TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

VOICE FOR THE DEFENSE

VOLUME 52 NO. 7 • SEPTEMBER 2023

Texas Criminal Defense Lawyers Association

19TH ANNUAL STUART KINARD ADVANCED DWI SEMINAR

AVAILABLE IN PERSON, LIVESTREAM, & ON-DEMAND AT YOUR OWN PACE FOR UP TO A YEAR!

NOVEMBER 2-3, 2023
MENGER HOTEL • SAN ANTONIO, TX

COURSE DIRECTORS

BOBBY BARRERA, ADAM KOBS,
ASHLEY MORGAN, & GARY TRICHTER

TCDLEI SCHOLARSHIPS AVAILABLE AT TCDLA.COM!

THURSDAY, NOVEMBER 2

HOW TO USE EXPERTS EFFECTIVELY	DON FLANARY
PROBATION CONDITIONS MISDEMEANOR AND FELONY	STEPHANIE STEVENS
VOIR DIRE	DAVID BURROWS
FINDING REASONABLE DOUBT IN THE BLOOD DATA PRE AND POST-ANALYTICAL ERRORS	DR. KEVIN SCHUG
APPLICATION OF BLOOD DATA AND THE ROADMAP FOR CRIMINAL DEFENSE CASES	ASHLEY MORGAN
BREATH TESTING CASES	JARROD SMITH & BRAD VINSON
CLOSING ARGUMENTS	MICHELLE BEHAN

FRIDAY, NOVEMBER 3

USING THE ALR HEARING TO PREPARE TO CROSS THE ARRESTING OFFICER	ADAM KOBS
USING THE DEFENSE EXPERT TO UNDO THE SFSTS	LISA MARTIN
SUCCESSFULLY ATTACKING BLOOD SEARCH WARRANTS	GARY TRICHTER
DWI MOTIONS	AMBER VAZQUEZ
ETHICS	BETTY BLACKWELL
COLLATERAL CONSEQUENCES	GEORGE SCHARMEN

Advertisement

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

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. 7 | September 2023

Features

Columns

Available online at www.tcdla.com
Volume 52 No. 7 | September 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

October

October 4-7
CDLP | Advanced Trial Academy
Round Top, TX

October 5-6
CDLP | William Habern Corrections & Parole
Austin, TX

October 5-7
TCDLA | Future Indigent Defense Leaders 3.0 & 4.0 *w/ HCPDO & TIDC*
San Antonio, TX

October 11
CDLP | Innocence for Students w/ IPOT
Austin, TX

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

October 20
CDLP | Nuts & Bolts *w/ SACDLA*
San Antonio, TX

October 27
CDLP | Riding for the Defense
South Padre, TX

October 27
CDLP | Financial Friday
Webinar

November

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

November 16
CDLP | Capital Litigation
Dallas, TX

November 17
CDLP | Mental Health
Dallas, TX

November 17
CDLP | Financial Friday
Webinar

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 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

January 26
CDLP | Financial Friday
Webinar

February

February 1-2
TCDLA | Federal Law
New Orleans, Louisiana

February 14-18
TCDLA | President's Trip
Charleston, South Carolina

February 16
CDLP | Indigent Defense
Dallas, TX

February 22
CDLP | Mental Health
Houston, TX

February 22
CDLP | Setting Up the Appeal
Houston, TX

February 23
CDLP | Capital
Houston, TX

February 23
CDLP | Veterans
Houston

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 w/ NCDD*
New Orleans, Louisiana

March 29
CDLP | Financial Friday
Webinar

April

April 5
CDLP | Riding for the Defense
Longview, 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 25-27
TCDLA | FIDL 3.0 & 4.0 Returner *w/ HCPDO & TIDC*
Austin, TX

April 26
CDLP | Riding for the Defense
San Angelo, TX

May

May 3
TCDLA | 17th Annual DWI Defense Project
Dallas, TX

May 13
CDLP | Mindful Monday
Zoom

June

June 11
CDLP | Chief PD Training
San Antonio, TX

June 12
CDLP | PD Training
San Antonio, TX

June 12
CDLP | Mental Health
San Antonio, TX

June 12
CDLP | Capital Litigation
San Antonio, TX

June 13-15
TCDLA | 37th Annual Rusty Duncan Criminal Law Course
San Antonio, TX

June 14
TCDLA & TCDLEI Board & CDLP Committee Meetings
San Antonio, TX

June 14
TCDLA Annual Board Members' Meeting
San Antonio, 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

Yippie Ki Yay

Damn, I miss the 80's. I feel I can base my life off movies from the 80's. There is not a day that goes by that I don't quote a movie line...it is my mojo. It is my motivation as I drive to the office, when I am about to go to trial, and when I do my mental and physical exercises. Movies help me open up the creative side of my brain. Movie quotes are the thought bubbles in my head—some of my favorite thought bubble quotes.

Empire Strikes Back (1980) - *"Do or do not, there is no try."*
Poltergeist (1982) - *"They're Here!"*
Scarface (1983) - *"Say hello to my little friend!"*
Sudden Impact (1983) - *"Go ahead, make my day."*
The Terminator (1984) - *"I'll be back!"*
The Breakfast Club (1985) - *"Don't mess with the bull young man, you'll get the horns."*
Top Gun (1986) - *"I feel the need.."*"...the need for speed!"*
Lethal Weapon (1987) - *"I am too old for this shit."*
Stripes (1981) - *"You're a lean, mean fighting machine."*
Road House (1989) - *"I thought you'd be bigger." and "I want you to be nice until it's time to not be nice."*
Die Hard (1988) - *"Yippie Ki - Yay **"*

If you are about to go to battle, If something good happens, If you want to politely tell someone off, Then, my go to quote is "Yippie Ki-Yay **. In this President's Column, I would like to recognize the excellent work of some of your fellow TCDLA members.

One of the most essential member benefits of TCDLA is the Strike Force. This Committee stands ready and willing to assist their fellow TCDLA members when some judges find zealous reputation as contemptuous behavior. I want to recognize Bobby Mims, Nicole DeBorde Hochglaube, Reagan Wynn, Joe Connors, and Russell Wilson; each one of these individuals have dedicated countless hours of work in defense of TCDLA members in the past two months.

Another important member benefit is the Amicus Curiae Brief Committee. This Committee provides amicus assistance in both state and federal courts in cases that present issues of importance to criminal defendants, criminal defense lawyers, and the criminal justice system. This Committee's importance is essential to TCDLA's mission statement in protecting and ensuring individual rights guaranteed by the Texas and Federal Constitution. I would like to recognize the excellent brief writing by the following committee members: Aaron Diaz, Stacie Lieberman, Kyle Therrian, and Jason Niehaus.

Every day I serve as your President of TCDLA, I am constantly in awe of our members willing to volunteer their time to the causes that are important to this Organization and its members. This month, I recognized the hard work and dedication of the Strike Force and Amicus Committee Members with a Yippie Ki-Yay ** salute. Keep up the hard work and thank you for everything you do for TCDLA.

CEO's Perspective

MELISSA J. SCHANK

"Life is what you make of it."

Pura Vida

As I embarked on a recent vacation with my family, I couldn't help but reflect on the ever-changing nature of life and the importance of staying true to our values. The trip was a chance to recharge, particularly as my daughter was preparing to leave the nest, serving as a reminder of how life constantly evolves beyond our control.

During our vacation, I dove into some thought-provoking books that had sparked my interest. These books compelled me to ponder the core values that guide my decisions; both in my personal life and in my role at work, where I feel my family and colleagues depend on my actions. Intrigued and needing to focus on myself, I immersed myself in these books, finding inspiration in their pages. I could not put the first book down till there was a section recounting the story of a wife who had the power to decide whether her husband would take on clients based on her belief in their innocence. This narrative saddened me as many still feel this way about the understanding of justice and empathy – then and now. It made me question how we can simultaneously promote empowerment, uplift others, and promote open-mindedness while still ensuring that justice prevails. The concept of defending those accused, even when guilt may be possible, underscores the importance of a fair and just legal system.

My second book was short and focused on how we interact with others: happy to stressful moments. Treating everyone as if they were the Messiah returning served as a moving reminder to maintain empathy and patience in all interactions. I always need a reminder to slow down.

Finally, the last book, which I didn't finish because I ran out of time, was all about leadership. It was so good. The only regret I have from my vacation is that I didn't have a chance to read my favorite fiction magical books due to wanting to rejuvenate myself.

As a recommendation to all of our members, you may get some of the same inspiration and knowledge from our own TCDLA publication "Criminal Trial Strategies" by Charlie Tessmer. This book not only empowers criminal defense lawyers but also reinforces the value of continually seeking knowledge to excel. I must confess, I didn't read my entire vacation. I did have conversations all week long with a family from New York who offered a fresh perspective on life and values. It was intriguing to compare our differing regional outlooks and discuss how our backgrounds had shaped our worldviews. These conversations left me inspired to consider how I could contribute to positive change, fostering greater understanding between individuals from diverse cultural and regional backgrounds.

I was also pushed out of my comfort zone by agreeing to do three-wheel driving and rafting excursions, which my children chose. Even those harrowing adventures provided a valuable lesson in how precious life is. My daughter fell out and hit her head, saved by the helmet and our guide. After the event, the guides asked for gratuity if we valued their service. I listened as many of the other attendees felt it wasn't necessary for reasons that were absurd to me. I felt it was the right thing to do and I would have done it in the States because I was truly appreciative of their assistance on an excursion that we could say was scary! It was a small gesture of gratitude for their efforts in ensuring our safety and enjoyment.

Reflecting on these experiences, reading, and interactions I realized that we should all strive to do better, treat others as we wish to be treated, and continue evaluating our personal and organizational values and goals. I always have to remind myself of those goals.

The same goes for TCDLA. Cohesion within our group is vital, fostering an environment where support, empathy, empowerment and understanding thrive. It is contagious! For our organization to succeed, it's crucial that our team and colleagues remain engaged, empowered, and committed to our mission. This mission revolves around creating a safe and supportive environment for our members, one that transcends external barriers like politics and personal drama. Disagreements will inevitably arise, but true leaders empower and support one another, seeking guidance from mentors or life coaches, regardless of age. This is the essence of what TCDLA represents.

In our ever-changing world, my journey reinforced my commitment to our mission, and I am always disheartened by those who disagree, recognizing that I can't change their perspectives. However, my quest for personal growth and understanding persists.

TCDLA Amicus Brock Peters

Overview

Brock Peters is seeking mandamus relief from the Supreme Court of Texas (SCOTX) after being ordered by a civil judge to divulge the bars at which he consumed alcohol before a major motor vehicle accident. While defending this civil lawsuit, Peters is also defending himself in an intoxication assault prosecution with prosecutors who would assuredly like to have the same information. The pending mandamus asks SCOTX to order the civil trial judge to follow the Fifth Amendment and honor his assertion of privilege against self-incrimination. TCDLA wrote as amicus a brief tracking the history of the Fifth Amendment right against self-incrimination from the English Star Chamber to Dave Chapelle pleading the FiF. It illustrates for a court versed in civil practice the experiences of criminal defense lawyers in courts where the right is taken as a given.

Scan QR to Read More!

How to Scan a QR Code:
On your compatible smart phone or tablet, open the built-in camera app. Point the camera at the QR code. Tap the banner that appears on your smart phone or tablet to navigate to the site!

Drafters: Kyle Therrian, Jason Niehaus, Aaron Diaz

Kyle Therrian Bio

Kyle practices criminal defense statewide with a focus on state criminal appellate law and federal criminal defense. His office, Rosenthal Kalabus & Therrian, is located in McKinney, Texas, and is Collin County's largest criminal defense firm. Kyle serves as Chair of TCDLA's Amicus Committee, Chair of Texas Criminal Defense Lawyers Education Institute, and is the author of the Significant Decisions Report. Locally he also serves as president of the Collin County Criminal Defense Lawyers Association. He enjoys being a resource for lawyers in need of quick answers to tricky legal problems is always happy to take a call from a colleague in need.

Jason Niehaus Bio

Jason leads the litigation and appellate sections of Bodkin, Niehaus, Dorris, & Jolley PLLC, headquartered in Flower Mound, Texas. Notable cases on which he is counsel of record or counsel as amicus curiae include: Watkins v. State 619 S.W.3d 265 (Tex. Crim. App. 2021)(scope of Michael Morton Act), Oliva v. State 548 S.W.3d 518 (Tex. Crim. App. 2018) (Prior DWI is punishment issue, not element, for DWI 2nd), Holoman v. State, 620 S.W.3d 141, 142 (Tex. Crim. App. 2021)(proof of FV prior during punishment inadequate to trigger habitual felon sentencing range), Ex parte K.T., 645 S.W.3d 198, (Tex. 2022)(an acquittal at trial is not the commission of an offense for expunction of that record), and Ex parte CF (same). His reputation for being a thorn in the government's side is his most proud accomplishment.

Aaron Diaz Bio

Aaron M. Diaz is an associate attorney with the Goldstein & Orr law firm in San Antonio, Texas. Before attending law school, Aaron spent over a decade as a paralegal and received his Bachelor of Science degree in Criminal Justice from the University of Texas Pan-American, and a Master of Arts degree in Legal Studies from Texas State University. Aaron graduated from St. Mary's University School of Law, cum laude, in May of 2020. His passion for writing earned him several awards throughout law school. During his first year, Aaron received the Excellence in Writing Award or "Super Brief," which is awarded to a first-year law student who demonstrates superior brief writing skills. Aaron also represented St. Mary's Law in The Paper Chase legal writing competition, placing third against other Texas law school students. Additionally, Aaron served on the St. Mary's Law Journal as a staff writer and senior associate editor. His student comment entitled, Restoring the Presumption of Innocence: Protecting a Defendant's Right to a Fair Trial by Closing the Door on 404(b) Evidence, was published in Volume 51 of the St. Mary's Law Journal. During his third year of law school, Aaron served as a student defense attorney in the St. Mary's Criminal Justice Clinic where he represented indigent defendants. His service to the Clinic earned him the Francisco Leos Award for Excellence in Clinical Studies. He was also the recipient of the Lucien Campbell Criminal Law Scholarship and the Texas Criminal Defense Lawyers Association Charles Butts Scholarship. Aaron's current practice focuses solely on juvenile and adult criminal defense, representing clients charged with misdemeanor and felony offenses. He also handles state and federal appeals and post-conviction writs of habeas corpus cases. Aaron is a current TCDLA Board member and serves on several TCDLA committees.

TCDLA

TCDLA Board Application

Due November 2 by 5pm

Any member of TCDLA in good standing who desires to submit an application to serve on the TCDLA Board of Directors or officer chain should complete the TCDLA Board Application (scan QR code below) and email it to mschank@tcdla.com; fax to (512) 469-9107 or mail to TCDLA: 6808 Hill Meadow Dr., Austin, TX 78736, by 5 pm on November 2, 2023.

TCDLA seeks applicants with a diversity of backgrounds and experiences representing the demographics of all Texas districts to strengthen the work the TCDLA Board does. Now is the time to band together and get involved. We are stronger together.

The Nominations Committee will meet in Round Rock to consider applications nominating new board members on December 2, 2023. TCDLA Bylaws, Art. IX § 2: "Prior to January 31st of each year, the President-Elect shall appoint a Nominations Committee consisting of one member from each of the Association's membership areas and all officers. The Nominations Committee shall meet, and the members present shall select its nominee(s) for those positions in the Association which are open for election or reelection."

Application

Access the application at tcdla.com (top), scan the QR Code below, or email mschank@tcdla.com.

How to Scan a QR Code:

On your compatible smart phone or tablet, open the built-in camera app. Point the camera at the QR code. Tap the banner that appears on your smart phone or tablet to navigate to the site!

