

VOICE

FOR THE DEFENSE

2022-2023
TCDLA Committee Members
Thank You!

How to Use
Technology to Help
your Client Better
and Protect Yourself
From a Grievance
pg 18

Phone Extraction
pg 21

Juvenile Justice
and Determinate
Sentencing, Parole
Basics for Kids
pg 24

Social Service
Providers Article
pg 26

Recent Texas
Exoneration: Melvin
Quinney
pg 30



Texas Criminal Defense Lawyers Association

EVIDENCE: IT'S ALL ELEMENTARY

Available In Person, Livestream, & On Demand At Your Own Pace!

NEW!
Fact Pattern
Demos & Lectures
Interactive!

COURSE DIRECTORS:

Sarah Roland • Reagan Wynn • Thomas Wynne

SEPTEMBER 7-8, 2023

Aloft Dallas Downtown • Dallas, TX

Thursday

Cell Phone & Tech Authentication by an Expert Sean Hightower & Dan Gugliotta
Interrelationship of State and Federal Practice Camille Knight
Evidentiary Foundations: Getting it in and Keeping it out & Live Demos ..Jason Cassel
Guide to Evidence Greg Westfall
A Criminal Defense Perspective: Common Trial Evidentiary IssuesLaurie Key
Evidentiary ToolboxJeep Darnell
Interactive Groups and Demo Presenting Evidence Thomas Wynne

Friday

The Mechanics of Litigating Pre-Trial Evidentiary IssuesChris Abel
Experts from an Evidentiary StandpointMolly Bagshaw
Q&ASpeakers
Extraneous Bad Acts and Bad Characters.....Rusty Gunter
A Bench Perspective: Common Trial Evidentiary Issues ...Judge Audrey Moorehead & Panel
Forensic, Experts, & Interviews in Sex CasesHeather Barbieri & Dr. Aaron Pierce

TCDLEI Scholarships available at tcdla.com!

Register today at tcdla.com or give us a call at 512-478-2514

P: 512.478.2514 • F: 512.469.9107 • www.tcdla.com • 6808 Hill Meadow Dr, Austin TX 78736

Advertisement

EDITOR

Jeep Darnell | El Paso, Texas • 915-532-2442
jedarnell@jdarnell.com

ASSISTANT EDITORS

John Gilmore, III | San Antonio, Texas
Amanda Hernandez | San Antonio, Texas
Sarah Roland | Denton, Texas
Jeremy Rosenthal | McKinney, Texas
Mehr Singh | Lubbock, Texas
Clay Steadman | Kerrville, Texas

DESIGN, LAYOUT, EDITING

Alicia Thomas | 512-646-2736 • athomas@tcdla.com

SIGNIFICANT DECISIONS REPORT EDITOR

Kyle Therrian | McKinney, Texas

TCDLA OFFICERS

President | John Hunter Smith • Sherman
President-Elect | David Guinn • Lubbock
First Vice President | Nicole DeBorde Hochglaupe • Houston
Second Vice President | Clay Steadman • Kerrville
Treasurer | Sarah Roland • Denton
Secretary | Lance Evans • Fort Worth
CEO | Melissa J. Schank • 512-646-2724 • mschank@tcdla.com

DIRECTORS

Sam Adamo • Houston	Joseph Hoelscher • San Antonio
David Adler • Bellaire	John T. Hunter • San Antonio
Matthew Allen • San Antonio	Jonathan Hyatt • Longview
Stephanie Alvarado • Dallas	Kameron Johnson • Austin
Gene Anthes • Austin	Jolissa Jones • Houston
Molly Bagshaw • Houston	Sean Keane-Dawes • Floresville
Phil Baker • La Grange	Peter Lesser • Dallas
Robert J. Barrera • San Antonio	Jani J. Maselli Wood • Houston
Lara E. Bracamonte • Rockwall	Lauren McCollum • San Angelo
Jessica Canter • Seguin	Dean Miyazono • Fort Worth
Omar Carmona • El Paso	Mitchell Nolte • McKinney
Jason D. Cassel • Longview	Mario A. Olivarez • Corpus Christi
Allison Clayton • Lubbock	Stephanie Patten • Fort Worth
Angelica Coglianò • Austin	Shane Phelps • Bryan
Justin Crisler • Austin	Rick Russwurm • Dumas
Cesar De Leon • Brownsville	Lisa Strauss • Bellaire
Aaron Diaz • San Antonio	Matthew Smid • Fort Worth
Clifford Duke • Dallas	Suzanne Spencer • Austin
Brian Erskine • Austin	Fred Stangl • Lubbock
Joseph A. Esparza • San Antonio	Joe Stephens • Boerne
Amber Farrelly • Austin	Scott Stillson • Wichita Falls
Rick Flores • Austin	Mark Thiessen • Houston
Robert Gill • Fort Worth	Patty Tress • Denton
John S. Gilmore • San Antonio	Paul Tu • Sugar Land
Lisa Greenberg • Corpus Christi	Judson Woodley • Comanche
Paul Harrell • Gatesville	Thomas Wynne • Dallas
Sean Hightower • Nacogdoches	Jennifer Zarka • San Antonio

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. 6 | July/August 2023

Features

18

How to Use Technology to Help your Client Better and Protect Yourself From a Grievance
Benson Varghese

21

Phone Extractions: What Are They and What Do They Reveal?
Daniel Gugliotta

24

Juvenile Justice and Determinate Sentencing, Parole Basics for Kids
Abner Burnett

26

Social Service Providers Article
Scott Ehlers

30

Recent Texas Exoneration: Melvin Quinney
Mike Ware & Jessi Freud

Columns

05

President's Message
John Hunter Smith

06

Chief Executive Officer's Perspective
Melissa J. Schank

10

Editor's Comment
Jeep Darnell

11

Ethics
Chuck Lanehart & Megan Gower

15

The Federal Corner
T.W. Brown

17

Beyond City Limits
Dean Watts

35

Significant Decisions Report
Kyle Therrian

Available online at www.tcdla.com
Volume 52 No. 6 | July/August 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

August

August 11

TCDLA | 21st Annual Top Gun DWI
Houston, TX

August 17

CDLP | Building Blocks for a Next Level
Criminal Defense Attorney
Austin, TX

August 17-18

CDLP | Innocence Work for Lawyers w/
IPOT
Austin, TX

August 21

CDLP | Mindful Monday
Webinar

August 23-26

TCDLA | DWI Super Course: SFST/DRE/
ARIDE
Austin, TX

August 24-25

CDLP | Floyd Jennings Mental Health
Symposium
Austin, TX

September

September 7-8

TCDLA | Evidence: It's All Elementary
Dallas, TX

September 8

TCDLA Executive & Legislative Committee
Meetings
Dallas, TX

September 9

TCDLA Board & CDLP Committee
Meetings
Dallas, TX

September 15

CDLP | Riding for the Defense
McKinney, TX

September 18

CDLP | Mindful Monday
Zoom

October

October 4-7

CDLP | Advance Trial Academy
Round Top, TX

October 5-6

CDLP | Corrections & Parole
Austin, TX

October 5-7

TCDLA | Future Indigent Defense
Leaders 3.0 & 4.0
San Antonio, TX

October 11

CDLP | Innocence for Students w/ IPOT
Austin, TX

October 12-13

CDLP | 20th Annual Forensics
Austin, TX

October 27

CDLP | Riding for the Defense
South Padre, TX

October 27

CDLP | Nuts & Bolts w/ SACDLA
San Antonio, TX

November

November 2-3

TCDLA | 19th Annual Stuart Kinard DWI
San Antonio, TX

November Continued

November 16

CDLP | Capital Litigation
Dallas, TX

November 17

CDLP | Mental Health
Dallas, TX

November 20

CDLP | Mindful Monday
Webinar

November 30 - December 1

TCDLA | Defending Sex Crime Allegations:
Adults and Children
Round Rock, TX

December

December 1

TCDLA Executive & Legislative Committee
Meetings
Round Rock, TX

December 2

TCDLA & TCDLEI Board & CDLP
Committee Meetings
Round Rock, TX

December 8

CDLP | Against All Odds w/ SACDLA
San Antonio, TX

December 15

CDLP | 16th Annual Hal Jackson Memorial
Jolly Roger w/ DCCDLA
Denton, TX

December 18

CDLP | Mindful Monday
Webinar

January

January 3

CDLP | Prairie Pups w/ LCDLA
Lubbock, TX

January 4-5

TCDLA | 43rd Annual Prairie Dog
Lubbock, TX

January 19

CDLP | Riding for the Defense
Waco, TX

January 26

TCDLA | Defending Vehicular Crimes
Austin, TX

February

February 1-2

TCDLA | Federal Law
New Orleans, LA

February 14-18

TCDLA | President's Trip
Charleston, SC

February 16

CDLP | Indigent Defense
Dallas, TX

February TBD

CDLP | Mental Health
Houston, TX

February TBD

CDLP | Setting Up the Appeal
Houston, TX

February TBD

CDLP | Capital
Houston, TX

February TBD

CDLP | Veterans
Houston

February Continued

February 24

CDLP | Career Pathways
Webinar

February 29

TCDLEI Board Meeting
Zoom

March

March 7-8

TCDLA | From Start to End
Woodlands, TX

March 8

TCDLA Executive & Legislative
Committee Meetings
Woodlands, TX

March 9

TCDLA Board & CDLP Committee
Meetings
Woodlands, TX

March 17-22

CDLP | 47th Annual Tim Evans Texas
Criminal Trial College
Huntsville, TX

March 21-22

TCDLA | 30th Annual Mastering
Scientific Evidence DUI/DWI Co-
sponsored with NCDD
New Orleans, LA

March 24-26

TCDLA | Operation Lone Star
Austin, TX

April

April 5

CDLP | Riding for the Defense
Longview, TX

April 11

CDLP | 13th Annual Craig Washington
w/ Thurgood Marshall School of Law
Houston, TX

April 11

CDLP | Juvenile Training Immersion
Program
Austin, TX

April 11

CDLP | Addressing Race, Gender, &
Equity in Criminal Justice
Austin, TX

April 12

CDLP | Juvenile
Austin, TX

April 19

CDLP | Riding for the Defense
College Station, TX

April 19-20

CDLP | Fiesta w/ SACDLA
College Station, TX

April 25-27

TCDLA | FIDL 3.0 & 4.0 Returner
San Angelo, TX

April 26

CDLP | Riding for the Defense
San Angelo, TX

April 27

TCDLA | FIDL 5.0 Core 101
San Angelo, 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

JOHN HUNTER SMITH



Rusty Recharge

Following the annual Rusty Duncan seminar I never fail to feel recharged and energized to take my new found knowledge back to the office and my practice. Spending three days in San Antonio surrounded by my brothers and sisters in the practice is as rewarding as the seminar. Looking back at the fire that was fueled at the seminar, I am reminded of Tom Petty's lyrics, "Well, I won't back down, No, I won't back down, You could stand me up at the gates of hell, but I won't back down."

At this year's Rusty, I had the opportunity to see how the sausage was made. On Tuesday afternoon, I observed the TCDLA staff setting up for the Rusty Duncan seminar. I was in awe of the entire staff and their attention to detail. Their hard work was for US and OUR Organization. Next time you are at seminar, stop and tell a member of the TCDLA staff that you appreciate their hard work and dedication.

As I have prepared for the 2023-2024 TCDLA Presidency, I have been guided by our purpose, "...to protect and ensure by rule of law those individual rights guaranteed by the Texas and Federal Constitutions in criminal cases; to resist the constant efforts which are now being made to curtail such rights: to encourage cooperation between lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance to promote justice and the common good."

When I read TCDLA's purpose, I am reminded of you, the members. The practice of law is mentally tough and grueling. Sometimes, it feels we cannot make anyone happy that we have been tasked to represent. To my fellow members, I want to thank you for the work you do for our profession. Your work does not go unnoticed by your peers. I appreciate your loyalty to the profession and the rule of law. Lastly, I appreciate your loyalty to this Organization.

Over the course of the next year, I encourage you to

attend as many TCDLA seminars as you can, not only for the knowledge that will be gained, but for the comradery. It is the comradery that makes us strong and different from other organizations. Others may try to imitate our example, but they will always fall short since they cannot capture the unique spirit that embodies TCDLA.

At some point in the future, we will inevitably lose some of the fire that we felt when we left Rusty Duncan. I encourage you to lean on your TCDLA comrades to stoke the fire once again. We should always be fueled by Tom Petty's desire that, "We won't back down." We are in this fight together.



CEO's Perspective

MELISSA J. SCHANK

"VOLUNTEERS DO NOT NECESSARILY HAVE THE TIME; THEY JUST HAVE THE HEART."

-Elizabeth Andrew

2022-2023 TCDLA Committee Highlights - Thank You

TCDLA has more than 40 committees and 200 committee members. Committee members meet via Zoom and in person to create resources, support our members, and serve on the front line of defense! If you are passionate about a particular area and want to join a committee, visit the website for a full list of possibilities. Committee-interest forms can be found online—or just email me. Thank you to our members who contribute their time and talents.

Affiliate | Co-Chairs Laurie Key & Susan Anderson

The Affiliate Committee kept communication open with local bars and assisted with training and recruitment. They also contacted local bars who are not affiliates to help or convince them to join TCDLA.

Amicus (Brief) Curiae | Chair Niles Illich & Vice Chair Kyle Therrian

The Committee was consulted on eight cases of statewide significance and two with the Supreme Court. The Committee is looking to expand its efforts by adding attorneys willing to volunteer and write on briefs as a committee member.

Awards | Co-Chairs David Botsford & Betty Blackwell

The Awards Committee meets every March and selects the Hall of Fame inductees (subject to Board approval), the Percy Foreman Lawyer of the Year, and the Charles Butts Pro Bono Lawyer of the Year. The Committee can give the Rodney Ellis Award to a non-lawyer for outstanding service to criminal defense but chose not to in 2023. The Committee also considers nominations for the Rising Star Award, recognizing lawyers licensed for less than ten years who have shown outstanding leadership. Five Rising Star Awards were given this year at Rusty Duncan.

Budget and Financial Development | Chair Clay Steadman & Vice Chair Sarah Roland

The TCDLA Budget and Financial Development Committee meets at least once per month via Zoom to review the organization's current revenue, debt obligations, and cash flow. Over the past several months, the TCDLA Budget and Financial Development Committee, along with the assistance of Melissa Schank and Mari Flores, created and subsequently completed the 2023 – 2024 TCDLA Budget, which was reviewed and approved by the TCDLA Board via electronic vote on June 9, 2023. TCDLA exceeded budget projections for the 2022 – 2023 fiscal year, and our organization remains financially strong for the foreseeable future. The review and signature process for the TCDLA Treasurer and other approved signatories on the financial accounts requires the review on at least a monthly basis of all financial account statements of the organization and the review, approval, and signature of over 2,500 checks per year. TCDLA's leadership and the Budget and Financial Development Committee remain committed to ensuring our organization remains financially sound and prosperous in the coming years.

By-Laws | Chair Adam Kobs

This year, we had no proposed by-laws, modifications, additions, or deletions! Your Committee continues to make sure they are up to date and will monitor and make recommended adjustments as needed.

Cannabis | Chair Don Flanary & Vice Chair Joseph Hoelscher

The TCDLA Cannabis Committee met and reviewed opinions and assembled an entire Voice issue dedicated to Cannabis related issues.

Capital Assistance | Chair Patrick McCann & Vice Chair Philip Wischkaemper

With the help of a tremendously talented and experienced group of committee members, the Capital Assistance Committee has

1. Begun a full overhaul of the TCDLA capital motions
2. Provided two articles to the Voice

3. With the help of Melissa and Keri rebooted the TCDLA capital list serve
4. Helped Rick provide courses and materials for the ongoing series of TCDLA Capital coursework
5. Begun planning a mitigation training session for next year and
6. Issued a call for the new generation of TCDLA's diverse membership to come and join the fight against the Texas death penalty

Client Mental Health | Chair Alyse Ferguson & Vice Chair Jon O'Toole

The Client Mental Health Committee worked to provide presentations to enhance lawyer knowledge and service to clients with mental illness. This included putting together three mental health seminars and monthly virtual Mindful Monday CLE. In addition, the Committee focused on providing resources to members. The Committee continued work on print material, including free cheat sheets and mental health resources.

Corrections & Parole | Co-Chairs Gene Anthes & William Habern

This year the co-chairs served as course directors for the upcoming Post-Conviction Seminar in Austin scheduled for October 5-6, 2023. The committee has also continued work on legislative proposals to create an independent SCFO. Several committee members spoke at the Capital urging the creation and separate funding of an independent SCFO. Throughout the year, committee members have provided updates on TDCJ and Parole Board matters of interest, while also fielding listserv questions on parole and corrections.

Criminal Defense Lawyers Project | Chair Monique Sparks & Vice Chair Jeep Darnell

This past year, the CDLP committee saw some 300 speakers travel to over 40 live and 75 online seminars throughout Texas, training more than 5,250 criminal defense lawyers. Operating with the theme "Journey for Justice," the team traveled throughout Texas!

Diversity, Justice & Inclusion | Co-Chairs Thuy Le & Monique Sparks

The Diversity, Justice & Inclusion Committee continued to spread the word with statements highlighting various holidays and underrepresented groups. In addition, the Committee's fourth annual Addressing Race, Gender, Money and Equity In Criminal Justice Seminar was a huge success.

DWI Resource| Co-Chairs Steve Gonzalez & Doug Murphy

The DWI Resource Committee continued to fight the good fight against the State and bad laws and monitor legislation.

Executive | Chair Heather Barbieri & Vice Chair John Hunter Smith

The Executive Committee reviewed all business written and approved by committees, bringing items to the TCDLA Board for approval when required. This year the Committee met monthly via Zoom and in person quarterly —a productive and successful year.

Ethics | Chair Robert Pelton & Vice Chairs Joseph Connors & Thomas Mayr

The Ethics Committee monitored and responded to the dedicated Ethics Hotline via email, ethics@tcdla.com, and phone (512) 646-2734. The Committee responds within 24 hours, responding to multiple inquiries daily. In addition, the committee members submit articles monthly for the standing ethics column in the Voice.

Health & Wellness | Co-Chairs Mark Griffith & Savannah Gonzalez

The Committee will implement new programs.

Indigent Client Defense | Chair Jani Maselli Wood & Vice Chair Jessica Canter

The Indigent Defense Committee shared their Court Cost Workgroup Booklet, and committee members from each district are reviewing cases and creating a best practices document for judges.

Judicial Conduct | Chair Ed Mallet & Vice Chair Philip Wischkaemper

The Judicial Conduct Committee reviewed several cases where a former Midland Assistant D.A., Ralph Petty, received extra compensation from the County's judicial budget for being a "law clerk" to the judges. In the central case where the Los Angeles, California, Federal Defenders Capital Habeas Unit discovered the double-dipping and inherent conflict of interest, they sought a deposition and Petty claimed his Fifth Amendment rights. The death row defendant prevailed on his writ. TCDLA filed Complaints with the Commission on Judicial Conduct against the seven judges still in service who had participated in the scheme. A recent report from our sources in Midland has informed us that one of the judges, who was tangentially involved, received notice that his complaint had been dismissed. Ultimately, the Judicial Conduct Commission dismissed all complaints against all remaining judges.

Also, during the year, the Committee advised members on a variety of issues, including motions to recuse, for change of venue, for a continuance when experts became unavailable and similar, often confidential, matters.

Juvenile| Chair Kameron Johnson & Vice Chair Sarah Gilmore

The Juvenile Justice Committee developed and conducted juvenile-specific trainings concerning all aspects of juvenile defense – both in lecture and small group format. The full-day seminar in Austin and the

juvenile webinars were well attended. Additionally, the Committee worked on juvenile legislation by serving as experts and a resource for the legislature during the legislative session. The Committee also held case staffing and reviews for attorneys throughout the state with complex juvenile cases and created juvenile materials and cheat sheets on the website. The Committee has also published juvenile related articles in the Voice.

Law School Students | Chair Anne Burnham & Vice Chair Molly Bagshaw

The Law School Students Committee organized and presented the Third Annual “Pathways to Criminal Defense Practice,” a pan-Texas (including the University of Oklahoma!) law school virtual Interactive career day event; created a law school students public website page with student-specific resources; hosted a law student reception at Rusty Duncan in collaboration with the New Lawyers Committee; and facilitated TCDLA speaker presentations at individual law schools – most notably at St. Mary’s, Baylor, and University of Houston Law Center. We had several local events at law schools with committee members. If you are involved at your alma mater and would like to become a “captain” to help get criminal defense spotlighted at your law school, please contact Molly Bagshaw or Anne Burnham.

