracy of the three phase evaluation. WAT is a weak test.

Sobriety tests do not create probabilities, they change them. HGN, WAT, OLS change probabilities by only a small amount: 15, 10, 12%. HGN, WAT, OLS are weak tests that have no meaningful power to change the probability that a driver's BAC is elevated. (The issue of *no meaningful power* is explained in Part 2.)

### 2. Most sober people fail the WAT test, Many sober people fail the HGN and OLS tests.

Figure 5 shows how often sober people (as defined by BAC) fail the HGN, WAT, and OLS tests.

Look again at the WAT table. Look at Row 2. Notice the label at the left, "< 0.08%." This lower row tallies just those drivers whose BACs were low. No driver with a high BAC was tallied in this row. Every driver who completed the WAT test, and had a low BAC, was

assigned to one of the two boxes in this lower row. Your calculator says 36 + 40 = 76.

The number 36 tallies drivers who had a low BAC, and passed the WAT test. These WAT results are correct.

The number 40 tallies drivers who had a low BAC, but failed the WAT test. These WAT results are wrong.

Of the 76 drivers who had a low BAC and completed the WAT test, 40 had test results that were wrong. 40 / 76 = 53%.

When sober drivers (as defined by the BAC) took the WAT test, the test gave the wrong answer 53% of the time. Most sober people failed the WAT test.

Let's repeat this calculation for the HGN and OLS tests.

HGN: 30 / 81 = 37%. When sober drivers took the HGN test, the test gave the wrong answer 37% of the time.

OLS: 31 / 75 = 41%. When sober drivers took the HGN test, the test gave the wrong answer 41% of the time.

### 3. The small increment of accuracy gained by reliance on the SFST, comes at the cost of many false convictions.

Having used Figure 5 to show that HGN, WAT and OLS are weak tests, you'll want to prepare for the counterargument that no test is perfect, and the study proves these tests do add some accuracy, and that means they will help the jury.

Think of this as the Backhoe Fallacy. If you were beachcombing for lost rings and coins, scooping up the sand with a backhoe would collect many treasures you would otherwise miss. That's good. The trouble is that the scoop would necessarily also collect lots and lots of sand. That's bad. All the while the SFST's "BAC high" result is correctly identifying drivers with a high BAC, the same result, "BAC high", is incorrectly identifying innocent drivers as having a high BAC. So yes, by relying on the SFST juries can correctly convict a few extra guilty drivers, but in doing so they will necessarily and unavoidably convict a large percentage of the innocent drivers.

Your expert can quantify this. Suppose 100 juries rely on 100 defendants' failed WAT tests to decide whether or not the defendants had a high BAC. That reliance will add an increment, Figure 5 says something like ten percent, to the accuracy of those verdicts. But Row 2 of the WAT table shows that the inevitable cost of those few points of increased accuracy will be that 53% of the innocent drivers will be wrongly convicted.

Reliance on HGN adds 15% accuracy, at the cost of 37% of innocent drivers being convicted. OLS 12%, 41%.

Figure 5 shows that the small increments of accuracy created by reliance on the HGN, WAT and OLS, inevitably come at the cost of many false convictions.

### 4. Validation study officers do not identify impaired drivers by administering the SFST, instead they use crude pretesting to pick out easy to find drivers who are obviously drunk

If you craft a DUI(D) defense that attacks the SFST's inaccuracy, Figure 5 reveals further helpful facts about the SFST that your expert can explain to the judge and jury.

The after-the-HGN-WAT-OLS-results-are-known *post-test probabilities* (82 to 87%) we extracted from Figure 5 show that DUI officers were able to park their cars, observe the stream of traffic, and extract from it a group of drivers most of whom were drunk. That is impressive. But the contribution of the HGN, WAT and OLS tests to these drunk driver identifications was small (not meaningful, see Part 2). Figure 5's before-the-SFST-is-done *pre-test probabilities* show that by the time officers had completed just Phases One and Two of the DWI Detection Process, they had already selected a group of drivers 72% of whom had a high BAC. No SFSTs had been done yet. The SFST contributed nothing to these correct identifications. By comparing these numbers, 82 to 87% and 72%, you can use Figure 5 to show that the great bulk of the correct identification of impairment was created not by the HGN, WAT, OLS tests, but by the pre-screening.

Now consider the pre-screening. In Phase 1 and Phase 2, officers stop people who make a driving mistake (or have a bad tail-light, or "anything else") and rapidly pick out folks who look drunk. Stuster and Burns failed to measure how officers did this prescreening, but whatever the details, the process was quick, unstandardized, and unscientific. Blunt. Figure 5 shows that a quick, blunt, unscientific process can identify drivers, most of whom are drunk. How can this


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be?

Notice that officers don't have to identify every alcohol impaired driver, or even most; they just have to make sure that the drivers they do pick are impaired. Stuster and Burns shows that they do this by picking out drivers who are very drunk. Officer's use Phase 1 and Phase 2 to pick out drivers whose BAC is so high that their impairment is obvious. In Stuster and Burns, the drivers selected by prescreening had an average BAC of 0.12%. That's one and a half times the per se limit –very high.

Stuster and Burns is not alone. The SFST training manual teaches officers about two other SFST validation studies. Florida 1997 and Colorado 1995. Florida officers were 95% accurate. The average BAC of drivers selected for Phase 3 SFST testing was 0.13%. The average BAC of drivers correctly arrested was 0.15, which the study itself describes as "a severely impairing alcohol level." NHTSA's Drug Recognition Expert training manual confirms: "[d]rivers with a BAC level of 0.15 percent were 12 times more likely to crash than sober drivers." Florida officers used Phases One and Two to pick out drivers who were obviously drunk.

Colorado officers were 86% accurate. The Colorado study says: "[o]ver half were 0.15% or higher. More than 25% were above 0.20%, and five drivers had BACs of 0.30% and higher." The average driver BAC was 0.15%. Colorado officers used Phases One and Two to pick out drivers who were obviously drunk.

Exactly how officers did their prescreening is not important to your purpose, but life experience suggests methods that would work. Officers ask: "how much have you had to drink?" A lady who admits to four beers has a high alcohol level. Besides confessions, officers can just select those drivers who are obviously drunk. A lady driving on the wrong side of the road, who admits to five vodka doubles and stumbles from her car reeking of booze… is drunk.

Here's how all of this is relevant to a DUI(D) defense. Your expert has used Figure 5 to invalidate the high HGN, WAT, OLS, and SFST accuracies reported by NHTSA's validation studies. The accuracies do not arise from the SFST, or from Phase 1 and Phase 2 prescreening, or from highly trained officers' mystic ability to unravel observable indicators of impairment. The accuracies arise from the fact that some drivers are obviously drunk, and they are the ones study officers pick out of the stream of traffic. Turns out not so impressive after all.

Your expert may use science words like *selection bias* and *spectrum bias*.

By the way, the officers in these studies were not cheating. They were doing exactly what they were supposed to do – take dangerous drivers off the road. Good for them.

### 5. The trained and experienced DUI officers who evaluated drivers in this hallmark study knew the SFST does not work. They changed its answers.

But wait, there's more! Figure 5 reveals further helpful facts your expert can explain to the judge and jury.

SFST training teaches officers that in the Stuster and Burns validation study "[c]orrect arrest decisions were made 91% of the time *based on the three SFSTs* (HGN, WAT, OLS)" [emphasis added]. Stuster and Burns itself repeatedly says officers' decisions were "based on SFST results." These claims are incorrect.

Stuster and Burns includes another contingency table, its Figure 4, on its page 18. That figure is reproduced here. This table quantifies the ability of DUI officers, who administered an SFST and measured drivers' BAC with a PBT machine, to "estimate" each driver's BAC as revealed by the PBT machine officers used to measure the BAC. We are to believe these BAC "estimates" are based on the SFST.

Look at Figure 4. Look at the square with 24 in it. This square tallies all the sober drivers whose BAC officers wrongly estimated as being high. These are the officers' False Positive results. Twenty-four false positive BAC "estimates."

Flip back to Figure 5. Look at the WAT table. Look at the similar square. See the 40? Forty false positive WAT results. When sober drivers took the WAT test, the test was wrong 40 times. The WAT test indicated that each of those 40 drivers had a high BAC. If DUI officers had based their "estimates" on the WAT, they would have estimated that each of those drivers had a high BAC. Officers did not do that. Officers estimated a high BAC in only 24 of these sober drivers. Officers changed at least 40 - 24 = 16 of the WAT test's wrong false positive answers into correct true negative answers.

Officers changed 16 of 40 wrong WAT false positive answers. Your calculator says 16 / 40 = 40%. When the WAT test gave the wrong answer, when it incorrectly indicated that a sober person had a high BAC, Stuster and Burns' DUI officers ignored that answer, changed that answer, corrected that answer 40% of the time.

Look again at Figure 4, this time at Row 1. See the 4? This box tallies all the drivers who had a high BAC, who officers wrongly estimated to have a low BAC. There were four false negative BAC estimates.

Now look at Figure 5, at the WAT table, at the similar box. See the 16? There were 16 false negative WAT results. If DUI officers had based their "estimates" on the WAT, they would have estimated that each of those drivers had a low BAC. Officers did not do that. Officers estimated a low BAC in at most 4 of these sober drivers. Officers changed at least 16 - 4 = 12 of the WAT test's wrong false negative answers into correct true negative answers.

When the WAT test gave the wrong answer, when it incorrectly indicated that a high BAC driver had a low BAC, Stuster and Burns' DUI officers ignored that answer, changed that answer, corrected that answer 12 / 16 = 75% of the time.

I leave you and your expert the exercise of using Stuster and Burns' Figures 4 and 5 to do similar calculations for HGN and OLS.

The trained and experienced DUI officers who did the driver evaluations in this hallmark study knew the SFST does not work. They ignored and corrected its answers.

### 6. Officers did not actually arrest the drivers they "decided to arrest"

We're done with Figure 5, but here's one last helpful fact your expert can wring from Figure 4. We're deep in the weeds and this is gonna get fussy; it's OK for you to stop now.

Look at Figure 4. This contingency table quantifies the diagnostic performance of DUI officers' ability to estimate drivers' BAC. Stuster and Burns describes these results in the paragraph immediately above the figure: "It can be calculated from the data contained in Figure 4 that *officers' decisions* were accurate in 91 percent of the 297 cases (i.e. [210 + 59] ÷ 297 = .906). Further, officers' *decisions to arrest* were correct in 90 percent of the cases in which BAC was estimated to be ≥ 0.08 (i.e. 210 ÷ 234 = .897)" [emphasis added].

These very results get into court by way of the SFST Training Manual, which teaches officers that, in the Stuster and Burns study, "correct *arrest decisions* were made 91% of the time based on the three SFSTs (HGN, WAT, OLS)" [emphasis added].

I sheepishly admit, for a long time when I read these sentences I thought "decisions to arrest" meant, you know, decisions to arrest, as if officers actually arrested the drivers they decided to arrest.

They didn't.

If officers had matched their actual arrests with the "arrest decisions" / "Estimated BACs" of Figure 4, then they would have arrested 234 drivers. But they didn't. I draw your attention to Stuster and Burns' Table 4, reproduced here. This table gives a "detailed accounting of the estimated and measured BAC data by age and gender category, and by the disposition of the enforcement stop." See if you can find, among the dozens of entries in this half-page of fine print, Stuster and Burns' single mention of the total number of drivers actually arrested. See it? 217.

Stuster and Burns' officers did not arrest 234 drivers. They actually arrested 217 drivers. Officers did not actually arrest all the drivers they "decided to arrest."

Of course they didn't. That would have required officers to actually arrest people they knew had BACs below the legal limit, and to release drivers they knew were an immediate danger to themselves and others.

Stuster and Burns' Figure 4 reports 24 false positive officer estimates. (Don't confuse Figure 4 with Table 4.) In each of these cases the officer administered an SFST, estimated the driver's BAC to be above the per se legal limit –and then did a PBT proving that estimate was wrong. Now, still at the roadside, the officer knows this DUI suspect's BAC is below the legal limit. What crime is the officer supposed to arrest the driver for?

Stuster and Burns' Figures 4 and 7 report 4 false negative officer estimates. In each of these cases the officer administered an SFST, estimated the driver's BAC to be below the per se legal limit –and then did a PBT proving his estimate was wrong. Now, still at the roadside, the officer knows this driver's BAC is above the legal limit. The officer not only knows this driver (some with BACs as high as 0.12%) is guilty, he also knows she is an immediate danger to herself and others. Are we really to believe San Diego DUI officers released these drivers?