Editor's Comment

JEEP DARNELL

Embrace the Suck

It's Sunday afternoon and I am at the office preparing for what is expected to be a long murder trial. Trust me, I'd rather be with my family swimming in the pool, playing and having fun. But, I've got a job to do. These are the times that I find the hardest and that I dislike the most about this job. I love being in trial, but I hate the loneliness and anxiousness of preparing for a big trial. I keep thinking how the timing of this trial couldn't be worse: this is the last week of my kids' summer break, and there are only so many summers I get to spend with them; I'll miss the first day of school festivities, and there are certainly a finite number of those to enjoy; I'll miss my oldest son's birthday, because it will fall right in the middle of this trial; and I'll likely still be in trial for both of my sons' first baseball games of the fall season. I'm sure my kids will be fine and they won't remember that dad wasn't around much for a couple of weeks in August of 2023. My guess is that I am not alone in feeling so alone when I'm getting ready for trial. I would be willing to bet that there are quite a few of our almost 4,000 members who have felt the isolation that comes with this job.

Why the hell do we do this job and miss out on time with our families and force ourselves into periods of isolation? I tend to tie things to sports if you haven't read any of my prior columns, and this time always reminds me of a couple of things that I used to feel when I was an athlete. I remember the time I spent lifting weights and running before football season when I was home from college for a few weeks. All of my buddies from high school were home and having fun and had no desire to spend hours every day in a gym or on a football field. But, I knew I needed to put in the work because my teammates were somewhere doing the same thing. It also reminds me of those minutes after I put my uniform on and before I hit anyone in warmups right before a game. My nervous energy was through the roof and there was no outlet to dissipate that pent up anxiousness and adrenaline. I knew I needed to get that first hit in before the game started so I could get it out of the way and focus. Sure, my adrenaline was going stay so high that I would twitch all the way up until the opening kick went in the air, but I had to make sure my head stayed on straight so I could focus. In both situations I found that I wasn't alone and I needed to rely on people that felt the same way; my teammates. When I was lonesome at home training, all I had to do was pick up my phone and text or call anyone of my teammates and that loneliness somehow eased a little as we could commiserate together. I also found that I could bang heads with a teammate before a game and get that first cage rattle and we both could then focus a little better. The loneliness in the preparation, unfortunately, was necessary to get better every day. The anxiousness was also a necessary evil that I oddly miss because that energy was addicting and is so hard to recreate, except for right now as I prepare for this trial.

I know I have a good case and I've got a shot in this trial. Frankly, if I ever stop feeling anxious before a trial, I need to find a new job. I think that a lot of us probably feed off that nervous energy and that's what makes us good at what we do and that's really why we do this. As much as we may hate the sleepless nights before trial, we are addicted to the nervous energy and adrenaline. I know I'm going to feed off that anxiousness until the moment I stand up and begin my voir dire. As soon as my brain switches from nervous energy to focus, I'm good.

The loneliness, however, will always, but it is a necessary evil. Luckily, each of us should know that we have almost 4,000 brothers and sisters who we can take a few minutes to call or text when we are in that pit of preparation and anxiety. Each of us needs to make sure that we have a circle of friends in this Organization that we can lean on for times like this. Friends, who like my teammates, have felt the same way that I do right now, and friends who know that they can text or call me when they are stuck in the same feeling of isolation. If anyone of you ever need someone to call or text, please reach out. I'm happy to be a teammate.

Be safe,

Jeep Darnell

Ethics and the Law

SHANE PHELPS

The Story of Atticus Finch Day

Every year for the past fourteen years in Brazos County, attorneys gather, clad in seersucker apparel, to pause and reflect on the ideals embodied in the character of Harper Lee's fictional southern lawyer, Atticus Finch. Not surprisingly, we call it "Atticus Finch Day." We come together as a bar, as colleagues, and as friends, to re-commit ourselves to the nobility of our profession and to representing our clients zealously and ethically without tearing each other apart in the process.

I have been asked many times about the origins of Atticus Finch Day.

Here is how it came to pass.

Every lawyer, at one point or another in his or her life or career, has pointed to Atticus Finch as an inspiration. We revere his courageous fight to defend an innocent black man in the segregated South from charges of raping a white woman. We pontificate about his ethics, his quiet strength, and his willingness to do the right thing without regard to personal consequence.

We cite Atticus as our ideal and, far too often, we fall short.

Atticus Finch Day was born as a hopeful answer to a courthouse community that had become so fractured and dysfunctional that lives were being affected. Political vendettas, personal discord, email scandals, runaway grand juries, courts of inquiry, animosity between the District Attorney's Office and the County Attorney's Office, tension between prosecutors and defense attorneys, rampant rumor, and gossip, all contributed to a pretty unpleasant place to work.

And lest anyone suggest that I am being holier-than-thou, I wholly and completely accept my share of the blame and regret every minute of it.

For me, it all came to a head during a heated jury trial in the 361st District Court. I, along with another assistant district attorney, Cory Crenshaw, was prosecuting an attorney for multiple counts of forgery. The attorney had become involved in email scams involving counterfeit checks. She represented herself and local attorney Phil Banks was appointed by the Court as "stand-by counsel" to assist her during the trial.

Phil and I had dealt with each other from time to time while negotiating pleas in criminal cases. Phil was always friendly and jovial, and I enjoyed his visits to my office. We were not close friends, but we were friendly. Phil is "old school Bryan" and I was still a relative newcomer to Brazos County, having moved just a few years prior from Austin to accept a position with the DA's Office.

The trial was difficult, as is always the case with a *pro se* defendant. And, it was especially difficult for Phil, a veteran trial attorney, to watch as the attorney on trial slowly but surely convicted herself.

According to my former boss, I had developed a reputation among the defense bar as a somewhat relentless and dogged prosecutor in trial. Sometimes, I could not tell when enough was enough.

At one point several days into the trial, I saw what I thought was an important opportunity to raise an issue and present additional evidence that would have, in retrospect, prolonged the trial unnecessarily. As I look back at that point in the trial, even though she "opened the door" wide, the case was already over.

And Phil had had enough. Arguing the admissibility, relevance, and necessity of the evidentiary path I was attempting to take, we found ourselves nose-to-nose about six feet in front of the jury, red-faced, in an epic stare-down.

Then Phil said it: "Make my day, Phelps." I looked

down and saw that his fists were clenched, and he was ready to "throw down" right there in front of the jury.

Turns out, Phil had a temper.

I said to Phil something like: "You're not the man I thought you were." It was a stupid thing to say in the heat of trial.

The Judge called strategically for a break, and I retreated to the District Attorney's Office. About five minutes later, Phil came to the District Attorney's Office and apologized to me. I apologized to him. We hugged.

At least that's how I remember it.

Phil and I became very good friends. And we both regretted our conduct in the courtroom that day. As our friendship and mutual affection grew, we revisited the whole episode frequently. We both agreed that we fell short.

About this time, I reread *To Kill a Mockingbird*. I had read the novel in my teens, and it was a big part of the inspiration for me personally to go to law school. It occurred to me in rereading the book and reacquainting myself with Atticus Finch that I could do better as an attorney. Being an attorney is much more than winning cases and making money. It is, or should be, about righting wrongs, seeking justice, and bettering my community. Ours is a noble profession, despite what some may think, and incredible good has been accomplished by courageous attorneys motivated by the right ethics and principles. Like Atticus Finch.

I approached Phil with an idea. In an interesting irony, when we delivered our final arguments in the trial in which Phil and I had our confrontation, we both showed up in seersucker suits. Atticus Finch wore a seersucker suit. I asked Phil if he would join me in attempting to gather attorneys together at least once a year to rededicate ourselves to the ideals we often point to in Atticus Finch but frequently fall short of. We could dress in seersucker apparel, drink lemonade, talk about why we revere Atticus Finch, read passages from the novel, and commit to working harder in the coming year to do better, to be more like Atticus Finch.

Phil was enthusiastic and we worked together each year since to build Atticus Finch into a meaningful observance at which we and our fellow attorneys could resolve to be better advocates, aspire to more noble ends, and to treat each other gently, or at least gentler, in the process.

Regarding the latter aspiration, treating each other more civilly while advocating for our clients, I looked to the Texas Disciplinary Rules of Professional Conduct to see what it said about this issue. While it imparts important rules and comments about not unnecessarily delaying litigation, not filing frivolous lawsuits, and being honest and candid in our dealings with the courts and opposing counsel, I did not find much that specifically deals with how we should treat each other as colleagues.

So, I turned to what I believe has been an overlooked canon of professional conduct, "The Texas Lawyer's Creed: A Mandate for Professionalism." The Lawyer's Creed was issued in 1989 by the Texas Supreme Court and the Texas Court of Criminal Appeals, a product of the Texas Supreme Court Advisory Committee on Professionalism, chaired by Justice Eugene Cook, often called the "father of professionalism" in Texas. Justice Cook was a gentleman lawyer who believed strongly that we, as lawyers, should not lose sight of the basic tenets of civility in the fight for our clients.

The purpose and philosophy of The Lawyer's Creed is stated in the first paragraph of the Creed:

"I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but

I know that professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this creed for no other reason than it is right."

Article III of the Lawyer's Creed directly addresses how we should deal with each other in the practice of law. The preamble to Article III reads:

"A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct."

Courtesy. Candor. Cooperation. An exhortation against unprofessional conduct, even in the face of unprofessional conduct levied against us. These are the tenets of basic decency in human interaction. And they apply doubly in a field such as ours in which conflict and disagreement is a part of every day of a criminal defense attorney's practice.

Following the preamble to Article III of the Lawyer's Creed are 19 personal pledges. Of particular relevance to what we are trying to accomplish with Atticus Finch Day are numbers 9 and 10:

I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.

I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.

There are 17 more that bear reading and aspiring to. I realize it is sometimes hard to give obstinate prosecutors the benefit of the doubt, but striving not to be the person who starts unprofessional conduct or being drawn into unprofessional conduct is to be more like Atticus Finch. So, every year, we gather to remind ourselves that the practice of law can be noble, civil, and effectively accomplished without tearing each other apart in the process. If you are like me, unnecessary conflict is painful and weighs on me in unhealthy ways. *Reading To Kill a Mockingbird,* aspiring to be more like Atticus Finch, giving my opponents the benefit of the doubt until they conclusively prove they don't deserve it, and adhering to the guidance of The Lawyer's Creed has eased my stress and made the practice of law far more rewarding.

And so, we created Atticus Finch Day. And copies of The Lawyer's Creed are always displayed and made available to attending attorneys.

The first year, we met in the elevator lobby of the courthouse. There were about 10-15 of us and we all listened as local criminal defense attorney Billy Carter read his favorite passages from *To Kill a Mockingbird* and exhorted us to strive to be better lawyers, like Atticus Finch. The event has grown each year and we had to move to a bigger venue, the Atrium area in the Brazos County Administration Building. Our crowds have grown steadily. Last year, we were standing room only.

Over the years, Atticus Finch Day has featured some of the best lawyers in Texas giving their take on Atticus Finch and the practice of law. Rusty Hardin, John Raley, former Chief Justice Wallace Jefferson, Buck Files, Cathy Cochran, and many others have shared their moving perspectives on life as a zealous and ethical attorney. On our tenth Atticus Finch Day, Michael Morton brought a crowd of well over 150 to their feet after his emotional speech about his ordeal in the criminal justice system and the lawyers who worked so hard to free him.

Humbly, I think it has made a difference. At least it has for me. I'm a better lawyer today for having taken the time each year to revisit the reasons I became an attorney and reflect on the good that can be done with a law degree in the hands of an ethical and determined attorney. And my friendship with Phil has made me a better person.

Sadly, my partner in this adventure, Phil Banks, passed away recently. It was a huge blow to our local bar. Phil was larger than life and known and loved by all. He was my friend, and I will miss him greatly. Atticus Finch Day this year will be dedicated to Phil.

The courthouse is a calmer and friendlier place these days. At least it seems that way to me. I hope that Atticus Finch Day has had something to do with that. Every courthouse should have such a celebration. I am happy to share how we do it in Brazos County with anyone interested in launching a similar event in his or her community.

And, by the way, Phil would have laid me out with one punch.

Shane Phelps *is the founder and lead attorney at Shane Phelps Law in Bryan, Texas. Shane is a former United States Marine, a graduate of Rice University and the University of Texas School of Law, and is board certified in criminal law. He is in his second term as a member of the Board of Directors of TCDLA. Licensed in 1987, Shane is a former prosecutor and has been practicing criminal defense since 2011. He lives in College Station Texas with his wife, Jean.*

Texas Criminal Defense Lawyers Association

Access Your Publications on the App!

Download the New TCDLA App:

Access your purchased publications, read the latest news and articles, quickly locate TCDLA programs, and connect with your association peers – all on the new TCDLA App.

Available on the App Store

GET IT ON Google Play

Features Include:

- Newsfeed – the latest news of interest to the legal practitioner
- Update Profile
- Join or Renew Membership
- Register for a CLE
- Shop for Merchandise or Publications
- Donate to a Scholarship Fund
- TCDLA Twitter Access

TCDLA Member Features

- Member Directory – Easily find and contact TCDLA members by name or location
- TCDLA Codes - Includes criminal codes, statutes, and case law.
- Events – View and register for upcoming TCDLA seminars
- Listserv – Continue connecting with our community on important issues
- Resources - A library including motions, transcripts, briefs, seminars, and more
- TCDLA Sidebar Podcast – Listen to new podcast episodes straight from the app

Texas Criminal Defense Lawyers Association

BILL HABERN CORRECTIONS & PAROLE

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

OCTOBER 5 - 6:

AUSTIN SOUTHPARK HOTEL

The seminar is sponsored by CDLP, a project of TCDLA, funded by the Texas Court of Criminal Appeals.

The Federal Corner

JOEL PAGE

Second Amendment Challenges to 18 USC §922(g)(1) The Felon in Possession Law – Heat Up

As Chrissy Hynde would say: "*don't get me wrong*." The overwhelming weight of federal authority, even after *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S.Ct. 2111 (June 22, 2022), holds that §922(g)(1) is constitutional in all instances, and certainly against a person with the kind of criminal record that is likely to bring him or her to the attention of federal prosecutors.

But as Bob Dylan would say: "*something is happening here and we don't know what it is.*" Three federal court opinions, all issued since the beginning of June, have declined to accept the prosecutor's assurances that felons categorically lack Second Amendment rights. Two of these opinions – *Range v. Attorney General*, 69 F.4th 96 (3d. Cir. 2023) (en banc), and *United States v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309 (S.D. Miss. June 28, 2023) -- actually found a constitutional violation and awarded relief. The third, a divided panel of the Seventh Circuit, remanded the case so that the parties could do a better job of combing the history books in search of information about the Second Amendment rights of felons. *Atkinson v. Garland*, 70 F.4th 1018 (7th Cir. 2023). Again, this represents a small minority of the post-*Bruen* caselaw, and of the three only *Bullock* represents a broad challenge to the statute. Nonetheless, it's notable that in the course of a month three courts have seriously entertained a constitutional challenge to a staple federal criminal statute. It's probably time to pay attention.

BACKGROUND TO *BRUEN*

In *District of Columbia v. Heller*, 554 U.S. 570 (2009), the Supreme Court held that the Second Amendment protects an individual right to own guns unconnected to military service. But it included the following dicta:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.
>
> *Heller*, 554 U.S. at 626-627.

After *Heller*, the courts of appeals settled on a two-part test to evaluate gun regulations. See Bruen, 142 S.Ct. at 2126-2127 (recounting this test before abrogating it). First, the court would determine whether the challenged regulation comports with the Second Amendment as originally understood, as judged by text and history. If it is consistent with this original concept of the Amendment, the regulation would survive scrutiny. But if not, it might still survive under a means/end scrutiny akin to equal protection analysis. Essentially, this second part of the test would weigh the burden on Second Amendment rights against the government's interest in preventing violence.

Bruen held that this formula contained "one step too many." Under *Bruen*:

> [w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.
>
> *Bruen*, 142 S. Ct. at 2129–30.

The first sign that *Bruen* might affect §922(g) was the Third Circuit's en banc decision in Range. Range sued the Attorney General for permission to possess a gun notwithstanding his prior 20-year-old felony conviction for falsifying his food stamp paperwork. The Third Circuit ruled in his favor, rejecting the government's reliance on *Heller's* "long-standing prohibitions" dicta. As the court noted, the first federal prohibition on felon gun possession didn't come until the 1930's and the first one targeting non-violent crimes didn't come until 1968. The court also rejected the government's contention that felons are not among "the people" referred to by the Second Amendment. Finally, it rejected three historical analogues offered by the government to §922(g)(1): 1) discriminatory laws enacted near Founding that forbade

gun-ownership by African Americans, Native Americans, Loyalists, Catholics, and Quakers,1 2) the fact that felonies were capital at Founding, on the theory, perhaps, that dead men neither wear plaid nor bear arms2, and 3) laws near Founding that called for the forfeiture of weapons used in a crime. The Third Circuit didn't think any of these sounded like §922(g)(1). And although it described the opinion as narrow, and clearly seemed to be influenced by the innocuous nature of Range's priors, the Third Circuit did not provide any clear standards for differentiating good claims from bad - a point not lost in the dissent.