Legislative | Chair William Harris & Vice Chair Bobby Mims

The Legislative Committee met at least monthly this year and reviewed pending bills that were flagged by TCDLA professional lobbyists. Allen Place, Shea Place, and David Gonzalez spent endless hours at the Capitol during the session. Often, they and witnesses testifying didn’t leave until after midnight. Betty Blackwell and Steve Brand deserve special recognition as Travis County members who gave up a great deal of their time testifying on legislation. The lobbyists and the Legislative Committee continue to update members with the Legislative Cheat Sheet, legislative update presentations, and provide source material with the latest laws. TCDLA lobbyists and Legislative Committee members will be traveling all over the state to visit with local affiliate criminal defense associations for update presentations. The Legislative Committee will continue to maintain the Legislative Update listserv and provide important notices by email (legislative@tcdla.com).

Listserv | Chair Jeep Darnell & Vice Chair David Moore

The Listserv Committee monitored thousands of posts throughout the year on the TCDLA listserv (TCDLA offers more than 20 different specialty areas), spread awareness of the rules when needed, and fostered group respect. Staff are notified immediately if members need assistance or if there is a need to remove a post or access to a member.

Long Range Planning | Chair Nicole DeBorde Hochglaupe & Vice Chair Monique Sparks

The Committee met in Austin and came up with four initiatives. The board and Committee are working with the staff monthly to achieve our goals and will report at each quarterly board meeting.

- Enhancing Communication & Reorganizing Resources
- Revitalizing the Organization
- Empowering & Supporting Members & Volunteers
- Understanding Member Resources to Increase Education Access

Media Relations| Co-Chairs Lisa Greenberg & John Torrey Hunter

The Media Relations Committee was generally the first committee to respond to recent events. Committee members throughout the state created press releases quickly and fostered relationships with their local media outlets and reporters to assist in getting our voices and perspectives heard when needed.

Membership Benefits | Chair Sean Levinson & Vice Chair Stephanie Alvarado

The Membership Committee this year sponsored more member socials throughout the state, including the Cowboys stadium tour, a hockey game, a baseball game, and wine tours.

Memo Bank | Chair Tip Hargrove & Vice Chair Warren Wolf

The Memo Bank Committee was the brainchild of two old tech-incompetent lawyers who didn’t know how to save a darn thing from the listserv. Past President/Hall of Famer Vee Perini and Hall of Famer Tip Hargrove wanted to preserve the best of our membership’s recurring posts of general interest. Committee members reviewed all posts and flagged items for inclusion on a section called “Listserve Saved—the good stuff.” This is in the members-only section, which has expanded to include the Voir Dire and Motions banks.

New Lawyers | Co-Chairs Patty Tress & Jennifer Zarka

The New Lawyers Committee assisted in a Career Day and hosted a meet and greet at Rusty Duncan, and has already received a few sponsors for next year. The Committee will be putting on a Building Blocks seminar on August 17, 2023, in Austin with travel stipends. Please encourage any new lawyers, lawyers licensed less than five years, those new to criminal defense, and those who want to refresh their practice to attend!

Nominations | Chair John Hunter Smith

The Nominations Committee met several times throughout the year to review the process and encourage

members and districts to apply. This year the Committee voted on twelve new members and seven renewals for the Board of Directors, ratified at the Annual Members meeting in June. The Committee will prepare an analysis report next year to ensure Texas-wide representation.

Past Presidents | Chair Betty Blackwell

The Past Presidents Committee meets to keep former presidents abreast of TCDLA issues and to make use of their institutional knowledge for innovative solutions.

Prosecutorial | Chair Lance Evans & Vice Chair Monroe Solomon

The Prosecutorial Committee assisted members' concerns and proceeded as necessary.

Public Defender | Co-Chairs Jessica Canter & Clifford Duke

The Public Defender Committee continued to strengthen public-defense ties around the State. Using our annual meeting in San Antonio, we concentrated on networking our new and expanding Public Defender, Regional Defense, and MAC offices with the common goal of superior indigent defense. Our trainings addressed the nuts and bolts integral to daily defense and the growing need to recognize diversity and a holistic defense for indigent clients. We're looking to TCDLA as the linking organization for these growing offices as we continue to help each other statewide.

Rural Practice | Co-Chairs Paul Harrell & Dean Watts

Meeting throughout the year, the Rural Practice Committee worked on several virtual roundtables, addressing member needs and monitoring the Rural and TCDLA Listserv. The Committee also changed the name of the recurring Rural column in *The Voice* to "Beyond City Limits."

Strike Force | Chair Nicole DeBorde Hochglaube

Strike Force received calls and emails from TCDLA members almost weekly. The Committee is proud to serve members under attack for their performance of the criminal defense function in their representation of the

accused. Strike Force appeared in person and remotely throughout the state, representing our members, and spent many hours brainstorming with criminal defense lawyers under attack. Special thanks to the many committee members who have dropped what they were doing to step up for a member in need.

Technology | Chair Clifford Duke

The Technology Committee this year focused on helping master old technology and finding new technology tools for members to work on the Police Accountability database and linking reports to TCOLE member numbers. Check out the TCDLA website for our bank of "How To" videos for daily tech tasks and their use.

Transcript Database | Chair Carmen Roe

The Transcript Database Committee continued to strategize the collection and organization of transcripts.

Veterans Assistance | Chair Terri Zimmerman & Vice Chair Jon Shelburne

The Veterans Assistance Committee worked to serve as a resource for TCDLA members on accurate information about legal issues involving active duty, reserve, retired, or former military members. Their biggest event of the year was the Annual Veterans Justice Clinic, held in February. Speakers included experts discussing topics such as the physical and psychological effects of combat, the workings of the Veterans Administration, developments in military law, confusing military paperwork such as the discharge certificate (DD-214), and the operations of the various Veterans Treatment Courts around the state.

Voice | Editor Jeep Darnell & Assistant Editors: John Gilmore, Amanda Hernandez, Sarah Roland, Jeremy Rosenthal, Clay Steadman, & Mehr Singh

The Voice editorial committee reviewed over 100 articles from members and committees - we always need more! Editors sought out current events and resources as needed. The Voice archives were updated, and new resources were added to help new authors easily submit an article from 500-2500 words. In addition, editors edited content and checked citations. After the articles were finalized, the Committee members went through the proofing process on each of the ten 46-page Voice magazines annually. We now also offer an electronic version of the Voice for anyone who does not want to receive a printed version.

Women's Caucus | Co-Chairs Betty Blackwell & Cynthia Hujar Orr & Vice Chairs Kristen Gavigan & Leah Jackson

The Women's Caucus Committee put together a women-specific seminar and hosted a Women's Caucus at Rusty Duncan which was interactive. The Committee also kept members engaged on the listserv, and members submitted articles for the *Voice*.





TCDLA Family

Editor's Comment

JEEP DARNELL

Despite the heat we are currently experiencing in this first week of July, this is one of my favorite times of the year. I just got home a few weeks ago from Rusty Duncan, where my wife and I got to enjoy good food, fun times, and much needed time with close friends we don't get to see often enough. I, along with members of the El Paso criminal bar, my oldest son, and others, had our annual Declaration of Independence reading yesterday, which is always a great time, and the newcomers always find out they appreciate it much more than they thought. I'm about to get to enjoy my favorite holiday and blow things up over the long 4th of July weekend and in a little over a week, my family and I will travel to South Padre Island for the TCDLA Members Trip, where we will get to enjoy spending time with our new President, John Hunter Smith, and his family, and many other TCDLA members and their spouses, kids, friends, and other family members.

Even though the heat this time of year always seems to weigh heavy and make things move slower, the opportunity to spend time with my TCDLA family always provides me with a much-needed battery recharge. It's like the first half of the year always seems to beat me down a little, but the opportunity to laugh, eat, drink, tell war stories, and enjoy being around other lawyers who have been similarly beaten down is something every TCDLA member should take the time to enjoy. Some members are more involved than others, but the best part about this time of year is that any member has the opportunity to get as involved as they want in just a short period of time. If you find yourself wanting to engage more in this wonderful Organization, look no further than the Members Trip. I will never forget my first trip, many years ago. My oldest son and I flew out together on Tuesday, and my wife, who was pregnant with my youngest son, came out and met us a few days later. That first night at the beach, my son and I stayed at out until an hour that was not mother-approved, but we met up with some other TCDLA people and lost track of

time. Everyone in attendance immediately fell in love with my oldest son who, at about 2 years of age, was just tall enough to run into the incoming tide as fast as his little legs would carry him and get knocked on his backside fairly quickly. He thought it was hilarious and so did we, so he did it about a million times that night.

Everyone I know who has attended the Members Trip has a similar story about how they and their families became part of the TCDLA family. I don't know who looks forward to the trip more, me or my kids. They have so much fun playing with the kids they only get to see occasionally, but it is such a special time for everyone's families to get to know each other and I can tell you our Christmas card list has grown exponentially over the years, as have the number of cards we receive from other members. I hope to see more and more of our members every year during the wonderful summer events and I hope that by this coming winter, I get to send and receive a Christmas card from someone new reading this column.

Be safe,

Jeep Darnell

Ethics and the Law

CHUCK LANEHART
& MEGAN GOWER



Zealous Advocacy Cannot Be Reduced to Binary Code: Ethical Implications of Using Artificial Intelligence to Represent Criminal Defendants

“Can we agree that’s legal gibberish?”

These were the angry words of Judge P. Kevin Castel of the United States District Court for the Southern District of New York. Judge Castel was conducting a show cause hearing, and his “legal gibberish” question referenced a ChatGPT-created response brief that cited six non-existent cases. At the show cause hearing, Steven Schwartz, the lawyer responsible for the ChatGPT research, received questions from Judge Castel such as, “Do you cite cases without reading them?” and “Have you heard of the Federal Reporter?” Trying to save himself from sanctions, Schwartz said he thought the program was a search engine, and his lawyer—speaking on Schwartz’s behalf—indicated that the public needs a stronger warning about the dangers of ChatGPT. Judge Castel has yet to decide whether to impose sanctions on Schwartz. Matthew Russell Lee, *Lawyer Suing Avianca Used ChatGPT Which Invented 6 Cases Now Sanctions Hearing Here*, INNER CITY PRESS, <https://matthewrussellleeicp.substack.com/p/lawyer-suing-avianca-used-chatgpt> (last visited June 16, 2023).

Programs run by artificial intelligence (AI) have become a hot-button topic in the legal world. In the realm of criminal defense, AI carries two major implications: first, the ethical obligations for attorneys using AI; and second, the danger of clients foregoing hiring a licensed attorney in favor of seeking legal advice from AI.

Use of AI by Criminal Defense Attorneys

ChatGPT is a chatbot that is powered through artificial intelligence (AI). See Blair Chavis, *Does ChatGPT produce fishy briefs?*, ABA J. (Feb. 21, 2023, 1:58PM), <https://www.abajournal.com/web/article/>

[does-chatgpt-produce-fishy-briefs](#). The program—released by the company OpenAI in November of 2022—can draft legal documents such as appellate briefs and contracts. See *id.* A lawyer must only type a request—whether for contractual language or a brief—into the ChatGPT website, and the program will draft a response in accordance with the request. See Kate Rattray, *Will ChatGPT Replace Lawyers?*, Clio, <https://www.clio.com/blog/chat-gpt-lawyers/> (March 14, 2023). While ChatGPT may be appealing to lawyers looking to save time when drafting legal documents, like all technology, it is prone to error.

Even proponents of ChatGPT recognize the technology is not perfect and “[r]esults obtained from ChatGPT are often riddled with errors and, in some cases, outright falsehoods.” Nicole Black, *The Case for ChatGPT: Why lawyers should embrace AI*, ABA J. (Feb. 21, 2023, 1:11PM), <https://www.abajournal.com/columns/article/the-case-for-chatgpt-why-lawyers-should-embrace-ai>. For example, when ChatGPT was asked to draft a LinkedIn post for an article in which a lawyer was quoted, the program cited a quote that did not exist in the publication. See *id.* When ChatGPT was used in connection with other legal software, the document drafted referred to a non-existent state ethics provision. See *id.* Other tests of ChatGPT have found similar concerns about the program citing authorities or sources that do not exist. See *id.* ChatGPT is not like the use of a pre-prepared form. While forms carry the risk of citing outdated law, ChatGPT carries the risk of citing non-existent law. When using programs such as ChatGPT, attorneys should be mindful of their duties of diligence and candor toward the court,



TCDLA Ethics Hotline

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

requiring that they thoroughly review any document drafted or authority cited by AI-powered programs. See Tex. Disciplinary Rules Prof'l Conduct R. 1.01 cmt. 6; Tex. Disciplinary Rules Prof'l Conduct R. 3.03 cmt. 3.

Arguably, if a lawyer charges their normal fee for work that was completed using AI, the lawyer could be subject to sanctions under Texas Disciplinary Rules of Professional Conduct (TDRPC) Rule 15.07. A factor that the TDRPC enumerates as relevant when considering if an attorney has charged a reasonable fee is "the time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly." Tex. Disciplinary Rules Prof'l Conduct R. 1.06(DD). While the TDRPC do not currently account for AI, a lawyer billing for work that was completed using AI, e.g. charging the time it normally would have taken to draft a document that was actually drafted by AI, is comparable to billing for recycled work product. See ABA Comm. On Ethics and Pro. Resp., Formal Op. 379 (1993) (discussing that a lawyer violates their ethical duties by billing for recycled work product). Under TDRPC Rule 15.07, a lawyer who violates the duty to charge a reasonable fee may be subject to sanctions.

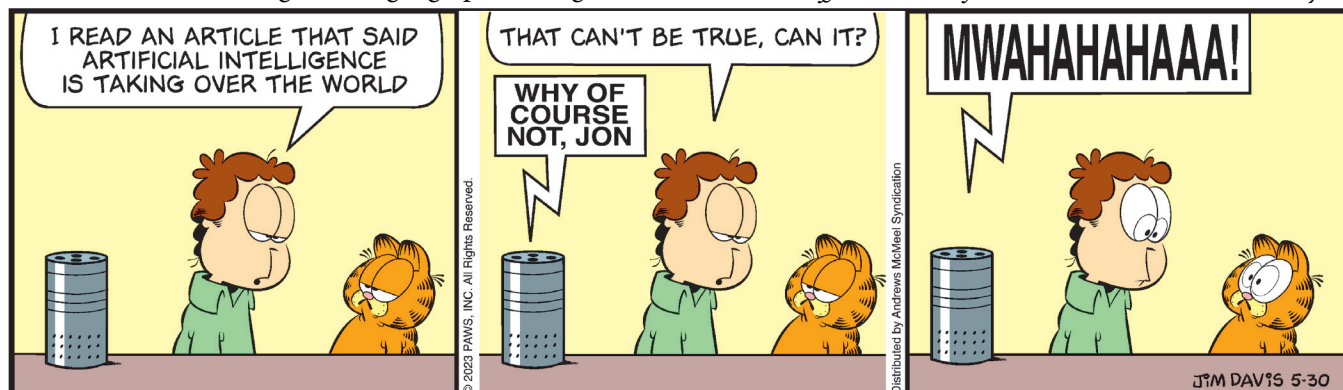
Finally, attorneys must be cognizant of the duty of confidentiality when using AI programs. See Tex. Disciplinary Rules Prof'l Conduct R. 1.05(b). In April of this year, ChatGPT was banned in Italy until its parent company made changes to become more transparent about its data-collection process. See Adi Robertson, *ChatGPT returns to Italy after ban*, VERGE (April 28, 2023, 2:17 PM), <https://www.theverge.com/2023/4/28/23702883/chatgpt-italy-ban-lifted-gdp-data-protection-age-verification>. These changes appear to be limited to Italy, though other countries such as Spain and Canada are considering similar bans. *Id.* ChatGPT is not a search engine that learns from browsing the internet—it learns how to improve its responses, in part, from the prompts and feedback it receives from users. See Catherine Thorbecke, *Don't tell anything to a chatbot you want to keep private*, CNN (April 6, 2023, 10:46 AM), <https://www.cnn.com/2023/04/06/tech/chatgpt-ai-privacy-concerns/index.html>. Considering this language-processing model

and the lack of transparency about data privacy when using ChatGPT in the United States, lawyers should refrain from including confidential information when giving the program a prompt.

Use of AI to Replace Criminal Defense Attorneys

The use of AI is not confined to lawyers, because laypersons have equal access to these programs. In January of 2023, Joshua Browder, CEO of the company DoNotPay, tweeted that his company was working on a "robot lawyer," which would tell pro se defendants what to say in court via a Bluetooth device. Niamh Rowe, *An AI Lawyer is About to Defend a Human in a U.S. Courtroom*, Daily Beast (Jan. 14, 2023, 2:53AM), <https://www.thedailybeast.com/ai-lawyers-from-donotpay-will-defend-human-defendants-in-traffic-court>. Browder stated that his goal was to ensure "that the ordinary, average consumer never has to pay for a lawyer again." *Id.* In addition to a robot lawyer that tells defendants what to say in court, DoNotPay also offered drafting assistance for a wide array of areas of law, including immigration services and contracts. See Debra Cassens Weiss, *DoNotPay doesn't live up to its billing as a 'robot lawyer,' offers 'substandard' legal docs, suit claims*, ABA J. (March 10, 2023), <https://www.abajournal.com/news/article/suit-claims-donotpay-doesnt-live-up-to-its-billing-as-a-robot-lawyer-offers-substandard-legal-docs>. Notably, Browder—just like the creators of other AI programs—is not a lawyer. *Id.*

On March 3rd, 2023, a lawsuit was filed that alleged DoNotPay violated California law by holding itself out as a lawyer and providing legal services without a law license. See *id.* The lawsuit alleged DoNotPay is not supervised by a licensed attorney, and many documents created by the program were unusable because they were "so poorly or inaccurately drafted." See *id.* The lawsuit is anticipated to turn into a class action. See *id.* Following the threat of criminal charges in multiple states for the unlicensed practice of law, Browder said on Twitter the company would switch to consumer rights issues, such as helping dispute medical bills and credit reports. Debra Cassens Weiss, *Traffic court defendants lose their 'robot lawyer,'*



GARFIELD © 2023 Paws, Inc. Reprinted with permission of ANDREWS MCMEEL SYNDICATION. All rights reserved.

ABA J. (Jan. 26, 2023), <https://www.abajournal.com/news/article/traffic-court-defendants-lose-their-robot-lawyer>.

It may be easy to brush off the DoNotPay fiasco as another fraudulent, failed Silicon Valley business venture, but the larger ramifications of the situation cannot be ignored. Laypersons, specifically those coming from a low socioeconomic background, are particularly vulnerable to companies like DoNotPay. These companies present themselves as the solution to access to justice issues. However, their lack of expertise makes it more likely that a client will end up with an unnecessary conviction than a financially favorable deal on legal services. If a lawyer messes up a client's case, a client may have an ineffective assistance of counsel claim. If a robot messes up a client's case, the client will likely, at best, only receive damages to put in their commissary account as they serve out the jail sentence they got courtesy of their robot lawyer. Had Browder not widely publicized his program in a way that got the attention of criminal defense attorneys on Twitter, it is likely that AI may have "represented" *pro se* criminal defendants for a significant period of time before state bar associations became aware of the situation.

Despite Browder's unlicensed practice of law, he did make a good point: "The truth is, most people can't afford a lawyer." Bobby Allen, *A robot was scheduled to argue in court, then came the jail threats*, NPR (Jan. 25, 2023, 6:05PM), <https://www.npr.org/2023/01/25/1151435033/a-robot-was-scheduled-to-argue-in-court-then-came-the-jail-threats>. While AI programs should not be utilized by laypersons to draft legal documents, the use of AI by licensed professionals could increase access to legal representation. Attorneys may be willing to take on more *pro bono* work or work at a lower cost if they can save time with drafting assistance from AI. While a world in which criminal defense attorneys are replaced by robots

sounds like a plot to an Orwellian novel, the use of AI to aid diligent defense attorneys in increasing access to legal representation is a reality that should be welcomed.

Chuck Lanehart is a shareholder in the Lubbock firm of Chappell, Lanehart & Stangl, P.C., where he has practiced law since 1977, and he is a 1977 graduate of Texas Tech University School of Law. He is board certified in the field of Criminal Law by the Texas Board of Legal Specialization. He serves on TCDLA's ethics committee and strike force, and he is statewide co-coordinator of the annual TCDLA Declaration readings. He previously served as director of the State Bar of Texas and of TCDLA. He is author of several books, including "Evolution of the Texas Plains," published by The History Press July 10. He is co-author of "Fatal Exam: Solving Lubbock's Greatest Murder Mystery," to be published by Texas Tech Press in November 2023. In 2018, the Lubbock Area Bar Association presented Chuck the James G. Denton Distinguished Lawyer Award, the Bar's highest honor. In 2008, Chuck was named among the "200 Most Influential People in the History of Lubbock" by the Lubbock Avalanche-Journal. He can be reached at chuck@lubbockcriminaldefense.com or 806-765-7370.