Stuster and Burns' pages 19 and 20 discuss the officers' false BAC estimates at some length. I commend to you and your expert the pleasant exercise of dissecting this discussion to puzzle out which drivers were and were not arrested. Note that 234 "arrest decisions" - 24 false positive non-arrests = 210 arrests. 210 arrests + 2 false positive arrests ("…two of the subjects with measured BACs of 0.07 were arrested for DWI" ) = 212 arrests. 212 arrests + 4 false negative arrests = 216 arrests, which is close to the 217 actual arrests.

### 7. Officers based drivers' actual arrests not on the SFST, but on the Portable Breath Test they administered to each driver

This exercise can get close to the correct answer, but in the end Stuster and Burns' written report fails to reveal precisely how drivers' actual arrests related to officers' "arrest decisions." To find that out, you need the study's raw data. I myself am co-author of peer reviewed research that obtained and analyzed Stuster and Burns' data set. I've made the data set available for you on the web: sfst.us/raw.html. A few minutes with Excel clarifies the relationship. Check my work.

Look at this article's Figure 4b. This is Stuster and Burns' Figure 4, supplemented with the actual arrest and release counts for each cell. (Remember, Stuster and Burns and the SFST training manual equate "Officers' Estimated BACs" with "arrest decisions." In this figure 210 and 24 represent SFST "arrest decision" arrests; 4 and 59 represent SFST "arrest decision" releases.). Drivers' actual arrests do not match officers' "arrest decisions."

Notice the pattern. The drivers' actual arrests matched "arrest decisions" / "BAC estimates" that matched the PBT. Actual arrests did not match "arrest decisions" / "BAC estimates" that did not match the PBT. What the actual arrests matched was the PBT.

Let's be specific. Square 4: when the "arrest decision" / "BAC estimate" was to release drivers who then proved, by PBT, to have a high BAC, drivers were actually released only one time out of four.

Square 24: when the "arrest decision" / "BAC estimate" was to arrest drivers who then proved, by PBT, to have a low BAC, drivers were actually released 22 times out of 24.

When the SFST based "arrest decision" / "BAC estimate" was wrong, officers followed the SFST (1 + 2) / (4 + 24) = 11% of the time. In these same cases drivers' actual arrests matched the PBT (3 + 22) / (4 + 24) = 89% of the time.

Square 59: when the "arrest decision" / "BAC estimate" was to release a driver who then proved, by PBT, to have a low BAC, the driver was actually released 57 times out of 59. (The two arrests were for drugs and underage alcohol).

Square 210: when the "arrest decision" / "BAC estimate" was to arrest a driver who then proved, by PBT, to have a high BAC, the driver was actually arrested every time.

When the SFST based "arrest decision" / "BAC estimate" was correct, officers failed to follow it only 2 / (59 + 210) = 1% of the time. In these cases, drivers' actual arrests matched the PBT 99% of the time.

In the Stuster and Burns "SFST" validation study, actual arrests agreed with the driver's PBTs results (3 + 22 + 57 + 210) / 297 = 291 / 297 = 98% of the time.

From Stuster and Burns' raw data, 217 actual arrests. Not 235.

214 drivers had a PBT reading showing a high BAC; 213 were arrested. The one driver released had a BAC of 0.08%.

83 drivers had a PBT reading showing a low BAC; 4 were arrested. Of those 1 was for drugs, 1 for underage alcohol, 1 was noted to have "BAC late"; 1 had BAC of 0.07 with no additional notation.

Stuster and Burns does not validate the SFST, it validates the ability of traffic police to administer a PBT and arrest drivers according to its results.

## Series roundup

### Summary

A newly published peer-reviewed scientific study, Kane 2021, does something NHTSA has not done in two generations – calculate and report the scientific accuracy of law enforcement's Standardized Field Sobriety Test.

Using Kane 2021 you can now show that NHTSA's hallmark SFST validation study data proves that the fact a driver failed her SFST, HGN, WAT, or OLS testing does not make it meaningfully more likely her BAC was elevated. Testimony about a driver's SFST results cannot help the jury decide the question at issue in an impaired driving prosecution.

Kane 2021's table of SFST accuracies at various BAC levels can help your expert demonstrate that law enforcement's misuse of the statistic "accuracy" leads DUI officers to describe SFST results in "layman terms" that grossly overstate the diagnostic power of the SFST. Far from helping the jury, this scientifically incorrect testimony will mislead them.

The inaccuracy of the HGN, WAT, and OLS tests can be demonstrated directly from Stuster and Burns' study report.

### Getting ready for expected prosecution arguments

If your DUI(D) defense strategy includes an attack on the accuracy of the SFST, here are a couple prosecution counter arguments you'll want to prepare for.

First, and I am not making this up, the prosecution's expert is likely to testify there is no need to worry about false positive sobriety test results, because police only administer the SFST to people who are impaired. NHTSA has been teaching officers this theory as far back as the 1990s. You should be ready for the Phase 1 and Phase 2 control group 72% accuracy shown in Stuster and Burns' Figure 5 to be offered as proof of this point.

Second, sure the SFST is not perfect, but the opinions of trained and experienced officers are highly accurate. Officers' opinions are based not on the SFST, but on the totality of the driver's evaluation. Again, you'll want to be ready for Stuster and Burns' Figures 4 and 5 to be offered as proof of the point – after all the officers' "arrest decisions" were correct 91% of the time.

You and your expert can roll up your sleeves and fight this terrible science point by point, or you may consider my own favorite reply to these prosecution theories. (I'm not an attorney, but these ideas are endorsed by my friends Dunning and Kruger. As far as you know.). Ready?

Your pretrial target is not the entire DUI(D) evaluation process, it is this officer's testimony about your client's SFST. You seek to exclude testimony mentioning this driver's HGN, WAT, and OLS

tests. That's all. The science proves this specific testimony would be not helpful. It will mislead the jury. Exclude the inaccurate SFST, but let the weaving and slurring and other Phase 1 and 2 stuff in.

Excluding the SFST is nice in itself, but notice the knock on effects. Without the *Standardized* FST, the officer's evaluation loses its pretense of scientific foundation, structure, and reliability. The SFST validation studies, the officer's SFST training, and his certification are no longer relevant. The prosecution is left with vague, unstandardized, untested, unvalidated Phase 1 and Phase 2 findings. As the science says it should be.

In this article "Stuster and Burns" refers always and only to the scientific study and never to the study's authors. This article is about the science quantifying the diagnostic power of the SFST. Nothing here is a statement about the knowledge or intentions or actions of any person at NHTSA or the IACP or the authors of, or the officers involved in, Stuster and Burns 1998.

## Endnotes

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# When is State Jail Not a State Jail?

## CLIFFORD DUKE

I know, this sounds like a setup to a lawyer joke, which don't get me wrong are some of my favorites. When should you ditch your lawyer? When they lose their Appeal. But no, this question actually does appeal to our legal nerdiness. A man in an interrogation room says, "I'm not saying a word without my lawyer present." "You are the lawyer," says the policeman. "Exactly, so where's my present?". What we want to know is: When is a State Jail offense just a State Jail and how can it become more? How many lawyer jokes are there? Three. The rest are true stories. Ok, ok, I'm done. Let's take a look at these state jail felonies.

I will start with enhancements. We all know about enhancements, right? Sequential prior penitentiary trips can be used to enhance the punishment ranges of new charges. A prior penitentiary conviction bumps the punishment of your third degree to that of a second, second to a first, and your new first degree case now carries fifteen to life. Tex. Pen. Code § 12.42(a)-(c). Two prior trips to the clink and now your non-state jail cases are punished twenty-five to life. Tex. Pen. Code 12.42(d) State jail felonies however are a world unto themselves.

A regular (a.k.a. non-aggravated) state jail carries 180 days to two years in the state jail. Tex. Pen. Code 12.35. There are two different ways that a regular state jail offenses can be enhanced. The first is by other state jail offenses. Two prior state jail offenses increase the punishment range of a State Jail to that of a third degree penalty (2-10 TDC). Tex. Pen. Code 12.425(a). Those prior convictions do not need to be sequential. Id. The second, and more serious way that a state jail offense can be enhanced, is when the client has prior two non-state jail offenses that are sequential (meaning final conviction before the second final conviction). Then the punishment range of your non-aggravated state jail felony is raised to a second degree felony (2-20 TDC). Tex. Pen. Code 12.425(b).

Why did we focus on the fact that it is the punishment range is enhanced? Because the offense classification remains the same, it is just punished differently. A state jail, is a state jail, is a state jail. Just because it's punished as a second or third degree felony, it never becomes a second or third degree felony. It can never be used to enhance a non-state jail offense, i.e. a first, second or third degree felony. *Campbell v. State*, 49 S.W.3d 874, 877 (Tex. Crim. App., 2001). Additionally, a state jail can never be enhanced beyond 2-20. Except when it can…

So now we get to when a state jail is not a state jail. Aggravated state jail offenses break all of the rules. A state jail felony becomes aggravated one of two ways; either by a the use or exhibition of a deadly weapon, defined by Section 1.07 of the Penal Code, or by having a final conviction for one prior aggravated felony. Tex. Pen. Code 12.35(c). Interestingly, while 12.35(c) says an aggravated state jail is punished as a third degree felony, the courts have treated them more like an actual third degree felonies, unlike non-aggravated state jail felonies. In fact, an aggravated state jail felony can be enhanced under the 12.42 habitual offender statutes to 25 – Life. *State v. Kahookele* 640 S.W.3d 221 (Tex. Crim. App. 2021). Additionally, priors for aggravated state jail offenses can be used to enhance non-state jail felonies. Tex. Pen. Code 12.42(a)-(c). They are state jail offenses that in all practical effect are third degree felonies.

So when is a state jail not a state jail? When it is apparent. Get it? A parent? Because kids drive you crazy and make you aggravated! No? Ok, it was a reach. Never mind. I'll see myself out. But make sure to pay attention to those indictments. Don't let the state mix state jail and non-state jail enhancements. Make sure your non-state jail offenses are sequential. Remember that you can't use non-aggravated state jail offenses to enhance first, second, or third degree felonies even if they were punished with penitentiary time. Aggravating, right? Until next time legal nerds.

**Clifford Duke** *has been with the Dallas County Public Defender's Office for the last thirteen years after a short miserable term practicing personal injury and worker's compensation law. He is a graduate of Gonzaga University, a Past President of the Collin County Young Lawyers Association and the Dallas County Criminal Defense Lawyers Association, and currently serves on as a Director for TCLDA. He enjoys occsaionally volunteering with Legal Aid of Northwest Texas, as well as speaking for TCDLEI and TCDLA. He and his wife are both avid hockey fans and players, and are enjoying getting their six year old son into the best game on earth.*

# Significant Decisions Report

KYLE THERRIAN

[Operation Lone Star's] concentration of law enforcement and military resources along the border has produced roughly four thousand arrests for misdemeanor trespass since June 2021, and few other charges. Of the 3,245 persons who have been booked through the OLS processing centers in Del Rio and Hebbronville, 2,722 (84%) were charged in Kinney County. The trespass arrests have overwhelmed the Kinney County Court, which adjudicated zero misdemeanor cases in the 30 months prior to OLS's inception. To date there has not been a single trial of an OLS trespass case. Instead, an ad hoc system has emerged to dispense justice. It operates as follows: (1) arresting officers take OLS detainees to a tent in Val Verde County where they appear before a specially designated OLS magistrate via video link for Article 15.17 proceedings; (2) the magistrates set bond for persons charged with misdemeanor trespass and no criminal history at generally between $1,000 and $10,000; (3) the pretrial detainees, who are almost always indigent, have no means of posting bond, and are transferred more than 100 miles away from the county of arrest to await trial in state prison facilities, the first time this has been done in Texas history; (4) the Texas Supreme Court issued an order under which counsel are appointed to represent OLS detainees, yet significant delays in appointment of counsel routinely occur, and appointment after arrest ranges between 2 and 139 days; (5) usually between 30 and 90 days after arrest, the Kinney County Attorney files an information alleging Class B misdemeanor trespass with an enhancement if convicted to Class A penalty due to the disaster Proclamation, providing a maximum possible sentence of one year in jail; (6) generally between 90 and 120 days after arrest, judges set the cases for arraignment, where each OLS detainee is offered a sentence of "time served" in exchange for a guilty plea; and (7) counsel for detainees must advise their clients that the only way to contest the trespass charge is to remain in jail.