On June 20, 2023, the Seventh Circuit got into the act in *Atkinson*, chastising both sides, but especially the government, for the failure to build a historical record regarding the history of felon disarmament. It closed with a lengthy list of questions for the parties and the district court to answer, likened by the dissent to a demand for "a Ph.D.-level historical inquiry that necessarily will be inconclusive." While *Atkinson* obviously does not stand for the proposition that §922(g)(1) violates the constitution, even as applied, the majority certainly wouldn't have bothered with the remand unless it harbored some doubt about the statute's constitutionality.

Five days later, the Chair of the Sentencing Commission, Judge Reeves, of the Southern District of Mississippi, dismissed a §922(g)(1) indictment in *Bullock*. That opinion is lengthy and not entirely unsalty, containing a detailed critique of the originalist method that brought us to this point, and of *Heller* and *Bruen*. Following those decisions, however, it concludes that §922(g)(1) is unconstitutional even as applied to a defendant with prior convictions for aggravated assault and manslaughter. Indeed, the court makes exceptions only for state laws that disarm felons and people whose priors would expose them to the death penalty today. It's a fascinating read, and the reader may get the sense that it is intended to call a bluff.

What's next? *Range* is in clear conflict with the holding of the Eighth Circuit in *United States v. Cunningham*, 70 F.4th 502 (8th Cir. 2023), which holds the statute constitutional against all Second Amendment comers. Given the circuit split and the importance of the issue, a certiorari grant is all but assured. Were I a betting man, I'd bet the statute survives, but I wouldn't bet the house on it.

1 Of course, each time the government makes this argument, it hastens to add that these laws would violate the 14th Amendment if enacted today. The reader nonetheless does not get the impression that the government has fully considered the logical or moral implications of its argument: it has urged the courts to use an explicitly racist law at Founding as the baseline for contemporary constitutional rights. It surely cannot be the law that everything states did to racial minorities in the antebellum period they may do to everyone today, so long as they do so equally.

2 But see Tom Metcalfe, "Viking sword from warrior's grave unearthed in family's yard in Norway," Live Science (July 6, 2023), available at https://www.livescience.com/archaeology/vikings/viking-sword-from-warriors-grave-unearthed-in-familys-yard-in-norway. Although the Third Circuit didn't say as much, the government's argument, if accepted, would also seem to imply that felons lack First, Third, Fourth, Fifth, Sixth and Seventh Amendment rights, since none of them may be exercised beyond the grave either.

Joel Page *is the Appellate Supervisor for the Federal Public Defender of the Northern District of Texas, where he has worked for 17 years. He secured a favorable opinion form the Supreme Court in Davis v. United States, 140 S. Ct. 1060 (2020), and quite a lot more unforable opinions from the Fifth Circuit over the years.*

Beyond the City Limits

PAUL HARRELL

Beyond City Lights

Coryell County is bordered on three sides by Ft. Cavazos (recently renamed from Ft. Hood) but does not share any of the urbanity of neighboring Bell or McClennan Counties. As such, Coryell County cannot resource a Veteran's Court. Like many rural Texas counties near military installations, there is an ever-growing need for Veteran representation. All troops who have been separated from active duty have access to one document that can help form a positive narrative for them: the DD 214.

If an individual is separated from active duty for any reason (discharge, retirement, cause), he or she is given an exit form promulgated by the Department of Defense [DOD], Form 214, that informs the entirety of the individual's career and character of service. It is necessary to review this form during any consultation to have a rudimentary understanding of the active-duty time. This is a quick and useful reference for the criminal defense practitioner about how to use and interpret some of this information for the benefit of the client.

Most DOD forms have boxes and numbers, and this form is no exception. However, not all the boxes tell the complete story. If you've never seen one, there are blank samples readily available online and I would suggest you look at one before an initial consultation with a Veteran. There are certain boxes which I always review during a consultation.

Box 2 will tell you the branch of service the Veteran was discharged from. Box 4a and 4b list the grade, rate or rank and pay grade at the time of separation. You will see further down how they were discharged but the latter two are going to be keynotes in your consultation. Rank and pay grade in the military are numbered. Regardless of the years of service, if the rank is E-2 or below, there is a likelihood that the character of service may be affected. At the least, there may have been some military discipline that caused a rank reduction. There are always possible reasons for non-promotion, so it is imperative to inquire.

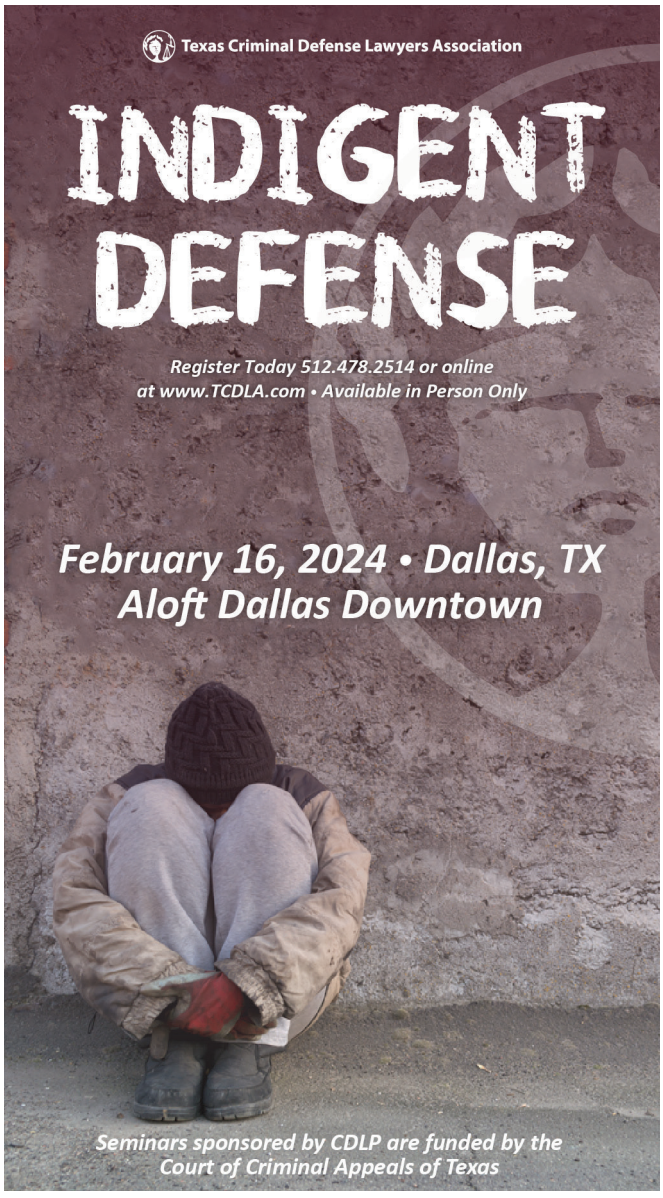
Box 11 lists the Military Occupational Specialty (MOS), which describes the job the service member performed during active duty. The numbers don't translate across all branches of the military, but there should be a named designation as well. There will be a primary MOS, but if a troop does any specialty for one year and a day, they are entitled to that secondary MOS whether they had formal training in the subject matter or not. This section is important during the consultation because if the Veteran wasn't combat arms, or never did combat arms, he/she probably never trained for loss or had direct counseling after a trauma event.

Box 12 a-h is a detailed record of service dates, including prior service, but during consultation it is important to focus on (f) and (g), foreign service and sea service, as these are indicators of deployments. Time spent on a ship or in a foreign country may have an adverse effect on physical, mental, and relationship well-being. Whatever the consultation is regarding, this time away from home may be a key contributing factor. Remember that the DOD normally shows the date as year first and day last, i.e., 230901 is September 1, 2023; in this section, though, they do the calculation as years, months, and days.

Box 13 lists any awards or citations. Any personal award will come with a write-up detailing the award. If that write-up exists, you will want to get your hands on it and use it in your defense. Box 18 will detail any armed combat or specific mission support even though it is simply titled, "Remarks." Box 24 will tell you the nature of service, i.e., honorable. Box 28 is the type of separation (retirement, discharge, etc.). If remotely positive, all of this can be used in negotiations, grand jury packets, or just to start a conversation with the veteran about help or services available to them. A mere 30 boxes on one sheet of paper may not seem like enough, but there is plenty

of information to at least start a narrative. Going through the DD 214 with the Veteran may help open the dialogue for a story, and it is my practice to request a copy at every Veteran consultation. Be aware there are plenty of errors in these forms and many Veterans don't understand the importance of keeping them handy. So, at a minimum, your review of this document may help them in resolving any matter before them.

Paul Harrell *is a solo practitioner of criminal defense in Coryell County. He served honorably in the USMC from 950701 to 030821 and has been a TCDLA member since 080601. It took me 17 years to gather the courage to go to the VA and get some services and a disability rating, so I have renewed my passion for helping Veterans navigate the legal system. I also serve as a "translator" for civilian lawyers in the hopes that both groups see good results.*



TCDLA STRIKE FORCE

Providing assistance to lawyers threatened with or incarcerated for contempt of court. Call 512-478-2514 or email Nicole, nicole@debordelawfirm.com or Reagan, rw@reaganwynn.law.

Co-Chairs

Nicole DeBorde Hochglaube
Reagan Wynn

District 1

Jeep Darnell
Jim Darnell
Mary Stillinger

District 2

Tip Hargrove

District 3

Chuck Lanehart
Bill Wischkaemper

District 4

Heather Barbieri
Darlina Crowder
Kyle Therrian

District 5

Stephanie Patten
Greg Westfall

District 6

Kristin Brown
George Milner, III
Russell Wilson, II

District 7

Sean Hightower
Bobby Mims
David Moore

District 8

Steve Keathley
Michelle Latray

District 9

Betty Blackwell
David Botsford
David Frank

District 10

Joseph Connors
Don Flanary
Gerry Goldstein
Michael Gross
Angela Moore

District 12

Sheldon Weisfeld

District 13

James Makin

District 14

Danny Easterling
Robert Fickman
Murray Newman
Grant Scheiner
Stan Schneider
Jed Ross Silverman
Lisa Teachey
Quentin Tate Williams

Bond Advocacy for the Active-Duty Military Member Charged in State Court

MATTHEW J. HEFTI

When an active-duty military member is arrested by the local civilian authorities, they are not entitled to a defense attorney from the JAG corps like they would be if they were charged in the military courts under the Uniform Code of Military Justice (UCMJ). The member will be on their own to find legal representation like any other citizen accused, whether by privately retaining one or by having one appointed for them if they cannot afford one. Given the enormous military presence in Texas, odds are good that if you're a criminal defense attorney, you will at some point field a call to potentially represent an active-duty military member needing representation in state courts, even if you have no prior connection to the military legal system.

Often, as with many clients, the first call for representation may come when the active-duty client is already in custody after an arrest. And when an active duty servicemember is in the custody of the civilian authorities, they face serious collateral consequences and the danger of further legal trouble in the military in a way that civilians in similar situations do not.

In addition to any charges they currently face, any violation of state or federal law can also subject a military member to criminal prosecution in the military legal system under the UCMJ, in either adverse administrative proceedings or in criminal proceedings in Article I Courts-martial. Military members are also subject to the orders of members of their chain of command, which often carry the force of law. This means that the active-duty client who is in custody faces all the same challenges and hardships as any other citizen accused, but they also face the risk of additional criminal charges from a separate sovereign for failing to appear for duty. The state court practitioner must be ready to spring into action and use all the tools available to secure the release of their active-duty client as quickly as possible. This article will discuss the important steps and information to be gathered to best represent the active-duty client. With that said, I have provided an Application for Writ of Habeas Corpus and Motion to Set Reasonable Bond that tracks the contents of this article below.

Without delay, obtain as much information as possible about the active-duty client's current military assignment and status. In addition to all the same information you'd get from any client, you'll also want to obtain the name, rank, and contact information for any military peers who may be willing to write a favorable character letter; the name, rank, and contact information for any immediate military supervisors; and the name, rank, and contact information for the client's commanding officer.

At the bare minimum, obtain the client's unit of assignment, rank, and duty station. With even this minimal information, you can look up the number for the base operator at the military installation where they are stationed to locate the commanding officer of their unit. It's important to communicate right off the bat with the client's chain of command to keep them apprised of the situation involving their troop, and—to the extent possible—establish a rapport and enlist their assistance in securing the release of your client.

As with any client, begin crafting your client's story early. Seek out peers and immediate supervisors to write declarations to present as evidence with a motion to reduce bond or with a pretrial writ. Nearly all active-duty military clients will have at least one or two buddies who are willing to say some nice things about them. Have them address the client's good character, reliability, and reputation for following rules. I've found many military supervisors will bend over backward to help their troops out of a jam. Even if they aren't fond of your client, very few military supervisors would be unwilling to explain in plain and factual language what the client's job is and why it's important to the unit—and, thus, why it's important to the security of our nation—that the member be present in the unit to do their assigned duties.

Commanders also have the discretionary authority to restrict members to the duty station. While few military members would find the idea of being confined to the installation an attractive option—especially if they normally live off post—it may become a much more attractive option to the client if their alternative is being confined in the county jail or paying hundreds of dollars per month in electronic monitoring fees upon their pretrial release. Even if a commanding officer is reluctant to vouch for the service or character of your client, a simple declaration from the client's commanding officer representing that the member will be restricted to base and that the member's chain of command will cooperate with local authorities to ensure the member appears for all court appearances is powerful evidence to persuade an elected county judge to release a client on the condition that they remain on the military installation.

If you cannot secure any assistance from the client's commanding officer, consider suggesting to the judge in the appropriate case that they impose a restriction to the military installation as a condition of the member's bond. It reduces the risk to the public (and their constituency); it increases the odds the member will appear for trial; and, to some degree, it makes the client someone else's problem instead of theirs.

Securing an active-duty client's release from pretrial confinement is only the first step in a long road that can often be more strategically complex than defending a civilian. However, that defense will be far easier when your client is making meaningful contributions contributing to their unit's mission on a daily basis and available to assist in preparing their defense. And whether it's bond advocacy or any other stage of the proceeding, the members of the TCDLA Veterans Assistance Committee are a valuable resource; always willing and eager to help with any questions you may have about representing military members, whether veterans or still serving.