Megan Gower is a rising 3L at Texas Tech University School of Law. She is originally from Alamogordo, New Mexico and attended Texas Tech University for undergrad, where she graduated magna cum laude with a Bachelor of Arts degree in History and Political Science. She is a member of Phi Delta Phi and is currently the President of Tech Law's Criminal Law Association. Her TTUSL team was champion of the 2023 regional ABA National Appellate Advocacy Competition in Los Angeles, where Megan was named best advocate. After completing law school, she plans to practice capital defense in Texas. Megan has clerked for Chappell, Lanehart & Stangl in Lubbock since 2020.

Shout-Outs!

Kudos to Past President Sam Bassett and Jason Ortega, who tried a murder case in Travis County which resulted in a hung jury. Subsequently, the client entered a plea to manslaughter with a deferred adjudication sentence. The case involved self defense with the shooting captured on a Ring doorbell camera. "Not the complete victory we wanted but our client was grateful to avoid prison and a murder conviction."
Way to go!

Great work by Phil Lynch and Shane O'Neal! They won Campos-Ayala & Moncada on the sufficiency of the evidence issue. Both clients who had illegally crossed into the U.S. got a ride from a 17-year-old who had already filled up his car with marijuana. To receive

the ride, they had to wedge themselves on top of the bundles of marijuana. Convicted of possession with intent to distribute, sentenced to 5-year mandatory minimums. Reversed and Vacated. **Fantastic!**

Shout out to Angelica Cogliano and Addy Miro! Their client (24 with no record) and another addict were using a substance that ended up being fentanyl. They both died. Only their client could be revived by naran. The client ended up charged with knowingly delivering his friend the fentanyl that caused his death. A jury brought him justice and found him NOT GUILTY. He will be doing 18 months on a fair possession charge and getting treatment. **Great Work!**

Welcome New TCDLA Members!

May 16, 2023 - June 15, 2023

Regular Members

Gary Bower - Corsicana
Katherine Bush - Amarillo
Janet Celeste - The Woodlands
James Coleman - Temple
Joshua Davila - Laredo
Brandy Douglas - Denison
Jacklyn Fox - Sioux City
Todd Hinds - Houston
Alex Hinshaw - Amarillo
Jason Johnson - Houston
Anthony Mendoza - San Marcos
Jose Munoz - Edinburg
José Ramírez - Austin
James Rivera - Houston
Marina Sawires - Allen
Jason Scofield - Houston
Laurel Shedd - Houston
Jessica Siegel - Houston
Sheena Winkfield - Fort Worth
Ashten Yarberry - Amarillo
Gustavo Zambrana - Austin
Public Defender Members
Mary Acosta - Houston
Jacob Hill - Texarkana
Jisha Jaganathan - Sugar Land
Austin Lowe - Jourdanton

Chaz Nungaray - El Paso
Jade Ortego - Jourdanton
Maite Sample - Houston

Affiliate Members

Eric Schneider - Austin
Sarah Gammell - Austin

Investigator Members

Bobby Rachel - Corsicana

Distinguished Members

William Holmes - Odessa

Paralegal Members

Joy Ellis - McKinney

Student Members

Sophia Arnold - Fort Worth
Alexis Biedrzycki - San Antonio
Brienne Boiarsky - Houston
Elleni Carrillo - Lubbock
Kenedy Douglas - Norman
Anne Greenberg - Lubbock
Destiny Hagan - Houston
Ethan Jimenez - Lubbock
Sarah Kannel - Lubbock
Travis Kiner - Spring Branch
Karagan Kusak - Bulverde
Jessica Sexton - Pleasanton
Kyiana Sykes - Houston
Adam Trevino - San Antonio



A banner for TCDLA's "Riding for the Defense" program. The background is a photograph of several horses in a field. In the center, there is a circular logo featuring a silhouette of a person riding a horse. Below the logo, the text "TCDLA" is written in large, bold, white letters, and "RIDING FOR THE DEFENSE" is written in smaller, bold, white letters. To the left of the logo, the text "These seminars are sponsored by CDLP, a project of TCDLA, funded by the Texas Court of Criminal Appeals." is written in small white text. To the right of the logo, the text "McKINNEY - 9.15.23", "SOUTH PADRE ISLAND - 10.27.23", "DENTON - 12.15.23", and "WACO - 1.19.24" is written in bold white text. To the right of the logo, the text "LONGVIEW - 4.5.24", "COLLEGE STATION - 4.19.24", and "SAN ANGELO - 4.26.24" is written in bold white text.

McKINNEY - 9.15.23
SOUTH PADRE ISLAND - 10.27.23
DENTON - 12.15.23
WACO - 1.19.24

LONGVIEW - 4.5.24
COLLEGE STATION - 4.19.24
SAN ANGELO - 4.26.24

TCDLA
RIDING FOR THE DEFENSE

These seminars are sponsored by CDLP,
a project of TCDLA, funded by the Texas Court
of Criminal Appeals.

The Federal Corner

T.W. BROWN



Appeals Waivers and Restitution Claims Collide at the Fifth Circuit.

How should appeal waivers apply to arguments about restitution? A defendant cannot waive the right to challenge a sentence exceeding the statutory maximum,¹ but identifying the “statutory maximum” in the restitution context can be difficult. Federal restitution statutes do not limit a district court’s authority to impose restitution beyond a particular dollar amount. They instead set a series of limits on the type of losses that may be compensated and the individuals to whom restitution may be ordered. Rather than a single “statutory maximum,” the restitution statutes thus create a series of “statutory maxima” by way of their various “loss” and “victim” definitions. A district court “imposes a sentence expressly foreclosed by statute” whenever it ignores or misinterprets one of those definitions,² and if a defendant raises that type of error on appeal, the claim survives an otherwise applicable waiver by implicating the statutory-maximum exception. Not every argument about restitution so qualifies, and a pair of recent opinions from the Fifth Circuit helps distinguish one species of claim from another. Those opinions, in turn, clarify the limits of the statutory-maximum exception recognized and applied in earlier cases.

The most recent opinion is *United States v. Alfred*.³ The restitution statute applied there defined a victim’s compensable losses with reference to those proximately caused by the defendant’s offense conduct.⁴ That approach makes sense given the nature of the offenses at issue: the possession and distribution of child pornography.⁵ Per statute, each defendant convicted for possessing or distributing an image of child pornography is on the hook for their individual role in causing the aggregate losses suffered by the victim depicted, but given the proximate-cause requirement, no one defendant could be legally ordered to pay for the entirety of the victim’s losses due

to the existence of others committing the same crime.⁶ The proximate-cause analysis thus functions as a hard limit on the district court’s authority to impose restitution and must be accounted for at sentencing. An order of restitution imposed without reference to proximate cause would therefore “exceed[] the statutory maximum.”⁷ Mr. Alfred pleaded guilty to distributing child pornography, and in his plea agreement, waived the right to appeal.⁸ He nevertheless filed a notice of appeal and alleged in a merits brief the district court’s complete failure to account for proximate cause.⁹ The Fifth Circuit rejected his framing of the error alleged as inconsistent with the record. The district court, after all, had attempted in good faith to apply the statutory proximate-cause requirement to the facts before it.¹⁰ As a result, Mr. Alfred could do no more than quibble with the “outcome” of the district court’s analysis, rather than attack its legal authority to award restitution in the first place.¹¹ His fact-bound claim fell within the agreed-upon waiver, and the Fifth Circuit dismissed the appeal.¹²

In *United States v. Meredith*,¹³ the Fifth Circuit addressed another type of limit set by statute. The restitution statute applied in that case tied the district court’s authority to award restitution to the extent agreed to by the parties in their plea agreement.¹⁴ The Fifth Circuit recognized the terms of the plea agreement as “[t]he relevant statutory maximum,” but in Mr. Meredith’s

⁶ See 18 U.S.C. § 2259(b)(2)(B).

⁷ *Winchel*, 896 F.3d at 389 (citing *United States v. Chem. & Metal Indus., Inc.*, 677 F.3d 750, 752 (5th Cir. 2012); *United States v. Gordon*, 480 F.3d 1205, 1209-10 (10th Cir. 2007); *United States v. Broughton-Jones*, 71 F.3d 1143, 1147 (4th Cir. 1995)).

⁸ *Alfred*, 60 F.4th at 980.

⁹ *Id.* at 981.

¹⁰ *Id.* at 982.

¹¹ *Id.*

¹² *Id.*

¹³ 52 F.4th 984 (5th Cir. 2022).

¹⁴ 18 U.S.C. § 3663(a)(3).

¹ *United States v. Leal*, 933 F.3d 426, 431 (5th Cir. 2019).

² *Id.* (citing *United States v. Winchel*, 896 F.3d 387, 389 (5th Cir. 2018)).

³ 60 F.4th 979 (5th Cir. 2023).

⁴ See 18 U.S.C. § 2259(b)(2)(B).

⁵ See 18 U.S.C. § 2259(b)(1)-(2), (c)(3).

case, those terms were imprecise.¹⁵ “[H]aving agreed to let the district court handle the arithmetic,” the Fifth Circuit held, Mr. Meredith could “not complain” on appeal “about how the numbers shook out.”¹⁶

The Fifth Circuit has recognized other claims as implicating the statutory-maximum exception. In *Alfred*, for example, it contrasted Mr. Alfred’s challenge to those advanced by appellants alleging a district court’s actual and complete failure to account for proximate cause in the child-pornography context.¹⁷ That type of error, the Fifth Circuit had previously held, results in a restitution award that “necessarily exceeds the statutory maximum” by ignoring a hard limit on the types of losses defined as compensable by Congress.¹⁸ In *United States v. Kim*, the Fifth Circuit recognized another type of error that survives an appeal waiver. There, the defendant pleaded guilty to copyright infringement.¹⁹ To determine a victim’s actual loss in copyright-infringement cases, the district court must first calculate the number of counterfeit items placed into commerce.²⁰ Next, it must determine the “‘lost net profit’ suffered by the victim of the infringement.”²¹ The district court overlooked these requirements at Mr. Kim’s sentencing hearing and instead ordered him to pay restitution based on the total number of counterfeit items possessed multiplied by their retail value.²² Since these errors implicated the district court’s

apparent misinterpretation of the term “loss,” the Fifth Circuit proceeded to the merits despite Mr. Kim’s appeal waiver.²³

How to distinguish *Alfred* and *Meredith* from a case like *Kim*? The standard of review is a good place to start. For over three decades, the Fifth Circuit has recognized that a challenge to the district court’s statutory authority to award restitution—or the restitution order’s legality *vel non*—presents a legal question subject to *de novo* review.²⁴ That type of claim turns on the correct interpretation of the various “loss” and “victim” definitions set by the federal restitution statutes, and if a district court ignores or misinterprets those definitions, the ensuing restitution order slips the bounds of the statute’s text. That error, like the one alleged in *Kim*, implicates the district court’s statutory authority to order restitution in the first place and thereby survives an appeal waiver.

Alfred and *Meredith* dealt with a different type of claim. In those cases, the district courts correctly interpreted their statutory authority, and the defendants could not credibly challenge the restitution awarded as “expressly foreclosed by statute.”²⁵ They instead advanced case-specific and fact-bound challenges to the specific amount of restitution imposed at sentencing. Those types of claims ultimately turn on the district court’s application of the statute at issue, not the district court’s interpretation of the rules set by statute. That straightforward distinction—interpretation versus application—differentiates one species of claim from another and provides a workable rule to apply in future cases.

15 *Meredith*, 52 F.4th at 987.

16 *Id.*

17 60 F.4th at 982 (citing *Leal*, 933 F.3d at 431; *Winchel*, 896 F.3d at 389).

18 *Winchel*, 896 F.3d at 389.

19 *United States v. Kim*, 988 F.3d 803, 809 (5th Cir. 2021) (citing 18 U.S.C. § 3663A(a)(1), (c)(1)(A)(ii), (c)(1)(B)).

20 *Id.* at 812.

21 *Id.* at 813 (quoting *United States v. Beydoun*, 469 F.3d 102, 108 (5th Cir. 2006)).

22 *Id.* (citing *Beydoun*, 469 F.3d at 108).

23 *Id.* at 811.

24 *United States v. Chaney*, 964 F.2d 437, 451-52 (5th Cir. 1992) (citing *United States v. Badaracco*, 954 F.2d 928, 942 (3d Cir. 1992); *United States v. Cook*, 952 F.2d 1262, 1263 (10th Cir. 1991)).

25 *Leal*, 933 F.3d at 431 (citing *Winchel*, 896 F.3d at 389).

T.W. Brown is an Assistant Federal Public Defender in the Northern District of Texas. He graduated from the University of Arkansas School of Law in May 2013 and joined the FPD’s Fort Worth office in January 2015. He spent a few years in the trial division and has been in appeals since May 2019. You can reach T.W. at Taylor_W_Brown@fd.org.

New Shirt Design!

\$20

JUST BECAUSE YOU DID IT,
DOES NOT MEAN YOU'RE
GUILTY

Available at tcdla.com! Call 512.478.2514



Petition for Discretionary Review Guidance for the Rural Practitioner

3 Things to Avoid When Writing Your PDR

Petitions for Discretionary Review. PDRs. Either you understand them, or you don't. There is not much middle ground one way or another. I'll plead the 5th on my understanding (as always!). Thus, I won't attempt to tell you how to write a good one. However, I can tell you how to NOT write a PDR.

Spoiler alert. There is nothing original in this article. I'm getting all my information straight from the Court of Criminal Appeals. They gave us a "Don't let this happen to you" warning in *Bradley v. State*, 235 SW.3d 808 (2007). This case is a must read if you are serious about writing PDRs. In the meantime, here are three mistakes to avoid when writing PDRs.

Mistake #1: Cutting and pasting your COA brief to pass it off as a PDR.

I know what you are thinking. You put all that effort into writing a great appellate brief. So why reinvent the wheel? Just cut and paste, right? Doing that is a surefire recipe for scolding. In *Bradley*, the CCA said:

"Converting a direct appeal claim into a discretionary review ground entails considerably more time, effort, and analysis than a minor tinkering with the original direct appeal brief." *Id.* at 809.

So don't do it. Ever.

Mistake #2: Raising every issue from your COA brief in the PDR.

This is a kissing cousin to mistake #1, but must be distinguished. You should not include every original appellate issue when you rewrite your original brief for a PDR. Here is what the CCA says:

"It is exceedingly rare for a court of appeals to commit numerous errors, each of which is likely to adversely impact the jurisprudence of the state. Quantity is not a substitute for quality. One is best served by formulating

one or two strong grounds for review rather than scattering pellet shots across the entire target of the direct appeal opinion." *Id.* at 810.

That's pretty self-explanatory. Stick to the significant issues, not the little ones that probably didn't matter anyway.

Mistake #3: Trying to get a knockout when you file your PDR.

What does that mean? A PDR is more of a "Hey, get a load of this!" kind of deal rather than, "Hey, rule in my favor right now!" Here is what the CCA says:

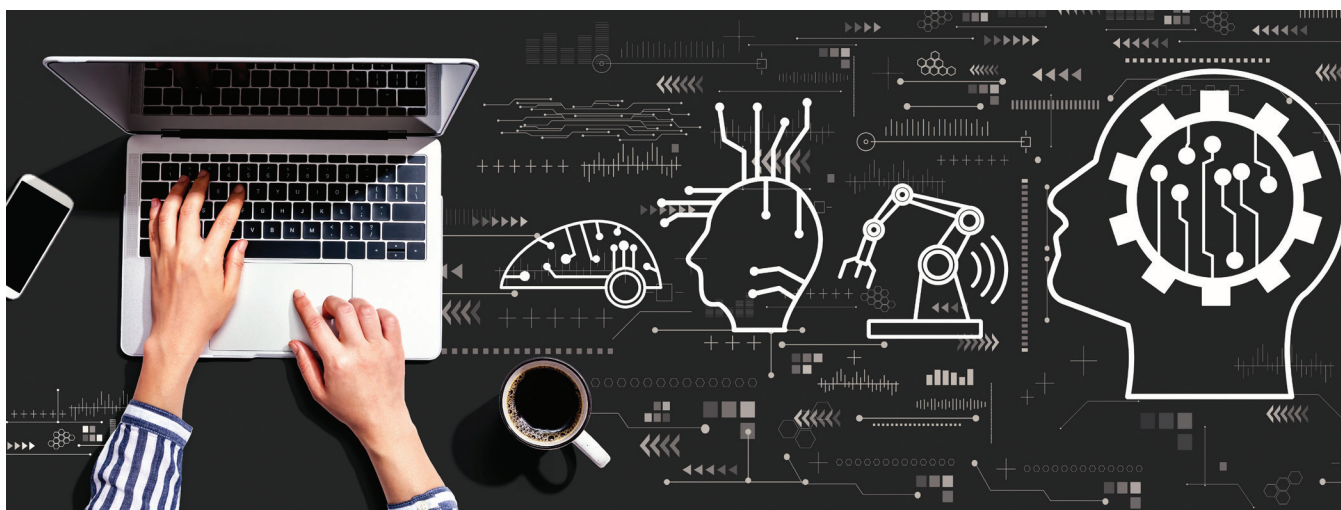
"A petition for discretionary review need not (and should not) attempt to resolve the merits of the question presented. It need only attract the interest of at least four judges concerning the legal issue. If the petition is granted, both sides will have ample opportunity to present persuasive facts, authority, and reasoning to support a proposed resolution and request specific relief." *Id.* at 810.

Now here is my all-time favorite quote by the CCA. I don't think Ernest Hemingway could have put it any better:

"In short, a petition for discretionary review should be a highly polished small jewel that invites the reader to request a view of the entire necklace. It should not be a lump of coal that merely repeats the direct appeal brief." *Id.* at 810.

There you go, fellow criminal practitioners. Don't give the CCA a lump of coal. Instead, give them a well-polished jewel (metaphorically speaking, of course!).

I hope this helps guide you on what not to do when writing a PDR. If you want to know how to write a good one, attend Rusty Duncan in June and listen to one of the PDR gurus. The State Bar's Advanced Criminal Law Course is also a great source. In the meantime, good luck, take care, and have fun!



How to Use Technology to Help your Client Better and Protect Yourself From a Grievance

BENSON VARGHESE

Over 7,700 grievances are filed against Texas lawyers yearly. Roughly 20% of all sanctions arising from those grievances are in criminal cases. If you are a criminal practitioner handling serious cases, it is likely a matter of time before you have a grievance filed against you.

This article focuses on how you can leverage technology to do two things. First, what can you do to minimize the chances of a grievance being filed against you? Second, how to prevent that grievance from becoming a sanction.

Let's start by looking at the top three reasons grievances are filed. Over the last five years, roughly 40% of grievances against attorneys in Texas have been due to a lack of communication. Another 26% of grievances were based on neglect, and the last 21% were a failure to safeguard property.

I. Combating Lack of Communication

In any criminal case, there are flurries of activity and periods where seemingly nothing happens. A new case comes in the door. You review discovery, make contact with the prosecutor, investigate the case from the defense side, and get your own witness statements. You might put together a grand jury packet or talk to the prosecutor about what you think is an appropriate outcome.

And then, it is often the case that nothing happens for months. The prosecutor hasn't had a chance to review the case, it hasn't made it to the grand jury yet, or the prosecutor has just made an offer that's miles away from any possible resolution. As attorneys, we know what is happening in those months - we are waiting for something to change, and our patience and persistence will pay off. However, our clients, particularly those who have never been in trouble before, do not know that. Whether we are in the doldrums

of a case or gearing up for a crucial juncture, we must keep our clients in the loop.

Texas Rules of Disciplinary Conduct 1.03(a) and (b) set forth the duty to keep our clients informed during the course of representation.

So how do you do that?

If you are not leveraging technology, every touch point is either a phone call or an in-person meeting. One of the reasons there's been very little communication in the slow times is that, as criminal practitioners, our days are spent putting out fires and getting ready for the next big thing on our calendar. It isn't realistic to think we can meet with every client in person between every setting to keep them informed. There's a better way, and it is not email.

A. Use Cloud-Based Law Practice Management Software (LPMS)

I rely heavily on my law practice management software to communicate with clients. Think of your law practice management software as a cloud-based portal to manage your cases and communicate with clients. Too often, I have seen attorney-client communications end up in a phone dump. Using a cloud-based portal is critical to preventing that from happening to you.

B. Use the Secure Messaging Feature of Your LPMS instead of Email

When you send a message through a cloud-based law practice management software, the message remains within the cloud and is never downloaded to the client's phone. They can log in and read a message anytime, but it remains solely in the cloud.

Secure messages also remain associated with a case at all times, so it is easy to see a comprehensive history of

your communication with the client and others related to the case. Compare that to the special kind of pain to search your email to find all the communications related to a particular case.

Secure messages also mean that you can repeat yourself far less. After being asked the same thing around the third time, you can start referring back to the previous secure message you've sent them.

C. Combine Secure Messaging with Automation

You can vastly improve your communication by using automation to create regular touchpoints for your client and more substantive manual touchpoints.