Almost no detainees elect to wait in jail to contest the charges, even when they are demonstrably innocent. Clients uniformly decline to assert substantial defenses that they have to the trespass charge, including not being on private property at all and lack of notice that entry was forbidden. All OLS criminal trespass convictions to date were attained by guilty plea.

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.

## Fifth Circuit

### *United States v. Navarro*, 54 F.4th 268 (5th Cir. 2022)

**Attorneys.** Bradford W. Bogan (appellate), Maureen Scott Franco (appellate).

**Issue & Answer 1.** Does SORNA (federal law directing sex offenders to register with state registration databases) create an independent obligation to register where the underlying offense is a registration offense under SORNA but not the laws of the state maintaining the database in which the defendant must register? Yes.

**Issue & Answer 2.** SORNA Tier II offenses require a 25-year registration period. If a person is convicted of a state offense comparable to a SORNA Tier II federal offense, they fall within the requirements of the Tier II registration period. The federal offense criminalizing sexual conduct with minors appears under SORNA's Tier II registration requirements. Colorado law criminalizes sexual conduct with minors slightly more broadly than the

federal statute does. Is the more expansive Colorado law sufficiently comparable to the SORNA offense to trigger the SORNA Tier II registration period? No.

**Facts.** In 1999 the defendant pleaded guilty to attempted sexual assault in the State of Colorado. In 2013 he moved to Texas and did not register. Texas law did not require him to register. In 2019 law enforcement discovered the defendant living unregistered in Texas and brought the instant prosecution under 18 USC § 2250(a) (Sex Offender Registration and Notification Act "SORNA").

**Analysis 1.** The parties agree that SORNA is inapplicable when an offense is classified as a registration offense under SORNA but is not classified as a registration offense in the state maintaining the relevant registration database. Notwithstanding this agreement, the Court must interpret the law. The parties' agreement has no basis in the law. SORNA creates independent bases to register regardless of whether the federal registration offense also qualifies as a state registration offense. It is true that SORNA tells offenders in which state to register, but this aspect of SORNA does not delegate to the states authority to define whether a person has an obligation to register under SORNA.

**Analysis 2.** SORNA creates three tiers of sex offenders: (1) 15-year registrants, (2) 25-year registrants, and (3) lifetime registrants. All offenders who are not Tier II or Tier III are Tier I by default. Here, the district court treated the defendant as a Tier II offender and determined his registration obligation to last until 2026. A Tier II state-level offense is one "committed against a minor" and "is comparable to or more severe than" a list of federal crimes, including "abusive sexual contact" (a term that includes engaging in sexual acts with minors). However, the court must not compare the actual conduct underlying the offense. Instead, the court must use a "categorical approach" focusing solely on the elements of the state and federal statutes. Here the two offenses are not comparable. The federal statute splits sexual conduct with minors into two distinct offenses: (1) sexual conduct with minors between 12 and 16, and (2) sexual conduct with minors under the age of 12. The relevant Colorado statute does not make the same distinctions, it criminalizes sexual conduct in a broad category of minors: those under the age of 15. Moreover, the closest comparable crime under SORNA's Tier II requires as an element of the offense proof of a four-year age differential between the offender and the victim. Simply put, the Colorado statute criminalizes conduct that the federal statutes do not. Under the categorical approach, they are not comparable. The defendant thus defaults to Tier I and needed to register only until 2019.

**Comment.** I really thought the opinion would dig into the fact that the defendant pled guilty to attempted sexual assault. In Texas, criminal attempt is its own offense, regardless of the underlying offense the defendant attempted to commit. Perhaps there would be an entirely different analysis reaching the same result if the underlying offense had been a Texas offense.

## Texas Court of Criminal Appeals

### *State v. Hardin*, No. PD-0799-19 (Tex. Crim. App. Nov. 2, 2022)

**Attorneys.** Donald B. Edwards (Appeal). Andrew Palacios (Trial).

**Issue & Answer.** Does a driver commit a traffic offense if the car's right-rear tire briefly, but safely, touches and drives over the dividing line between the center and right lane of traffic? **No.**

**Facts.** Officers were looking for a driver of a U-Haul suspected of being involved in multiple burglaries. An officer found a U-Haul and followed the truck until the driver-defendant briefly straddled the lane divider while rounding a curve. The defendant did not veer or dash toward the other lane. The defendant was not driving erratically or unsafely.

**Analysis.** Texas Transportation Code § 545.060 provides in relevant part:

a. An operator on a roadway divided into two or more clearly marked lanes for traffic:

   1. Shall drive as nearly as practical entirely within a single lane; and

   2. may not move from the lane unless that movement can be made safely.

There are several principles of statutory construction at play here: every word has meaning and should be given effect, statutory provisions should be harmonized, rules of grammar should be implemented, technical words have technical meanings, and non-technical words should be construed to common usage. "Nearly" means "almost but not quite." "Practical" means "having or displaying good judgment" and is synonymous with "sensible." "Safely means "free from harm or risk." Thus, Subsection (a)(1) does not require a motorist to always remain entirely within a lane; "[h]e or she must almost but not quite stay within the lane." Subsection (a)(2) prohibits lane departures that are unsafe whether they are complete lane departures or partial.

> Considered in connection with subsection (a)(1), any unsafe weaving out of the lane violates the statute but weaving out of the lane without creating a safety risk does not violate the statute because incidental weaving is still staying "as nearly as practical" entirely within a single lane.

This is consistent with the legislature's intent because the legislature joined the two subsections with the word "and" making both subsections necessary to the commission of the offense. Reading the two subsections as independent requirements (independent offenses) would render (a)(1) unconstitutionally vague. "Even assuming a motorist has notice of when he or she is no longer being 'practical,' it is impossible to know what constitutes 'almost, but not quite' practical for purposes of avoiding criminal liability."

**Concurring (Slaughter, J.).** The State did not raise the "reasonable-mistake-of-law" doctrine. The State should


have done that.

**Dissenting** (**Keller, J.**). What if a car straddles the lane safely for ten minutes? Clearly, you aren't supposed to do that but because it can be done safely, the majority opinion would condone it. Section 545.060 is not a criminal statute it is a list of requirements that constitute the "Rules of the Road." As such a person commits a criminal offense (under a different statute) when they do not follow all of the rules of the road. Conjoining the two subsections with the word "and" merely lists multiple requirements – all of which must be met to be in compliance with the "Rules of the Road."

**Dissenting** (**Yeary, J.**). The first subsection is a requirement "drive as nearly as practical entirely within a single lane." The second subsection is a prohibition "may not move from the lane unless that movement can be made safely." The Court's perceived interconnectedness between the two subsections is flawed.

**Comment.** If "shall drive as nearly as practical entirely within a single lane" is "unconstitutionally vague," shouldn't making a right turn "as closely as practicable to the [left-hand or right-hand] curb or edge of the roadway" also be unconstitutionally vague. According to this opinion: yes. Time to start teeing up wide-turn traffic stops.

### *Ex parte Salinas*, No. WR-90,982-01 (Tex. Crim. App. Nov. 16, 2022)

**Attorneys.** Neil Davis (Writ).

**Issue & Answer.** Is trial counsel ineffective for failing to object to the State's substantive use of a defendant's post-Miranda silence to selective questions during its case-in-chief? **No—the underlying question remains an unresolved issue of constitutional law.**

**Facts.** The defendant twice stood trial for the offense of murder. His first jury was hung on guilt. His second jury convicted him and sentenced him to 20 years of confinement. The defendant contends that his trial attorneys were ineffective for failing to properly challenge the State's use of his decision to stand mute and say nothing at all when investigating officers posed a question regarding the murder weapon (a shotgun) found in his parents' home where the defendant lived. The defendant had engaged with officers and answered questions until this question was posed.

At the first trial, the investigating officer initially made no reference to the substance of the defendant's interrogation but did admit in cross-examination that the defendant did not confess. In response, the prosecutor tried to elicit the defendant's silence when questioned about the murder weapon. A debate ensued about proper warnings for custodial interrogation after. The record was unclear as to whether the interrogation occurred at the defendant's home or at the police station while the defendant was in custody. Ultimately the investigating officer testified without objection to the defendant's silence in response to questioning about the murder weapon. Defendant's first trial ended in a mistrial when the jury was unable to reach a unanimous verdict.

The same lawyers represented the defendant at his second trial. A different investigating officer testified. A different prosecutor representing the state conveyed to the trial that the murder weapon interrogation occurred

at the defendant's home and not at the police station while in custody. Notwithstanding this representation, the new investigator testified that the murder weapon interrogation did not occur at the defendant's house, but rather at the police station. Nonetheless, this officer's position was that the defendant was not in custody when the interrogation occurred. Defense counsel objected to the State's use of the defendant's silence on Fifth Amendment grounds—regardless of whether he was in custody.

On direct appeal, the Court of Criminal Appeals held that "[i]n pre-arrest, pre-Miranda circumstances, a suspect's interaction with police officers is not compelled. Thus, the Fifth Amendment right against compulsory self-incrimination is simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak." The United States Supreme Court addressed the case in a plurality opinion but avoided resolving the pre-arrest-versus-post-arrest-silence dispute by holding that a person must specifically invoke his Fifth Amendment privilege before relying on it to insulate his silence from use at trial.

The Supreme Court plurality indicated that the State violates a defendant's right to due process when it seeks to use the defendant's post-Miranda silence at trial. This is the impetus of the instant writ of habeas corpus. Although, the State established that the defendant was not in custody at his second trial. Despite the second investigator's testimony there existed at least one offense report reflecting that the defendant had received Miranda warnings before his decision to stand mute. The defendant contends that his trial counsel was ineffective for failing to raise a Fifth Amendment objection on this basis.

**Analysis.** The State may not induce a defendant to remain silent in the face of police questioning by cautioning of his right to remain silent, then use that silence against him at trial. *Doyle v. Ohio*, 426 U.S. 610 (1976). If *Doyle* were directly applicable to the facts of this case, trial counsel would be ineffective for having not articulated *Doyle* as the basis of excluding evidence. But *Doyle* is not directly applicable. The difference between *Doyle* and the instant case is that the defendant in the instant case invoked his silence piecemeal by answering some questions but standing mute on a single incriminating question. *Doyle*, in contrast, remained silent as to all questions post-*Miranda*. Defendant's silence was selective. Selective post-*Miranda* silence is an unresolved issue in constitutional law as reflected in a near-comprehensive discussion by the Ninth Circuit in *Hurd v. Terhune*, 619 F.3d 1080 (9th Cir. 2010). The Supreme Court declined to resolve the conflict among jurisdictions when the Ninth Circuit sanctioned the prosecutorial use of post-*Miranda* selective silence. Given that the issue is unresolved, trial counsel cannot be considered ineffective for failing to articulate the Ninth Circuit's point of view.