Motion accessible at tcdla.com under Members Only Section in Motions Bank

CAUSE NO. _____

EX PARTE	§	**IN THE DISTRICT COURT**
	§	*****th JUDICIAL DISTRICT**
CLIENT	§	***** COUNTY, TEXAS**

APPLICATION FOR WRIT OF HABEAS CORPUS AND MOTION TO SET REASONABLE BOND

CLIENT, Defendant in the above-styled and numbered cause, acting by and through his attorney, moves this Court to grant a Writ of Habeas Corpus and set a reasonable bond in this cause; and in support of this Application and Motion Defendant shows the following:

1. This Application and Motion is made pursuant to Arts. 1.07, 11.24, and 17.15 of the Texas Code of Criminal Procedure; Art. I, §§11 and 13 of the Texas Constitution; and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
2. Applicant, CLIENT, is illegally confined and restrained of his liberty by the Sheriff of Bell County, Texas, in the Bell County Jail in Belton, Texas, in lieu of a bond in the amount of $100,000. CLIENT is charged with the offense of *** under Texas Penal Code ***, a felony of the *** degree. The allegation has not been indicted. CLIENT has not been in custody long enough to trigger the protections of Article 17.151.
   CLIENT is not a threat to the complaining witness or to the public.
3. CLIENT is not a threat to the public. CLIENT has no prior criminal history, no history of substance abuse, and no history of violence. The current allegations against him do not involve force or the threat of force.
4. Apart from the current unindicted allegations, CLIENT has a clean military service record and the respect and support of his military leadership. (Declaration of MILITARY SUPERVISOR).
5. CLIENT has a reputation and character for being an outstanding soldier, a dedicated worker, a respected peer, and a respectful person. (Declaration of MILITARY COLLEAGUE).
6. CLIENT is willing to comply with any reasonable conditions of bond imposed by the court to ensure the safety of the complaining witness and the public, to include having no contact by any means with the complaining witness and staying restricted to the Fort Hood military installation except to appear as this court and his military duties may require.
7. Simply put, the facts of this case show that CLIENT is not a continuing danger to society and that he will appear in court as required.
   CLIENT is not a flight risk.
8. The primary purpose or object of an appearance bond is to secure the presence of a defendant in court for the trial of the offense charged. *Ex parte Rodriguez*, 595 S.W.2d 549, 550 (Tex. Crim. App. 1980).
9. CLIENT has a history of reliable employment. His active-duty military status and assignment to Fort Hood give him strong ties to the community. CLIENT is not a flight risk. His military supervisor attests to his character and reliability. His family is in LOCATION, but his FAMILY MEMBER attests that CLIENT will appear for court, he has the support of his family, and they will encourage him to appear. (Declaration of FAMILY MEMBER).
10. Generally, bail is oppressively high if the amount is more than necessary to provide reasonable assurance that the accused will appear in court. *Ex parte McDonald*, 852 S.W.2d 730, 732 (Tex. App.—San Antonio 1993, no pet.). This court already has reasonable assurance that the accused will appear in court by virtue of CLIENT's active-duty status. CLIENT's military supervisor affirms that both he and CLIENT's chain of command will ensure that CLIENT appears as required. (Declaration of MILITARY SUPERVISOR).

11. CLIENT is not a flight risk because his movements and behavior are controlled by a separate sovereign. *Gamble v. United States*, 139 S. Ct. 1960, 1967 (2019) ("[A] crime against two sovereigns constitutes two offenses because each sovereign has an interest to vindicate."). As a military servicemember, CLIENT is subject to the Uniform Code of Military Justice (UCMJ). Because of his military status, if CLIENT fled or failed to appear as required, he would not only face repercussions from the State of Texas, but he would also expose himself to serious federal criminal charges under the UCMJ. See, e.g., UCMJ Art. 86 (10 U.S.C. 886), Absence without leave; UCMJ Art. 87a (10 U.S.C. 887a), Resistance, flight, breach of arrest, and escape; UCMJ Art. 87b (10 U.S.C. 887b), Offenses against correctional custody and restriction; UCMJ Art. 92 (10 U.S.C. 892), Failure to obey order or regulation.
The current bond set in this case is oppressively high.
12. The restraint of Applicant is illegal because Applicant is entitled to a reasonable bond under the statutory and constitutional provisions set out above, and the current bond is oppressively high. Courts should not set bail so high as to be oppressive, but they should only set bail high enough to provide reasonable assurance that the defendant will appear at trial. *Ex parte Ivey*, 594 S.W.2d 98, 99 (Tex. Crim. App. 1980).
13. The bond amount is set in this case is excessive. Defendant has insufficient funds individually and is unable to raise enough funds through family and friends, to post either a cash bond or to pay the professional bondsman premium required for a surety bond in that amount.
14. CLIENT is a RANK in the United States Army. He lives in the Fort Hood barracks. His monthly pay is $***, before taxes and living expenses are considered. Furthermore, during his confinement, CLIENT forfeits his pay and entitlements from the military. DoD Financial Management Regulation, Volume 7A, Chapter 03, § 030204(A), available at https://comptroller.defense.gov/Portals/45/documents/fmr/archive/07aarch/07a03.pdf.
15. The bond amount currently set in this case—greater than three times CLIENT's annual salary as a United States Army Soldier—far exceeds the amount necessary to ensure Defendant's appearance at all court proceedings in this case. It effectively creates a "no bond" situation that results in illegal confinement and restraint of the Defendant.
CLIENT's release on a personal recognizance bond pre-trial serves important public policy interests.
16. "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *U.S. v. Salerno*, 481 U.S. 739, 755 (1987).
17. Data shows that too often pre-trial detention is the norm rather than the exception.
18. The spirit of the bond system itself is grounded in presumptive release pending trial in most cases, and available data shows that not doing so with low-risk, low-level offenders actually increases the likelihood of re-offense, inverting one of the principal purposes of bond. Yet 75% of people held in county jails today are pretrial detainees who haven't been convicted of an offense, which costs taxpayers at least $1 billion every year.
Interim Report to the 86th Legislature, House Committee on Criminal Jurisprudence, January 2019, at 40 (internal citations omitted), available at https://house.texas.gov/_media/pdf/committees/reports/85interim/Criminal-Jurisprudence-Committee-Interim-Report-2018.pdf.
19. CLIENT fills the military occupational specialty of ***. His release will allow him to continue his assigned military duties as an "invaluable asset" to his unit and their "important national security mission." (Attachment 1, Declaration of MILITARY SUPERVISOR).
20. Furthermore, if CLIENT's confinement continues, his inability to work and earn a living will make him indigent and will require that the taxpayers pick up the tab to provide him a constitutionally adequate defense. If, on the other hand, CLIENT is released pre-trial to resume his military duties as he awaits trial, he will once again be entitled to his military pay so he may remain self-sufficient, raise funds for his legal defense, and save the taxpayers of Bell County significant money that would otherwise be required to house him and provide the "raw materials integral to the building of an effective defense." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

CLIENT requests a personal recognizance bond with a promise to appear. In the alternative, he requests a reasonable cash bond of $1,000.

21. Because CLIENT is not a flight risk, and this court has reasonable assurance he will appear to face charges, CLIENT requests a personal recognizance bond.
22. If the court finds it necessary, CLIENT requests a personal recognizance bond with appropriate conditions, such as

restriction to the Fort Hood military installation and a protective order for the complaining witness.

23. If the Court is unwilling to issue a personal recognizance bond, CLIENT requests a reasonable cash bail. Because CLIENT's limited financial resources and current lack of income due to his unauthorized absence from duty, he only has the funds required to post cash bond in the amount of $1,000 or a premium fee to a professional bondsman that equals the same, which will reasonably and adequately secure the presence of CLIENT before this Court and any other court to which this case may be transferred for resolution of this matter.

APPLICANT PRAYS that this court grant this Application and issue the Writ of Habeas Corpus and, upon hearing, set a personal recognizance bond in this case and release Applicant from the illegal confinement and restraint, subject to reasonable conditions to ensure the protection of the public. In the alternative, applicant prays that this court set a cash bond in the amount of $1,000 with reasonable conditions to ensure the protection of the public, and release Defendant from the illegal confinement and restraint.

Respectfully submitted,

_____

SIGNATURE BLOCK

Matthew J. Hefti *is a member of the TCDLA Veterans Assistance Committee. Prior to law school, he served twelve years on active duty as an Explosive Ordnance Disposal technician in the Air Force, with two combat tours to Iraq and two to Afghanistan. Mr. Hefti lives in Houston, TX, and is Counsel at Parlatore Law Group, LLP. He can be reached at* matthew.hefti@parlatorelawgroup.com *and at 832-916-3052.*

Welcome New TCDLA Members!

July 16, 2023 - August 15, 2023

Regular Members

Dirk Ryan Ashbaugh - San Antonio

Kimberly Rene Bronson - Galveston

Natalia Chavez - San Antonio

Cedric Davis - Houston

Anthony J. Fusco - San Marcos

Abraham Galaviz - Houston

Kathryn Elise Mecredy - Houston

Felix Readus - Houston

Kenneth Stillman - Dallas

Edgar R. Baez - San Antonio

Ty Czapla - Tyler

Jonathan C.C. Day - Houston

Zhonghua Lai - Round Rock

Adrianne Z. Norman - Katy

Affiliate Members

Courtney Bingham - San Angelo

Paralegal Members

Taylor Brayton - Plano

Student Members

Appresha Huff - Addison

Taylor Stringer - Griffin

Angie Vertti Canto - Dallas

Julia Vineyard - San Antonio

Public Defender Members

Salina Adolph - San Antonio

Garrett Cleveland - Kerrville

Brittany Durham - San Antonio

Elizabeth Harris - Dallas

Stacy January - San Antonio

Moka Vanessa Ndenga - San Antonio

47TH ANNUAL

Tim Evans Texas Criminal Trial College Registration • March 17-22, 2024

Completed Applications must be received by 5:00 pm on Dec 29th

❑ Male ❑ Female Bar Number: _____ Name: _____

Address: _____ City: _____

State: _____ Zip: _____ Phone: _____ Fax: _____

Cell phone: _____ Email: _____

Must be a licensed Texas attorney - ***Complete the entire application***

I would like to attend this training and have enclosed:

❑ $150 registration (refunds, less 10% processing fee, only for cancellations made before March 1, 2024). Registration price includes breakfast and lunch each day, dinner two nights, and hotel (double occupancy).

❑ This application plus a letter of intent telling us your level of trial experience. Additionally, please tell us why you want to attend the Tim Evans Texas Criminal Trial College.

❑ A letter of recommendation from a Texas judge (District, County, or Federal).

❑ A letter of recommendation from a criminal defense attorney.

❑ Single Room $575 ❑ Requested Roommate: _____

NOTE: After March 1st, cancellations will be charged the actual cost of $750 per person if we can't fill your spot.

You will be notified by January 22, 2024. Only complete applications will be considered.
*If you have special needs or are financially unable to pay, please contact TCDLA.

Credit card number: _____ Expiration date: _____

Signature: _____

❑ I applied last year ❑ I attended Criminal Trial College in: _____

Trial Experience: * *Please be candid about your trial experience, and do not exaggerate*

Number of Trials (as first chair only):

#_____Felony Jury #_____Felony Bench #_____Misdemeanor Jury #_____Misdemeanor Bench #_____ Civil Jury

Number of Trials (as second chair): **On a separate sheet explain your involvement*

#_____ 2nd Chair Felony Jury** #_____ 2nd Chair Misdemeanor Jury**

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

Other Training or Experience:

Law school: _____ Date graduated: _____

Other trial training courses taken: _____

Former Prosecutor: ❑ Yes ❑ No

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

_____

Public defender: ❑ Yes ❑ No

If yes, what office?: _____

Email: smartinez@tcdla.com | Fax: 512-469-0512 or mail to 6808 Hill Meadow Drive | Austin, TX 78736

The Tim Evans Texas Criminal Trial College is sponsored by CDLP, a project of TCDLA, funded by the Texas Court of Criminal Appeals.

Pharmacogentics

ROBIN BAESSLER

In my work as a criminal defense attorney, I've spent a lot of time getting clients into programs. Especially dual diagnosis programs treating both substance abuse and mental illness. Once I got my client into a program, I viewed my job as essentially done. The only obstacle I saw was whether there was a program available and whether I could convince the prosecutor and judge to agree. After presenting the program to the client as an alternative to jail or prison, I didn't put much thought into how to further assist the client with staying in the program or how to make the program more accessible to the client, other than advocating that the client be allowed to return after a relapse or assisting the client with the logistics of traveling to the program.

I was frustrated when some clients abandoned these programs. During one lively discussion with a colleague, I threw around words like, "personal responsibility" and "unwillingness," to which she responded, "The programs need to be better." While this discussion could be an entirely new article, I wondered if there was anything I could do to make mental health treatment more appealing to the client. Getting a client into a program is one thing, but is there a way I could help the client get through the treatment process successfully?

In many dual diagnosis programs, medication compliance is key to successful completion. If a client refuses medication, he or she will likely be terminated from the program. I heard many clients list negative side effects from psychiatric medications such as sleeping all day, feeling groggy, insomnia, and weight gain. Many clients who received mental health treatment prior to being charged with a crime have experienced some type of negative side effect from their prescribed medication. Also, many clients were frustrated at the idea that they were prescribed medication without regard to their individual needs. Or that their complaints about side effects were not being heard. All of these factors undoubtedly lead to frustration and, ultimately rejection of treatment.

All I could do was tell them to be patient and that it takes time to find the right medication to ease their symptoms. The medication must take effect and if there are too many negative side effects, then the medication must leave the system before a different medication can be introduced. I understood why clients want to give up on a program rather than endure weeks or even months to find the right type and dosage of medication. But I could see no other option. I believed this trial-and-error approach was the only way to find effective medication.

As it turns out, the developing field of precision medicine is using diagnostic testing to tailor medication type and dosage based on a person's genotype.[1] Pharmacogenetics, sometimes also referred to as Pharmacogenomics, combines the fields of pharmacology

1 https://www.healthit.gov/topic/scientific-initiatives/precision-medicine. The aim of precision medicine is to treat each patient individually.

and genetics to study specific genes that control how certain medications are metabolized.[2] It is hoped that information about how an individual may metabolize a particular medication will allow treatment professionals to either adjust the type of medication prescribed or adjust the dosage of that medication. Pharmacogenetics is meant to replace the method of responding to side effects after they present in the patient by obtaining and interpreting a genetic profile that flags potential issues with medications and dosages.[3]

The same drug does not affect everyone in the same way. Genes affect how a person responds to a medication in a variety of ways. A medication is processed in four basic stages: absorption, distribution, metabolism, and excretion. Medications are metabolized at different rates by different people. Also, different people are able to metabolize the same medication better than other people. For example, if a person metabolizes a medication slower than normal, that person will have too much of the medication in his or her body and will experience negative side effects (too much of the medication). Conversely, if a person metabolizes a medication faster than normal, he or she will break down the medication more quickly and will not have enough medication in his or her body, which results in little to no effects from the medication. Also, people metabolize different types of drugs better than others. For example, one medication may be poorly metabolized by one person, causing unwanted side effects or for the medication to not be effective at all. A pharmacogenetic test will characterize a person's metabolic rate and predicted reaction to certain medications.[4]

Pharmacogenetic tests target specific genes that affect metabolism. Certain enzymes are produced that affect how the body metabolizes drugs, such as those used to treat bipolar disorder, depression, and schizophrenia. Some patients are classified as "responders" and "non-responders," or people who process the medication too quickly or too slowly. The test results are expressed in three colors: green, yellow, and red. The manufacturers of these tests caution to not take these colors too literally: red does not necessarily mean the medication should not be prescribed, but rather that there may be potential issues that require adjusting the dosage or some other variation.

There are several agencies that catalogued and published lists of psychiatric medications that have been studied using pharmacogenetic testing.[5]

The cost is relatively low, around three to five hundred dollars, and appears to be covered by most health insurance, including Medicare. The test itself involves a cheek swab. The results take less than one week.[6] The cost-benefit analysis seems well worth it, both to the client who receives treatment as well as the social benefit of decreased recidivism. The effectiveness of pharmacogenetics is promising for persons in need of psychiatric medication.[7] Ideally, pharmacogenetic testing will shortcut many fruitless weeks of side effects and frustration. This interactive process will hopefully make the clients feel more engaged in a process that responds to their individual needs. In the end, perhaps the implementation of pharmacogenetic testing will result in even more clients receiving treatment that actually betters their lives. It is great to have more programs, but even better to make these programs appealing to as many people as possible with the use of pharmacogenetics.

2 https://www.nigms.nih.gov/education/fact-sheets/Pages/pharmacogenetics.aspx. National Institute of General Medical Sciences, Pharmacogenetics (March 2020).

3 Pharmacogenetics: The Right Drug to the Right Person, Aneesh T, Sonal Sekhar, Asha Jose, Lekshmi Chandran, Subin Mary Zachariah, J Clin Med Res, 2009; 1(4):191-194

4 Pharmacogenetics: Understanding the Basics: https://genesight.com/genetic-insights/pharmacogenetics-understanding-the-basics/.

5 NIH Genetic Testing Registry: http://www.ncbi.nlm.nih.gov/gtr. FDA Table of Pharmacogenomic Biomarkers in Drug Labeling: http://www.fda.gov/drugs/science-and-research-drugs/table-pharmacogenomic-biomarkers-drug-labeling. National Human Genome Research Institute: https://www.genome.gov/27530645.