For example, on any given case, I may send the following messages:

1. Welcome message - an automated message to the client within 24 hours of hiring that tells them about the firm, how to reach me, and what to expect during the case.
2. Practice area message - an automated message that goes out 36-48 hours after hire based on the practice area selected in the LPMS that tells them more specific information about the offense. For example, in a DWI case, the client will receive a link to my DWI blog that goes into extensive detail on how DWIs are investigated and what ways we can fight a DWI charge.
3. Practice area video - an automated message that goes out about a week after hiring with a YouTube video that tells the client more about the charge.
4. Discovery summary - This is a manual message to the client when my discovery summary is ready. This message invites the client to review the summary and welcomes them to schedule a meeting to discuss any questions they have, and invites them to come to review any DME at the office if they are interested.
5. Prior to each setting, a semi-automated message goes out explaining the upcoming court setting. For example, if we create a "Consultation Setting," a standard setting in Tarrant County, my client will receive a message explaining what will happen at the setting, where to go, what to expect, etc.

You will have a touch point with your client every 3-4 weeks through manual, automated, and semi-automated secure messages.

If you read through that and thought to yourself, "I don't have a YouTube practice area video or online blog to send them; this doesn't apply to me," let me give you three tools to challenge that.

First, check out Otter.ai. It is an excellent online transcription service. You can record yourself once explaining precisely what you'd tell a client if they were in the office. Then, Otter.ai will transcribe your voice, almost instantly, into text so you can cut and paste that into your automated secure messages to use as an explanation that

goes out to every client in that practice area.

Second, if your LPMS does not offer automations, there is a quick workaround that would work. TextExpander (available at textexpander.com) is a tool that lets you create memorable shortcodes that automatically expand into whatever text you want. For example, I can set "#consultation" as my shortcode; anytime I type that out, it will automatically expand to a five-paragraph explanation of what happens in a consultation setting.

Third, you might think you don't have a video you can share with a client. Let me introduce you to Loom.com. Loom allows you to make explanation videos while making a screen recording at the same time in only a matter of minutes. For example, if I wanted to send a client a more personalized explanation about their case, judge, and prosecutor, I might pull up the case information screen for our county and walk them through that information in a quick video. It'll probably take me 60 seconds to share something with my client that is really public information but very meaningful to them.

For example, you could show the following:

"Your case has been filed in the ____ court. Your judge is _____. The judge has been on the bench for _____. The court is on the ____ floor of the ____ building located at _____. The prosecutor assigned to the case is _____. I've already reached out to request discovery and a grand jury presentation. I'll let you know as soon as they've opened up discovery to me."

A minute in front of your webcam creates something of value for the client that likely cuts down on future phone calls or questions.

Now you may have gotten this far, but you're thinking to yourself, "What about my clients who are in custody?" Several programs can handle printing and mailing out letters for you. At my office, we use Click2Mail. When combined with your LPMS, the workflow allows letters to be generated automatically as PDFs, just as a secure message would be. These PDF files can then be uploaded to a service like Click2Mail, which will handle postage, delivery, and even certified mail for you, without ever leaving the office. While this won't replace jail visits altogether, it will keep your in-custody client far more informed than most people in jail.

Similarly, letters that are uploaded as PDFs to your LPMS are a great way to communicate with your out-of-custody clients.

Between secure messages, letters, and videos, there are many great ways to manage client expectations, explain the process, and help keep clients informed.

II. Combating Allegations of Neglect

Allegations of neglect go hand-in-hand with a lack of communication. A client who receives very little communication will think nothing has happened on their case, even if there may be a lot of work being done behind the scenes.

The ways to leverage communication outlined in the section above can certainly reduce the number of allegations of neglect. The heightened level of communication doesn't just help the client or your job efficiency, it also creates an unimpeachable record of your contact with your client. Should a grievance ever be filed against you, it only takes a matter of minutes for you to create a log of all communication you have had with the client.

A good LPMS will have the ability to print an activity log that is specific to a client or case. Similarly, with Click2Mail implementation, you are far less likely to have an in-custody client who says they've been sitting in custody for months with no communication.

Beyond a lack of communication, there's the question of whether work is getting done. As much as we are professional firefighters, we can't just focus on the biggest blaze. We have to have systems and processes in place to make sure nothing falls through the cracks.

You can also add reminders to prompt you for any upcoming event or deadline. For instance, I like a 10-day out reminder for any federal filing deadline, so it stays at the top of my mind as the due date draws near. This, too, decreases the chance of any missed deadline that could be a basis for an allegation of neglect as set for in Rule 1.01(b) of the Texas Rules of Professional Conduct.

III. Safeguarding Property and Fee Disputes

The best way to safeguard property and avoid fee disputes is to record what each dollar coming into your firm is attributable to at all times. A good LPMS can be extremely helpful by allowing you to keep records of what funds are going into IOLTA and why and track when money is moved over to operating. In particular, the failure to properly maintain and account for IOLTA accounts can result in allegations of a violation under Texas Disciplinary Rules of Professional Conduct 1.14(a).

If your LPMS also processes payments, incoming online payments (credit card and eCheck) will automatically be logged. The best practice is also to log all incoming payments through your LPMS. That means if you receive unearned attorneys fees or the judgment from a forfeiture, you would manually log that as an incoming payment. You'd also log any expenditures that are case related or a disbursement of trust funds to the client. This way, you can avoid allegations that you failed to segregate funds properly or misused funds that were dedicated for a particular purpose.

The other way that your LPMS can help you avoid fee disputes is to properly track your time. The most advanced LPMS offering can do most of this automatically. The platform can recognize when you're working on something,

logging a call, drafting a document, etc., and it will track your time for you (which you can edit as needed, of course).

Even if you don't have a cutting-edge LPMS in place, virtually every LPMS has the ability to manually track time. It is critically important that you keep track of your time. There is always a temptation not to log time in a flat fee case. However, this can become a problem if you ever need to answer a fee dispute or a grievance. In those cases, your time entries are the one thing most likely to get you out of hot water and show how you have worked on a case.

IV. Don't Fail to Respond to a Grievance

While this article focuses on avoiding a grievance altogether, I should mention one last way to get grieved that can be avoided. The failure to respond to a grievance itself is an offense under TDRPC 8.01(b) and 8.04(a)(8).

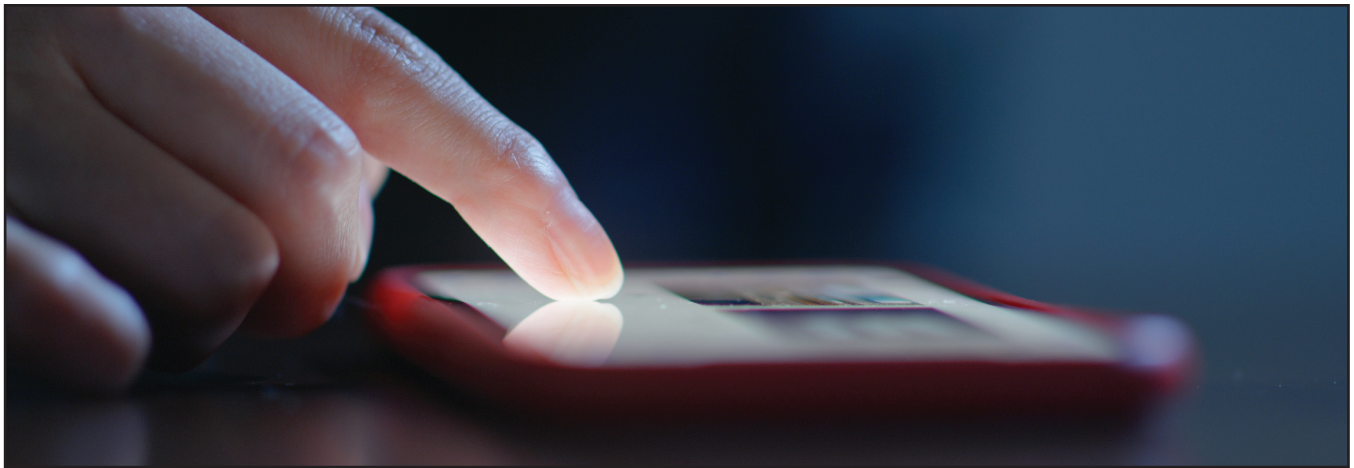
If your office receives a grievance, it is imperative that you respond to the grievance. Your staff must know that it has to be brought to your attention immediately. My staff is instructed that if any attorney in my office gets a grievance, the following steps must happen.

First, the response deadline is calendared in our LPMS. The deadlines are added to the attorney's calendar and my calendar. Then, a hard copy of the grievance is delivered to the attorney and myself, and a reminder is set in the LPMS in advance of the response deadline to ensure a proper response has been prepared. Finally, depending on the nature of the grievance, tasks will be assigned - such as printing the activity log or pulling all the time entries on the case. If you used an LPMS as you worked on the case, all those time entries, secure communications, and a document trail should make responding to a grievance a straightforward task - a word that not many would use to describe the response process otherwise.

Ultimately by using things like a law practice management software and other online tools, you can significantly reduce the possibility of a grievance being filed against you and any grievance from becoming a sanction.



Benson Varghese is the founder and managing partner of Varghese Summersett PLLC, one of the largest and fastest-growing criminal defense, personal injury, and family law practices in North Texas. He is a Board Certified Criminal Lawyer and an experienced litigator who has tried more than 100 cases before Texas juries. Before going into private practice and starting his own firm, Benson served as a prosecutor at the Tarrant County Criminal District Attorney's Office. Benson is currently in the process of launching a new case management software system called Lawft, which will offer law firms tools to more effectively communicate with clients, manage caseloads, and grow their practices. He can be reached at benson@versustexas.com or 817-203-2220.



Phone Extractions: What Are They and What Do They Reveal?

DANIEL GUGLIOTTA

Have you ever found yourself reviewing a police report about the phone extractions obtained in your case and thought, “What the heck does this mean?” Even if you have not, you might eventually be a little confused by all the terminology referencing cell phone extractions. My hope by the end of this article is that you will be a little more confident in your understanding of the different cell phone extractions being performed by law enforcement or other entities and be better equipped to represent your clients!

For starters, the three most common software/hardware you will see used to perform cell phone extractions are through Cellebrite, GrayKey, and MSAB (by XRY). But, before we jump into what extractions can be obtained from each of these companies, let's first talk about device states. The three states that a device is in that Law Enforcement or Unique Wire receive are: Unlocked (a decrypted state), BFU (Before First Unlock) Locked state, and AFU (After First Unlock) Locked state. Let's dive into what each of these lock states mean for a phone.

BFU (Before First Unlock) is a term used for a phone that has gone through some sort of power cycle (powered off and then back on). This could be from losing power (battery charge ran out) or the phone was powered off prior to being seized. Manufacturers of smartphones have built a security feature into their devices so that when a power cycle occurs, the phone is placed in an encrypted state.

AFU (After First Unlock) is a term used for a phone that has a locked display screen but has remained powered on since the last time a user has entered their

unlock passcode. This locked state allows for advanced software/hardware to attack the more vulnerable encryption of the phone.

Unlocked (decrypted) is a term used for a phone that does not contain a passcode or the passcode has been provided by the owner or recovered by a software/hardware. This allows full, unrestricted access to the phone's memory system and removes all encryption from the phone.

The type of extraction that can be done depends on the state of the phone as set forth above. Now, let's discuss what extractions can be obtained from each of these locked states.

BFU (Before First Unlock) File System extractions obtain about 10% of the data on the phone and this is typically just system information. This typically does not provide any user related data. This system data is obtained without the passcode.

AFU (After First Unlock) Full File System extractions obtain significantly more data from the phone and includes mainly user data (both live and deleted data), as well as system data. With GrayKey and Cellebrite, this extraction can be obtained without having the passcode to unlock the device. Additionally, a phone in an AFU state is much easier to move to an unlocked state through decryption methods like Brute Force or other exploits.

Unlocked State provides the following extractions: Logical/Advanced Logical, File System, Full File System, and Physical extractions. Let's take a look at each of these.

Logical/Advanced logical extraction provides

the basic live data stored on the phone. This includes call logs, text messages (both SMS and MMS), digital images, digital videos, recordings, and basic application data (like applications installed). The majority of the data recovered from this extraction is user created data. *It should be noted that user created data can be manipulated by users (such as deleting text messages, call logs, altering data location, deleting internet history, etc.), which can make it challenging on the backend to determine provenance.* Typically, third party application data is not extracted with this specific extraction. Third party applications include but are not limited to the following: Facebook, Facebook Messenger, Instagram, TikTok, Twitter, WhatsApp, etcetera.

File System extraction provides not only the pieces of data obtained through an Advanced Logical Extraction, but also provides whole parts of the file system. This can include more detailed system data, databases, and file system logs. Broken down, this extraction can provide detailed information from native and third-party applications (i.e., web history, search history), Exchangeable Image File Format (EXIF) information regarding media (images and videos) and emails, and location data history. What is EXIF data? This is data like the date and time, location, and camera used to take an image or video.

Full File System extraction provides a more comprehensive collection of file system data. As mentioned above, the data obtained from a File System is extracted during this extraction and a Full File System extraction can offer a broader decoding of this data. This can include third party data (i.e., messages from social media applications), deleted data, and hidden

databases that could not be decoded from the above extractions. This particular extraction is closer to the most comprehensive extraction that is available by the three main companies listed above; which is the Physical Extraction. It should be noted that the Full File System extraction is not typically an option for consumer grade extraction solutions. There are options for Law Enforcement Agencies and DFIR (Digital Forensic Incident Response) Companies, like ours Unique Wire, that can obtain these types of extractions.

Physical Extraction is the closest extraction Cellebrite offers to a bit for bit copy of the phone's entire memory system. This basically means this extraction is an exact copy of the phone's entire memory. This extraction includes the data from all of the above-mentioned extractions and typically provides temporary data (current applications running; this would be considered the RAM data) and additional deleted data that is still stored in the phone's memory. Often this extraction provides detailed GPS location data, Bluetooth connection data, wireless network data, and Wi-Fi access points; just to name a few. This is the holy grail of extractions because it provides all of the data for an analyst to comb through! The only caveat to this extraction is that around 2018, Android and Apple operating systems introduced File Based Encryption (allows targeted encryption for user created files); which makes obtaining a Physical Extraction nearly impossible on newer smart phones...this is why a Full File System extraction is so important!

I want you to picture the classic skeleton figurine from your old middle school health class (or the one your neighbor had out for Halloween!). We know the



TCDLEI Memorializes, Fallen But Not Forgotten ...

Charles Baldwin
Quinn Brackett
Peter Bright
Jack H. Bryant
Phil Burleson
Charlie Butts
Ward Casey
Byron Chappell
Emmett Colvin
Rusty Duncan
C. David Evans
Elaine Ferguson

C. Anthony Friloux Jr.
Jim Greenfield
Richard W. Harris
Richard 'Race -
horse' Haynes
David Hazlewood
Odis Ray Hill
Weldon Holcomb
Floyd Holder
W. B. "Bennie" House
David Isern
Hal Jackson

Knox Jones
Joe Kegans
George F. Luquette
Carlton McLarty
Ken Mclean
Kathy McDonald
George R. Milner
Daniel Mims
Roy Minton
Ebb Mobley
Brian E. Murray
Harry Nass

Anthony Nicholas
David A. Nix
Rusty O'Shea
Mike Ramsey
Charles Rittenberry
George Roland
Travis Shelton
Robert William Tarrant
Charles Tessmer
Doug Tinker
Don R. Wilson Jr.

**To memorialize a loved one, email
athomas@tcdla.com**

Texas Criminal Defense Lawyers Educational Institute



skeleton represents just the bones of a human body; which is just a small part of what makes up our body. Y'all do not need a health lesson on what makes up the human body, but think of the phone extractions you just read about like the skeleton. An Advanced Logical Extraction is like the skeleton, just the bare bones of the phone's memory. A File System Extraction adds some tissue and muscle to those bare bones, but it is still more like a cadaver than a living person; meaning there is a lot of data still missing! A Full File System Extraction gets us a closer to a living, breathing human being, but is still not quite there. Finally, a Physical Extraction provides all of the data and is the fully intact and formed, living, breathing human. Despite that silly illustration, it should paint a clearer picture of what data is actually obtained through each extraction!

So, what extractions should we expect to see from law enforcement? Most extractions that you will commonly see law enforcement obtain are Advanced Logical and File System Extractions. These extractions will provide law enforcement the low hanging fruit they might be looking for to bolster their case against your clients. This fruit could be videos, images, text messages, call logs, some broad location data, and evidence of the existence of a particular application on the phone. Picture that skeleton and think of all of the parts missing! Without the Full File System and Physical Extractions, there is a lot of data that is missing! This data could be exculpatory to your client and could be the exact thing needed to question or refute the data obtained by law enforcement.

Finally, when it comes to reviewing the data that is obtained, some of you have told me you are reviewing this data yourselves. What you are reviewing is referred to as a Reader Report. An important thing to understand about these Reader Reports are they are typically filtered by whomever is creating the reader reports. This means you are not always receiving or reviewing all of the data on the phone. In order to review all of the data, you should be **requesting a copy of the raw extraction**. The raw extraction is all of the data recovered by the opposing counsel. A raw extraction can only be reviewed with a licensed program called Cellebrite Physical Analyzer. This is where we at **Unique Wire Inc.** can assist each of you! We have the capabilities (licensing), experience to review the raw extraction and advanced knowledge to ensure all of the data can be analyzed and provided to you and your client.

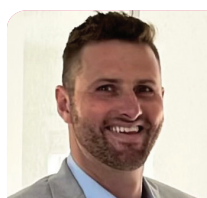
I hope this provides you a little better understanding of the different types of cell phone extractions obtained by law enforcement AND gives you the confidence to ask the pertinent questions of law enforcement on behalf of your client.

Thank you so much for taking the time to read this

article and please be on the lookout for more digital forensics related articles to come across your desk! If you have any additional questions or have any digital forensics needs, please do not hesitate to reach out! I am here to serve each of you and provide expert support when you and your client need it.

Respectfully,

Daniel Gugliotta
Unique Wire Inc.
Digital Forensic Expert/Analyst
dgugliotta@unique-wire.com
Corporate: (800) 924-DATA (3282)



Daniel Gugliotta is a Digital Forensic Expert and Analyst with Unique Wire Inc. for the state of Texas. He holds several industry standard certifications for Computer Forensics and Cell Phone Forensics. He is a former Police Detective/Digital Forensic Examiner for a high tech task force that included state, local, and federal law enforcement agencies. He was also a former Task Force Officer with the FBI in order to investigate digital crimes at the federal level. He looks forward to providing his unique expertise to assist you and your client's needs as well as better your understanding of how to use/understand digital forensic evidence. He can be reached at dgugliotta@unique-wire.com or at (541) 941-7162.

TCDLA

August 23-26, 2023
AUSTIN, TX • AUSTIN SOUTHPARK HOTEL

DWI Super Course
SFST/DRE/ARIDE

COURSE DIRECTORS:
TYLER FLOOD • JOHN COLLINS

LIMITED SPOTS

Register at tedla.com or call our office at 512.478.2514



Juvenile Justice and Determinate Sentencing, Parole Basics for Kids

ABNER BURNETT

Imagine three doors stand before you: A, B, and C. If you go through door A, you're going to get bonked on the head and then you're going to get a prize. If you go through door B, you're going to get water thrown on you and you're going to get laughed at. But after you get laughed at, someone will ask you a question. If you answer the question immediately, right or wrong, you'll get bonked on the head and you'll get to go free. If you go through door C, it will lead you back through door B, but now when you go through door B, you will get a slice of pecan pie and then get lectured. After the lecture, a uniformed person will give you \$10 and slap you around a little bit. Then, depending on how old you are and whether you've impressed anybody along this gauntlet, you might become governor. But you still will not be free. But what is freedom and where is the prize?

Confused? You are not alone. The juvenile justice system is every bit as complex as the above scenario. When it comes to juvenile determinate sentencing and parole, it is important that lawyers learn to navigate the various laws at play; and ultimately, determine which door their client must choose.

Determinate Sentencing

A determinate sentence is a fixed length, meaning that your juvenile client will either be placed on probation or be incarcerated for a specified period of time. When deciding whether to pursue a determinate sentence, the prosecutor should consider the nature and severity of the offense, the juvenile's age, level of culpability, behavior in detention, and risk of reoffending.

The Human Resources Code

"Human Resources" is synonymous with "Department" or "Division." More often one hears the condensed abomination "HR." Perhaps only I view it as a sadistic cynicism intended to mock an employee trying to navigate labyrinthine company policies, benefits, retirement, etc.

For a juvenile's case in the criminal, rather family, justice system, the Human Resources Code codifies provisions related to juvenile determinate sentencing and parole. The Chapters of the Human Resources Code to which I refer below are hellishly complex for the juvenile's lawyer. But for the juvenile client, it is a doorway to heaven, to freedom. Albeit freedom with conditions.