### *Monjaras v. State*, No. PD-0582-21 (Tex. Crim. App. Nov. 23, 2022)

**Attorneys.** Jani Maselli Wood (Appeal). Nicholas Mensch (Appeal). Timothy Donahue (Trial).

**Issue & Answer.** When officers give orders to keep hands where they can be seen, closely flank a suspect, and ultimately place their hands on a person, have they converted their consensual encounter into an investigatory detention requiring proof of reasonable suspicion? **Yes, at least here they did.**

**Facts.** Officers saw the defendant walking around an apartment complex with a backpack. He seemed overdressed for the weather. He looked down as they

## Shout-Outs!

**Kudos to Oliver Neel and Sara Neel** of The Neel Law Firm in Fredericksburg, Texas. They were able to successfully defend a mandamus filed by the State in a juvenal sexual assault case where the Court entered a discovery order requiring the complaining witness' phone data be handed over to the Defense/Respondent under court order when the proper steps to precure the discovery are taken and the evidence is considered material and relevant. *See In Re State Ex Rel. Steven A. Wadsworth*, 653 S.W.3d 759 (Crim. App. - San Antonio 2022). **Way to go!**

**Shout out to Angela Cameron**, an assistant chief of the appellate division of the Harris County Public Defender's Office, who has litigated Gareic Hankston's case since 2013. She lost at the Court of Appeals (COA). She filed a PDR and it was granted. She then lost 9-0 from the Court of Criminal Appeals (CCA) in 2017. She filed a cert. petition with the U.S. Supreme Court which, granted and remanded the case to the CCA in 2018. The CCA reversed and remanded to the COA. And now, she has won again at the COA where the court held that the admission of his historical cell site location information was harmful. *State v. Hankston*, No. 14-13-00923-CR (Tex. App.—Houston, Dec. 12, 2023, no pet. h.) **Amazing work!**

**Great job by Heather Fisher and Patty Tress!** Both fought a very hard battle for a client charged with murder and tampering. The defense team conducted a thorough 702/705 hearing and motion to suppress. Ultimately, the client accepted and offer one week into trial – the offer was lower than before the trial began. **Fantastic!**

**Incredible work by Sarah Roland and Keith Hampton!** Ms. Roland directed the only hearing in a criminal case where the state hospital system risked actual contempt for failing to hospitalize a person found incompetent to stand trial. Both Ms. Roland and Mr. Hampton knew Texas had an excuse it actually didn't have before – a true catastrophic crisis. So the purpose, which was fulfilled, was to put at least one official under oath so that we could forward it to friends in the legislature. The key witness confirmed that nothing from our judicial branch of government would make any difference, including the proposed bill. **Outstanding!**

passed by. When officers circled back to harass the defendant, he was gone. Officers assumed the defendant ran away but they later encountered him on the other side of the apartment complex. Officers pulled in front of the defendant without activating their lights or sirens. With their patrol vehicle blocking his path, two officers stood closely on either side of the defendant. The defendant appeared nervous as officers interrogated him. Officers asked defendant for consent to search his person. When the defendant began emptying his pockets officers placed hands on him. After the defendant finally consented officers positioned the defendant against a squad car and searched him. Officers ultimately found a gun on the defendant's person. The State charged the defendant with unlawful possession of a firearm by a felon. The defendant filed a motion to suppress, but the trial court and the First District Court of Appeals in Houston found law enforcement's interaction with the defendant to be a mere "encounter" not subject to the requirement of reasonable suspicion triggered by an investigatory detention.

**Analysis.** Officers may briefly detain an individual based on reasonable suspicion for so long as is necessary to confirm or dispel that suspicion. Alternatively, officers may interact with a citizen consensually without detaining the citizen for any reason whatsoever (without reasonable suspicion). "An encounter is a detention if an officer, through a showing of force or authority, restrains a citizen to the point that an objectively reasonable person would not feel free to decline the officer's requests or terminate the encounter." Here the encounter was initially consensual. Officers approached the defendant in the middle of the day in a public location and were not overtly hostile. Additionally, officers initially kept their distance, did not place their hands on the defendant, and only asked basic questions necessary for identification. However, the consensual encounter escalated into an investigative detention. Officers eventually flanked the defendant closely, gave orders, and placed hands on the defendant. These actions demonstrated that the defendant should not feel free to disregard the requests of the officers. The court of appeals erred by taking these circumstances piecemeal in a divide-and-conquer fashion instead of considering their totality-of-circumstances impact.

**Comment.** Justice Goodman's dissent from the First Court prevails: "[w]hen Monjaras hesitated to consent, the officers detained him by compelling his compliance through a show of their official authority, which included instructing Monjaras as to how he was to behave, flanking him, intruding his personal space, and touching his person."

### *Sandoval v. State*, No. AP-77,081 (Tex. Crim. App.—Dec. 7, 2022)

**Attorneys.** Jennae Swiergula (Appeal), Jared Tyler (Appeal), Nathaniel Perez (trial), Alfredo Padilla (Trial).

**Issue & Answer 1.** 60 percent of county residents indicated an awareness of the underlying facts of the case in a pretrial change of venue poll. Was this sufficient to mandate a change of venue? **No.**

**Issue & Answer 2.** When the trial court conducts venire qualification on a special venire (one summoned for a particular case rather than summoned for jury duty generally) must the trial court permit the defendant and his attorneys to be present? No.

**Issue & Answer 3.** When a trial attorney presents a trial strategy to the trial court in an effort to make a record of that attorney's advice and the client's decision-making, has trial counsel placed his own interests in avoiding a writ above those of his client in having an attorney advance the best interests of the client at trial? No.

**Facts.** A jury convicted the defendant of capital murder, and the State is seeking to kill him. The defendant murdered a border patrol agent when the agent and his family were fishing. The murder was well-known to the citizens of Willacy County where it occurred and only 29 percent of those responding to the defendant's poll had not already formed an opinion as to his guilt. The trial court transferred venue to Cameron County. Once in Cameron County, the defendant moved to transfer venue again. He presented testimony from two local defense attorneys who stated their belief that the defendant could not receive a fair trial in Cameron County. Among those ultimately chosen to serve on the jury, nine had some knowledge of the case but had not rendered an opinion on guilt.

Because the trial court summoned a "special venire" (one summoned for a particular case instead of summoned for jury service generally), the trial court conducted the initial jury qualification which typically takes place in the central jury room. The qualification and excusal of jurors did not occur on the record and neither the defendant nor the defendant's attorney were allowed to participate.

During the course of the trial, the defendant's trial attorneys went to great lengths to explain on the record their strategies and the choices the defendant could make between competing strategies. In doing so, the trial attorneys divulged confidential information seemingly to protect themselves against a writ of habeas corpus for ineffective assistance of counsel.

**Analysis 1.** To change venue a defendant must show that pretrial publicity was "pervasive, prejudicial, and inflammatory." Publicity by itself is not enough. This showing can be made in a hearing on a motion to change venue or by the testimony of prospective jurors in voir dire. The defendant failed to establish any prejudice arising from the local knowledge of the basic facts of the case. The defendant's own polling in Cameron County showed that 60% of respondents had not yet formed an opinion as to guilt and the record reveals that most jurors had heard little if anything about the case.

**Analysis 2.** Generally, excuses, qualifications, and exemptions occur before a prospective juror is assigned to a panel and sent to a courtroom. Sometimes they can even be resolved before the date of jury service. Prior to being assigned to a panel, jurors are a general assembly, and "the general assembly portion of jury selection is not considered part of the trial and therefore the accused is not entitled to be present." This process "lack[s] the traditional

adversarial elements of most voir-dire proceedings," and the right to be excused from the venire "belongs to each of its individual members, not to the defendant." Because the process is permissible when conducted before the general assembly, it would be "nonsensical" to make it impermissible simply because the trial court summoned a special venire and the qualification and exemption process occurred in the courtroom rather than the central jury room.

**Analysis 3.** "At least ordinarily, an attorney's own interests in protecting against an ineffective assistance claim will not conflict with the client's interest." Before an attorney's interest can be said to conflict with the client's "there has to be a showing that the interest itself is antithetical to the client." Here the jury was the factfinder, and the sentence was automatic upon the jury's finding of special issues. Making the trial court privy to defense strategy in the ex parte fashion it occurred could not have prejudiced the defendant. Nor did counsel's decision to delegate to the defendant the ability to choose among prospective witnesses rise to the level of abandoning the defendant or leaving him to his own devices at trial.

**Comment.** I've never been a big fan of making a lawyer's CYA record. I guess it can come in handy when an issue comes up on the fly and you haven't had an opportunity to memorialize legal advice in advance. But two things are always going to be true in a case like this: (1) In a capital murder case you are just going to get a writ, and (2) if you have to testify as the attorney, the trial court is going to believe you.

### *Rios v. State*, No. PD-0441-21 (Tex. Crim. App.—Dec. 7, 2022)

**Attorneys.** Catherine Bernhard (appellate), Kenneth Onyenah (trial).

**Issue & Answer.** The defendant is not able to read the English language (or doesn't read it well). The trial court did not secure an explicit jury trial waiver from the defendant. Nonetheless, the judgment and a few pass slips note in the English language that the defendant waived a jury trial. Under these circumstances did the defendant knowingly, intelligently, and voluntarily waive his right to a jury trial? No.

**Facts.** The State convicted the defendant of continuous sexual abuse of a child. The defendant pled not guilty but did not execute a written jury waiver and the trial judge did not admonish the defendant regarding his right to a jury trial.

The defendant testified in an appeal abatement hearing focused on determining whether he validly waived his right to a jury trial. He explained that he is a native Spanish speaker and reads little English. He remembered trial counsel bringing an interpreter only to one of the many pretrial settings he attended. On multiple court appearances, he also recalled counsel handing him a blank pass slip to sign "so that trial counsel could prove that [defendant] was present and get a new court date." The four pass slips leading up to trial had check marks next to "trial by the court." However, the defendant testified that he did not know what that meant. On one setting defendant recalled being surprised by a meeting with a probation officer attempting to conduct a presentence investigation report in advance of an open plea he did not want. According to the defendant when he confronted his attorney about this, his attorney explained that it would cost another $5,000 if he wanted a trial. The defendant also explained that the trial itself was a surprise. The defendant was under the impression that he was appearing for another pretrial setting on the day his case ultimately proceeded to a bench trial.

The probation officer who previously attempted a presentence investigation report testified at the abatement hearing. It was her impression that the defendant was genuinely confused about the posture of his case. He also did not know the potential punishment outcomes and sex offender registration obligations.

Trial counsel testified at the abatement hearing and confirmed his practice of having clients sign blank pass slips that he would later complete with pertinent information. Trial counsel confirmed the defendant did not want an open plea but disputed whether the defendant was aware he had chosen to have a trial before a judge.

The parties stipulated that clerks prepare judgments using software that prepopulates parts of the judgment "including that jury waiver recital if the clerk uses the form for defendants convicted after a bench trial."

The Fifth Court of Appeals in Dallas upheld the defendant's conviction and found that he validly waived his right to a jury trial because boilerplate recitations contained in the auto-populated judgment and the check marks appearing in the English language pass slips.

**Analysis 1.** Because the waiver of the right to a jury trial is a "waivable-only right" a court may consider the issue on appeal absent a trial objection (as is the case here). The State argues that case law establishes a "presumption of regularity" in judgments that reflect waivers of rights. But regardless of legal presumptions, the record simply fails to establish the State met its burden to show an intelligent and knowing waiver. There are numerous factors for consideration in determining a valid jury trial waiver: (1) whether the defendant knew about his right and the nature of his right, (2) whether the defendant executed a written waiver, (3) whether the trial court provided an admonishment, (4) the defendant's education and background, (5) the level of the defendant's involvement in his defense, (6) the defendant's ability to understand discussions surrounding his waiver, (7) the words and actions of the defendant, (8) discussions with trial counsel about the right to a jury trial, (9) what language the defendant understands, (10) the lack of an objection, and (11) whether there is a docket entry indicating an express waiver. The defendant here does not speak English well, there is no explicit waiver of a jury trial in the record, jury waiver was not discussed in open court, and the pass slips were proven to be of little value given the manner in which they were executed.

Even if the defendant knew he had the right to a

jury trial there is no evidence he knew the nature of that right—"a waiver cannot be knowing and intelligent unless the record shows that the defendant at least had sufficient awareness of the relevant circumstances and likely consequences of waiving his right to a jury."

Waiver of jury trial is not only a "waivable-only right" the denial of a jury trial is structural error. This means not only can a court review the error without an objection, but that the error is reversible without an analysis of harm. It is an error that affects the framework of a trial.

**Dissenting (Keller, J.).** The record supports a waiver of jury trial: "(1) the judgment recites that he waived a jury, (2) pass slips signed by Appellant indicated that his trial would be before the court, (3) a trial was conducted without a defense objection to the absence of a jury, (4) Appellant testified during both phases of trial without objecting to the absence of a jury, and (5) Appellant's motion for new trial failed to complain about the lack of a jury trial."

**Comment.** Courts of appeal looking for expedient ways to dispose of cases frequently find a waiver to exist simply because something somewhere in the record (often boilerplate) indicates waiver. The Fifth Court is not wrong to recognize presumptions such as judgment regularity (the judgment reflects it so it must be true). But presumptions are just presumptions. They aren't sacrosanct, and they shouldn't operate contrary to logic. It's nice to see the Court of Criminal Appeals essentially say, "hey this case involves actual facts."

Here is probably the most consequential holding in this case:

The parties and majority agree that a violation of a defendant's right to a jury trial is structural error defying a harm analysis because the error affected the framework of the trial. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). So do a number of other courts. This is a question that neither this Court nor the United States Supreme Court has resolved. This Court does not usually recognize structural errors until the United States Supreme Court identifies them, but we believe resolution of this issue is sufficiently clear that we will deviate from our usual practice and hold that a violation of the federal constitutional right to a jury trial is structural error.