6 Cost-Effectiveness of a Pharmacogenetic Test to Guide Treatment for Major Depressive Disorder, Erik J. Groessl, Steven R. Tally, Naomi Hillery, Alejandra Maciel, Jorge A. Garces. J. Manag. Care Spec. Pharm: 2018 Aug; 24(8): 726-734.doi: 10.185531/jmcp.2018.24.8.726.

7 Pharmacogenetics in Psychiatry: An Update on Clinical Usability, Ron H.N. van Schalk, Daniel J. Muller, Alessandro Serretti, and Magnus Ingelman-Sundberg. Front. Pharmacol. 11:575540; doi: 10.3389/fphar.2020.575540.

Robin Baessler *is an attorney at the Law Office of Thomas C. Fagerberg, PC, where she represents persons charged with crimes ranging from murder to DWI. She moved to Texas in 2022. She is originally from Los Angeles, where she worked as a criminal defense attorney for over sixteen years. One of her specialties is DNA evidence, garnered through her work in a specialized unit at the Los Angeles County Public Defender's Office, defending cases involving matches from evidence in cold-hit cases to DNA profiles in convicted offender databases. She also attended the National Forensic College, held annually in New York City through the Innocence Project. She can be reached at robin@fagerberglaw.com or 512-610-1090.*

Extra! Extra! Read All About it! Blue Warrant Update

SEAN LEVINSON

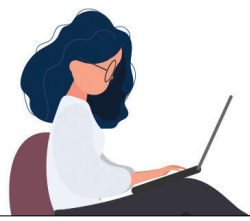
There has been a recent change in Blue Warrants and I wanted to provide an update on the changes and its impact on our clients.

Traditionally, any parolee who was accused of a violation had a Blue Warrant issued. These could be for technical violations or new offense violations. Technical violations are essentially any violation that doesn't involve a new offense. For example: positive drug tests, failure to maintain approved residence, leaving the state without permission, etc. New offense violations are exactly what they sound like – new alleged violations of the law. The new Blue Warrant changes affect only new offense violations; technical violations will still be handled as before.

Typically, when a parolee is arrested for a new offense, a Blue Warrant is issued almost immediately. Once in custody, the client is then provided a preliminary hearing and if probable cause is found, this normally results in the case being "held over" until the new criminal case is resolved. After the case is adjudicated in court, a revocation hearing is held to determine if the allegation is sustained and if so, what sanction to be imposed. The Blue Warrant is in effect the entire time. Clients who can bond out on the new offense are not able to get out of custody because of the Blue Warrant.

Recently, the Parole Division has taken a new approach to handle Blue Warrants. New offenses still generally trigger an automatic Blue Warrant. As before, after arrest, they are then provided with the option to have a preliminary hearing. **However, if probable cause is found at such hearing, the case is then not automatically held over until adjudication of that new offense.If an information has not been filed (misdemeanors), or a grand jury has not returned a true bill (felonies), within 41 days of arrest on the Blue Warrant, the Parole Division will then staff the case to determine whether the warrant shall be withdrawn. In other words, if after 41 days, the parolee is in custody only on an arrest and no charges have been formally filed against them, the Parole Division will staff the case to determine if the Blue Warrant shall be withdrawn.** If so, the client can then post bond on the new offense and return to parole supervision. If the case is eventually formally charged days, weeks, or months later, the Parole Division can then re-issue a Blue Warrant and the process starts all over again.

So what does this mean for our clients? Well, a



Get Published!

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

few things. First, as we know in some jurisdictions the Grand Jury only convenes a few times a year. Clients who otherwise would be sitting in jail for months waiting to see if formal charges will be filed, could now be released. They would then be free to go back home and resume employment while still reporting to parole. Secondly, in jurisdictions where it is commonplace, this may encourage attorneys to submit Grand Jury packets. Clients, now on bond, would be able to assist their attorneys in their defense and provide documents or witnesses that could be used in such packets. Lastly, with the client on bond and back on parole supervision, they could potentially finish their parole sentence prior to charges being filed.

Lawyers confronted with this situation should be encouraged to be proactive and reach out to the Parole Division to request a staffing to determine if warrant closure is appropriate. While I do not know how long these changes will be in effect, they do provide some assistance and a welcome relief to clients and their attorneys who have new offenses while on parole.

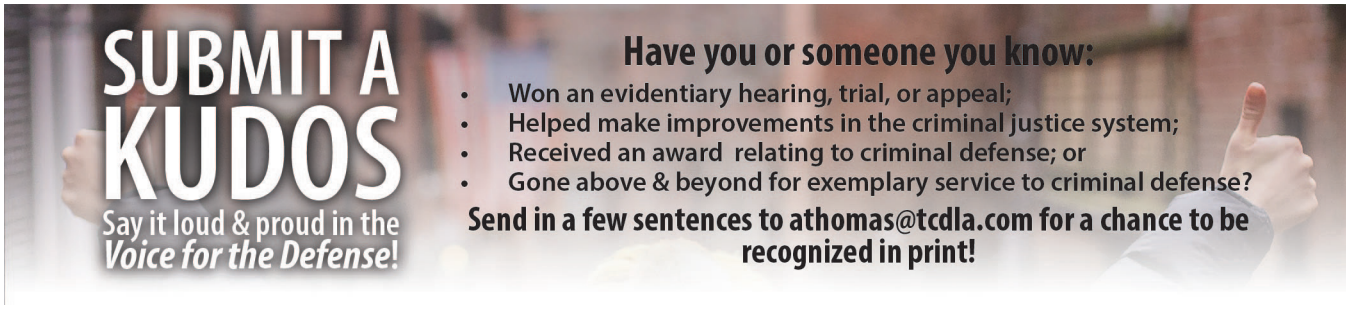
Sean David Levinson *is the founder of the Levinson Law Firm. Sean's office is a boutique law firm focusing on parole matters throughout the state of Texas. In addition to representing clients before the Parole Board, he also handles parole revocation hearings, Medically Recommended Intensive Supervision (MRIS) cases, Blue Warrant issues, pre-incarceration client consultations, and planning/strategy sessions with defense counsel. He frequently speaks on corrections and parole law topics for bar associations across the state of Texas. As a native Spanish speaker, he consults with clients in both languages. Sean graduated from Arizona State University with a double major in Business Management (B.S.) and Broadcasting (B.A.). He received his J.D. from Northern Illinois University. Sean holds an LL.M. from the Benjamin N. Cardozo School of Law/Yeshiva University. He is licensed to practice law in Texas, New York, and Illinois. He lives in Austin, Texas with his Yorkie, Indiana Jones. He is a certified scuba diver and his favorite band is Counting Crows. He can be reached at (512) 467-1000 or BetterCallSean.com.*

Shout-Outs!

Congrats to Paul C. Looney, Wade B. Smith, & Clay S. Conrad on winning their Motion to Suppress. Their client was a passenger in the backseat of a friend's car when they were pulled over for what officer's claimed was an illegal tint on the windows and a non-matching paper license plate. Body camera video showed the officers went beyond what the law allows for a pat-down and contradicted much of what the officers wrote in their reports. During cross-examination, each officer contradicted the others' testimony multiple times. Armed with the transcript of the hearing, Clay drafted a memorandum briefing all the issues for the judge and Wade gave closing arguments. The judge gave her ruling, agreeing that it was an illegal search, and granted the motion to suppress. This resulted in the State dismissing the case against their client. **Way to go!**

Shout out to Sheldon Weisfelt and Cesar de Leon. They got all charges dropped against their client, who was accused of failing to report large cash transactions during a series of real estate deals in Hidalgo County. **Fantastic work!**

Kudos to Gina Morgan and Spencer Robuck! Their client was charged with DWI 3rd or more. The two priors were pled a few years before just a couple of weeks apart in two separate counties. They focused on the lack of investigation regarding operating. Client was intoxicated and admitted evidence showed the client was a .26 BAC at the time of the blood draw. Client was in the driver's seat of the running vehicle, headlights were on, her seatbelt was fastened, and she told police that she was coming home from the bar. However, her car was parked and there was zero testimony or evidence as to how long it had been parked. They were able to exploit the lack of investigation to prove operating while intoxicated and the jury agreed. **Amazing!**



Best Practices Guide for Working with a *Padilla* Attorney

MANUELA "MIMI" ALCOCER

In *Padilla v. Kentucky*, the U.S. Supreme Court established that criminal defense attorneys have an obligation, as part of the Sixth Amendment guarantee of effective assistance of counsel, to advise noncitizen clients about the immigration consequences of the criminal charges against them.[1] Many noncitizen defendants will be blindsided by later immigration detention and deportation that could have been avoided had defense counsel been informed and worked with an immigration attorney to work towards an immigration safe outcome in the client's criminal case.

The first important step in the process of advising your noncitizen client begins with obtaining the most accurate information possible and as much information as possible when working with a *Padilla* Attorney.

Gathering Information:

The best approach to protecting clients' immigration status is quite simple:

1. 1. Obtain exact information on the client's immigration situation;
2. 2. Consult an immigration expert to determine realistic criminal goals that can minimize immigration consequences;
3. 3. Determine with the client how important the immigration goals are, as opposed to traditional criminal defense goals;
4. 4. Formulate a strategy that balances the adverse immigration consequences, with the other consequences of the criminal case, in light of the desires of the client;
5. Use standard criminal defense techniques to try to achieve the client's goals.

Continue to consult with an immigration attorney since additional immigration questions frequently arise during the course of the case. Finally, counsel must inform the client of the immigration consequences of the final disposition and arm the client with information on how to confront the immigration authorities. This same approach is applicable no matter what procedural stage the criminal case has reached whether it's the beginning of a normal criminal case, during plea-bargaining, during litigation of a criminal case, during sentencing, during probation violation proceedings, during juvenile proceedings, and it applies during appeal and other post-conviction proceedings.

What information is needed by the *Padilla* Attorney to effectively advise the client:

1. <u>Citizenship:</u>
   The very first question that defense counsel should ask of every client is whether the client is a United States citizen. Any non-citizen can be deported if they become deportable. It does not matter if the individual has been a Lawful Permanent Resident for 30 years or more – they can be deported if deportability can be established. This is why it is so important to ask each client if he/she is a U.S. citizen. Otherwise, the non-citizen can be placed in jeopardy if their immigration status is not identified and in turn protected.

1 *Padilla v. Kentucky,* 559 U.S. 356 (2010).

The best source for this information is the client. If the client answers in the affirmative, ask them to produce some sort of proof of citizenship. The most common forms of identification of U.S. citizenship are a United States passport, a U.S. Certificate of Citizenship, a U.S. Certificate of Naturalization, or a U.S. Citizen Identification Card.

If the client answers in the negative, it is important to continue gathering the necessary information to determine your client's immigration status.

2. Immigration Status:

Once it is determined that your client is not a U.S. Citizen the next question to answer is the exact immigration status of your client. There are several types of non-immigrant visas. Some of the more common non-immigrant visas are the Tourist visa (B2), Student visa (F1), Business Visitor (B1), or Specialty Occupation work visas (H-1B). There are a myriad of other types of non-immigrant visas and it will be important to determine if your client holds a non-immigrant visa. A chief concern for your client that holds a non-immigrant visa is to avoid a disqualifying criminal-related ground that will trigger revocation of that visa.

If your client indicates that they are a Lawful Permanent Resident, have your client produce their LPR card. The LPR card is also known as a green card. It will be important to see proof of LPR status. Many times individuals will have applied for lawful permanent residency, have not received a decision, and mistakenly believe they already have LPR status. The chief immigration concern of a Lawful Permanent Resident is usually to avoid deportation. Another concern is to preserve eligibility to naturalize. Your client may also be concerned with maintaining her eligibility to travel. If your client becomes inadmissible due to a crime-related inadmissibility ground, she will not be able to re-enter the U.S. after traveling abroad. 2

Other types of presence with permission in the United States include Deferred Action or Temporary Protective Status. These types of documents do not confer status on the client but allow the client to be present in the United States for a specified amount of time with permission. One type of deferred action is Deferred Action for Childhood Arrivals (a.k.a. Dreamers). Another type of deferred action is deferred action for victims of domestic violence under the Violence Against Women's Act.

Refugees and Asylees have been admitted to the United States due to fear of persecution in their native land, on account of race, religion, nationality, membership in a particular social group, or political opinion. The chief concern of a Refugee or Asylee is to avoid deportation to the country where they may be persecuted or even killed.

If your client is present in the United States without a non-immigrant visa or without a green card (LPR status), or another type of permitted temporary stay then your client does not have status and may have either entered the U.S. without inspection or their visa has expired. In this situation, your client is already deportable due to being in the country without a valid visa.3 However, the chief concern in this situation is to preserve eligibility for possible cancelation of removal and/or preservation of eligibility for future immigration benefits.

Whatever your client's immigration status you will want to discuss with your client their main concern and goal regarding their immigration situation.

3. Prior Criminal History:

Nothing can change the trajectory of an immigration case more quickly than prior criminal history. For example, the client's present case may not affect your client, but if they have a prior criminal conviction, the multiple convictions could make your client deportable.4 This is why it is so important to know whether your client has a criminal history.

It is often difficult to ascertain from your client whether they have any prior criminal convictions. Many times a client simply does not know what happened in a previous case. They may mistakenly believe that just having paid a fine or served a few days in jail means that they do not have a record. This is why it is imperative for defense counsel to confirm their client's criminal history against official records.

4. Entry Dates

Date of entry or admission is important because it many times determines whether a case will affect a non-citizen client. An LPR, for example, must avoid a crime involving moral turpitude within

2 *See* INA § 101(a)(13)(C)

3 *See* INA § 237(a)(1)(B)

4 *See* INA § 237(a)(2)(A)(ii)

five years of admission to avoid deportability.[5] The client's original date of admission is the determining factor not necessarily the date the client became a lawful permanent resident. 6 For example, the client may have entered on a non-immigrant visa, but later adjusted status to an LPR. This is why it is important to discuss with your client her entire immigration history.

5. Family and Familial Status

Another important piece of information is the client's family information and their family's immigration status. Many forms of relief to deportation depend on whether the client has close relatives that are either U.S. Citizens or lawful permanent residents. For example, non-LPR cancelation of removal requires that the non-citizen *demonstrate that to deport her would cause exceptional and extremely unusual hardship to her LPR or U.S. citizen spouse, child, or parent.*[7] A client's family information is also very important to determine if a client may already be a U.S. citizen. Sometimes a client is not aware that they are a U.S. citizen. The laws regarding U.S. citizenship through acquisition and derivative citizenship are very complicated. For example, Congress has changed the law relating to derivative citizenship for lawful permanent resident children gaining citizenship through their parent's citizenship several times since 1934. The most recent change to the derivative citizenship rules passed as the Child Citizenship

5 *See* INA § 237(a)(2)(A)(i)

6 *See Matter of Alyazji*, 25 I&N Dec. 397, 398 (BIA 2011)

7 *See* INA § 240A(b)(1)

Act of 2000 which went to effect on February 27, 2001.

A person is said to have "derived" U.S. citizenship if he or she was born outside the United States but gained U.S. citizenship as a minor when one or both of his or her parents became a naturalized citizen. The current law on "derivative" citizenship is contained in INA § 320, 8 U.S.C. § 1431. The determination of whether a person derived citizenship is based largely on the date the last act occurred and the law in effect at the time.

A person is said to have "acquired" U.S. citizenship if he or she was born outside the United States but gained U.S. citizenship at birth by having been born to a U.S. citizen parent or parents. The current law on "acquired" citizenship is contained in INA §§ 301(c), (d), (e), (g), (h), 303, 8 U.S.C. §§ 1401(c), (d), (e), (g), (h), 1403; and INA § 309, 8 U.S.C. § 1409 (child born out of wedlock).

6. Present Criminal Case:

Finally, the *Padilla* attorney tasked with preparing an analysis of the client's present criminal case will need to know how the charges are plead. The charging document is the one piece of information that will outline the exact language charging your client. The *Padilla* attorney must determine if the criminal charge is a crime involving moral turpitude, an aggravated felony, or carries any other immigration consequences. The method of analysis is very complicated and turns many times on the culpable mental state, the possible sentence, and other factors. This is why it is imperative to get the documentation the *Padilla* attorney requests.