The interplay between Texas Family Code §53.045, and §54.04, §54.11 with Chapters 244, 245 of the Human Resources Code can be difficult to comprehend, as analogized by the first paragraph.

Representing Juveniles in Determinate Sentencing Cases

Assume that you are looking into the eyes of a 12-year-old charged with murder under the determinate sentencing statute.¹ Both client and counselor presume innocence out loud, but a brutal question overshadows the horizonless start to the attorney/client relationship, "What's the worst that could happen?" The first, and arguably most important, discussion to have with your client should be over the range of punishment in his or her case. Though, starting anywhere else would probably be easier. If a lawyer finds the interplay of §53.045, and §54.04, §54.11 Texas Family Code with Chapters 244,

245 of the Human Resources Code difficult to absorb, understand, and articulate to her or himself, how much more challenging to communicate it lucidly to a child?

The worst under the juvenile determinate sentencing statute, the maximum penalty is 40 years.² When advising our young client, should we be cautiously or wildly optimistic? A juvenile adjudicated on an allegation of murder and receiving a disposition of 10 years or less may be eligible for probation.³ A child adjudicated for murder and given a sentence greater than 10 years is eligible for parole after having served a minimum of three years in the Texas Juvenile Justice Department. This means that the 12-year-old has a shot at parole release before turning 16.⁴

After turning 16, the client can either be paroled,⁵ continue serving the sentence until aging out at 19,⁶ or be sent to grown up prison.⁷

What is meant by aging out? When a child sent to a TJJD institution turns 18, the Texas Juvenile Justice Department “shall evaluate whether the child is in need of additional services that can be completed in the six-month period after the child’s 18th birthday to prepare the child.”

Prepare for what?

“[F]or release from the custody of the department or transfer to the Texas Department of Criminal Justice.”⁸ This is called the “up or out” policy.⁹

Then, if the department (TJJD) does not send the child grown to adulthood to prison while in juvenile jail, the department turns that person over on her or his 19th birthday to the Texas Department of Criminal Justice to serve the remainder of the sentence on adult parole.¹⁰

I kid you not. Happy birthday.

Parole in Juvenile Cases

Below are some ground floor provisions of parole as the idea applies in a determinate sentence case.

A. If sent to a TJJD institution on a determinate sentence, a juvenile has the opportunity for early release after serving a minimum period. For a finding of true on a murder charge, the minimum would be three years.¹¹ After she or he turns 16, one of three things can happen:

1. TJJD grants the child parole after having served the minimum sentence;¹²
2. The child may remain incarcerated to continue the sentence until being paroled later or aging out on the 19th birthday, at which time she or he is sent to the Texas Department of Criminal Justice for continuation of the sentence as an adult parolee;¹³ or

3. TJJD sends the child to grown up prison to finish the sentence.¹⁴

Except for the explicit differences set out in Texas Government Code §508.156, the parole rules pertaining to adult corrections facilities govern a child sent to the Texas Department of Criminal Justice to serve the remainder of a sentence.¹⁵

This layout of statutes is akin to a map of the interstate highways. After learning to maneuver your way around, you then enter the caverns of law that describe the criteria for judicial consideration when deciding which door to send the juvenile through. Start with Texas Family Code §54.11.

There are laws governing juvenile parole revocation, laws pertaining to scaled degrees of independence during parole, and laws providing discretionary opportunities for the juvenile court to hold hearings on lengthening or shortening the custodial leash. The complexity causes one to daydream wistfully about parole eligibility, found in Texas Government Code §508.145.

Conclusion

Despite the complexities inherent in juvenile determinate sentencing and parole law, both seasoned and veteran practitioners can learn the nuances within the different codes and feel confident to take on their first juvenile case.

Abner Burnett

Tel: 956 534 4829

Email: aburnett@trla.org or lawyerburnett@gmail.com



Abner Burnett *Juris Doctor degree, South Texas College of Law, Houston, Texas 1987. Private Practice, plaintiff personal injury and criminal defense, Odessa, Texas 1987-2002. Director, South Texas Civil Rights Project [Oficina Legal del Pueblo Unido], San Juan, Texas 2004-2008. Public Defender, Texas RioGrande Legal Aid 2008-2022; Served for several years as Director of the TRLA Public Defender Division. Currently Living in McAllen, Texas, somewhat retired, somewhat self-employed*

★Members Only★

Did you know there's a Member's Only section on our website? Sign in to tcdla.com and click on the Members Only tab to explore all of our resources exclusive to TCDLA members!

Need help finding it? Give us a call at 512.478.2514



SOCIAL SERVICE PROVIDERS ARTICLE

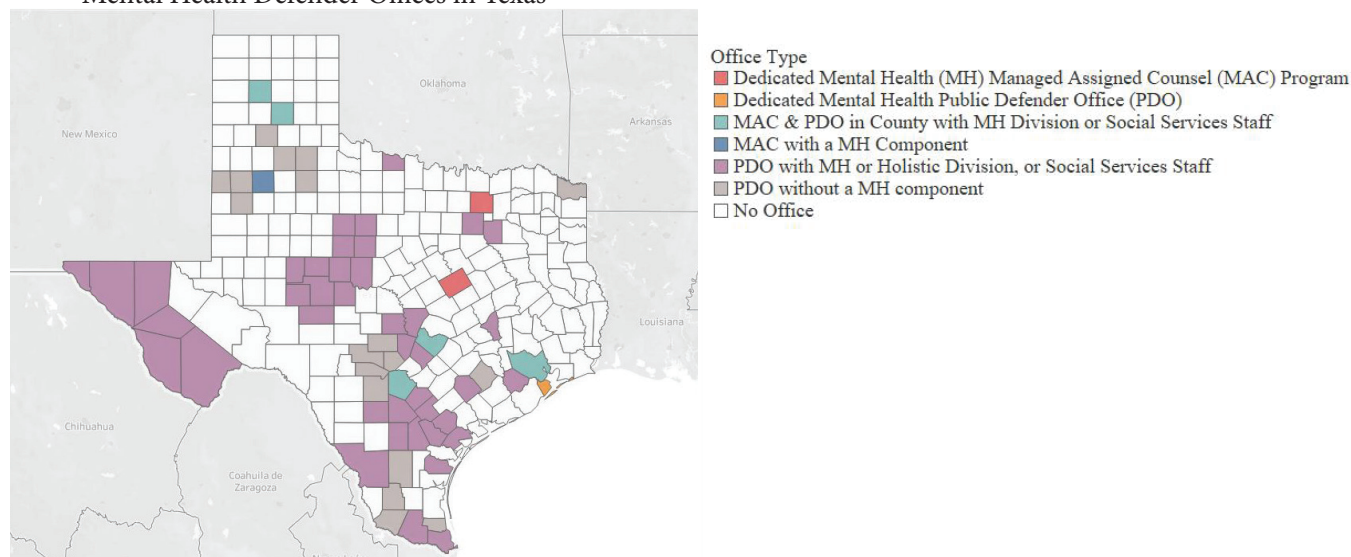
SCOTT EHLERS

Criminal defense social service providers are known by various titles—social worker, case manager, mitigation specialist, alternative disposition specialist, client advocate, or peer navigator, to name a few. They serve in varying roles and have different qualifications and levels of education. Some, like social workers, are licensed. Despite their differences, these social service providers can help attorneys get better case (and life) outcomes for their clients.

Social workers have been part of the defense team in public defender offices since the 1970s. Until recently, social workers were probably best known among criminal defense practitioners in Texas for serving as mitigation specialists in capital cases. Today, social workers, case managers, and other social service providers are common in Texas public defender offices [PDOs] and managed assigned counsel programs [MACs].

The Texas Indigent Defense Commission always includes these positions in its planning studies for new PDOs and MACs because the Texas Indigent Defense Commission [TIDC] views social service providers as critically important members of the defense team, particularly in representing defendants with a mental illness [MI] or intellectual or developmental disability [IDD]. As of this writing, there are 30 PDOs or MACs covering 50 counties that are a specialized mental health PDO or MAC, or a PDO or MAC with at least one mental health division or social service provider on staff. Bexar, Harris, Travis, Potter, and Armstrong Counties have both a PDO and MAC with social service providers on staff.

Mental Health Defender Offices in Texas



Map by Kristin Meeks and Sarah Gammell

Benefits of Social Service Providers

So, exactly how can a social service provider on the defense team help their clients, attorneys, and improve case outcomes? I posed that question to criminal defense social service providers during one of TIDC's recent "meetups" with that community.

Gilan Merwanji, Director of Holistic Defense & Social Work Supervisor for the Harris County of Managed Assigned Counsel, responded:

"Defense social service providers play a critical role in supporting attorneys and clients in navigating the complex social service and legal systems. Through direct intervention, courtroom advocacy, resource navigation, mitigation, community partnerships, and connection to services, social service providers can assist attorneys in building a strong legal defense, and clients have a chance at more favorable legal and life outcomes."

Crystal Voelpel, Social Services Manager for the

Travis County Mental Health Public Defender, notes:

"Social workers and case managers help clients connect to resources within the community, social workers [also] assess a clients' risks, needs, and help navigate resources available to them. Successful reintegration into the community requires appropriate supports and engagement with community providers; both of which can potentially reduce recidivism. As a client's needs are met, and they have less barriers to maintaining their wellbeing, they won't need to return to behaviors that may have led to criminal justice involvement in the past."

Marisol Morales, Mental Health Social Worker for the Bexar County Public Defender's Office, believes that

"One of the most important ways to improve case outcomes is by having the social worker/case manager prepare a Sentencing Mitigation Plan. It gives the opportunity for judges to gain a better understanding of the defendant. Humanizing the individual can be the difference between prison or probation-it's a way to

AWARDS
RETIRED DISTRICT COURT JUDGE
FORMER PROSECUTOR & DEFENSE LAWYER
FEATURED ON CBS, PBS, & NATIONAL NEWS

KG
Kherkher Garcia
CATASTROPHIC INJURY TRIAL LAWYERS

BOARD CERTIFIED
MEMBER OF 9 FIGURE LITIGATORS®
BILLIONS RECOVERED FOR OUR CLIENTS
\$200 MILLION RECORD
BREAKING VERDICT

OF COUNSEL

HON. MARC CARTER

STEVE KHERKHER

PARTNER

60+ YEARS OF COMBINED EXPERIENCE

ACCEPTING REFERRALS AND CO-COUNSEL AGREEMENTS

KHERKHERGARCIA.COM | 713.333.1030

impact the sentencing. By including a case manager or social worker at the beginning of the case allows them to develop a plan to divert the individual into treatment or an alternative to incarceration.”

Benefits of Utilizing Social Service Providers

Research bears out the benefits of including social service providers as part of the defense team, a model oftentimes referred to as “holistic defense.” Texas-based research has focused on mental health defender programs that incorporate social service providers in the defense team, along with attorneys with specialized training to represent clients with MI or IDD. Research has shown mental health defender programs can:

Reduce jail days and save counties money: The Ft. Bend Co. Public Defender’s Office reduced jail days from 56.9 days to 19.4 days for misdemeanor defendants with mental illness. Savings ranged from \$32.26 per case to \$734.51 per case.

Reduce recidivism: An evaluation of the Dallas County Public Defender Office’s Mental Health Division (DCPDO) found that six months after case disposition, the office’s clients experienced significantly lower rates of recidivism compared to a control population not represented by the office. Re-arrest rates for DCPDO clients with schizophrenia and major depression were about two-thirds lower than the control group, and about half lower for persons with bipolar disorder. For Travis County Mental Health Public Defender (TCMHP) clients with disposed cases between FY2009-13, 39 percent of TCMHPD clients were rearrested, as compared to 50 percent of defendants represented by counsel from the mental health wheel.

Improve representation and case outcomes: Misdemeanor dismissals were almost five times more likely for Harris County Public Defender’s Office clients with mental health diagnoses than for a similar group of defendants with assigned counsel. HCPDO secured dismissals for 27% of clients vs. 6% in the match group.

Success Comes in Many Forms

Criminal defense social service providers see the client benefits of their work every day, but they also recognize success for their clients can be measured in different ways. “To me, success can be outcome or process driven,” says **Gilan Merwanji** from the Harris County MAC. “I had a case where we didn’t get the outcome we had hoped for, but the client was still appreciative of all our efforts in hearing him, writing his story, and advocating in court for him – this was a process-driven success. At another time, we had a client who went into substance use treatment, resulting in a favorable disposition. What made it an even bigger success for the client was the judge recognizing the client’s effort in open court, which led to the court staff, bailiff, judge, and others who were present clapping for

the client. The client had never experienced anything like this before and was filled with emotions.”

Shewanna Chark, a social worker for the Harris County MAC, shared her story:

“A successful case that I worked on involved a homeless client who had no place to go and was living on the street. The judge did not want to release him due to his long rap sheet of small misdemeanor offenses. The judge and attorney were not aware of a community program that I was able to access that provided shelter and additional services to acclimate the client back into society. This program included mental health services, help getting an ID, housing, and other services. Both the attorney and social worker worked together on getting the client released to this program – this is the magic of holistic defense!”

Success can also be achieved simply by listening to the client and helping them achieve the outcome they want. **Monique Joseph**, the Holistic Services Director for the nonprofit Restoring Justice, recounted:

“One of my successful cases involved a client who told the entire legal team, ‘I don’t need all that social service stuff. Just get this case off my back and I can do the rest.’ We did just that and got his case dismissed! Some may ask how is it a success if the client did not take advantage of social services or programs? What we have learned at Restoring Justice is that often the only need in our community is to have someone from each system willing to see the client, hear them out, and advocate for what they want! Although my main job is resource connection, having a genuine relationship with clients builds community agency! This

Texas Criminal Defense Lawyers Association
**11TH ANNUAL
ADVANCED
TRIAL ACADEMY**
LIMITED SPOTS!
**October 4-7, 2023
Round Top Festival Institute
Round Top, TX**
Register Today 512.478.2514 or online at www.TCDLA.com
Available in-person with interactive group activities
The seminar is sponsored by CDLP, a project of TCDLA, funded by the
Texas Court of Criminal Appeals.



TCDLA Members Trip

CLE in the Sun

Criminal Defense Lawyers in the Making!



July 12-15, 2023
South Padre Island

client is now taking care of his horses, starting his own business, is able to be a present father for his children, and can start healing from the harm caused by the system. That is success!”

Advice for Attorneys

Most law schools don’t teach their students how to work with social workers as part of their legal team. Since it is a fairly new concept in Texas, most attorneys won’t have experience or training on how to do so either. A common theme among the social service providers who contributed to this article was that attorneys need to recognize social service providers as a valuable member of the defense team who can contribute to a successful outcome for the client and enhance attorney-client relations. “Attorneys need to recognize that social workers, just like attorneys, practice in different areas of specialization – criminal defense, immigration, health, and civil areas,” said **Gilan Merwanji**. “I would like attorneys to see the social service provider as a great resource, but more importantly, as an equal team member who is bringing their expertise into helping build the best defense possible.”

Yvonne Blanco Spriggs, the MAC Mental Health Liaison for Potter & Armstrong Counties, asks attorneys to “understand the role that the social worker or case manager has, along with the limitations that arise with each case. We have knowledge in what we do and the work that it takes for us to work with our client demographic; we do not need the added stress of having to ‘handle’ the attorney’s personality as well. We are there to help firstly the client, but secondly the attorney and attorney’s staff. However, we still need to keep working relationships with the courts, corrections department, housing authorities, recovery program coordinators, and local mental health authority [LMHA] program coordinators. Respect runs both ways. We support and promote the attorneys; we ask

for that in return.”

Crystal M. Voelpel, from the Travis County Mental Health Public Defender wants attorneys to know that:

“Social workers have their own code of ethics to practice within. All services are also person-centered, meaning it is the client who has the autonomy to decide what services they want to receive (even if none at all). I would remind attorneys of the value a client advocate can have when included in client communication, decision-making, and case strategy,” said Monique Joseph from Restoring Justice. “We are often overlooked, while also expected to perform miracles. Give advocates the space and opportunity to communicate on how they can best support your case and the client. Advocates are not magicians, but we do have a unique perspective that can help in ways ‘outside of the box’ that is often created in many attorneys’ minds.”

In the end, Shewanna Chark’s advice sums it up the best: “Don’t be afraid to utilize our expertise, to improve your client’s life outcomes, as well as the legal outcomes of the case.”



Scott Ehlers is the Director of Public Defense Improvement for the Texas Indigent Defense Commission. Prior to joining TIDC, he was a panel attorney for the Capital Area Private Defender Service (2015-2016), worked at the Harris County Public Defender’s Office (2011-2015), served as the Sen. Rodney Ellis’ Criminal Justice Committee staffer (2008-2011), and was NACDL’s State Legislative Affairs Director (2004-2008). Ehlers is a member of TCDLA’s corrections, mental health, and public defender committees.

Special thanks to all the social service providers for contributing their expertise to this article.

RECENT TEXAS EXONERATION: MELVIN QUINNEY

MIKE WARE & JESSI FREUD

In San Antonio, in 1989, Melvin Quinney was a father of four in the middle of a high conflict divorce from his wife Debbie when his life was torn apart. Debbie accused Melvin of sexually abusing, first, their five-year-old daughter who would not outcry despite coercive efforts to get her to do so, and then their nine-year-old son, John, as a part of Melvin's alleged participation in a completely unsubstantiated, and in fact, non-existent nation-wide satanic cult that purportedly engaged in the ritualistic practice of sexually abusing and murdering children. At the time, Melvin did not know he was about to be a victim of the moral panic of the 1980s and 90s, eventually dubbed the "Satanic Panic," which was wrongfully imprisoning and otherwise ruining the lives of innocent people in Texas and all over the nation and even beyond. This moral panic had the buy in of law enforcement, CPS, and prosecutors' offices in Texas and elsewhere. Think Q-Anon on steroids.

While trapped in the CPS system due to the bizarre allegations Debbie made, and after excessive biased and coercive interviewing by state actors and other "moral entrepreneurs," John purportedly outcried. Melvin was charged with second-degree indecency with a child by contact. After John pointed to his dad, Melvin, as his abuser in a 1991 trial, the trial ended predictably: a 20-year sentence. It wouldn't be until over 20 years later that John would come to realize that Melvin was not a satanic worshiper and he had never been sexually abused by his father.

Before the chaos that led to his wrongful conviction, Melvin was a typical blue-collar dad: he had served in the military and had been honorably discharged before coming back to Bexar County to work and raise a family. In his spare time, he played the piano. He had no prior legal problems or brushes with the law.

After John's mother died, John, now 19 years old,

became responsible for himself and his younger siblings. He began to question his beliefs about his childhood, many of which revolved around hyper religiosity and conspiracy theories (à la Alex Jones). As John matured and in the absence of his mother's control, failed prophecies, distance from old social groups, and his siblings' effort to re-engage their dad, John came to realize what had happened to his memory: as a nine-year-old child, he had been falsely convinced (gaslighted) that his father abused him, and engaged in ritualistic murders, when he had not. John contacted the Innocence Project of Texas for help.

With the cooperation of the Bexar County District Attorney's Office Conviction Integrity Unit, led by Assistant District Attorney Matt Howard, we reinvestigated the case. We interviewed corroborating witnesses. We consulted with subject matter experts like Dr. William Lee Carter, Dr. Alexandria Doyle, Dr. Mary DeYoung and Dr. Aaron Pierce. And ultimately, in June, 2022, we had an evidentiary hearing back in the court that convicted Melvin 30 years earlier, where John took the stand and recanted his false trial testimony. Our experts explained to the court why John's recantation was reliable and how John and Melvin's story fit into the history and context of the Satanic Panic of the 80s and 90s. With the support of the State, in September 2022, the trial court recommended to the Court of Criminal Appeals that Melvin be found actually innocent. Specifically, the court concluded:

1. Applicant has established, by clear and convincing evidence, that based on the newly discovered evidence, namely John's credible recantation, corroborating witnesses Sarah Parker and Louis Hughston, the expert opinions of Dr. Alexandria Doyle and Dr. William Lee Carter as to the credibility thereof, and the new retrospective understanding of the satanic panic of the 1980s and 90s as explained and analyzed by Dr. Mary DeYoung, no reasonable juror would



Matt Howard, Bexar County District Attorney's Office Conviction Integrity Unit Chief, Joe Gonzalez, Bexar County District Attorney, John Parker, Mike Ware, Executive Director of the Innocence Project of Texas, and Melvin Quinney

have convicted him.

In February, the Court of Criminal Appeals agreed. On April 10, 2023, the Bexar County District Attorney Joe Gonzales filed a motion to dismiss his case which was granted by Judge Christine Del Prado. For the first time in over 20 years, Melvin, now 75 years old, did not have to register as a sex offender. He can now move to live near the kids and grandkids he was separated from for too long.