### *In re Brent Smith*, No. WR-93,354-02 (Tex. Crim. App.—Dec. 7, 2022)

**Attorneys.** Kristin Etter (writ), Jerome Wesevich (writ), Keith Hampton (writ), Billy Pavord (writ).

Issue & Answer. Does a district court have statewide jurisdiction to hear a habeas writ before the filing of an indictment? No.

**Facts.** Governor Abbott declared a second disaster of illegal border crossings through his Operation Lone Star ("OLS"). The result has been lawlessness along the US-Texas Border, a place now seemingly devoid of Constitutional protections for people who enter the United States. This case involves Kinney County and its county attorney


Brent Smith who spearheads Texas's scheme to punish Hispanics with illegal and perpetual confinement. This is accomplished by courts and prosecutors systematically denying arrestees access to the justice system. Because Kinney County courts have effectively suspended the writ of habeas corpus, the above-named attorneys and others (including Angelica Cogilano) have taken their clients' writs to be heard in Travis County. This is a writ of prohibition aimed at stopping them.

The briefing by Kristin Etter, et al. sets forth the real disaster at the border:

> OLS features three central directives: (1) it authorizes "use of all available resources of state government . . . to assist and protect Texans from criminal activity and property damage;" (2) it "direct[s] DPS to use available resources [to prevent] criminal activity along the border, including criminal trespassing, smuggling, and human trafficking;" and (3) it commits state resources to support pretrial detention of persons arrested under OLS.
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> OLS's concentration of law enforcement and military resources along the border has produced roughly four thousand arrests for misdemeanor trespass since June 2021, and few other charges. Of the 3,245 persons who have been booked through the OLS processing centers in Del Rio and Hebbronville, 2,722 (84%) were charged in Kinney County. The trespass arrests have overwhelmed the Kinney County Court, which adjudicated zero misdemeanor cases in the 30 months prior to OLS's inception. To date there has not been a single trial of an OLS trespass case. Instead, an ad hoc system has emerged to dispense justice. It operates as follows: (1) arresting officers take OLS detainees to a tent in Val Verde County where they appear before a specially designated OLS magistrate via video link for Article 15.17 proceedings; (2) the magistrates set bond for persons charged with misdemeanor trespass and no criminal history at generally between $1,000 and $10,000; (3) the pretrial detainees, who are almost always indigent, have no means of posting bond, and are transferred more than 100 miles

June 15-17, 2023 San Antonio, TX

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- Applicants must be a member of the Criminal Justice Section of the SBOT, or, in the alternative, may join when they apply for the scholarship.

**Deadline for applications is Friday, April 7, 2023, and recipients will be notified by April 15, 2023. Questions? Email Dwight McDonald at Dwight.Mcdonald@ttu.edu.**

away from the county of arrest to await trial in state prison facilities, the first time this has been done in Texas history; (4) the Texas Supreme Court issued an order under which counsel are appointed to represent OLS detainees, yet significant delays in appointment of counsel routinely occur, and appointment after arrest ranges between 2 and 139 days; (5) usually between 30 and 90 days after arrest, the Kinney County Attorney files an information alleging Class B misdemeanor trespass with an enhancement if convicted to Class A penalty due to the disaster Proclamation, providing a maximum possible sentence of one year in jail; (6) generally between 90 and 120 days after arrest, judges set the cases for arraignment, where each OLS detainee is offered a sentence of "time served" in exchange for a guilty plea; and (7) counsel for detainees must advise their clients that the only way to contest the trespass charge is to remain in jail.

Almost no detainees elect to wait in jail to contest the charges, even when they are demonstrably innocent. Clients uniformly decline to assert substantial defenses that they have to the trespass charge, including not being on private property at all and lack of notice that entry was forbidden. All OLS criminal trespass convictions to date were attained by guilty plea.

As this Court recently recognized, Article 17.151 is an important tool to protect pretrial detainees: "Article 17.151 is mandatory; if the State is not ready for trial within [15] days of the beginning of the defendant's detention, the defendant accused of a [class B misdemeanor] must be released on personal bond or by reducing the required bail amount." *Ex parte Lanclos*, 624 S.W.3d 923, 927 (Tex. Crim. App. 2021).

Counsel for OLS detainees have attempted to enforce Article 17.151 with limited success. *See, e.g., Ex Parte Eric Uriel Sifuentes, et al.*, No. 04-21-00579-CR, 2022 WL 202720, at *1 (Tex. App.—San Antonio Jan. 24, 2022). As *Sifuentes* recognizes, even though 153 OLS detainees were jailed between 114 and 153 days in violation of Article 17.151, all but four had pleaded no contest to leave jail prior to issuance of the appellate mandate directing their immediate release. Id. at *1-2. Practical delays in enforcing Article 17.151, even under the expedited procedures allowed in TEX. R. APP. P. 31, limit its efficacy. For example, the 153 Sifuentes petitioners applied for habeas relief due to violation of Article 17.151 on November 5, 2021, but the clerk did not accept the filing until December 5, 2021, and a hearing was not granted until December 13, 2021, and the appealable order denying habeas relief was not made of record on the court's docket until after December 22, 2021.

Efficacy of Article 17.151 has been further undermined by the deliberate efforts of Relator Smith and judges serving Kinney County. They sought and obtained the removal of three judges who indicated that they were prepared to hear habeas petitions based on violation of Article 17.151.

* * *

One of the writs involves an individual who was arrested on what appears to be a Class C

## TCDLA STAFF SPOTLIGHT

# Sonny Martinez

## Media Specialist

**Native State:** Texas **Zodiac Sign:** Pisces **Favorite Color:** Green

**Favorite Animal:** Bear

**Hobbies:** Playing Basketball, Watching Movies, & Being Outside

**Fun Fact:** Knows how to juggle

**Sonny Martinez** was born and raised in Austin, Texas. He recently graduated with his B.S. in Business, Marketing & Management from Penn State University, where he played point guard for the men's basketball team. In his spare time, Sonny enjoys playing basketball, hiking, and listening to music.

misdemeanor criminal trespass complaint on October 14, 2021, who has now been in custody on a $1,500 bond for 147 days since his arrest with no formal charges ever having been filed against him. In that case, despite having requested appointed counsel on October 14, 2021, undersigned counsel was not appointed until March 3, 2022. On that same date, undersigned counsel filed an Article 17.151 writ and is currently awaiting the acceptance of that filing by the Kinney County District Clerk. Counsel is attempting to have that case heard prior to April 22, 2022, given the blatant and inexcusable disregard for Article 17.151 and the excessive and illegal detention.

**Analysis.** A writ of prohibition requires a showing that (1) there is no adequate remedy at law, and (2) the party requesting prohibition has a clear right to relief. Here the Kinney County Attorney satisfies the first prong because he has no adequate remedy at law—the Travis County District Court prohibited him from representing the State when hearing the underlying writ of habeas corpus. Conceivably, the Kinney County attorney could vindicate his rights on direct appeal, but [ironically] denying him access to the courts for such a lengthy period of time is not an adequate remedy. The crux of this case thus focuses on the second prong: whether the Kinney County Attorney has a clear right to relief.

Since the late 1800s Texas "one of the cardinal principles of our system of government was to localize the administration of law." In 1885 the State Supreme Court found that its original habeas jurisdiction over matters not first brought before a district court was limited to cases in which the applicant has shown a valid reason why it had circumvented the local judge. To not limit the exercise of this authority to extraordinary circumstances would lead to the absurdity of courts in far-flung places requiring parties and witnesses to incur the expense of travel.

If the Court of Criminal Appeals must abstain from exercising its habeas jurisdiction absent extraordinary circumstances, it only makes sense that only in extraordinary circumstances should a non-local court invoke habeas jurisdiction over matters arising in another county. Examples of extraordinary circumstances include: "long-term unavailability or serious backlog of courts in the county of the charges" or "a truly catastrophic event." The circumstances of this case do not rise to the level.

The citation to Texas Code of Criminal Procedure Article 11.06 as support for state-wide habeas jurisdiction is also unpersuasive. Article 11.06 provides that "Before indictment found, the writ may be returnable to any county in the State." Clearly this provision deals with felony offenses—a misdemeanor case (such as those involved here) cannot be considered "before indictment" if the State intends to file by information and no indictment is expected.

**Comment.** [sigh . . .]

The courts are the only check on Greg Abbott's power. And we all live in the Kingdom of Abbott unless our courts say we don't. Here they didn't. The Court of Criminal Appeals grounds its opinion in Texas's history of localized rule of law: "one of the cardinal principles of our system of government was to localize the administration of law."

The irony is tragic. This aspect of our State's legal tradition derives from our roots as a slave state and post-civil-war legal traditions seeking to perpetuate some semblance of control over the Black population.

> Texas's political structure was expressly designed to limit government's ability to impose social change, and to prevent the nonwhite population from threatening the traditional power of Whites (R.B. Campbell, 2003; Keyssar, 2000; Perkinson, 2010). An extremely decentralized system of government endured through reforms in the early 1970s, and Texas entered its period of intense modernization with a state legislature that met just once every two years, allocated limited powers to the governor, and established a state structure that deferred power to local government and away from centralized decision making (R.B. Campbell, 2003). Taxes were low and state institutions meager. For prison policy, this meant the emergence and perpetuation of plantation-style prisons that endured into the early 1980s, with prisoners, mostly Black and Hispanic, toiling fields in rural Texas under guard by poorly paid rural Whites (Perkinson, 2010).
>
> MC Campbell Theoretical Criminology, 2012.

Was the court's discussion of the wisdom of those who made the rules in 1885 a useful argument on a superficial level? Yes. It is regrettably aloof to the fact that many will view this citation as an approving memorialization of the shameful aspects of our history. Brown people are being imprisoned at our border and they cannot meaningfully avail themselves to our courts. That—any way you choose to interpret the law—is an absolute wrong the redress for which high courts must exist.

## 1st District Houston

### *Harris v. State*, No. 01-20-00140-CR (Tex. App.—Houston [1st Dist.]. Dec. 15, 2022)

**Attorneys.** Dal Ruggles (Appellate), Monique Sparks (Trial), Chevo Pastrano (Trial), JoLissa Jones (Trial).

**Issue & Answer.** This case involves a self-defense jury instruction in a fact pattern where the defendant was likely engaging in criminal activity before shooting and killing the victim. The trial court provided the jury with this unrequested instruction which the defendant contends was not applicable to the facts of the case. Under these circumstances, when a jury sends a note indicating that it is confused by the instruction, was the trial court required to substantively instruct the jury that they can consider self-defense even when the presumption of reasonableness is inapplicable? No.

**Facts.** This is an en banc reconsideration of a panel decision from May 26, 2022. The en banc court withdraws its previous opinion, vacates its judgment, and issues this opinion and judgment in its stead.

"This is a murder case arising from a drug-related shooting." Officers responded a shots-fired dispatch and discovered a deceased man with a single gunshot wound to the back of the head. Witnesses told officers that the victim and the defendant had been in an argument over a drug deal which escalated to the shooting. The drug deal occurred at an intermediary's apartment. When the victim arrived, he told the intermediary that he was carrying a firearm, intended pay for drugs with counterfeit bills, and would steal the drugs if necessary. According to the testimony of the intermediary, these facts were never conveyed to the defendant. Nonetheless, it seems that the defendant discovered that the money was fake, attempted to shut down the drug deal, and attempted to leave. The victim intercepted the defendant and pinned him against the wall. When the victim purportedly turned to reach for a gun, the defendant drew his own gun and shot the victim in the back of the head.

Because the defendant presented some evidence of self-defense, the trial court instructed the jury on the defense of deadly force self-defense. The court's instruction included "(1) definitions of the relevant statutes, (2) the burden of proof for self-defense, (3) relevant statutory definitions, (4) law of the issue of retreat, and (5) the presumption that deadly force is per se reasonable when the defendant is not otherwise engaging in criminal activity. During deliberations, the jury submitted a written question to the trial court asking: "In reference to Section 3, Page 14, does the admitted commission of a crime, sale of a controlled substance, negate the basis of a claim of self-defense?" The defendant urged the trial court to respond "no." The trial court instructed the jury to refer to the jury charge for answers.