If the State has made plea recommendations, give the *Padilla* attorney this information. The *Padilla* attorney can analyze the plea recommendation and determine if pleading to the recommended plea will be immigration safe and more beneficial for your client. In turn, the *Padilla* attorney can construct a plea that you can present to the State. Gathering the necessary information in preparation for working with a *Padilla* attorney is extremely important. Each piece of information helps the *Padilla* attorney create a personalized flow chart of the consequences of your client's present criminal case. The requested information will also help the *Padilla* attorney identify relief to deportation, eligibility for immigration *benefits, current immigration status, and possible U.S. Citizenship. Working together with a Padilla attorney will help protect your client and help avoid negative immigration outcomes in your client's case.*

Mimi Alcocer is an Immigration Attorney at the Travis County Public Defender's Office and is a member of TCDLA's Crimmigration committee. She advises criminal defense attorneys and their clients on the immigration consequences of criminal convictions in compliance with Padilla v. Kentucky. Previously she was the inaugural immigration attorney at the Fort Bend County Public Defender's Office and prior to that she represented unaccompanied minors in Asylum, SIJS and in removal defense before the EOIR. She has been advocating for the rights of immigrants for over 15 years. She can be reached Mimi.Alcocer@traviscountytx.gov or (512) 317-1858.

The Nuts and Bolts of Providing Effective Expert Witness Testimony

How to Handle Your Next Expert Witness on Direct Examination

MATT SMID

The main purpose of expert testimony is to convey relevant information to the jury in a manner by which the members will understand it, remember it, and appreciate it. A witness can have impeccable qualifications, wealth of knowledge, and extreme intelligence, but if the expert cannot effectively communicate that information to the members of the jury, their testimony is worthless at best, and harmful at worst. The purpose of this paper is to provide you with tools that will allow you to effectively communicate with your next expert witness.

Communication with Attorneys

Hopefully, you will have had an opportunity to meet with your expert witness well before he/she takes the stand so that you can better understand the expert's opinions and conclusions. It is critically important that the attorney fully understand not only the conclusions, but the basis upon which the expert reached those conclusions. It is extremely important that the expert be given access to all information (both disputed and undisputed) before he/she testifies. Obviously, a change in the factual scenario could change the opinion and conclusion. It is the expert's job to insist that the attorney make all information available so the expert can best inform the attorney about how different facts could alter the expert opinion. It is much better for the attorney to know this before the trial testimony than to learn it, for the first time, while the expert is testifying. Furthermore, it is helpful for the expert to have the benefit of knowing all the possible scenarios that surround the event in question.

Before trial, the expert should "walk through" what his/her testimony will be. It is critical, prior to trial, to discuss what information, documents, diagrams and other visual aids will be needed at trial.

Trial Testimony

During the expert's testimony, it is extremely important that the witness vividly describes any documents or items that are being referred to. If the expert is referring to a document, always refer to the exhibit number and the title of the document, if it has one. Also, if the expert is referring to a particular item contained in the document, be extremely descriptive as to what exactly is being discussed. This will assist the jury during the expert's testimony. Always refer to measurements in feet, inches, etc. It is amazing how many times witnesses use their hands to describe distances or use reference points.

There is a tendency on the part of witnesses to engage in a "conversation" with the attorneys during testimony. The witness needs to understand that testimony is not a conversation. The attorney is dictating a question to the witness and the witness is dictating an answer to the court reporter. Also, be aware that most Americans do not speak in a grammatically correct fashion. The incorrect grammar is only accentuated when it is read from a transcript at trial. Therefore, be keenly aware of the grammar that the

expert uses while testifying.

General Rules for Trial Testimony

The following are five rules to give to each expert witness that testifies. Typically, if the witness follows these rules, the testimony will go smoothly and the testimony will be effective.

1. **Concentrate on the Question**

Typically, witnesses are lulled into the belief that trial testimony is a conversation. It is not! Each word of the question is important. Therefore, the witness should concentrate on every word of the question.

If the witness's concentration starts to fail, then he/she typically breaks down and starts violating all the rest of the testimony rules. One symptom of a lack of concentration is when the witness starts to answer a question before it is finished. If you catch your witness doing that, it is time to refocus. If he/she has done a good job at concentrating on the questions, the witness will be mentally fatigued at the end of the testimony.

2. **Make Sure That the Witness Understands the Question**

Make sure that the witness does not guess as to what the question is asking. Many times, technical terms are used incorrectly, but the witness thinks that he/she understands what the attorney is asking about because of the context of the question. Do not assume that the witness knows what the attorney is asking. Make sure the expert witness is clear as to the question. Attorneys who take the time to prepare their witnesses will typically not run into this problem.

Questions are sometimes so long that they become difficult to remember. In that circumstance, it is important for the expert witness to ask the attorney to repeat the question. Also, attorneys sometimes ask multiple questions at once. It is much easier for the witness to give one answer to one question. Therefore, it is recommended that the attorney break down the question into each of its subparts so the expert can answer them individually.

3. **Make Sure That You Know the Answer to the Question**

Some experts believe that they should know everything. The worst thing that a witness can do is to guess at an answer. If the guess is right, the expert has not made any points because he/she is expected to tell the truth. If he/she guesses wrong, his/her credibility is shot. It is much better for the witness to say, "I don't know." If the witness can refer to other material or information to find the answer, always offer to do so. It is perfectly acceptable for the witness to say, "I don't know the answer to that question off the top of my head, but I can find the answer for you if you would like for me to do so." I can't say it enough, preparation is key here.

4. **Formulate the Answer in Your Mind Before You Begin to Speak**

The court reporter is taking down every word that is spoken. Some witnesses begin to answer, but stop midway and state, "strike that" and then start over. They think that that record will begin after they have said strike that. The witness should understand that no one has the right to strike anything in a trial. Therefore, it is much better to formulate the answer in his/her mind before he/she begins to speak. Of course, this process needs to be quick to retain credibility.

5. **Answer Only the Question**

This is the rule that is most often broken in trial testimony. Sometimes, the witness does not fully understand the question. Other times, the witness is trying to convince an attorney that he/she is right. As such, witnesses start to argue with the attorney and go off on items that were never part of the question. The witness always loses when he/she volunteers information on cross-examination. First, it allows the attorney to ask more questions. Secondly, if the attorney likes what has been said, he/she will simply ignore the answer and restate the question again, causing the non-responsive answer to be a part of the record. If the attorney does not like the answer, he/she will simply object by stating that it is non-responsive. The witness never wins.

Conclusion

Effective communication in trial testimony is critical to defending your clients. The bottom line is that if you put in the time with your expert before trial, it may very well carry the day. Hopefully, this paper will help you better your communication skills when it comes to directing your witnesses at trial.

Matt Smid *practices state and federal criminal law in Fort Worth at Daniel, Evans, Moore, Biggs, Decker, and Smid. He started his career in Johnson County as an Assistant District Attorney and later moved to Tarrant County where he was Chief of the White Collar/Public Integrity Unit. Matt also worked as an Assistant Attorney General and Special Assistant United States Attorney for the Northern District of Texas specializing in health care fraud cases. He is board certified in criminal law by both the Texas Board of Legal Specialization and National Board of Trial Advocacy and currently serves on the TCDLA Board of Directors.*

Significant Decisions Report

KYLE THERRIAN

Ah, the era of robo-writers is upon us, my legal comrades! Brace yourselves, for Artificial Intelligence (AI) is ready to take the writing world by storm. Gone are the days of painstakingly crafting introductions for your magazine articles. Now, you can sit back and watch as AI-powered robo-writers do the heavy lifting for you.

Picture this: you, the lawyer extraordinaire, create the raw data for your article, and in a matter of seconds, the robo-writer spits out a perfectly polished introduction. No more struggling to find the right words or spending countless hours in front of your screen. It's like having your very own legal scribe, tirelessly working behind the scenes. And don't worry, my fellow lawyers, these robo-writers are not here to replace us. They are simply here to make our lives easier and more efficient. So, let's embrace this technological marvel and use it to our advantage.

With AI in our corner, we can focus on the nitty-gritty details of our articles, perfecting the arguments, and crafting compelling content. Let the robo-writers handle the introductions, while we dazzle the legal world with our expertise. So, join me, my legal brethren, in this new era of robo-writers. Together, we shall conquer the writing realm and leave our mark on the pages of legal magazines. Embrace the power of AI and let it do the heavy lifting in your introduction to a magazine article.

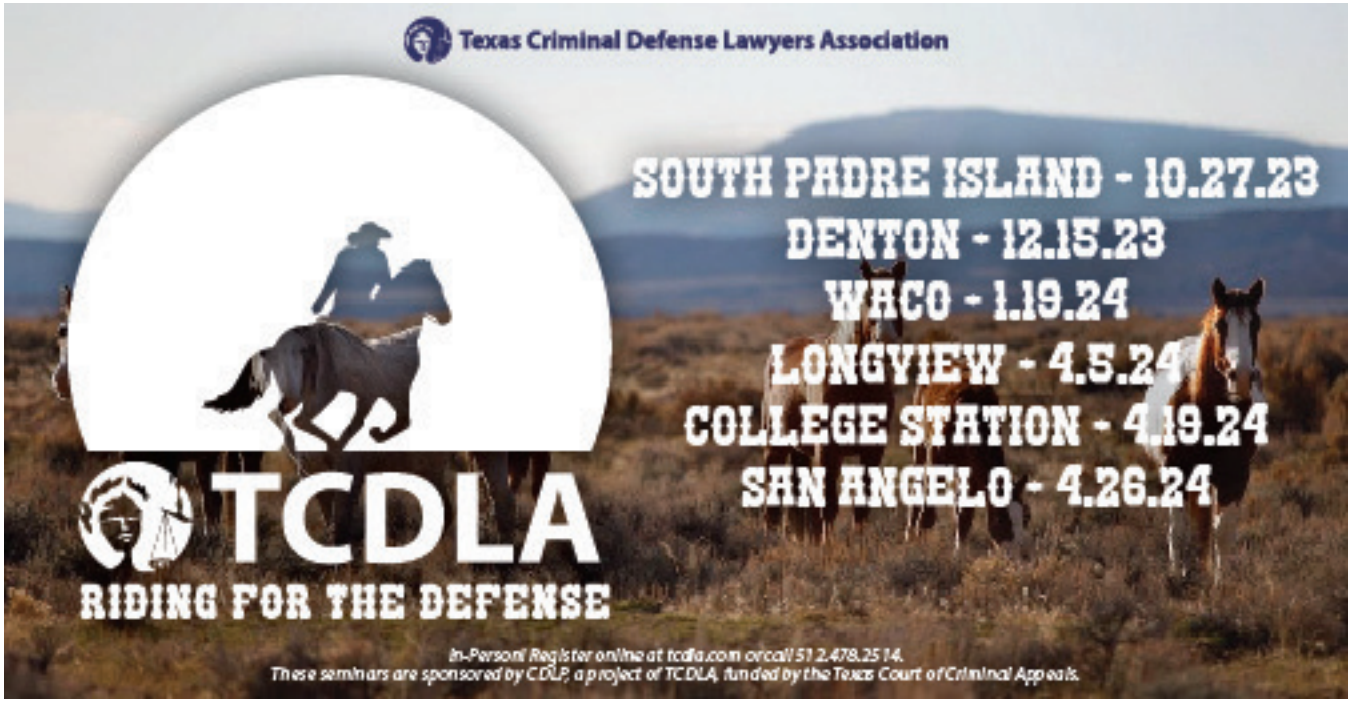
The preceding three paragraphs were written by A.I. and I truly hope the Editors for the Voice are kinder to me than the 10th Court of Appeals was to the lawyer who submitted a brief seemingly written by artificial intelligence.

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

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

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

Sincerely,



United States Supreme Court

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

Fifth Circuit

***Damme v. Big Bubba's Bail Bonds,* 72 F4th 116 (5th Cir. 2023)**

Attorneys. Kent, Anderson, Bush, Frost, & Metcalf, PC

Issue & Answer 1. Can a bail bondsman be held liable for false imprisonment if that bondsman wrongfully requested the discharge of their surety obligation and the issuance of a warrant? **No.**

Issue & Answer 2. Can a bail bondsman be held liable under principles of contract law for wrongfully requesting the discharge of their surety obligations and the issuance of a warrant? **Yes.**

Facts. Big Bubba's Bail Bonds posted a surety bond on behalf of Jeanty. While on bond Jeanty suffered an epileptic seizure and was hospitalized. The defendant's wife remained in contact with Big Bubba's, but Big Bubba's determined that Jeanty was not in compliance with his contractual obligations. Big Bubba's filed a petition with the trial court asking for the issuance of a warrant and Jeanty's arrest. Jeanty sued Big Bubba's for contract violation and false imprisonment. The district court dismissed Jeanty's claims.

Analysis 1. Under Texas law, the elements of a false imprisonment claim are (1) willful detention; (2) without consent; and (3) without authority of law. The issuance of a valid arrest warrant is sufficient proof to defeat a claim that imprisonment was without the authority of law. Jeanty does not contest the warrant's validity, only the grounds on which it was issued. Accordingly, the district court properly dismissed Jeanty's false imprisonment claim.

Analysis 2. "Traditionally, if the surety has wrongfully withdrawn from the bail bond, Texas law permitted the principal to contest the surrender in a civil action against the bonding company." In 1973 the Texas Legislature passed Texas Occupations Code Article 1704.207. That statute provided one remedy for a criminal defendant who becomes the victim of a wrongful surrender—he may contest the surrender and the surety may be obligated to refund their fee. The district court erroneously determined this to be the only remedy in this situation. Shortly after the passage of Article 1704.207, the Court of Criminal Appeals explained how a civil suit remained a separate remedy. Accordingly, Jeanty can maintain his contract-based lawsuit against Big Bubba's.

Texas Court of Criminal Appeals

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

1st District Houston

***McDonnel v. State,* No. 01-21-00691 (Tex. App.—Houston [1st Dist], Jul. 20, 2023)**

Attorneys. Mandy Miller (appellate), Leonard Peters (trial), Michael Peters (trial)

Issue & Answer 1. Should the trial court grant a mistrial when a complaining witness in a domestic

violence case blurts out that the defendant assaulted her previously? **No. Not here.**

Issue & Answer 2. When the defendant's strategy is to discredit the complaining witness by highlighting her acts of reconciliation occurring after the alleged assault, has the defendant opened the door to the jury hearing about nearly a dozen instances of prior assaults as evidence contextualizing the relationship between the complainant and the defendant? **Yes.**

Facts. The defendant and the complainant were going through a divorce. During this period, the defendant struck the complainant in the face while she was driving. The complainant testified at trial and stated that the assault hurt so bad that she went to the hospital. She also testified that she was motivated to go to the hospital because the last time the defendant struck her, she suffered a broken bone. The trial court sustained the defendant's objection to the complainant's extraneous acts testimony, granted the defendant's request for a limiting instruction, but denied the defendant's motion for mistrial. Through cross-examination, the defendant attempted to discredit the complainant by highlighting evidence of the couple reconciling on numerous occasions. The State claimed, and the trial court agreed, this opened the door to presenting other acts of abuse by the defendant. The State theorized that such evidence was necessary to show that the complainant was a victim of repeated domestic violence who presented typical post-abuse conciliatory victim behavior.

Analysis 1. A mistrial is appropriate only when "objectionable events are so emotionally inflammatory that curative Instructions are not likely to prevent the jury from being unfairly prejudiced against the defendant." The complainant's reference to a single instance of prior abuse did not rise to the level, especially in light of the fact that the defendant later opened the door to the state presenting even more acts of abuse.

Analysis 2. When the defensive theory is to question why a person would maintain a relationship with and assist in defending her abuser, the extent of the prior abuse becomes important and admissible under Article 38.371 and Texas Rule of Evidence 404(b) to contextualize the relationship between the complainant and the defendant. Similarly, Texas Rule of Evidence 403 does not require exclusion, especially in light of the trial court's limiting instruction that the jury is presumed to have followed.

Comment. The only safe way to call the complainant a liar in a case like this is in closing.