If you want to learn more about Melvin's case, and the Satanic Panic of the 1980s and 90s, consider listening to the excellent podcast *Conviction*, Season 2, "American Panic" (8 episodes), that traces the origins of the panic in Kern County, California, and tells John and Melvin's story, as well as the story of many other impacted families who were victimized by law enforcement and prosecutors who were acting under the influence of the "satanic panic."

This story of Melvin Quinney's exoneration is the second of what will be a recurring feature in the Voice. Mike Ware, Executive Director of the Innocence Project of

Texas, Allison Clayton, IPTX Deputy Executive Director, Gary Udashen, IPTX board member and former board president, and Jessi Freud, IPTX Senior Staff Attorney, will write periodic articles concerning particularly noteworthy exonerations from around the State of Texas. For purposes of these stories, the term "actual innocence" will follow the use of that term in the Texas statute providing compensation for the wrongfully imprisoned. (§103.001, Civil Practice & Remedies Code). Under that statute, wrongfully imprisoned persons are entitled to receive state compensation if they have received a pardon based on innocence, they have been granted writ relief by the Court of Criminal Appeals based on actual innocence, or they have been granted writ relief by the Court of Criminal Appeals on some other basis and the State's Attorney dismisses the charge on the basis that no credible evidence exists that inculcates the defendant and that the State's Attorney believes the defendant to be actually innocent.



Mike Ware is the Executive Director and Co-Founder of the Innocence Project of Texas. He also served as the first chief of the Dallas County District Attorney's Office Conviction Integrity Unit under Dallas County District Attorney Craig Watkins. The Dallas County Conviction

Integrity Unit was the first CIU in any District Attorney's Office in the Country.



Jessi Freud

While at Baylor Law School, Jessi began working with the Innocence Project of Texas in 2013. In late 2018, she joined the organization as a staff attorney where she focuses on post-conviction DNA litigation and other special litigation projects, as well as co-teaches an innocence clinic at a regional law school.

 **INSTANT ON-LINE SR-22** 
(PROCESSED and PRINTED in as little as 5 MINUTES!!!)

www.conceptSR22.com

AN ABSOLUTELY FREE SERVICE FOR YOUR FIRM

A revolutionary new way to provide the Texas SR-22 that will save you and your staff valuable time while also saving your clients money. No more waiting for your client to get that SR-22 to your staff, it's always readily available at your fingertips.

-  **INSTANTLY!** allows your Client to purchase and print the Texas SR-22 from ANY computer — ANY time.
-  **SAFELY!** uses an Operator's Policy to protect your Client's relationship with their current insurance provider.
-  **WITHIN 10 MINUTES!** emails the original SR-22 to your Client, the Texas DPS AND your office.
-  **IMMEDIATELY!** allows you and your staff to access and print the Texas SR-22 from our website.
-  **UNMATCHED!** rates and plans will save your Clients money over traditional methods.

Please go online or call Jay Freeman today for more information:

www.conceptSR22.com

From: ACCURATE CONCEPT INSURANCE

Dallas: 972-386-4386 ⚡ Toll Free: 800-967-4386



36th Annual
RUSTY DUNCAN
 Advanced Criminal Law Course
 2023







TCDLEI Fundraiser 2023

Thank you for helping us raise
more than ever!

Silent Auction Donators

Rick Wardroup	Efrain Sain
Lydia Clay Jackson	Kendra Scott
Jay Freeman	Deadra Grant
Joseph Sheppard	Ft. Worth Zoo
Warren Wolf	Biblical Art Museum Dallas
Shane Phelps	National Museum of the
Mark and Taly Thiessen	Pacific War
James Publishing and Bob Gill	Buckhorn Saloon and
Space Center Houston	Museum
Holiday Inn	Angela Moore
Clay Steadman	Gregg Westfall
Patrick Gabaldon	E. G. Morris and Suzanne
Abilene Zoo	Spencer
Sheraton - Arlington	Dustin Nimz
Overton Hotel	Landry's Seafood Restaurant

TCLEI \$100 + Donators

Jaime E. Carrillo	Amber D. Farrelly
Sylvia Cedillo	Matthew J. Schlake
Laurence A. Dunne, III	Daniel W. Hurley
Ronald L. Goranson	Audrey Moorehead
Michael C. Gross	Laurie L. Key
Steve A. Keathley	Jim Darnell
Justin Kiechler	Bill Wischkaemper
Wendy Lynn Little	Lisa Greenberg
Mario A. Olivarez	Frank B. Suhr
Ryan Patrick Phelan	Samuel R. Terry
Shane Phelps	Keltin L. VonGonten
Judith Shields	Philip Wischkaemper
Patty A. Tress	Cory A. Clements
Kameron D. Johnson	Mehr Singh
John A. Convery	David Guinn, Jr.
Kyle T. Therrian	

Passport Winners

Clifford Duke
Santiago Balderrama
Nicole Cloutier
Rick Davis
Stephanie Monique Pimentel
Sylvia Cedillo
Stanley R. Mays
Rick Davis

Membership Party Winners

Scott Lemonsk
Mark Thiessen
Olivia Kearney
Brad Runcie
Andy Taylor
Chris Lankford
Sarah Smitherman
Monique Huff
Nicholas Huges

Silent Auction Winners

Steve A. Keathley	Deandra Grant
Blakely Mohr	Catherine Evans
Paul Lechowick	Thomas Wynn
Stanley Mays	David Holmes
Shane Phelps	Rebecca Young
Leon Reed	Laurence Dunne
Allison Clayton	Kevin Willhelm
Janet Traylor	Brian Watston
Ishan Sareen	Celeste Villareal
Bertha Gutierrez	Molly Bagshaw
Paul Harrell	Kerri Anderson Donica
Laura Barbosa	Judith Shields
Keltin Vongonten	Jason Jarvis
Randel Cross	Suzanne Spencer
Gerald Ratliff	Rudolf Moisiuc
Sylvia Cedillo	Joe Stenberg
Nicole Cloutier	Richard Davis
Annie Scott	Bobby Barina
Katy Klinke	Jade Joplin
Gonzalo Serrano	

About

Each year at our Advanced Criminal Law Seminar: Rusty Duncan, TCDLA hosts a silent auction located on the Hill Country Level, the proceeds from which go to TCDLEI to fund scholarships given to lawyers to attend CLE events. As a 501(c)(3) nonprofit organization, donations made to TCDLEI are tax-deductible.



Didn't get the chance to donate?
Scan the code to contribute
online today!



Significant Decisions Report

KYLE THERRIAN

What do you call a legal demand to see dolphins while attending the TCDLA Members Trip in South Padre? Habeas porpoise. That joke is courtesy of Doug Gladden, and I regret to inform you this is the only good habeas news I have for you this month. The Great Writ is truly in jeopardy, and I am at a loss for words to distract you from its plight. Perhaps I need a habeas thesaurus. Oh God . . . But I promise these writ jokes are not any worse than those that appear below. Read on my Sig Heads!

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

Counterman v. Colorado, S.Ct. (2023)

Issue & Answer. When the government criminalizes threatening statements, does the First Amendment require the government prove that a defendant had some subjective understanding of the threatening nature of his statements? Yes. At least reckless intent.

Facts. During a two-year period, the Defendant sent hundreds of Facebook messages to C.W., a local singer and musician. The two had never met, and C.W. never responded. She tried to block him, but the Defendant continued his conduct using alternate accounts. Some messages expressed a romantic familiarity that did not exist. Some were mundane. Others opaquely threatened violence. All of them put C.W. in fear of harm. The State of Colorado charged the Defendant under a statute making it unlawful to "repeatedly make any form of communication with another person in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person to suffer serious emotional distress." Addressing the Defendant's claims under the First Amendment, Colorado Courts analyzed whether his speech constituted "True Threats" by considering only an objectively reasonable person standard. The Defendant argued that the First Amendment also required a subjective intent to threaten.

Analysis. The First Amendment permits restrictions on the content of speech in a few limited areas falling into "historic and traditional categories" "long familiar to the bar." One of these categories of speech is "True threats" of violence. Whether speech constitutes a threat is subject to the interpretation of the recipient. But, before such speech can be prosecuted there must be a showing of subjective intent. "[T]he First Amendment may still demand a subjective mental-state requirement shielding some true threats from liability." The Court must balance the chilling effect that comes with the absence of a subjective element and the impracticality of prosecuting a person's actual subjective intent. The Court has done this with success in the areas of defamation, obscenity, and incitement, and can do so here. The ultimate question involves the type of subjective standard that strikes the appropriate balance. "Among those standards [of purposefully, knowingly, and

recklessly], recklessness offers the right path forward. It is also consistent with the analysis in the Court's defamation jurisprudence seeking to afford "breathing space" for legitimate speech.

Concurrence (Sotomayor, J. joined by Gorsuch, J.). requiring nothing more than recklessness "is inconsistent with precedent, history, and the commitment to even harmful speech that the First Amendment enshrines."

Dissent (Barrett, J. joined by Thomas). Subjective intent should not be required. It gives speakers of True Threats preferential treatment. "We have held that nearly every category of unprotected speech may be regulated using an objective test."

Dissent (Thomas, J.). Joins Justice Barrett but writes separately to say that *New York Times Co. v. Sullivan* and its progeny are "policy-driven decisions masquerading as constitutional law."

Comment. The Texas Harassment statute has a higher mens rea requirement: "intent to harass, annoy, alarm, abuse, torment, embarrass." The Texas Stalking statute also has a higher mens rea requirement: "knows or reasonably should know the other person will regard as threatening." What is compelling about this case is that the Supreme Court indirectly held that electronic communications are in fact speech. Presently, the CCA does not agree.

Fifth Circuit

The United States Court of Appeals for the Fifth Circuit did not hand down any significant or published opinions since the last Significant Decisions Report.

Texas Court of Criminal Appeals

Ex parte Moon, No. PD-0302-22 (Tex. Crim. App. May 3, 2023)

Attorneys. David Cunningham, David Adler, Jack Carnegie, John Hagan, Christine Wood, Jadd Masso

Issue & Answer. A juvenile court may transfer a case to district court for adult prosecution when several conditions are met; among them is a judicial determination of probable cause and appropriateness of adult prosecution. Is an erroneous transfer order a matter that can be addressed by a pretrial writ of habeas corpus and interlocutory appeal? **No.**

Facts. The State is trying to prosecute the defendant for a capital murder they allege he committed when he was 16 years old. This is the second time the CCA has addressed this prosecution. The first time the CCA affirmed the COA holding: the juvenile court's transfer order was erroneous and "the case remains pending in juvenile court." The defendant turned 18 during the previous chapter of appellate litigation—an occurrence which normally precludes juvenile court jurisdiction. After the resolution of the previous appeal the State obtained a new transfer order from the juvenile court ordering the now-18-year-old defendant to stand trial in district court. The defendant filed the instant pretrial writ of habeas corpus challenging the jurisdiction of the district court because it

relied on an order from a juvenile court that did not have jurisdiction over the now-18-year-old defendant.

A former version of Article 44.47 of the Texas Code of Criminal Procedure regulated appeals of transfer orders at the time the defendant filed his writ of habeas corpus. That Article provided: that a "defendant" may bring an appeal "only in conjunction with the appeal of a conviction of or an order of deferred adjudication for the offense for which the defendant was transferred to criminal court."

Analysis. "Here, both the history and the literal text of former Article 44.47 make it clear that a defendant is not authorized to appeal from an adverse ruling in a pretrial habeas case that challenges a juvenile court's transfer order. The court of appeals should not have entertained Appellant's appeal." Article 44.7, as previously written, came into existence after the Legislature expressly repealed provisions of the juvenile appeal statute that allowed the interlocutory appeal of a juvenile transfer order. "[I]t would be anomalous to nevertheless permit what amounts to an interlocutory appeal from an adverse ruling on a pretrial application for writ of habeas corpus that challenges the jurisdiction of the criminal court based on an alleged defective juvenile transfer order."

Comment. Case law provides that a writ of habeas corpus is sui generis: of its own kind; unique. It is the "great writ" known in common law as a bulwark against arbitrary imprisonment at the hands of the king. We are not-so-slowly turning the modern writ into something as significant as the modern King of England. Messing with Legislative intent is nothing more than molding a piece of Play-Doh. Watch: the legislature is presumed to know what a writ of habeas corpus is and how it works to challenge an illegal restraint. Indeed, the Legislature expanded the traditional use of the Great Writ under Article 11. Traditionally a tool to liberate citizens from actual custody, in Texas it was specifically designed to also address constructive custody. Taking the Legislature's clear intent to broaden the cognizability of the Great Writ together with the origins of the Great Writ in Texas, "it would be anomalous" to think that the legislature meant to forbid its use in this scenario without explicitly saying so.

See. Legislative intent. I'm rubber, you're glue . . .

Inman v. State, No. PD-0251-22 (Tex. Crim. App., May 17, 2023)

Attorneys. Jeth Jones (trial)(appellate), Joshua Kelly (appellate)

Issue & Answer. Does the right to confrontation exist in a revocation hearing? **Maybe.**

Facts. A trial court sentenced the defendant to a period of deferred adjudication community supervision. During the period of supervision, the State filed a motion to adjudicate guilt alleging multiple violations of probation. The trial court conducted a hearing during which a probation officer and police officer shared hearsay accounts of the defendant's probation violations. The defendant objected and asserted her Sixth Amendment

right to confrontation. The trial court overruled the defendant's objections and the court of appeals affirmed after finding no right to confrontation in a revocation hearing.

Analysis. "Appellant filed a petition for discretionary review, and we granted review of the Confrontation Clause issue. However, after considering the parties' briefs and the record, we conclude that our decision to grant review was improvident."

Concurrence (Newell, J.)(joined by Hervey, Richardson, and McClure, JJ.). The right to confrontation exists under the Sixth Amendment and as a matter of due process. The defendant only raised her Sixth Amendment right. (Editorial note: this analysis suggests three judges would consider the right to confrontation in a revocation hearing as a matter of due process in the future). This consideration notwithstanding, the trial court's order adjudicating guilt can be upheld based on a ground for violation that does not implicate the Confrontation Clause.

Dissent (Keel, J.)(joined by Yeary and Slaughter, JJ.). "Our decision to grant was judicious because the lower court decided the confrontation issue on its merits, and there is a split among the courts of appeals on that point."

Comment. Superficially this seems like a wasted opportunity. But there are a couple of takeaways for your next revocation hearing. First, you might be able to get Judges Newell, Hervey, Richardson, and McClure on your team if you assert the right to confrontation under both the Sixth Amendment and the Due Process Clause. Second, Judge Keel's string cite gives us a breakdown of the jurisdictional split on the issue until such time as the Court takes this up again; plug it into your brief:

Inman v. State, No. 13-20-00349-CR, 2022 WL 709832, at *2-3 (Tex. App.—Corpus Christi-Edinburg March 10, 2022) (mem. op., not designated for publication) (holding that the Confrontation Clause does not apply in adjudication hearings); compare *Mauro v. State*, 235 S.W.3d 374, 375-76 (Tex. App.—Eastland 2007, pet. ref'd) (same), *Diaz v. State*, 172 S.W.3d 668, 673 (Tex. App.—San Antonio, 2005, no pet.) (same), and *Smart v. State*, 153 S.W.3d 118, 121 (Tex. App.—Beaumont 2004, pet. ref'd) (same), with *Perez v. State*, No. 13-14-00300-CR, 2015 WL 4234236, at *1 n. 2 (Tex. App.—Corpus Christi-Edinburg July 9, 2015, no pet.) (mem. op., not designated for publication) (holding that the Confrontation Clause applies in revocation hearings), and *Hughes v. State*, 651 S.W.3d 461, 470 (Tex. App.—Houston [14th Dist.] Mar. 15, 2022, pet. granted) (same).

Taylor v. State, No. PD-0660-22 (Tex. Crim. App., May 17, 2023)

Attorneys. Lance Taylor (appellate)

Issue & Answer. Is a formal speedy trial dismissal

hearing a pre-requisite to obtaining a dismissal for denial of speedy trial? **No.**

Analysis. On appeal a court must review a speedy trial claim de novo. The court of appeals in this case declined to do so because, in its assessment, the trial court did not conduct a meaningful hearing. The court of appeals analogized the instant case to others where defendants failed to develop the *Barker v. Wingo* speedy trial factors. However, in the cases cited by the court of appeals, the issue of speedy trial was not litigated, and the only fact known on appeal was the length of delay. Here there was at least some litigation. The only requirement for appellate review is that some relevant information be in the record: length of delay, reason for delay, assertion of the right, and prejudice. The only piece of information arguably missing in this case is prejudice. This should not have prevented the court of appeals from conducting its de novo review.

In re State ex rel. Wice, No. WR-93,089-01 (Tex. Crim. App. June 14, 2023)

Attorneys. Michael Mowla (appellate), Dan Cogdell (appellate), Philip Hilder (appellate), William Mateja (appellate), Heather Barbieri (appellate), Mitchell Little (appellate)

Issue & Answer. The State is split into administrative judicial regions (AJR). Each region has a presiding judge (Regional Presiding Judge or RPJ) who assigns other judges to preside in place of a recused judge. Sometimes an RPJ will transfer a judge to another region for assignment. Typically, this occurs in the following way: home RPJ signs a transfer order sending a judge to foreign AJR for assignment, next the foreign RPJ signs an order assigning the judge to a bench or a specific case. When a transfer order and assignment order following this pattern involve an active district judge (currently serving on another bench) . . .

Does the transfer order control the expiration of that judge's assignment? **No.**

Does the assignment order control the expiration of that judge's assignment? **No.**

Do limitations on an active district judge's assignment violate the Texas Constitution? **Yes.**

Facts. This case involves what is basically a loan between two AJRs. The Eighth AJR sent one of their active judges, Judge George Gallagher, to preside over Ken Paxton's prosecution pending in Collin County (in the First AJR). Typically, this occurs as follows: the assigned judge's home RPJ signs a transfer order sending a judge to foreign AJR for assignment, then the foreign RPJ signs an order assigning that judge to a bench or a specific case. This is what occurred in Ken Paxton's prosecution after the presiding judge of the 416th District Court in Collin County recused. The transfer order had an expiration date. The assignment order did not. After years of efforts by activists and other elected officials to kill the prosecution, Judge Gallagher transferred venue to Harris County. But his own transfer-from-the-Eighth-AJR-to-the-First-AJR order had expired. After two years of litigation in Harris

County, Paxton asked the Harris County trial judge to rule that Judge Gallagher's authority had expired when he issued his change of venue order sending his case to Harris County. The Harris County trial court agreed with Paxton and signed an order sending the case back to Collin County. The First Court of Appeals affirmed.

Analysis. Judicial authority derives from the Texas Constitution and the Court Administration Act (CAA) (Chapters 74 and 75 of the Texas Government Code). The CAA created additional categories of judges and statutory avenues to keep the judicial system functioning efficiently by permitting judicial assignments. There are 11 administrative judicial regions in Texas, each with a presiding judge who has authority to appoint judges in the event of disqualification or recusal. The CAA classifies trial court judges as follows:

Active Judge first derive their authority from the Texas Constitution. Constitutionally an active elected district judge has state-wide authority. The Court Administration Act supplements this authority with express permission to preside by assignment in any of the 11 Administrative Judicial Regions.

Non-Active Judge (Former Judge, Retired Judge, Senior Judge) purely statutory creations and thus derive authority only from the Court Administration Act.

"Under the Texas Constitution, elected district judges have the ability to serve state-wide when properly requested [to exchange a bench or hold court for another judge]." Like the Texas Constitution, the CAA provides authority to the presiding judge of the administrative judicial region to assign judges to preside when necessary to dispose of accumulated business. But the CAA does not apply to active district judges the same way it applies to non-active judges. There are numerous limitations to the assignment of non-active judges which do not apply to the assignment of active district judges.

No formal order is required for a district judge to exercise his or her Constitutional authority to preside in another district. Nor does any such requirement appear in the CAA. The CAA suggests a preference for the type of assignment/transfer order issued in this case, but the statute does not mandate it. Moreover, the Legislature would be unable to limit an active district judge's authority to preside in another county pursuant to the Texas Constitution.

Harmonizing our constitutional text, statutory language and our case law once more, we reaffirm the following on when an elected district judge may sit in another Texas district court.

We find once again that, in addition to the district in which they innately preside, duly elected district judges (active district judges) have constitutional authority to sit on any bench in any region in the State outside their home region provided they

have been requested by the presiding authority for that bench in that region.

* * *

... [N]o other judge can constitutionally prohibit, remove, or deauthorize a qualified active district judge from sitting outside their district—even where that bench is in a foreign region of the State."

Here, the RPJ of the First AJR, Mary Murphy, assigned Judge Gallagher without an expiration date. The order transferring Judge Gallagher from his home region to the First Region was unnecessary and thus its expiration date was irrelevant on top of unconstitutional.