**Analysis.** A trial court may supplement its jury charge with further instructions on the law when the jury requests additional guidance. When the trial court chooses to substantively respond to a jury question it is considered a supplemental jury instruction governed by the same rules that govern jury instructions. This means the trial court must limit its answer to setting forth the applicable law. The answer to the jury's question ("does the admitted commission of a crime . . . negate the basis of a claim of self-defense") is not found in statute. Non-statutory instructions are generally impermissible unless necessary to clarify the law and can be given without drawing the jury's attention to a particular type of evidence. The defendant claims the supplemental instruction (a substantive response to the jury) was required because the court's original charge erroneously set out the law on the presumption of reasonableness and confused the jury. The defendant contends that it was undisputed that he was in fact engaged in a drug deal and thus the presumption-of-reasonableness instruction was not supported by the evidence. The defendant contends that the jury became confused as to whether it could find the defendant's conduct reasonable without relying on the presumption. The defendant's argument fails in its assessment of the "undisputed" nature of his criminal activity. The defendant made a few suggestions throughout the course of trial attempting to distance himself from the criminal activity. Moreover, the purported drugs were never

tested and proven to be drugs. Thus, the presumption of reasonableness was properly submitted. Given that the instruction on the presumption of reasonableness accurately stated the law, the submission of the instruction and the trial court's subsequent refusal to give a substantive response to the jury's question were not in error.

Dissenting **(Farris, J.).** There was no evidentiary dispute about whether the defendant was engaging in criminal activity – everyone agreed. The submission of the instruction regarding the presumption of reasonableness only served to confuse the jury. The court's failure to respond substantively to the jury question compounded its error.

Dissenting **(Goodman, J.).** The jury's question—whether engaging in criminal activity negates self-defense altogether—illustrated the confusion caused by the court. Answering the question in the negative would not have endorsed or diminished either party's theories.

### *Cordova-Lopez v. State*, No. 01-20-00724-CR (Tex. App.—Houston [1st Dist.] Dec. 20, 2022)

**Attorneys.** Mark Hochglaube (appellate), Jose Julio "JV" Vela, Jr. (trial).

**Issue & Answer.** Is it structural error to conduct a trial during a pandemic where citizens are less likely to respond to a jury summons, where those who do will feel pressured to return a quick verdict, and where witnesses and participants wear face coverings? No.

**Facts.** The State tried the defendant for sexual assault of a child and obtained a 60-year sentence during the peak of the COVID-19 pandemic. The defendant filed a motion to continue his jury trial. In that motion he raised concerns about distracted jurors and court-instituted pandemic procedures that would interfere with his rights to a fair trial and representation by counsel. The trial court denied the defendant's motion for continuance.

**Analysis.** Structural errors are errors affecting the framework of the trial and thus require no harm analysis on appeal. Structural errors must be founded on a violation of federal constitutional right—but not all violations of constitutional rights are structural error.

Structural errors include a total deprivation of the right to counsel, lack of an impartial trial judge, denial of self representation, denial of a public trial, and lack of proper reasonable doubt instruction. See *United States v. Marcus*, 560 U.S. 258, 263 (2010).

The defendant lists the following reasons why a pandemic trial triggers structural error: (1) it amounts to a complete denial of counsel, (2) it denies a fair cross-section of the community, (3) safety precautions infringe on the right to confrontation, and (4) participants wearing face coverings infringe upon the right to a fair trial. The record shows that counsel participated and fails to show what deficiencies in representation existed because of the pandemic procedures adopted by the court. The record does not support the conclusion that the venire was the result of an erroneous cross-section. Such an error occurs only when underrepresentation is due to the systematic exclusion of an identifiable group. The defendant's identified groups—college educated and unemployed individuals—are not recognized groups for a fair cross-section analysis. Moreover, the defendant did not identify a practice of systematic exclusion. That participants in the trial could not hear at times did not affect the defendant's right to a fair trial because the record reflects that participants who could not hear were allowed to ask for testimony to be repeated. That witnesses were required to wear face coverings impeding the jury's credibility determinations did not affect defendant's right to a fair trial because no court has ever said witnesses wearing face coverings amounts to structural error.

Defendant's motion for continuance cited these concerns and additional ones, including: the insufficiency of the health and safety procedures, counsel's fear of contracting COVID-19, and the coercive pressure for a jury to quickly reach a verdict. However, these proposed harms are just speculative—not real.

**Comment.** This is not a very thoughtful opinion. It's a difficult issue and I'm not saying I have qualms with the outcome even though it is not consistent with my personal belief. The opinion has all the hallmarks of a conveyor-belt appellate disposition (a lot of "the argument fails because it fails" logic). That the defendant did not prove any prejudice in his motion to continue is consistent with the argument why the errors should be treated as structural (structural errors are recognized as errors with unprovable prejudice). Adding to the inherent difficulties in proving prejudice were the realities of the rapid re-mobilization of our courts when they all decided to re-open.

The defendant filed a PDR on December 29, 2022.

## 2nd District Fort Worth

### *Finley v. State*, No. 02-21-00112-CR (Tex. App.—Ft. Worth, Nov. 3, 2022)

**Attorneys.** William R. Biggs (appellate and trial).

**Issue & Answer.** Is it a violation of a defendant's right to confrontation when the trial court permits a witness to testify with a face covering during a pandemic, absent a showing of necessity? **Yes.**

**Facts.** The court previously reversed the defendant's conviction and maintains its previous judgment but substitutes the instant opinion.

The defendant's trial took place in late July 2021 when masks were voluntary for anyone in the courtroom. The complaining witness was the sole eyewitness to the alleged assault. The court allowed the complaining witness to wear a surgical mask over her nose and mouth. The defendant objected under the Sixth Amendment and articulated his concern that the jury would not be able to evaluate the complaining witness's facial expressions and demeanor. The State argued against the defendant's request by characterizing it as an attempt to "harass and annoy the victim." The closest thing to a showing of necessity was the State's articulation on behalf of the complaining witness that she felt more comfortable to testify in such a manner.

**Analysis.** The panel previously held that the State

did not show the requisite necessity for the trial court to dispense with face-to-face confrontation and permit the complaining witness to wear a face covering during cross-examination. On the same day the panel issued its opinion, the trial court supplemented the Appellate record with a transcript of a non-evidentiary abatement hearing held a month before the court issued its opinion. These findings included the trial court's opinion that its adopted health and safety measures adequately protected courtroom participants and thus masks were optional. "We are given no explanation as to why T.G. herself needed protection of a mask when others did not. At no point in these proceedings—not at any pretrial hearing, at trial, on appeal, or upon abatement of the appeal—has any evidence been adduced to explain why T.G. needed this special protection." The analysis from *Maryland v. Craig* remains determinative even in a pandemic: there must be an evidence-based finding that the departure from face-to-face confrontation is necessary to protect the well-being of the particular witness. The Supreme Court Emergency Orders do not and did not disturb this Constitutional rule.

**Comment.** This is a thoughtful opinion.

### *Upchurch v. State*, No. 02-21-00084-CR (Tex. App.—Ft. Worth, Nov. 23, 2022)

**Attorneys.** Harmony M. Schuerman (appellate), Curtis Fortinberry (trial).

**Issue & Answer.** The State introduce a lot of evidence regarding a heinous prior assault committed by the defendant against the same victim in the instant case. The evidence included pictures and medical treatment for the burns the defendant inflicted five years prior. Did the trial court err in finding this evidence was not substantially more prejudicial than probative under Rule 403? Yes, but harmless.

**Facts.** In 2014 the defendant set the complainant on fire—he doused her in gasoline while she sat in a car then lit her and the vehicle on fire. For this assault, the defendant was convicted of aggravated assault causing serious bodily injury upon his guilty plea. In 2018 the complainant married the defendant and shortly after he struck her in the throat during an altercation. For the 2018 assault the defendant was convicted in 2019 upon his guilty plea. In 2019 the defendant hit the complainant again in the head. The State indicted the defendant for assault-family-violence with a previous conviction. The State did not use the 2014 assault-by-fire as the indictment-based jurisdictional enhancement, instead they relied on the 2018 throat-punch. Nonetheless, the trial court permitted the State to present a detailed account of what transpired in 2014, including the complainant's medical records, photographs of the complainant's injuries, the gas can, the torch and the car involved in the fire. Counsel lodged a "strenuous" objection to this evidence in a hearing outside of the jury's presence and asserted that it should be excluded for its prejudicial impact under Rule 403. In his words,

> as soon as they hear he set her on fire, poured gas, set her on fire, then the trial is over. They're not going to hear another word of testimony regarding the case in chief that we're here on. All they're going to hear is: He set her on fire.

The trial court overruled the defendant's objection but insisted that counsel object again during trial. Things became more confusing when the State offered its evidence. When the State offered the medical records, and photographs of the gas can, torch, and car, counsel stated "no objection." When the State sought to admit photographs of the complainant's injuries, counsel maintained his Rule 403 objection.

**Analysis.** A Rule 403 probative-versus-prejudicial-effect objection triggers a balancing test by which the court must consider the following factors: (1) probative force of the evidence, (2) proponent's need, (3) tendency to suggest a decision on improper basis, (4) tendency to confuse or distract, (5) tendency the jury will give undue weight, and (6) how quickly the State can present the evidence. Here the assault-by-fire was probative of the nature of the relationship between the defendant and the complainant and showed his intent to commit an assault in the instant case. However, the state had little if any need for this evidence—and if it were important to the State's case, they could have offered a certified judgment rather than revealing the "horrific details of a crime that was disproportionately more heinous than the offense Appellant committed in this case." It is difficult to imagine a jury who would not be affected by this evidence "in some irrational but indelible way." The State contends the assault-by-fire helped explain the complainant's decision to not call the police on the day of the instant offense and her decision to continue visiting the defendant until two weeks before the trial. But if anything, the fact that the complainant was set on fire by the defendant makes the complainant's subsequent conduct bewildering. Under these considerations, the admission of the prior assault evidence was erroneous. However, it was also harmless. Because counsel seemed to have waived his objection to medical records but maintained his objection to the pictures, the pictures merely depict what is described in the medical records. Moreover, the evidence of guilt was overwhelming. A single witness—the complainant—says it happened and remembered how it happened and the police officer believed her.

**Comment.** I mean . . . this opinion took an abrupt U-Turn. It went from "how could the jury not have focused on the horrific details of the prior offense" to "no biggie" in the matter of a couple of paragraphs. Makes me think of the penguins from Madagascar "you didn't see anything [mysteriously waiving flippers and retreating into a hole]."

### *Bell v. State*, No. 02-21-00098-CR(Tex. App.—Ft. Worth, Nov. 23, 2022)

**Attorneys.** Henry C. Paine, Jr. (appellate).

**Issue & Answer 1.** Texas Family Code 85.042(b) requires the clerk of the court to send a copy of a protective order to a school identified as a prohibited place under a protective order. In a trial for violation of a protective order must the trial court submit this explanation of law

to the jury? **No.**

**Issue & Answer 2.** Does a person violate a protective order by engaging in prohibited conduct against a member of the family identified in the protective order but not listed as the protected person? **Yes.**

**Facts.** A court issued a protective order restricting the defendant and naming the father of the defendant's child as the protected person. Despite naming the Father specifically as "protected person," the terms of the order prohibited the defendant from

> Going to or near the residences, child-care facilities, or schools [Son] normally attends or in which [Son] normally resides. Specifically [Defendant] is prohibited from going within 1000 yards of the following location: Hebron Montessori School.

It is undisputed that the defendant went to the child's school.

**Analysis 1.** The clerk's obligation under the Family Code has no bearing on the law of the case—it does not assist the jury in identifying the elements of the offense or defenses.

**Analysis 2.** The Family Code identifies classes of individuals who are protected individuals in a protective order. It includes: "the person protected by the order," a "member of the family or household of the person protected by the order," and "a child protected under the order." The Penal Code punishes a violation involving "a protected individual" as opposed to "the protected individual." Here the protective order was clearly for the safety welfare and best interests of the protected person and other members of the family.

**Comment.** The substantive portion of the Appellant's brief is nine sentences.

## 4th District San Antonio

### *Ex parte Ortiz*, No. 04-22-00260-CR (Tex. App.—San Antonio, Dec. 7, 2022)

**Attorneys.** Rachel Garza (appellate), Kristin Etter (appellate), Billy Pavord (appellate).

**Issue & Answer.** Kinney County is holding undocumented immigrants for purported misdemeanor offenses without charging them or allowing release on bail. The result (likely intended) is that they are ultimately deported after being held for inappropriate lengths of time. If this conduct results in the effective denial of counsel and inability to return to the U.S. to defend oneself on the date of trial, are the Fifth and Sixth Amendment violations cognizable in a pretrial writ of habeas corpus? No.