2nd District Fort Worth

***Youngblood v. State*, No. 02-22-00172-CR (Tex. App.—Fort Worth, Jul 17, 2023)(not designated for publication)**

Attorneys. Robert Christian (appellate), Daniel Youngblood (pro se trial)

Issue & Answer. Did this pro se defendant outmaneuver the State on Speedy Trial grounds? **Yes.**

Facts.

- January 26, 2021, the offense purportedly occurred.
- April 29, 2021, law enforcement arrested the defendant for a misdemeanor.
- August 28, 2021, law enforcement arrested the defendant for a felony.
- October 6, 2021, the State indicted the defendant.
- October 19, 2021, the defendant filed a motion to proceed pro se.
- October 25, 2021, the defendant filed a pro se writ of mandamus asking an appellate court to order the trial court to give him a speedy trial and permit him to represent himself pro se.
- November 9, 2021, the defendant's appointed counsel withdraws, the trial court appoints new counsel, new counsel files a motion to suppress.
- November 22, 2021, the defendant's newly appointed counsel files a motion for speedy trial.
- December 13, 2021, the defendant's newly appointed counsel files an amended motion to suppress.
- January 18, 2022, the trial court permits the defendant to proceed pro se.
- February 2, 2022, the defendant files a pro se motion to quash, which the trial court sets for hearing on 14, 2022.
- February 7, 2022, the defendant files another motion for speedy trial, which the trial court sets for hearing on March 14, 2022
- February 15, 2022, the trial court hears and denies the defendant's amended motion to suppress.
- March 8, 2022, the defendant files an amended motion for reconsideration to suppress evidence.
- March 14, 2022, the defendant files an amended motion to quash and a petition for a writ of habeas corpus in the trial court requesting a court date, findings of fact, and a dismissal based on due process violations, unreasonable search and seizure, and unlawful arrest.
- March 17, 2022, the defendant files a motion in limine and a motion to disclose confidential informants.
- March 21, 2022, the State files responses to the defendant's motion to quash and to his petition for writ of habeas corpus.
- March 22, 2022, the State files a response to the defendant's motion to disclose identity of confidential informants, and on the same day, the trial court hears Youngblood's motion to quash, petition for

TCDLA Member Benefits

Texas Accountability Database

Since the 1963 decision in *Brady v. Maryland* defenders of justice have fought to have access to the information to level the criminal justice playing field. But prosecutors hide evidence, police move jurisdictions, and experts testify however they want to fit the circumstances. Your TCDLA Executive Committee, through the work of the Technology Committee, is excited to bring online a new member benefit pushing that fight forward: **The TCDLA Texas Accountability Database.**

This database, compiled from our member submissions and independent research, will track Texas peace officers and State's witnesses to allow our members to search for potential impeachable conduct and prior testimony. Through member supported collaboration this state-wide database will track witnesses across jurisdictions to stop potential state's witnesses from outrunning their sorted history.

TCDLA needs your help! You can now submit information to help your fellow attorneys statewide. If you have information on police officer misconduct, prior expert testimony, or impeachable information on frequent State's witnesses please scan the QR code below.

Any supporting documentation including State's disclosures or material received in discovery can be uploaded there as well. TCDLA is also collecting transcripts of any expert testimony. You may also email the information to mduarte@tcdla.com

Want to get rewarded for helping launch this amazing new tool? From now until the end of the calendar year every submission you make will get you an entry for raffle prizes from TCDLA. You could win:

- **A $100 Amazon Gift Card**
- **One Free Year of Membership with TCDLA**
- **Free Admission to a Quarterly or DWI CLE of your choice, including Rusty Duncan!**
- **$100 Credit in TCDLA Publications**

Imagine being a part of creating the largest database of impeachable information to support your sisters and brothers in the fight. TCDLA is ready to make it happen. We are stronger together.

Have questions? Shoot us an email. mduarte@tcdla.com

Let's push this fight forward.

How to Scan a QR Code:

On your compatible smart phone or tablet, open the built-in camera app. Point the camera at the QR code. Tap the banner that appears on your smart phone or tablet to navigate to the site!

writ of habeas corpus, motion for reconsideration to suppress evidence, motion for a speedy trial, and motion to disclose identity of confidential informants.

- March 22, 2022, the State announces "ready" and the trial court sets the defendant's case for trial on May 9, 2022.
- March 24, 2022, the defendant files an amended petition for writ of habeas corpus in the trial court requesting only an examining trial.
- May 5, 2022, the trial court holds a status hearing to inform the defendant that his May 9, 2022 trial setting is postponed until July 11, 2022. The defendant asserts his right to a speedy trial and requests a special setting, which the trial court denies.
- May 17, 2022, the defendant files a motion to dismiss on the grounds that his Sixth Amendment right to a speedy trial had been violated.
- June 28, 2022, the trial court hears and denies the defendant's motion to dismiss.
- July 11, 2022, the defendant's trial begins.

Analysis. Denial of the right to speedy trial is analyzed under *Barker v. Wingo*. The factors for consideration include: (1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of his speedy-trial right, and (4) prejudice to the defendant because of the delay. Here, whether measured from the date of arrest on the misdemeanor charge or the felony charge, the length of the delay is sufficient to trigger a speedy trial analysis. The State attempts to justify the delay by vague references to the COVID-19 pandemic, but the record fails to reflect any specific COVID-19 hindrances to prosecution. The State also unpersuasively attempted to blame the defendant's aggressive pretrial litigation. Because the defendant could articulate some personal prejudice in the trial court

the balance of *Barker v. Wingo* factors called for dismissal.

Comment. This is a leaving the scene of the accident resulting in death or serious bodily injury. It's a fine line between appreciating crafty "lawyering" and rooting for a "bad guy" in the face of serious bodily injury. Here, the serious injury was a minor non-medical-attention-needing cut to the nose. I respectfully ask everyone's indulgence to root for Youngblood, or as I call him, "The People's Champ." This case makes me think of the closing scenes of Burn After Reading. "Ozzie: what did we learn Palmer? [Palmer: I don't know sir]. Ozzie: I don't know either . . . I guess we learned not to do it again [Palmer: yessir].

Ochoa v. State, No. 02-21-00174-CR (Tex. App.—Fort Worth, Jul. 20, 2023)

Attorneys. Jeromie Oney (appellate)

Issue & Answer 1. Section 51.0095 of the Family Code requires law enforcement to procure a magistrate to give a child certain legal admonishments before custodial interrogation. When an interrogator sits blocking the door during an accusatory interview but does not handcuff the child and tells the child he is free to go, would "a reasonable, innocent person . . . believe that they [were in custody]? **No.**

Issue & Answer 2. Is a child defendant's confession given involuntarily when botched magistrate warnings (advising the defendant that he is a mere witness and not a suspect) combine with an interrogator's lies and misstatements about the nature of the interrogation (cooperation will spare him from incarceration)? **No.**

Facts. A jury convicted the child defendant of aggravated sexual assault of a child, injury to a child (with serious mental injury), and aggravated kidnapping. He was 14 years old when he raped, kidnapped, and wrapped a trash bag around a little girl's head. The trial court sentenced the defendant to 55 years imprisonment without the possibility of parole. The strength of the State's case rested on the child defendant's confession given to a Texas Ranger. The interrogation consisted of two phases: pre-magistrate-warnings and post-magistrate warnings. These warnings were required before the custodial interrogation of the child defendant.

The circumstances of the pre-warning phase were as follows:

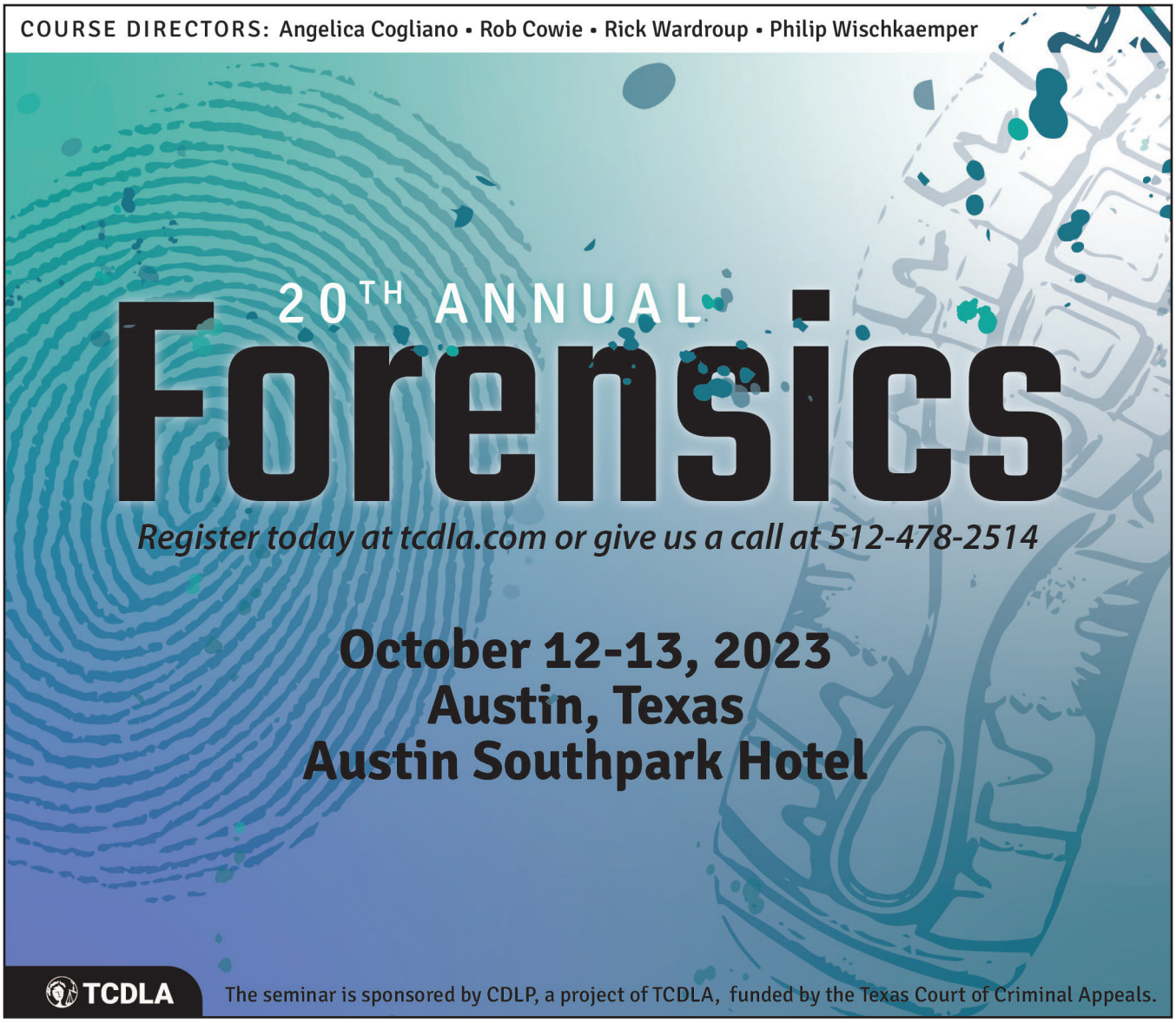
- The interrogator advised the child defendant he was free to leave, but the interrogator sat blocking the door. The child was not handcuffed. The child's mother was not present for the interrogation but was present at the police station.
- The interrogator told the child defendant that the interrogator was there to help him, he would help him more if he owned up to his mistakes, that he wasn't trying to put the child defendant in jail, and that the offense would end up in juvenile court where people would ultimately look to help him as well.

Eventually, another officer had an epiphany and suggested the interrogator involve a magistrate for legal admonishments. This made things worse. The magistrate bumbled the warnings as follows:

- The magistrate told the child and his mother that the child was being interrogated simply as a witness and was "not here under any charges."
- The magistrate told the child that his statements could be used as evidence but urged "I'm not saying that it would, you just have to be aware that anything you say could come back—you could be asked to talk about it or verify it at a later point in time."
- The magistrate told the child he could have an attorney appointed to represent him in questioning, but that appointed attorneys were really only for people going to court for their criminal charges.

Analysis 1. The child was not in custody. Custody is based on objective circumstances. They include: (1) the existence of probable cause, (2) the focus of the investigation, (3) the subjective intent of the interrogator (if the intent is manifested to the defendant), (4) the subjective belief of the defendant (if the belief is manifested by the defendant), (5) the child's age. There are also certain scenarios will always constitute custody: (1) significant physical deprivation of freedom, (2) an admonishment to the defendant that he cannot leave, (3) when law enforcement creates a situation that would lead a reasonable person to believe they are in custody, and (4) when probable cause exists and is manifested to the defendant and law enforcement does not admonish the defendant he is free to leave. None of these factors weigh in favor of concluding that a reasonable person would have objectively felt they were in custody. The interrogator had not yet accused the child of a crime and had not yet told the child he was detained. All the things that suggested custody were figments of the imagination—subjective beliefs of the defendant (accusatory statements by the interrogator, blocking the door, advising he could help in the prosecution and save him from jail).

Analysis 2. Texas Family Code 51.095 requires a magistrate to give specific instructions to a child under custodial interrogation. Here a magistrate did that but gave editorial commentary watering down the seriousness of the interrogation and the potential penal implications of the child's statements. Even though the very person the Legislature requires injected into the process to act as a neutral advice-giver and as a buffer between the child and zealous investigators explained the law in a way that assisted law enforcement in their manipulative interrogation, it's not a big deal. The interrogator was not really *extremely*



manipulative. The interrogator's suggestion that he would assist the child and his assurances that a confession would not lead to incarceration did not render the child's interrogation coercive by itself or when combined with the magistrate's botched warnings. Dirty tactics like this only rise to coercion when actual or firm promises are made. Here the interrogator kept it vague enough for our judicial system to sanction.

Comment. Skipper the Penguin: "You didn't see anything, right? [mysteriously waives hands]" Eric Darnell. *Madagascar*. DreamWorks Animation, 2005

Stephenson v. State, No. 02-22-00101-CR (Tex. App.—Fort Worth, Jul. 20, 2023)

Attorneys. Jason Niehaus (appellate), Derek Adame (trial)

Issue & Answer 1. When defense counsel concedes a defendant's guilt at trial and that defendant claims on appeal counsel did so contrary to his wishes, must the record establish that the defendant protested vociferously before an appellate court can afford relief? **Yes.**

Issue & Answer 2. When defense counsel does not call the defendant to testify at the punishment phase of trial and the defendant claims on appeal that counsel's decision was contrary to his wishes, must the record establish that the defendant insisted on testifying before an appellate court can afford relief? **Yes.**

Issue & Answer 3. When the Legislature created the offense of Continuous Sexual Abuse of a Young Child, they prohibited dual convictions for both Continuous Sexual Abuse and one of the acts forming a predicate to the offense of Continuous Sexual Abuse. When the facts show multiple acts of abuse against more than one child can the State maintain dual convictions without violating double jeopardy and the Legislature's no-dual-conviction rule? **Yes. Here they can.**

Facts. A jury convicted the defendant of six sexual offenses involving a child. Counsel's strategy appeared to

be avoidance of multiple convictions by presenting his client as honest enough to concede one of the more major offenses and denying the rest. On appeal the defendant claimed he did not agree with this strategy.

Analysis 1. In *McCoy v. Louisiana* SCOTUS held that a defendant had the right to veto trial counsel's strategy involving an admission of guilt. The *McCoy* court noted that McCoy was vociferous about his objections and his will to maintain innocence. SCOTUS distinguished McCoy's case from a prior one involving a defendant who was far less vocal. Here, the defendant was not vociferous. The defendant did not object when his attorney conceded guilt, he did not complain, he did not ask for new counsel, he gave sworn testimony outside the presence of the jury regarding his decision not to testify, he did not express any concern about counsel's conduct, and his appellate counsel did not attempt to present the defendant's concerns in a motion for new trial. "We cannot presume *McCoy* error based on a silent record."

Analysis 2. [The opinion is unclear on whether the defendant said anything about wishing to testify, instead the court focuses on a case where the defendant only sort of said he wanted to testify]. Like in the defendant's complaint regarding his attorney conceding guilt, an appellate court cannot presume deficient counsel or *McCoy*-esque Sixth Amendment error from a silent record.