Comment. It was probably not the best strategy for Ken Paxton to urge supporters to harass and pressure the Court of Criminal Appeals with repeated phone calls and messages in retaliation for ruling against him in another case. This opinion was issued 11 days after the Texas House of Representatives impeached Paxton and suspended him from office. Paxton's state prosecution will now resume alongside his impeachment trial, federal criminal investigation, and a civil lawsuit for purportedly firing top deputies in his office who reported him to the FBI.

Ex parte Sheffield, No. PD-1102-20 (Tex. Crim. App. June 21, 2023)

Attorneys. Johnna McArthur (appellate), Hon. Bryan Bufkin (stand-by counsel for pro-se defendant at trial)

Issue & Answer. Is a demand for speedy trial and a trial court's refusal to set a case for trial a matter that can be addressed by a pretrial writ of habeas corpus and interlocutory appeal? No.

Facts. In August of 2019, a court set the defendant's bond at \$100,000. The defendant filed pro se motions demanding an examining trial, a speedy trial, and a personal recognizance bond. Shortly after the defendant filed these motions, in September of 2019, the grand jury indicted the defendant for five felony offenses. Appellant briefly withdrew his demands after the appointment of new counsel, but then quickly resumed his pro se assertion of rights. "Proceedings in Appellant's case came to a halt in the Spring of 2020, as the trial court and all courts in Texas shut down in response to the emerging COVID-19 pandemic. Nevertheless, Appellant sought to keep his case moving forward . . ." The defendant renewed his demand for a speedy trial and filed a new motion seeking release because of the State's delay in trial preparedness under Article 17.151 of the Code of Criminal Procedure. The defendant converted these motions into writs of habeas corpus filed in June of 2020. The trial court denied relief, but the Seventh Court of Appeals reversed, recognizing the continued operation of the U.S. Constitution despite a pandemic.

Analysis. A writ of habeas corpus is an appropriate vehicle for litigating pretrial constitutional violations

only when the constitutional protection at issue would be effectively undermined if it were not cognizable. The Court of Criminal Appeals has expressly approved pretrial writs of habeas corpus for challenges to double jeopardy and bail. Outside of these areas “pretrial habeas should be reserved for [limited] situations in which the protection of the applicant’s substantive rights or the conservation of judicial resources would be better served by interlocutory review.”

Here, the right to speedy trial is not undermined if not litigated by interlocutory appeal. The trial court would have either proceeded to trial with unacceptable delay giving rise to dismissal, or the trial court would have indefinitely delayed. Mandamus and not habeas is a litigant’s remedy for indefinite delay.

Comment. The Court explains that interlocutory appeal would result in more delay and be self-defeating to the relief sought when the defendant is asking an appellate court to order that his case proceed to trial immediately. Oddly, the Court reverses analysis 8 paragraphs later when disposing of the defendant’s complaint that the trial court was required to stay the proceedings while his writ of habeas corpus was on appeal. Addressing that issue, the Court explained that a writ of habeas corpus is actually a totally separate legal action and that habeas litigation does not stay the criminal proceedings. So, the “hey you’re actually making things worse for yourself by making this big fuss” rationale did not last more than a few paragraphs. I don’t agree with this case, but it at least stood on sound rationale before inserting this self-contradictory analysis. I don’t like it.

Ransier v. State, No. PD-0289-20 (Tex. Crim. App. June 28, 2023)

Attorneys. James Millan (trial), Amanda Erwin (appellate)

Issue & Answer. Tampering with evidence is committed by any one of three acts: alteration, destruction, or concealment. To successfully destroy a syringe containing meth while in an officer’s presence, a defendant must surreptitiously manipulate the syringe to the point of destruction. If in the course of doing this, an officer discovers that the defendant is manipulating something, then learns that the something is a syringe, and then intervenes to prevent its total destruction, has the defendant sufficiently negated the State’s greater accusation of tampering and injected facts suggesting he is guilty of only the lesser-included offense of attempted-tampering (does he get a lesser-included instruction)? **No.**

Facts. A DPS Trooper encountered the defendant in his vehicle parked alongside the road. The Trooper’s interaction with the defendant led to a request to search the defendant’s vehicle. The defendant refused consent but agreed to pull items from the car for the officer to inspect. The defendant used this opportunity to grab a syringe containing methamphetamine so that he could surreptitiously break the syringe and discard its contents. The Trooper quickly saw what the defendant was up to

but could not identify what exactly was in the defendant’s hand. The Trooper intervened and a struggle ensued. During the struggle, the trooper was able to identify the object as a syringe. The trial court refused to instruct the jury on the lesser-included offense of attempted tampering with evidence. The court of appeals reversed and explained that the defendant never fully concealed the syringe—the trooper testified that once he saw what defendant was up to, the syringe was only partially concealed in the defendant’s hand.

Analysis. A defendant is entitled to submission of a lesser-included offense only if the following two-pronged test is satisfied: (1) the requested lesser offense is in fact a lesser-included offense of the charged offense, and (2) there is some evidence in the record that would permit the a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense. When the jury is instructed on alternate theories of the charged offense, the second prong of the test is satisfied only if “there is evidence which, if believed, refutes or negates every theory which elevates the offense from the lesser to the greater.

The court of appeals did not look at the full encounter. Before the officer could see that something was partially concealed, the syringe was fully concealed. “Absent some evidence negating full concealment, Appellant has not raised the lesser-included offense of attempted concealment.”

Concurring (Keel, J.). We need more clarification on when the possibility that a jury would not credit certain evidence constitutes a basis for claiming a negated offense in the lesser-included-instruction arena.

Dissenting (Yeary, J.).

I dissent for the reasons stated in my dissenting opinion *Chavez v. State*, 666 S.W.3d 772, 792 (Tex. Crim. App. 2023) (Yeary, J., dissenting) (“So long as the potential for doubt with respect to the elevating element is not an irrational one based upon all the evidence that bears on the question, the jury’s potential response may well provide a basis for the trial court to conclude that the defendant could rationally be found ‘guilty only’ of the lesser-included offense. If so, then, upon request for the instruction by either party, the lesser-included offense has become ‘the law applicable to the case’ for purposes of instructing the jury under the dictates of Article 36.14.”).

Dissenting (Newell, J.).

The Court fails to view the evidence in the light most favorable to the requested instruction. It focuses on evidence that establishes the greater offense of tampering without considering the affirmative evidence negating the greater offense.

King v. State, No. PD-0330-22 (Tex. Crim. App. June 28, 2023)

Attorneys. Taylor Ferguson (trial) Mary Thornton (appellate)

Issue & Answer. Does an employee retain standing to contest a search or seizure in his work vehicle several days after he was arrested and after the vehicle was returned to

his employer? **Possibly, but not here.**

Facts. The defendant was a truck driver. He lived in a semi tractor trailer owned by his employer. While passing through Fort Worth he assaulted a 12-year-old girl. Oklahoma City police arrested the defendant and executed a search warrant on the truck. Officers intended to seize the defendant's phone, but inadvertently left it in the truck and shipped it back to the defendant's employer. About a month later, officers contacted the defendant's employer and asked him to produce the defendant's cell phone. He complied. On receipt of the phone, officers obtained and executed a search warrant, and they discovered child pornography. During the punishment phase of the defendant's trial for assaulting the young girl, the State successfully presented the contents of the phone after the trial court denied the defendant's motion to suppress and found that the defendant had no standing to challenge the search. The Court of appeals reversed and held that the defendant maintained an expectation of privacy in his employer's truck.

Analysis. The court of appeals used the correct analytical framework for determining standing by considering six relevant factors: (1) whether a possessory interest existed, (2) whether the accused was legitimately in the place invaded, (3) whether the accused had complete dominion or control and the right to exclude others, (4) whether the accused took the kind of precautions taken by those seeking privacy, (5) whether the accused puts the place to some private use, and (6) whether the accused's claim of privacy is consistent with historical notions of privacy. *Grandados v. State*, 85 S.W.3d 217, 223 (Tex. Crim. App. 2002).

Despite using the correct framework, the court of appeals only looked to the defendant's expectation of privacy at the time of arrest and discounted any subsequent developments because an arrest alone cannot form the basis of lost privacy expectations. But this case is not resolved so simply, and the defendant had a burden to establish his expectation of privacy persisted. He produced no evidence regarding his expectations at the time of the seizure: nothing about his employment status, nothing regarding personal property remaining in the trailer, nothing regarding his ability to exclude others from the trailer, and nothing regarding his continued use of the trailer. The defendant did not show himself to have standing to challenge the State's much-later search of the tractor trailer.

Dissenting (Walker, J.). The defendant presented evidence of his expectation of privacy in a truck that operated as his home. One could assume [this expectation of privacy] would continue post-arrest unless something else significantly changed the defendant's relationship with the truck. The State did not present any evidence suggesting that the defendant's relationship vis a vis the truck had changed because of his arrest.

Comment. The Court should have analogized this scenario to a hotel eviction. A person has an expectation

of privacy in their hotel room unless and until the hotel evicts that person. In hotel room search cases it is not required for the defendant to negate the existence of an eviction. This is a fact that, if it exists, is incumbent on the State to show once the defendant can show an initial expectation of privacy. Judge Walker is correct.

1st District Houston

Dryer v. State, No. 01-22-00201-CR (Tex. App.—Houston [1st Dist.] June 6, 2023)

Attorneys. Stephen Aslett (appellate)

Issue & Answer. Article 38.37 of the Code of Criminal Procedure permits—in certain prosecutions—evidence of the defendant's other offenses committed against a child. The State can use this evidence to prove conduct conformity. When the State sneaks in evidence of an act committed by the defendant against a non-child (a 17-year-old) under the guise of 38.37, and counsel fails to object in a purely he-said-she-said prosecution, is the defendant entitled to reversal for ineffective assistance of counsel on direct appeal? **Yes.**

Facts. The State accused the defendant of sexually abusing his daughter. Because the only evidence potentially establishing guilt was the testimony of the complainant, the State presented six witnesses to testify about the defendant touching another girl's leg during a sleepover in 2017. Among these witnesses was the girl whose leg was purportedly touched by the defendant. She testified that she was about 16 years old when the leg touch occurred. This was not true, she was 17, and defense counsel should have known. She provided her date of birth and the date of incident in a recorded interview provided to counsel before trial.

Analysis. A defendant is entitled to a reversal of his or her conviction when counsel provides deficient performance that results in prejudice. Performance is deficient when it falls below an objective standard of reasonableness. Prejudice exists when it undermines confidence in the trial's outcome. Here, there is no question the testimony was inadmissible and there exists no scenario the court can imagine where allowing its admission would fall within a competent defense strategy. Trial counsel's deficient performance allowed the State to convert a relatively weaker prosecution into a conviction by asking the jury to believe not only the complainant, but both victims of the defendant's abuse.

Comment. Yes, it's prejudicially deficient performance. But a good attorney can miss something like this—a single statement by the conduct conformity witness contained in an 8-minute video recorded interview. It's frustrating to read so many what-defense-counsel-did-wrong themed cases where a prosecutor is both a but-for and the proximate cause of injustice.

2nd District Fort Worth

State v. Villanueva, No. 02-23-00001-CR (Tex.

App.—Ft. Worth, June 15, 2023)

Attorneys. Mark Streiff (appellate)(trial)

Issue & Answer. Carrying a weapon while committing a crime continues to be an independent crime in Texas, under Penal Code 46.02(a-1). But, in 2021 the Texas Legislature added the following provision to the UCW statute (TEX. PENAL CODE § 46.02):

(a-6) A person commits an offense if the person:

- (1) Carries a handgun while the person is intoxicated; and
- (2) Is not: . . . (B) inside of or directly en route to a motor vehicle . . .

Does this combination evince the legislature's intent to decriminalize UCW in DWI cases? **No.**

Facts. The defendant carried a firearm while committing the offense of DWI. The State charged him with unlawful carrying of a weapon. The defendant moved to quash the charging information for failing to state an offense. He contended that the 2021 amendments to the unlawful carrying statute decriminalized the conduct the State alleged he committed.

Analysis. There is a presumption against the legislature impliedly repealing a statute. When a new amendment seems in contradiction with a previous provision, the court will harmonize where possible. The two provisions at issue here can be harmonized. Under (a-6) a person can be drunk with a handgun inside of a vehicle without committing a crime. But if that person turns the car on and begins to operate the vehicle, that person still commits an old fashioned UCW.

Chavez v. State, No. 02-23-00046-CR (Tex. App.—Ft. Worth, June 15, 2023)

Attorneys. Joseph Cole (appellate)

Issue & Answer 1. Generally, “a pretrial writ application is not appropriate when resolution of the question presented, even if resolved in favor of the applicant, would not result in immediate release.” Given this, is a writ of habeas corpus a suitable vehicle for reducing the bond of a pretrial detainee who has a simultaneous federal hold? **Yes.**

Issue & Answer 2. Is \$1 million bail excessive when the defendant shows he can afford \$80,000 and the State fails to present any evidence in a bond reduction hearing aside from the general facts establishing probable cause in a murder case? **Yes.**

Facts. The State detained and jailed the defendant for an accusation of murder. The defendant filed a writ of habeas corpus to reduce his \$1 million bail. The State presented evidence in the form of probable-cause affidavits. The defendant presented his mother's testimony to establish that the family could not afford a \$1 million bail but could come up with ten percent of an \$80,000 bail. The defendant's mother also testified to the defendant's local ties. The state questioned the defendant's mother about his jail disciplinary records, his pending federal charge, and his criminal history. She had little if anything

to share in these areas.

Analysis 1. The State often cites the must-result-in-immediate-release rule as a mechanism for defeating habeas cognizability. But this concept “refers to a defendant's release from the illegal confinement or restraint imposed by a specific authority—not his ability to walk the streets generally.”

Analysis 2. It's not enough for the State to lean into the probable cause establishing a serious offense when the defendant presents countervailing evidence favoring release.

Comment. In the past, when I have seen the State invoke this doctrine of cognizability, I have thought to myself “what if the other reasons for confinement are bogus too?” If the government is intent on violating your rights in one way, is it unimaginable that the government would do it in two ways, or three, or four? They got to let you peel back the layers.

4th District San Antonio

Ex parte Aparicio, No. 04-22-00623-CR (Tex. App.—San Antonio, June 21, 2023)

Attorneys. Douglas Keller (appellate), Kathy Starling (appellate)

Issue & Answer. 4,076 people have been arrested as part of Governor Abbott's Operation Lone Star (OLS)—a program designed to arrest and hold immigrants unconstitutionally, to prolong their detention, and to deny them access to the judicial system. Exactly none of them have been women. Can a man arrested as part of OLS use a writ of habeas corpus to challenge the State's selective prosecution and violation of his equal protection rights? **Yes.**

Facts. Police or “vigilantes” looking for brown people near the border arrested the Defendant for trespassing. He was with a group of men and women. The police only arrested the men (there was some sort of reason for this articulated in the facts of the case, but it doesn't merit discussion).

Analysis. A writ of habeas corpus is not a proper vehicle for adjudicating an issue that can be addressed adequately through direct appeal after conviction. Pretrial habeas followed by interlocutory appeal is reserved for situations in which the protection of substantive rights and the conservations of judicial resources would be better served by interlocutory review. Even when these conditions are met an appellate court must have a developed factual record to rule upon. Here the facts are not disputed: OLS officers do not arrest females. Litigating the constitutionality of this practice through habeas and interlocutory appeal serves judicial economy and is necessary to protect the defendant's substantive rights.

Comment. The State actually argued in this case that discrimination is justified.

Even assuming Appellant has met his burden to show that the State's policies in this case have a discriminatory effect and are motivated by

a discriminatory purpose, these policies pass both intermediate and strict scrutiny due to the emergency situation on Texas' southern border.

Brief by Jaime A. Iracheta County and Luis Gurrola-Villarreal Assistant County Attorney. I wonder if they are proud.

5th District Dallas

Ex parte Stafford, No. 05-22-00396-CR (Tex. App.—Dallas, May 1, 2023)

Attorneys. Kyle Therrian (trial)(appellate), Allison Clayton (trial)(appellate)

Issue & Answer. Does Texas's True Source statute—a statute criminalizing campaign communications that create the appearance that they emanate from a source other than their true source—violate the First Amendment right to free speech? **Yes.**

Facts. Collin County indicted the Defendant for “knowingly represent[ing] in a campaign communication that the communication emanate[d] from a source other than its true source.” Specifically, the State alleged that the defendant sent text messages that created an appearance he was a Republican when he was really a Democrat. The Defendant filed a pretrial writ of habeas corpus challenging the statute facially on First Amendment Grounds.

Analysis. A statute targeting speech because of its content must survive strict scrutiny—it must be narrowly tailored to serve a compelling government interest. The State argues that the statute serves to promote “fair, honest, and orderly elections” and to prevent people from misleading voters. Superficially, these interests are compelling but the court “need not belabor this prong of the analysis” because the statute is not narrowly tailored—it does more than what the State asserts. The statute punishes both truthful and untruthful speech. So long as it seems to someone that it is purporting to emanate from an untrue source, a person's campaign speech can be criminalized. The prohibitions implicate explicit representations, imputed representations, implied representations, and representations made by both identified speakers and anonymous speakers. “We view the State's efforts to protect voters from confusion by restricting speech with skepticism.” Examples of free speech impacted by the True Source statute include scenarios when a person speaks as a surrogate for a campaign, when the Federalists signed the Federalist Papers as Publius and when Mitt Romney posted on Twitter as Pierre Delecto.

“Neither lies nor [misrepresentations] serve the ends of the First Amendment, and we do not suggest their desirability or further proliferation.” *Bentley v. Bunton*, 94 S.W.3d 561, 595–96 (Tex. 2002). But if the government seeks to restrict protected First Amendment speech, the Constitution demands, and our law requires, a narrowly tailored statute. That narrow tailoring is absent here.

Comment. Jurisdiction: Texas. Courts: All. Time:

Any. Advanced search: “pierre delecto.” Results: 1. Legal community: you're welcome.

Crumley v. State, No. 05-22-00716-CR (Tex. App.—Dallas, June 22, 2023)

Attorneys. Lindsay Williams (appellate), Donald Norris (appellate)

Issue & Answer. Does a trial court err when it excludes defensive evidence of a mental condition that would help explain his defensive theory that the defendant did not have the requisite mens rea? **Yes.**

Facts. The State convicted the Defendant of Online Solicitation of a Minor. The Defendant is autistic, and he tried to make this a central theme of his defense. The defendant testified that he preferred internet-based social interactions to in-person ones. The Defendant explained to the jury that prior to the alleged offense he tried to date a person he met online but that person deceived him. Frustrated with this fact, the Defendant sought out new interactions in other dating apps to “find another liar to catch and make that person admit he or she was lying to him.” In this crusade, the Defendant began interacting with a detective posing as a minor. The detective informed the Defendant he was interacting with a 13-year-old child. According to the Defendant, the Defendant knew this to be a lie, and when he agreed to meet for sex his true intent was to expose the lie. At trial the Defendant sought to supplement this explanation with evidence of his autism. Specifically, the Defendant wanted to show how his autism causes him to not pick up on social cues and to become fixated on ideas (such as the crusade to expose dating app liars) in a manner that causes him to overlook warning signs. The trial court refused to allow this testimony.

Analysis. It is true that Insanity is the only “diminished responsibility” or “diminished capacity defense” in Texas. However, a defendant's less-than-insane mental condition can bear upon a defendant's mens rea. Here the Defendant was prevented from presenting medical and lay witness testimony explaining how his autism causes him to think rigidly and miss social cues. With this testimony the defendant could have explained for the jury his unusual compulsion to meet with a person he believed was lying about her age.

We conclude the evidence here was relevant to rebut the mens rea element of whether appellant knowingly solicited someone he believed to be a minor with the intent that the minor engage in sexual activities. . . . [A]ppellant offered evidence that his perception of the world was affected by autism, which may be probative of whether he believed Alyssa was a minor and whether he intended to engage her in sexual activities.

A trial court's exclusion of evidence can rise to the level of constitutional error, reversible unless beyond a reasonable doubt it had no impact on the trial. When the trial court excludes evidence vital to the defense or defensive theory, it is constitutional error. Here the defendant's autism was vital to the core of his defense,

and it is not beyond doubt that the trial court's decision to exclude it contributed to the Defendant's conviction.

6th District Texarkana

Balderas v. State, No. 06-22-00024-CR (Tex. App.—Texarkana, May 25, 2023)

Attorneys. Gena Bunn (Appellate), Darlina Crowder (trial)

Issue & Answer 1. A conviction for Continuous Sexual Abuse of a Young Child requires proof of two or more sexual acts committed against a child younger than 14 years of age; two of these acts must occur during a period that is 30 days or more in duration. When proving at least two instances occurring before the complainant's 14th birthday, is it sufficient that the State show a date specific for the first instance, a period for the totality of abuse, and testimony that the abuse happened many other times between the ages of 12 and 18? **No.**

Issue & Answer 2. When a jury requests the contextual testimony surrounding a specific witness's assertion that the defendant essentially admitted to the offense, does the trial court improperly bolster the State's case by reading specifically what was requested plus the defendant's purported incriminating response? **Yes.**

Facts. A jury found the Defendant guilty of Continuous Sexual Abuse of a Young Child, Indecency with a Young Child by Exposure, and two counts of Sexual Assault of a Young Child. The evidence at trial came from the complainant who was 22 years old on the date of trial and who was 12 or 13 years old when the Defendant first assaulted her. The complainant explained that the defendant constantly assaulted her until she was 18 years old but was vague about whether more instances occurred before she turned 14 years old.