**Facts.** This is another Operation Lone Star case involving District Attorney Brent Smith and the corruption of our judicial system in Kinney County. The gist of the scandal is this: Hispanics are collected by law enforcement and vigilantes for sometimes meritorious and sometimes trumped-up criminal trespass charges. They are held in jail without the ability to post bond, Brent Smith won't file charges and the courts won't let them go when the law requires it. Eventually some defendants are picked up and deported by federal authorities during their illegal confinement. Here, the defendant requested the court dismiss charges through the filing a writ of habeas corpus. The defendant contends that Brent Smith and the Kinney County judiciary held him in order to implement the objectives of Operation Lone Star and facilitate his deportation. He asserted that his inability to return and defend himself from the charges levied against him is now an impossibility because of the government's improper conduct.

**Analysis.** It is true that the defendant is sufficiently restrained to justify the exercise of the trial court's habeas jurisdiction—"he is subject to the trial court's threats of bond forfeiture and a warrant for his arrest if he does not appear for trial as directed." However, here, the relief requested is not cognizable in a pretrial writ of habeas corpus. The Court of Criminal Appeals does not provide clear guidance on this issue but this much can be gleaned from case law.

A non-exhaustive list of issues that are cognizable in pretrial habeas includes:

- Double jeopardy
- Bail
- Statute of limitations (in most cases when shown on face of indictment)
- Facial constitutional challenges to a statute
- As-applied separation of powers claims involving government officials

A non-exhaustive list of issues that are not cognizable in pretrial habeas includes:

- Speedy trial
- Collateral estoppel not involving double jeopardy
- Challenging a denial of a motion to suppress
- Statute of limitations (if the indictment is subject to repair)

Because the instant case does not fit neatly in either list, the court must consider the following factors:

- Can the development of a trial record aid the resolution of the claim?
- Does the defect bring into question the trial court's power to proceed?
- Would the resolution of the claim result in immediate release?
- Would protections be undermined if the issues were not cognizable?
- Is the issue better addressed by a post-conviction appeal?
- Would the protection of substantive rights be better served?
- Would judicial resources be conserved?

Here the issue would benefit from a record at trial. The State's role in the defendant's removal is disputed. Whether the State or the defendant can secure the defendant's attendance in the US for trial is disputed. Actual, if any, impediments to attorney-client communication are not apparent in the record. Moreover, a Sixth Amendment violation cannot occur absent a trial, thus any infringement on the Sixth Amendment right to counsel must be

remedied on direct appeal after a trial is conducted.

**Comment.** There are certainly some factors the Fourth Court could have hung its hat on had it wanted to reach a different outcome.

## 5th District Dallas

### *Lall v. State*, No. 05-21-00770-CR (Tex. App.—Dallas, Nov. 30, 2022)

**Attorneys.** Brian Wice (appellate), Joshua Weber (trial), Kyle Steele (trial).

**Issue & Answer.** Is the extension of a traffic stop to conduct an open-air canine sniff of a vehicle justified by reasonable suspicion founded on the following factors: (1) refusal of consent to search, (2) seeming nervous, (3) coming from a place of purported drug-activity, (4) driving your car like a drug dealer would. Yes.

**Facts.** An officer saw the defendant wearing a fanny pack across his chest and loading things into his vehicle. The officer later stopped the defendant for having an obscured license plate. The officer removed the defendant from the vehicle and conducted a pat-down. The defendant seemed nervous during this encounter [go figure]. The officer confirmed that the defendant had no outstanding warrants and then gave him a verbal warning for the license plate. After completing all legitimate traffic-stop tasks, the officer requested consent to search the defendant's vehicle. The defendant said no. The officer continued to detain him and retrieved his canine from the back of his squad vehicle to conduct an open-air sniff around the vehicle. The canine smelled drugs, the officer discovered drugs, he arrested the defendant, and the State prosecuted him.

**Analysis.** Relying on the United States Supreme Court opinion of *Rodriguez v. U.S.*, 575 U.S. 348 (2015), the defendant contends that the officer was without justification to prolong the traffic stop in order to retrieve his canine from the vehicle and conduct an open-air sniff after he had checked the defendant for warrants and issued a verbal warning. This extends *Rodriguez* beyond its narrow holding. Here, the "mission" of the traffic stop had concluded, and the canine sniff prolonged the stop for about two minutes. The question becomes whether the officer had reasonable suspicion beyond that which justified the stop. According to the trial court, he did: the defendant was nervous, couldn't find his wallet, he had come from a location at which the officer suspected narcotic activity, he maneuvered his vehicle like a drug dealer, and he exercised his Fourth Amendment right to refuse consent to search. These facts combine for reasonable suspicion sufficient to prolong the stop for a canine open-air sniff.

**Dissenting (Pedersen, J.).** Officer Pope testified that the stop was over when the defendant refused consent. Officer Pope testified that he had "zero indicators that drugs were in appellant's vehicle." Officer Pope told the defendant he would be free to go if the canine did not alert on the vehicle. The factors cited by the majority were either known to the officer at the point he determined the stop was over or learned by the officer after he violated the defendant's rights. The majority further errs by relying on the defendant's invocation of his Fourth Amendment right to withhold consent to search.

**Comment.** The defendant filed a petition for discretionary review, and I suspect we will learn that Justice Pedersen is correct.

## 6th District Texarkana

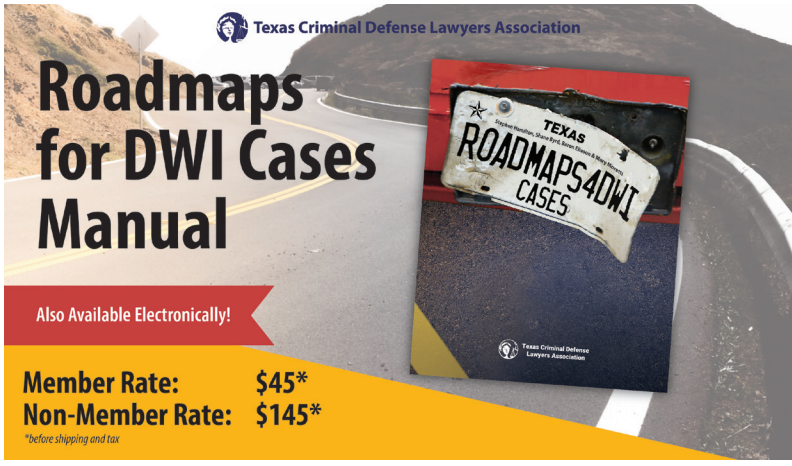
### *Ex parte Newsome*, No. 06-22-00123-CR (Tex. App.—Texarkana, Dec. 8, 2022)

**Attorneys.** James R. Hagan (appellate)(trial), Natalie Anderson (appellate)(trial), Jonathan Hyatt (appellate) (trial).

**Issue & Answer.** If the prosecution says nothing about its state of readiness for trial at a hearing on a writ of habeas corpus seeking release for delay in readiness for trial (Texas Code of Criminal Procedure Article 17.151) is the trial court required to release the defendant even when he requests release after indictment? Yes.

**Facts.** On January 1, 2020, the State arrested the defendant for capital murder and held him with bail set at three million dollars. On September 28, 2020, the State indicted the defendant. On July 12, 2022, the defendant filed a writ of habeas corpus seeking release on personal bond pursuant to Article 17.151 of the Code of Criminal Procedure (release because of delay in readiness for trial or securing indictment). Only the defendant presented evidence at the hearing on his writ—a single witness established his indigence.

**Analysis.** Under Article 17.151 (release because of delay in readiness for trial or securing indictment) the State has an initial burden to make a prima facie showing that it was ready for trial within the applicable period (Class B: 15 days, Class A: 30 days, Felony: 90 days). The State can discharge its burden by either announcing ready in the allotted time or announcing retrospectively that it had been ready in the allotted time. Here the State made no attempt to claim it had been ready for trial within the statutory time frame. Because Governor Abbott's pandemic emergency proclamation remains in effect and Executive Order GA-13 prohibits PR bonds under 17.151, the Court must release the defendant on a bond he can



afford.

**Comment.** This opinion is only possible because trial counsel filed a writ of habeas corpus (eligible for interlocutory appeal) and not a motion (not eligible for interlocutory appeal).

### *Ex parte Allen*, No. 06-22-00133-CR (Tex. App.—Texarkana, Dec. 21, 2022)

**Attorneys.** Deric Walpole (appellate)(trial).

**Issue & Answer.** Can a trial court order a defendant to have no contact with his wife of 37 years because he peppered his daughter's viciously abusive boyfriend with a 12-guage shotgun? No.

**Facts.** The State indicted the defendant and alleged he shot at a man's car with a 12-guage shotgun in December 2021. Evidence showed that the complainant had been physically abusing the defendant's daughter with whom he had a relationship. The shooting occurred when the complainant showed up at the defendant's home two days after his most recent attack on the defendant's daughter and was intertwined with a history of vicious behavior by the complainant.

A magistrate ordered that the defendant have no contact with his daughter and wear a GPS monitor as conditions of bond. The defendant filed a writ of habeas corpus in district court seeking these terms modified. The defendant presented evidence at the hearing on his writ of habeas corpus that he was not generally violent, had no criminal history, and was cooperative and respectful with investigating officers. The district judge denied relief and actually made things worse for the defendant—she added the condition that the defendant also not have contact with his own wife of 37 years.

After a mistrial on the charge of aggravated assault the defendant again requested modification of his bond conditions in a pretrial writ of habeas corpus. In this hearing the defendant's wife provided details showing there to be absolutely no reason for the bond conditions. Because the trial court erroneously believed the defendant had previously violated the bond conditions, it withheld its modification seemingly as a form of punishment.

**Analysis.** Bail cannot be implemented as an instrument of oppression or as a form of punishment. "A condition of pre-trial bail is judged by three criteria: it must be reasonable; it must be to secure the defendant's presence at trial; and it must be related to the safety of the alleged victim or the community." The defendant's wife is not a victim in this case. They have been married for 37 years without incident. There is no legitimate purpose for the bond condition. It is just punishment for being accused of a crime.

**Comment.** Good! Unchecked and irrational bond conditions have become rampant in many jurisdictions. We need more appeals like this. Don't be afraid of the abuse-of-discretion standard on appeal.

### *Johnson v. State*, No. 06-22-00027-CR (Tex. App.—Texarkana, Dec. 22, 2022)

**Attorneys.** Joshua Potter (appellate), Bart Craytor (trial).

**Issue & Answer.** When the value of damage caused is an element of the offense, can a jury convict without testimony regarding the value of damage caused? Yes, sometimes.

**Facts.** The defendant struck a pole and a vehicle in front of someone's house. He drove away but his car broke down at the end of the street. He decided to hang out until police came. The State charged him with failure to perform duty upon striking a fixed object and failure to perform his duty upon an accident involving damage to a vehicle. The jury convicted the defendant of the lesser criminal attempt of both offenses. No witness testified to the value of damage caused by the defendant.

**Analysis.** A jury can infer the value exceeded the requisite statutory amount of $200 if it is common sense to do so. Pictures of the damage caused were admitted into evidence and the pole and the car were logically jacked up to the degree of $200-plus damage.

## 7th District Amarillo

### *Ex parte Claycomb*, No. 07-20-00238-CR (Tex. App.—Amarillo, Nov. 22, 2022)

**Attorneys.** Lane Haygood (appellate), Mark Bennett (appellate), Julie Goen Panger (trial), Justin Kiechler (trial).

Issue & Answer. Texas Penal Code 33.07(a) provides in relevant part: "A person commits an offense if the person, without obtaining the other person's consent and with the intent to harm . . . uses the name . . . of another person to: (1) create a web page on a commercial social networking site or other Internet website . . . ." Is this prohibition facially invalid under the First Amendment? No.

**Facts.** The State alleged that the defendant uploaded a video on a porn website using another person's name with the intent to harm that person. The defendant filed a pretrial writ of habeas corpus challenging the constitutionality of the statute criminalizing the statute prohibiting the fraudulent use of another person's name to create a website or web posting.