During deliberations, the jury sent 8 notes to the trial court all asking for testimony or evidence pertaining to a phone call between the Defendant and the Complainant. According to the officer the Complainant confronted the defendant about whether he knew what he had done to her and he responded "Yes. Yes." The jury did not explicitly identify their dispute, but they did remain persistent in narrowing their requests—they wanted the context preceding the defendant's response. The Defendant insisted that the jury had not identified an actual dispute and that, if testimony is provided, it should include responses in cross-examination as well (testimony providing the appropriate context). The trial court inferred a dispute, read only the testimony from direct examination, and included the Defendant's purportedly incriminating response.

Analysis 1. A young child should not have to remember exact dates of sexual abuse, but it becomes important when figuring out whether the predicate offenses happened along the appropriate timeline to sustain a conviction for Continuous Sexual Abuse. Moreover, the complainant here was not a young child when she testified, she was 22 years old.

[T]o prove a second predicate offense, the State directs us to P.S.'s testimony that, while she lived in the green house, Balderas sexually abused her "at other times." The term "at other times" is exceedingly general in nature and, consequently, did not provide a basis for the jury to rationally infer that P.S. was younger than fourteen when Balderas committed the second predicate offense."

Analysis 2. The trial court may have the reporter's record read to a jury only when the jury identifies a witness and indicates that they disagree as to that witness's testimony. Only the part of the testimony in dispute may be read. The jury need not identify the nature of their disagreement and the trial court may infer a dispute in certain circumstances. The Court of Criminal Appeals has essentially found that a jury must ask for the same thing more than twice and show a dispute without stating one exists. The continued responses must show an attempt to narrow down what the jury is looking for. This is what occurred here. However, the trial court's selection of testimony was erroneous. When the trial court reads too much or too little testimony to the jury, its response may serve to bolster the State's case unnecessarily. The jury did not ask to hear the defendant's response to the Complainant's question "are you aware what you did to me." "The trial court's reading of the testimony emphasized what appears to be a clear admission by Balderas to P.S.'s allegations of sexual abuse . . ." It served to bolster the State's case unnecessarily.

Comment. Great work by trial counsel standing firm on objections. I don't agree that there was enough here to infer a dispute. The trial court instructed the jury over and over to identify a dispute. If anything should be inferred from the jury's persistence, it should be that their persistent failure to identify a dispute meant that there was no dispute.

Cunningham v. State, No. 06-22-00170-CR (Tex. App.—Texarkana, June 22, 2023)

Attorneys. Gena Bunn (appellate), David Moore (trial)

Issue & Answer 1. In a motion to revoke probation is an allegation that the defendant failed a drug test (in his first few weeks of probation) sufficient to put the defendant on notice that he is accused of doing drugs while on probation? **Yes.**

Issue & Answer 2. Does the right to confrontation exist in a hearing to revoke probation (deferred adjudication in this instance)? Yes, in the Sixth District at least.

Facts. The trial court sentenced the defendant to deferred adjudication probation. A drug test conducted four days into his probationary period showed the presence of methamphetamine in his system. The State filed a motion adjudicate guilt alleging that the Defendant "tested positive for Methamphetamines . . ." The Defendant moved to quash the State's motion to adjudicate because "there was no allegation that Cunningham possessed or consumed methamphetamine while on probation." The

Defendant asserted that due process required the State to more explicitly identify what condition he violated and argued against whether the State's accusation, if true, would be probative of a drug use during probation (as prohibited).

To prove the defendant used drugs during the probationary period the State sponsored the testimony of a probation officer who read notes made by another probation officer indicating circumstantially that the methamphetamine in the Defendant's system was from recent use and not pre-probation-period use. The Defendant objected to this testimony under the Sixth Amendment's Confrontation Clause.

Analysis 1. The conditions of probation were clear: don't use drugs. The State's allegation sufficiently informed the defendant that they believed he violated this condition.

Analysis 2. There exists a split among the courts of appeal regarding whether the Confrontation Clause applies in a hearing on adjudication or revocation. This Court "decline[s] to follow the majority of our sister courts, which base their reasoning on *Morrissey v. Brewer* . . . and in *Gagnon v. Scarpelli* . . . 'that community supervision and parole revocation proceedings are not a stage of a criminal prosecution.'" The Court of Criminal Appeals has distinguished state revocation proceedings from the federal ones addressed in *Morrissey* and *Gagnon*. Specifically, in a Texas revocation or adjudication hearing the State is represented by a prosecutor before a judge, formal rules of evidence and even the exclusionary rule apply, and the defendant may appeal. Serious liberty interests are at stake. The Sixth Court of Appeals is persuaded by the rationale of courts holding that confrontation is guaranteed in this context. Given that the hearsay statements were incriminating in nature, the testimony of the State's witness over the Defendant's objection violated his constitutional right to confront his accuser.

Comment. Another good job by a trial attorney preserving the record with the constitutional issue (not just a hearsay objection). In addition to the sound analysis of the Sixth Court, I think there is an additional point to make in the context of deferred adjudication: the adjudication proceeding is a continuation of the defendant's trial.

13th District Corpus Christi/Edinburg

Tates v. State, No. 13-20-00280-CR (Tex. App.—Corpus Christi, May 25, 2023)

Attorneys. Lane Thibodeaux (appellate), Bruno A. Shimek (trial)

Issue & Answer 1. Upon an appropriate factual dispute at trial, Texas Code of Criminal Procedure Article 38.23 requires the trial court to submit an instruction to the jury to suppress evidence and acquit if they believe evidence was obtained in violation of the law. When the factual dispute exists in the context of a prosecution for evading a lawful arrest or detention, does the trial court

err to deny the Defendant's requested Article 38.23 instruction (pertaining to the lawfulness of his detention). **No.**

Issue & Answer 2. Did the trial court err in conducting a punishment trial via Zoom during the COVID-19 pandemic? **Yes.**

Facts. A jury found the defendant guilty of Evading Arrest. The defendant contested the lawfulness of the traffic stop leading to his flight from the arresting officer. Nonetheless, the trial court denied his request for an Article 38.23 jury suppression instruction. After the jury found the defendant guilty, trial courts throughout Texas shut down due to the COVID-19 pandemic. The trial court conducted a sentencing hearing via Zoom. The defendant experienced some technical difficulties the extent of which are not clear in the record. Despite this, neither the Defendant nor counsel objected to the remote nature of the proceedings.

Analysis 1. The issue is subsumed in the jury's verdict that the defendant evaded a lawful arrest or detention.

Analysis 2. A criminal defendant has statutory and constitutional rights to be present during punishment proceedings. "Because we resolve the issue on statutory grounds, we do not reach the Defendant's constitutional challenges." Chapters 33 and 42 of the Code of Criminal Procedure address punishment proceedings. Combined, they provide that the defendant must be personally present at trial and sentence shall be pronounced in his presence. In the context of pandemic virtual plea hearings conducted without a physical presence waiver, the Court of Criminal Appeals held that remote videoconference technology is not a permissible substitute for a statutorily required in-person presence. This is not only a violation of the defendant's in-person trial rights, but probably even deprives the trial court of authority to preside.

Comment. There was no objection at trial, but the court held that right to be present at sentencing is not forfeited by a failure to object and can be raised on appeal without error preservation.

Maciel v. State, No. 13-18-00586 (Tex. App.—Corpus Christi, June 15, 2023)

Attorneys. Jake Spiegelhauer (trial)(appellate)

Issue & Answer. The defendant was a drunk passenger in a vehicle stopped abruptly in the middle of the road. She testified that when she became concerned for her safety and those around her, she tried but failed to move the vehicle to the shoulder while intoxicated. Under these circumstances was she harmed by the trial court's erroneous denial of a necessity instruction.

Facts. In her DWI trial the Defendant admitted to being intoxicated but defended her actions by explaining an unusual scenario. Her brother was trying to drive her home but became ill and stopped the vehicle in the middle of the road. The defendant felt unsafe and jumped into the driver's seat. She tried to pull the vehicle to the shoulder, but she could not get the vehicle to move. She felt she acted out of necessity but also did not feel as

though she “operated” the vehicle. The Thirteenth Court of Appeals initially affirmed her conviction and held that she did not sufficiently admit the offense to be entitled to the confession-and-avoidance defense of necessity. The Court of Criminal Appeals reversed and instructed the Thirteenth Court to conduct a harm analysis.

Analysis. The defendant’s concern for her safety was not reasonable as a matter of law. She was basically way too drunk to have formed any sincere belief about anyone’s safety—hers, her brother’s, anyone. Without a sincere belief that one’s actions were necessary; a jury could not have returned a verdict in her favor on the issue of necessity.

Dissenting (Benavides, J.). The majority substitutes its judgment for the jury. The defendant suffered harm and the case should be reversed.

Comment. This is result-oriented logic. Not sure why the Thirteenth Court would publish something like this.

Adair v. State, No. 13-22-00386 (Tex. App.—Corpus Christi, June 29, 2023)

Attorneys. Randall Pretzer (appellate)

Issue & Answer. When a trial court sentences a defendant to an enhanced range of punishment erroneously believing the defendant entered a plea to enhancement paragraphs, is the Defendant entitled to a new punishment hearing within the statutorily prescribed range of punishment even though he did not object? **Yes.**

Facts. The defendant slapped his girlfriend on the head. The State indicted the defendant for continuous family violence by virtue of alleging the Defendant’s previous conviction in 2012 for Assault-Family Violence by Impeding Breath. This is a third-degree felony. However, the State further alleged that the defendant had previously been convicted of another felony that, if proven, would enhance his sentencing range to a second-degree felony. The defendant entered into a plea agreement that did not reference this additional felony. The trial court made no finding on the State’s alleged enhancement and followed the prosecutor’s recommendation of deferred adjudication. The State subsequently moved to revoke the defendant’s supervision and the trial court ultimately sentenced the defendant to 12 years confinement. The defendant filed a letter with the court post sentencing stating that he wished to appeal “the severity of his sentencing.” The trial court treated the letter as a notice of appeal.

Analysis. The defendant did not preserve a complaint regarding the excessiveness of his sentence within the range of punishment. Nonetheless, in his letter to the trial court now treated as his notice of appeal, he stated that he wished to appeal based on the “Severity of sentencing.” Nonetheless, because the trial court erroneously believed the defendant entered a plea to an enhancement the defendant’s enhanced sentence fell outside of the sentencing range for un-enhanced third-degree felonies. A defendant’s right to a sentence within the proper range of punishment is absolute and nonwaivable.

14th District Houston

Lewis v. State, No. 14-21-00372-CR (Tex. App.—Houston [14th Dist.] May 18, 2023)

Attorneys. Mark Hochglaube (appellate), Ryan McLearen (trial), Sean Teare (trial)

Issue & Answer. The State charged the Defendant with retaliation against a witness (by threatening to kill his mother and the Complainant in this case). She was only a prospective witness. Is the evidence insufficient when the State proved the wrong type of witness? **Yes.**

Facts. While the defendant was awaiting trial in a harassment case against his mother, he learned that his mother was eager to testify against him. He told his ex-wife that he would have to kill her. The State erroneously charged the Defendant with the offense of Retaliation “for and on account of the service and status of [the Complainant] as a witness.” The Defendant’s mother was merely a prospective witness. When the State rested its case, the Defendant moved for a directed verdict. In response the trial court permitted the State to reopen its case. The State then adduced evidence that the Defendant’s mother did in fact testify against the Defendant, but in a protective order proceeding. The Defendant’s mother admitted she believed the Defendant’s threats attached to her desire to testify against him in the harassment case and not her serving as a witness in the protective order case.

Analysis. Texas’s Retaliation statute permits a prosecution for threats against a “witness” or a “prospective witness.” Each has different statutory elements. While the State is permitted to plead in the conjunctive and prove either allegation they allege, when the State pleads only one statutory element, evidence is insufficient when evidence only supports the unpleaded statutory element. The State could not save their prosecution in the face of a directed verdict motion by making the case about the protective order testimony rather than the harassment prospective testimony. The State’s witnesses all testified that they believed the Defendant’s statements pertained to his pending harassment case. Context and timing of the Defendant’s confinement and pending case support this.

Comment. Should we replace ham sandwiches with sloppy joes in the old grand jury adage?

Baban v. State, No. 14-22-00273-CR (Tex. App.—Houston [14th Dist.] June 1, 2023)

Attorneys. David Breston (appellate), Audley Heath (trial)

Issue & Answer. Regular Assault is not a lesser-included offense of Occlusion Assault (strangulation). A trial court that submits a lesser-included of regular Assault in an Occlusion assault trial commits reversible error. Can the State nonetheless preserve its conviction by citing the Defendant’s failure to demonstrate who requested the instruction? **No.**

Analysis. Before trial in this case the Court of Criminal Appeals held regular Assault is not a lesser-included

offense of Occlusion Assault (strangulation). But the Court of Criminal Appeals has long held that a defendant cannot request an erroneous lesser-included charge and then complain about it on appeal. Principles of estoppel prohibit this. The State's contention that it is the Defendant's burden to disprove estoppel on appeal is unpersuasive.

Briscoe v. State, No. 14-22-00094-CR (Tex. App.—Houston [14th Dist.] June 29, 2023)

Attorneys. Carmen Roe (appellate), Breanna Schwartz (appellate), Calvin Garvie (trial)

Issue & Answer 1. When a defendant repeatedly objects to the State's indictment as precluded by double jeopardy and the State amends the indictment mid-trial to cure the concern, is further objection to a mid-trial amendment required to preserve the issue of mid-trial amendment? **Yes.**

Issue & Answer 2. Is a concurrent causation instruction (two or more actors causing the same criminal harm) appropriate in a murder case where the State's theory is that the defendant was the only shooter, the State did not present evidence of another shooter, the Defendant flatly denies shooting the victim, and the Defendant blames an alternate perpetrator? **No.**

Facts. A jury found the Defendant guilty of aggravated assault for his role in a gunfight that resulted in the death of Kionn Lamothe. The gunfight involved the Defendant, Lamothe, Marvin Hart, and a third individual. The Defendant opened fire on Hart and the third individual. Another unidentified shooter opened fire in the same direction. Hart was wounded by one of the Defendant's bullets but survived. Lamothe died from a gunshot wound but officers could not find the bullet. The Defendant contested whether his bullet struck Lamothe. The State charged the Defendant with three counts of Murder—the third count alleged the Defendant committed an aggravated assault in the course of committing a felony and caused Lamothe's death (he shot at Hart and killed Lamothe). Before trial the Defendant pled guilty in a separate charge to committing aggravated assault against Lamothe[SR1]. Also, before trial the Defendant argued that the State could not proceed on Count Three because he had already been convicted of the aggravated assault committed against Hart (he shot at Hart). During the charge conference the State requested a lesser-included instruction on aggravated assault (against Lamothe). To cure the double jeopardy concerns, the State amended their murder-of-Lamothe-indictment to remove reference to Hart.

At the State's request, the trial court instructed the jury on concurrent causation (criminal responsibility exists when the defendant's conduct causes the result alone or concurrently with another cause).

Analysis 1. Article 28.10(b) prohibits a mid-trial amendment when the defendant objects. When the defendant does not object there can be no error.

Analysis 2.

The concept of concurrent causation, as provided in section 6.04(a) allows causation to be found even if the defendant is not the sole cause of the harm. Tex. Penal Code Ann. § 6.04(a). However, the concurrent-causation instruction addresses a narrower subset of concurrent causation in which “the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.” Tex. Penal Code Ann. § 6.04(a).

Here the State only ever argued that the Defendant was the sole cause or but-for cause of Lamothe's death. No evidence suggested that two or more causes could have caused the result. Concurrent causation is not an appropriate response to a Defendant raising an alternative cause—a different version of the facts in which he did not play a role in the death of Lamothe. There was a single bullet that caused Lamothe's death and there cannot be concurrent causes of that bullet being fired. The State muddled the issue by arguing felony murder—that “Even if the jury believed that the bullet that killed the complainant came from the unidentified shooter” it could convict the Defendant because he started the gunfight. The State's arguments were not a correct statement of the law, especially in the absence of evidence that Lamothe's death was a foreseeable result of the Defendant engaging in a gunfight with Hart where another unidentified shooter opened fire.

Comment. The State got outplayed by smart defense counsel who knew to plea to the aggravated assault before the murder trial. At least that's what it seems.

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

- 3rd District Austin
- 7th District Amarillo
- 8th District El Paso
- 9th District Beaumont
- 10th District Waco
- 11th District Eastland
- 12th District Tyler

Key:

SCOTUS: Supreme Court of the United States;

SCOTX: Supreme Court of Texas;

CCA: Court of Criminal Appeals;

COA: Court of Appeals;

AFV: Assault Family Violence;

IAC: ineffective assistance of counsel

Defendant: Appellant

CCP: Texas Code of Criminal Procedure



Texas Criminal Defense Lawyers Association

COURSE DIRECTORS:

Heather J. Barbieri, Jeff Kearney, & Ryan Kreck

72

68

64

60

56



ACCUSED

DEFENDING SEX CRIME ALLEGATIONS: ADULTS & CHILDREN

Available In Person, Livestream, & On Demand At Your Own Pace For Up To A Year!

NOVEMBER 30 - DECEMBER 1, 2023
Kalahari Resorts • Round Rock, TX

P: 512.478.2514 • F: 512.469.9107 • www.tcdla.com • 6808 Hill Meadow Dr, Austin, TX 78736

THE WHITEHALL HOTEL
HOUSTON, TX



Texas Criminal Defense Lawyers Association

21ST ANNUAL TOP GUN DWI

COURSE DIRECTORS:
DOUG MURPHY & MARK THIESSEN

FRIDAY • AUGUST 11TH, 2023

Available In Person, Livestream, & On-Demand At Your Own Pace for Up to a Year

Voir Dire: Sorting Out the Right Jurors.....	Julio Vela
Opening & Closing Arguments: Starting & Ending With Your Theme	Jed Silverman
10 Silver Bullet Trial Tactics in a DWI Case	Todd Overstreet
Strategies in Suppressing Evidence.....	W. Troy McKinney
Landing the Client (on the Flight Deck): Ethical Client Intake	W. Troy McKinney & Brent Mayr
Ethical Advertising	Brent Mayr
Ethical Fees & Agreements	W. Troy McKinney
Understanding Blood Testing from the Vein to the Lab	Amanda Culbertson
Challenging Hospital Blood Testing.....	Christopher McKinney
Cross Examination of Arresting Officer	Steve Gonzales
Understanding Police Tools of SFSTS and DRE	Sgt. Don Egdorf
Demonstration of Cross Examination	Steve Gonzales & Sgt. Don Egdorf
Intoxication Manslaughter: Understanding the Government's Investigation Before You Were Hired.....	Sean Teare
Crossing the Blood Analyst: Turning the Analyst into Your Expert	Joe St. Louis (Tucson, AZ)

Register at www.TopGunDWI.com or by calling our office at 512.478.2514

P: 512.478.2514 • F: 512.469.9107 • www.tcdla.com • 6808 Hill Meadow Dr, Austin TX 78736

Endnotes

- 1 § 53.045(a)(1) Tex. Fam. Code Ann
- 2 § 54.04 (d)(3)(A) (ii)Tex. Fam. Code Ann.
- 3 §54.04(q) Tex. Fam. Code Ann.
- 4 §245.051(c)(2) Tex. Hum. Res. Code Ann.
- 5 §245.051(c)(2) Tex. Hum. Res. Code Ann.
- 6 § 245.151, Tex. Hum. Res. Code Ann.
- 7 §244.014 Tex. Hum. Res. Code Ann, § 54.11 Tex. Fam. Code Ann.
- 8 §244.015 Tex. Hum. Res. Code Ann.
- 9 Robert Dawson, *Texas Juvenile Law*, (9th Edition, 2018), P. 572.
- 10 §508.156, Tex. Gov. Code Ann., §245.151(e) Tex. Hum. Res. Code Ann. § 245.151.
- 11 §245.051(c)(2) Tex. Hum. Res. Code Ann
- 12 §245.051(c)(2) Tex. Hum. Res. Code Ann.
- 13 §245.151, Tex. Hum. Res. Code Ann
- 14 §244.014 Tex. Hum. Res. Code Ann., and § 54.11 Tex. Fam. Code Ann.
- 15 *ITMO S.C.*, 790 S.W.2d 766 (Tex. App.- Austin 1990) reh overruled.