**Analysis.** "We construe the relevant portion of section 33.07(a) as prohibiting one from employing the name of another without permission for the purpose of creating a website or web post." This does not necessarily involve the expression of ideas, opinions, or information and thus does not implicate the First Amendment.

## 10th District Waco

### *Crucet v. State*, No. 10-21-00106-CR (Tex. App.—Waco, Dec. 7, 2022)

**Attorneys.** Lane Thibodeaux (appellate), Mary Conn (trial).

**Issue & Answer 1.** When the defendant has some criminal history and is sentenced at the low end of the sentencing range, is he entitled to a new trial on the basis of ineffective assistance of trial counsel who did not pursue a medical defense that would show the defendant had a

traumatic brain injury, post-traumatic stress disorder, but would also show he had a drug and alcohol problem? No.

**Issue & Answer 2.** Does Texas Rule of Appellate Procedure 21 deny due process by requiring a defendant to hurriedly prepare his case for a new trial within 30 days of receiving a sentence? **No. Not here.**

**Facts.** The trial court sentenced the defendant for the offense of aggravated assault with a deadly weapon. In a motion for new trial the defendant claims that his trial counsel was ineffective for failing to: (1) present medical records to the probation department for purposes of preparing his presentence investigation report, (2) failing to conduct an evaluation by a neuropsychologist, and (3) failing to present any expert testimony regarding his post-traumatic stress disorder and traumatic brain injury.

**Analysis 1.** Ineffective assistance of counsel is evaluated using the *Strickland v. Washington* two prong test: (1) deficient performance of counsel, and (2) prejudice. Here there is no prejudice—the defendant's conduct was sufficiently bad and the trial court's sentence sufficiently low that the purported deficient performance could not have had an impact on the sentence. The trial court sentenced the defendant on the lower end of the punishment range for this second-degree felony offense. He had previously been placed on deferred adjudication community supervision for evading arrest in a motor vehicle. In that case he fled law enforcement at speeds in excess of 150 miles per hour. The defendant was still on probation for this offense when he entered another person's house and pointed his gun at people. The medical records that the defendant contends would have helped him secure a lesser sentence show that his behavior could be explained by both his TBI or by drugs and alcohol.

**Analysis 2.** The defendant essentially contends that 30 days is not enough time to make the case for ineffective assistance of trial counsel. But the defendant was able to make a case here, and that is good enough. It is probably better to raise ineffective assistance of counsel in a post-conviction writ of habeas corpus.

## 14th District Houston

### *Stocker v. State*, No. 14-21-00412-CR (Tex. App.—Houston [14th Dist.] Dec. 8, 2022)

**Attorneys.** Windi Pastorini (appellate), R.P. Cornelius (trial), Bryan Savoy (trial).

**Issue & Answer 1.** "Your affiant [has lots of experience with crimes and phones]. Your affiant knows [criminals use phones]." Is this probable cause? No.

**Issue & Answer 2.** "[Insert facts clearly establishing probable cause]. "Your affiant [has lots of training and experience]" "Your affiant [knows criminals use phones that transmit GPS data]." "Your affiant [believes the defendant's cell data records will show] habits, motives, and intentions which could also provide leads as to the plans in relation to [the crime]." Is this probable cause? Strangely, yes.

**Facts.** The State convicted the defendant of capital murder for shooting a homeless man from a balcony in a nearby apartment. In August 2017 the victim was shot and wounded from an apartment balcony. After this incident officers researched the suspected apartment and learned that the defendant's name was "associated" with the address. Officers secured an arrest warrant and attempted to arrest the defendant at the apartment. The defendant was not home, but officers located a large number of guns and ammunition. In November 2017 the homeless man sustained gunfire again and died. The medical examiner matched the bullets in the victim's body to guns belonging to the defendant. When officers ultimately arrested the defendant they seized his mobile phone, obtained a warrant to search the device and search warrants for his cell phone provider. The search of the defendant's device produced texts and browser history. The search of defendant's cell phone provider records produced the defendant's location at various times.

The defendant filed motions to suppress evidence: (1) obtained in the search of his apartment after the first shooting, (2) obtained from his cell device pursuant to a search warrant, and (3) obtained from his cell provider pursuant to a search warrant. The trial court denied the motions to suppress.

**Analysis 1.** A cell phone search affidavit "must usually include facts that the cell phone was used during the crime or shortly before or after." Investigators must establish a nexus with more than mere conclusory allegations and boilerplate language propped up by generic training and experience. Here the supporting affidavit stated: "Your affiant [has lots of experience with crimes and phones]. Your affiant knows [criminals use phones]. Your affiant is requesting a search warrant be issued [to get evidence from the defendant's phone]." "There simply are no facts within the four corners of the affidavit that tie appellant's Samsung phone to any offense, much less the charged offense of capital murder." Because the State used evidence from the phone that was significantly inculpatory (including a message that said "I ended up having to shoot a guy . . ."), and used by the State to obtain a conviction, the trial court's erroneous ruling regarding the admissibility of evidence obtained from the cell phone harmed the defendant.

**Analysis 2.** Law enforcement must obtain a warrant supported by an application showing probable cause before obtaining data from a person's wireless carrier. This includes cell site location information. Generic statements such as "a cell phone was possibly used by a suspect and particular location data will help investigators produce leads" is insufficient. However, here, law enforcement provided far more detail. The investigating officer explained in his affidavit: (1) the similarities between the first and second shooting, (2) bases to connect the defendant to both, (3) the matching of the bullets to the defendant's firearm, (4) the investigator's belief based on training and experience that the defendant's provider data will produce leads, motives, and intentions.

**Comment.** The case is reversed, and the analysis of Issue 2 was just for funsies. Still, I don't quite understand

how the Court can conclude that the first affidavit fails for failing to establish a nexus between the phone and the crime, but then conclude that the second affidavit which similarly fails to establish a nexus between the phone and the crime is sufficient merely because it goes into more detail about why officers believe the defendant shot the victim. Either the defendant had the phone on him before, during, or after the murder and was therefore transmitting GPS location date . . . or he wasn't. The second warrant affidavit sheds no light on this.

**_State v. Zuniga_, No. 14-21-00757-CR (Tex. App.—Houston [14th Dist.] Dec. 13, 2022)**

**Attorney.** Matt Hennessy (appellate)(trial).

**Issue & Answer.** The Move Over Act of 2003 is codified under Texas Transportation Code § 545.157. It requires one of two things of a driver when "approaching" an emergency vehicle displaying visual signals, either: (1) vacate the lane closest to the emergency vehicle, or (2) reduce speed by 20 MPH or to 5 MPH when the posted limit is 25 MPH or less. Are these requirements unconstitutionally vague for failing to define the term "approaching?" No.

**Analysis.** Traditionally, a person challenging the constitutionality of a statute for vagueness has the heavy burden to show that the statute is impermissibly vague in all of its applications. Sometimes, the United States Supreme Court departs from this rule. It does so in First Amendment Cases. It has done so recently in non-First Amendment cases. Sometimes when the Supreme Court departs from the traditional rule, it continues to cite with approval cases applying the traditional rule. The Court of Criminal Appeals has at times suggested that the traditional rule is no longer the proper approach to analyzing vagueness. But then at times the Court of Criminal Appeals has maintained that the traditional rule remains in effect. The Fourteenth Court of Appeals will follow the traditional rule for three reasons: (1) the Supreme Court has not specifically disavowed the traditional rule, (2) the Court of Criminal Appeals has not repudiated the traditional rule, (3) the Fourteenth Court applied the traditional rule in recent cases.

Here, the defendant argues that a driver has no way of knowing at what point his duty to slow down or move over is triggered—it is unclear at what point he is considered to be "approaching." However, because the court is following the traditional rule, the defendant must show that the statute is vague in all of its applications. There is at least one application where a driver can violate the statute intentionally and without confusion: when that driver never slows and never moves over.

**Comment.** This is a fantastic outline of the cluster that is the vagueness doctrine in Texas and elsewhere.

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

- 3rd District Austin
- 8th District El Paso
- 9th District Beaumont
- 11th District Eastland
- 12th District Tyler
- 13th District Corpus Christi/Edinburg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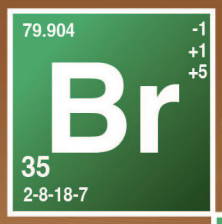


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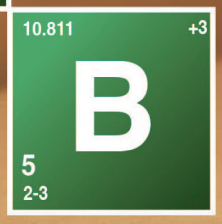


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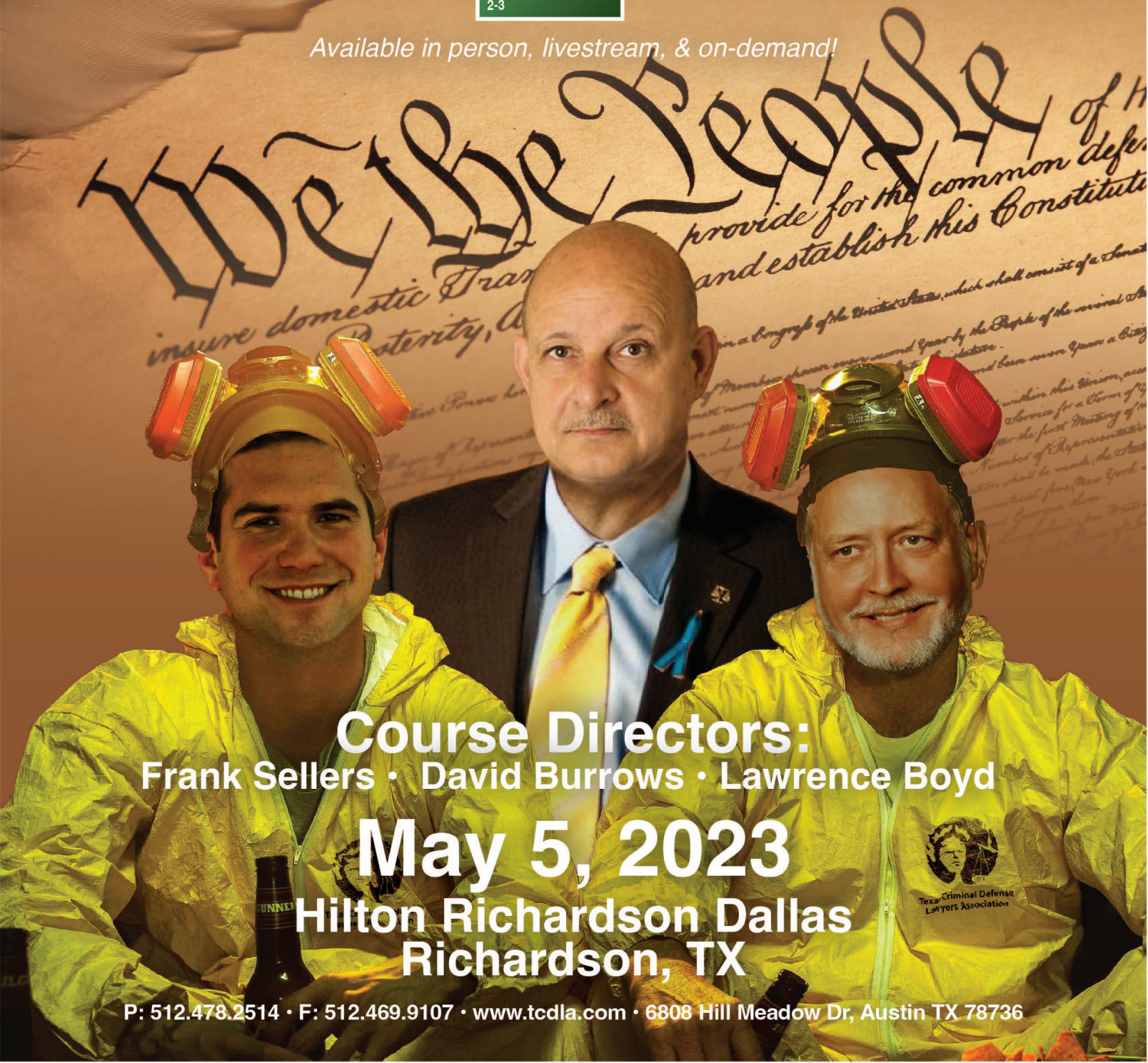

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Voir Dire Sex Cases ..... Jeff Kearney
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PowerPoints in Voir Dire ..... Jessica Canter

## Friday • March 3, 2023

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