Analysis 3. The Legislature prohibits a conviction for both continuous sexual abuse and a sexual offense establishing one of the predicate offenses necessary to prove continuous sexual abuse. The courts refer to this as the "anti-partitioning provision." The defendant raises the anti-partitioning clause in two ways: (1) his conviction for continuous sexual abuse of Child 1 and sexual assault of Child 1, and (2) his multiple convictions for continuously sexually abusing multiple children.

As it relates to his first contention, the case law is well-settled—if the court can find an instance of sexual assault that does not overlap with a period of statutorily defined sexual abuse, both convictions may stand. Here the record establishes both a stand-alone act of sexual assault and a period of sexual abuse that the jury could have relied upon without overlap.

As it relates to his second contention, the law is not well-settled, but rules of statutory construction dictate that independent acts of continuous sexual abuse are committed when the defendant commits qualifying acts of sexual abuse against separate children. The defendant relies on the fact that the statute permits the State to combine predicate offenses against mixed victims to support his theory that the unit of prosecution is not the victim but rather the conduct. The statute seems to suggest a different legislative intent when looking at the anti-partitioning clause. The anti-partitioning clause is victim-specific—it prohibits a conviction for a predicate sexual assault against a victim who is the same victim of continuous sexual abuse. This would suggest that the Legislature meant to leave the door open to multiple convictions for continuous sexual abuse when the abuse is committed against multiple victims. This is the better way to interpret the Legislature's intent—against the child sex offender.

Comment. Maybe I'm still riled up from the last case, but I've never been one to take a deep breath before jumping into my commentary. So, the standard is that the defendant must be vociferous about his protestation and lodge objections to counsel conceding guilt against the defendant's wishes? If this is how we are going to apply the rule in *McCoy* then courts need to start appointing

attorneys ad litem anytime a criminal defendant's attorney makes an admission purportedly on behalf of his client—someone to whisper in his ear "Now is the time to be vociferous if you wish." I get that, on average, a claim like the defendant's here is going to be conveniently invented for appellate purposes. I even agree that the record must reflect something supporting the contention. But the thrust of the opinion is focused on what the defendant should do to out-lawyer his lawyer instead of focusing on what his remedies might be if they aren't a direct appeal. Imagine if this were a surgery and the medical board said, "You should have been more vociferous when the doctor decided he had to amputate your leg during your knee surgery."

4th District San Antonio

Velasco v. State, No. 04-22-00030-CR (Tex. App.—San Antonio, Jul. 19, 2023)

Attorneys. Oscar O. Peña (appellate)

Issue & Answer. In a Sixth Amendment speedy trial analysis, should the State be taxed with the four years of delay it took a managing prosecutor to think about and ultimately reject the incredible plea offer made by the assigned prosecutor? **No.**

Facts. The defendant murdered his mother when he was 16 years old. He was detained as a juvenile for a year while the State worked to certify him as an adult. Once certified the State filed a complaint and sought indictment. During this period the defendant's attorney sought discovery and negotiated with the State. The assigned prosecutor ultimately made a probation offer contingent on a managing prosecutor's approval. While awaiting this approval the defendant's attorney made plans to relocate her practice and withdraw from cases in the relevant jurisdiction. The State encouraged counsel to remain on the case with promises of impending plea-agreement approval. For four years no approval came, and the State then withdrew its probation offer. Counsel withdrew and the defendant's new attorney demanded the case dismissed on speedy trial grounds.

Analysis. Speedy trial is analyzed under the *Barker v. Wingo* factors: (1) length of delay, (2) reason for delay, (3) assertion of the right, and (4) prejudice. Here the bulk of the litigation involved the attribution of blame for the considerable delay in resolving this case. The court of appeals faulted the State only "slightly" for post-indictment feet-dragging. The court of appeals excluded from its analysis the four years from juvenile arrest to adult indictment and focused instead on the two-year post-indictment delay (without explanation). With only slight blame attributed to the State and the defendant asserting his right so late in the process, the *Barker* factors balance against the defendant. The record here showed that the parties engaged in good-faith plea negotiations. Delay associated with good faith plea negotiations is not taxed against the State and generally shows that the defendant was seeking a plea agreement rather than a speedy trial.

Comment. "I'm waiting for my law partner to approve this . . . ." [30 days later] "I'm waiting for my law partner to approve this . . . ." [30 weeks later] "I'm waiting for my law partner to approve this . . . ." [30 months later] "I'm waiting for my law partner to approve this." [trial judge pats me gently] don't you worry your silly little head; we can wait as long as you need. Trial and appellate courts having equal patience for equally unjustifiably reasons asserted by the defense—this is what it would look like if it ever happened.

Elsik v. State, No. 04-22-00333-CR (Tex. App.—San Antonio, Jul. 26, 2023)

Attorneys. Danice Obregon (appellate), Michelle Ochoa (trial)

Issue & Answer. Is the Sixth Amendment right to confrontation violated when a law enforcement officer learns another person's country of origin directly from that person then testifies about that person's country of origin in a prosecution for human trafficking [smuggling undocumented immigrants]? **No.**

Facts. The defendant was driving a U-Haul with thirteen undocumented immigrants hiding under a blanket in the storage compartment. The passengers were interviewed by a border patrol agent who determined they were not eligible to remain in the United States. The State prosecuted the defendant for human trafficking. A jury convicted and sentenced the defendant to 99 years imprisonment.

Analysis. The Confrontation Clause prohibits the introduction of testimonial statements of a non-testifying witness without a showing of witness unavailability and a prior opportunity for cross-examination. Here the analysis begins and ends with an evaluation of the testimonial nature of a person's answer to a border patrol agent's question "where are you from." Certainly, the answer to this question could lead to prosecution of the interviewee or those involved in the interviewee's crossing into the United States. Federal courts seem split on whether the answers to these questions are testimonial as it relates to the prosecution of the person who transported the immigrants. This court ultimately sides with those who find such information to be mere data rather than testimonial statements. The border patrol agent involved in the collection of data in this case testified that his primary purpose in doing so was to determine eligibility

to remain in this country.

Nixon v. State, No. 04-21-00295-CR (Tex. App.—San Antonio, Jul. 31, 2023)

Attorneys. Michael Gross (appellate), Anthony Odiorne (trial), James Drummond (trial), Alexander Calhoun (trial), Scott Pawgan (trial), Robert Cowie (trial), Deepali Walters (trial)

Issue & Answer. Can you try a criminal defendant in the jail? **No.**

Facts. The State convicted the defendant of capital murder in an annex courtroom within the Medina County Jail. The defendant argued before trial that such a proceeding impaired his presumption of innocence, his right to an impartial jury, and his right to a fair trial. He argued that holding a trial inside of the jail would imply that the defendant is guilty or that he is too dangerous to be brought to trial inside the county courthouse. The State argued that trial inside of the courthouse would be inconvenient or impractical due to limited space, limited facilities (such as restrooms), and the amount of security required to guard the defendant. The State articulated how the procedures necessary to ensure safety inside of the courthouse would be far more suggestive of guilt than simply holding the trial in the jail. The State painted a picture of the jail facility with words, but the defendant painted a picture using actual pictures. The defendant's photos showed the jail looking very jail-like.

Analysis. "On appeal, Nixon argues the jailhouse setting is akin to forcing a defendant to be tried in prison clothing or visible shackles as was the case in *Estelle v. Williams*, 425 U.S. 501 (1976) (making a defendant wear identifiable prison clothing at his trial denies him due process and equal protection because of the impossible impairment of the presumption of innocence so basic to the adversary system of justice." The State attempts to analogize the jailhouse trial to enhanced security measures (armed guards) in the courtroom—a scenario SCOTUS distinguishes from the one in

Estelle. This is a case of first impression in Texas. Other jurisdictions addressing the issue have done so based on case-specific nuances, some of which focus on what a jailhouse trial would likely communicate to jurors they wouldn't learn in the context of the trial.

> We believe a jury trial setting in a building with markings that indicate to the public that the primary and substantial purpose of the building is to operate as a jail is more akin to the impermissible practice of trying a defendant in prison clothes and shackles rather than the permissible practice of allowing additional armed guards to sit in the courtroom.
>
> * * *
>
> We do not suggest that a trial setting in a building that houses a courtroom and a correctional facility will always erode the presumption of innocence afforded to a defendant. However, under the facts of this case, the various markings reminding the jury that the building at issue here has a primary purpose as a jail created an unacceptable risk that the jury would conclude, before hearing any evidence, that Nixon is too dangerous to transport and must be isolated from society.

This undermined the fairness of the proceedings and created a substantial likelihood of eroding the presumption of innocence. The record is devoid of evidence suggesting that the defendant presented the kind of safety or flight risk necessitating the procedures proposed by the State for conducting trial in the courtroom, nor does the record reflect that the trial court considered any alternatives to a jailhouse trial. "The record does not support the furtherance of an essential state interest to justify holding Nixon's trial in the Medina County Jail building."

Comment. The pictures did it. I mean I think without the pictures the court probably would have wanted to say this trial was legit. But the pictures gave them the ability to rule the way they wanted to (needed to) rule.

5th District Dallas

State v. Villa, No. 05-22-00220-CR (Tex. App.—Dallas, Jul. 18, 2023)

Attorneys. Whitney Villa (pro se), Bruce Anton (appellate), Madison McWithey (appellate)

Issue & Answer. Can the State appeal the ruling of a county court issued in its appellate capacity over an appeal of a Class C conviction from a municipal court of record? **No.**

Facts. The defendant lost the case in a municipal court of record and appealed to the county court. The county court reversed and remanded. The State attempted to appeal the ruling of the county court to the Fifth District Court of Appeals. The court of appeals asked the parties to address the intermediate court of appeals' jurisdiction over a State's appeal in such a scenario.

Analysis. The initial appeal from a municipal court of record is before a county court (or various and nuanced equivalents). From there:

> The statute governing our jurisdiction, under the circumstances in which this appeal reaches us, is Section 30.00027 of the Texas Government Code, titled "Appeals to Court of Appeals." See GOV'T § 30.00027; Pugh, 2022 WL 1793518. Pursuant to Section 30.00027(a), "The appellant has the right to appeal to the court of appeals if: (1) the fine assessed against the defendant exceeds $100 and the judgment is affirmed by the appellate court; or (2) the sole issue is the constitutionality of the statute or ordinance on which a conviction is based."

The State contends that its right to appeal is found under the normal rule—Article 44.01 of the Code of Criminal Procedure which authorizes the State to appeal from any appellate court non-acquittal judgment. Contrary to the State's contention, the rules applicable to State appeals from county court rulings on municipal court of record judgments is governed by Section 30.00027 (discussed above). The Legislature did not reference Article 44.01 in that provision, it simply provided that an "appellant" may appeal a county court's judgment "affirm[ing]" the municipal court. These are not the facts of this case, thus the court of appeals has no jurisdiction.

Dissenting (Goldstein, J.). Disagrees with the majority's statutory interpretation, including what the legislature meant by "appellant" and the absurd results of making the county court the court of last resort for the State in this scenario.

Comment. But is it absurd to make the county court a court of last resort for Class C offenses? It's hardly more absurd than making a municipal court (most of which are not much more than sophisticated collection agencies) a court of record.

7th District Amarillo

Garcia v. State, No. 07-22-00187-CR (Tex. App.—Amarillo, Jul. 12, 2023)

Attorneys. Erin Mulanax (appellate), Sage Seal (trial)

Issue & Answer. A motion for new trial preserves an error only when it is brought to the attention of the trial court (sometimes called presentment). Is presentment satisfied by emailing the motion to the court's staff? **No.**

Facts. A trial court sentenced the defendant to 18 years imprisonment following a contested sentencing

hearing on the defendant's plea of true to a motion to adjudicate guilt and revoke probation. The defendant filed a motion for new trial objecting to his sentence as unconstitutionally disproportionate to his offense and prohibited by the Eighth Amendment. His motion asserts that it was presented to the judge's office via e-service, but no such service appears in the record nor does the record reflect that anyone in the judge's office saw the motion.

Analysis. To preserve an issue by motion for new trial, the record must reflect the motion was brought to the attention of the trial court.

> we hesitate to say that sending an email alone proves the recipient gained actual notice of its content. Email addresses may be wrong, resulting in nondelivery. Programs may divert them to spam or junk files. The missives may wander long periods of time within the mysterious ethernet before ultimate delivery. They may be hidden within a morass of unsolicited emails. Attachments may go unattached. Or, emails may just go unseen. Those potentialities may well be why the Dallas Court of Appeals in Hashmi v. State, Nos. 05-21-01129-CR, 05-21-01130-CR, 05-21-01131-CR, 05-21-01132-CR, 2022 Tex. App. LEXIS 7949 (Tex. App.—Dallas Oct. 26, 2022, pet. ref'd) (mem. op., not designated for publication) concluded that the email sent to a court coordinator "does not constitute presentment . . . as the record contains nothing showing the . . . coordinator received actual notice of it." Id. at *10. We agree. Without more than an allegation about sending an email, the circumstances at bar do not establish that the trial judge or someone with authority to act for him had actual notice of the amended motion for new trial or the disproportionality claim within it.

Comment. At least I have something to quote now when I miss an important email.

9th District Beaumont

***Coleman v. State*, No. 09-21-00155-CR (Tex. App.—Beaumont, Jul. 12, 2023)**

Attorneys. Steven Green (appellate), Stella Morrison (trial), Kent Johns (trial)

Issue & Answer. Is an indictment (that tracks the language of the statute) alleging that the defendant did something "in a manner not authorized by law" unconstitutionally vague? **No, not if the defendant got discovery.**

Facts. The defendant owned a restaurant, and the State indicted him for using various food stamp cards for

purchasing food inventory for his restaurant. A raid of the defendant's restaurant resulted in the discovery of three food stamp cards not belonging to the defendant but used by him to purchase food at Sam's club. The State indicted the defendant for engaging in a scheme and continuing course of conduct that began on April 21, 2016, and continued until the presentment of the indictment for knowingly using, transferring, and redeeming food stamp benefits, namely Electronic Benefit Transfer Cards, in a manner not authorized by law.

Analysis. The Legislature did not define the term "not authorized by law" when it criminalized food stamp fraud. What is important here is that the State alleged that he violated the statute "knowingly" and that he had discovery. The State had to prove that he knew his use was "not authorized by law" and with his access to discovery and the State's witness list he was on notice how the State would attempt to do this at trial.

Comment. The defendant has a point. The statute basically says it's a crime to break the law. I'm not sure where the court was going with the "they said he did it knowingly" rationale, but it sounded a lot like "you know what you did."

10th District Waco

***Ex parte Lee*, No. 10-22-00281-CR (Tex. App.—Waco, Jul. 19, 2023)**

Attorneys. Craig Greening (appellate) (trial)

Issue & Answer. What happens when a lawyer submits a brief prepared by A.I.? **This.**

Facts & Analysis.

In presenting error to this Court, an appellant's brief must contain a clear and concise argument of the contentions made with appropriate citations to authorities and to the record. See TEX. R. APP. P. 38.1(i); Neville v. State, 622 S.W.3d 99, 104 (Tex. App.— Waco 2020, no pet.). That has not occurred in this case. In the "Standard of Review" and "Applicable Law" sections of his brief, Lee cites to the general, applicable case law and statutes. However, in his "Argument" section, where appropriate citations must be included, Lee cites to five cases to support the two sub-arguments to his issue. Only three of those five cases are published. None of the three published cases cited actually exist in the Southwest Reporter. Each citation provides the reader a jump-cite into the body of a different case that has nothing to do with the propositions cited by Lee. Two of the citations take the reader to cases from Missouri. As the State points out, even Texas cases with the same names as those cited

by Lee do not correspond with the propositions relied upon.1 Further, as again noted by the State, the brief is devoid of any citations to the record. These deficiencies, although brought to the Court's and to Lee's attention by the State in its brief to this Court, were neither contested nor corrected by Lee in any kind of reply, amended, or supplemental brief.2 Thus, Lee inadequately briefs his sole issue on appeal.

The failure to adequately brief an issue presents nothing for us to review, and we are not required to make an appellant's arguments for him. See TEX. R. APP. P. 38.1(i); Lucio v. State, 351 S.W.3d 878, 896 (Tex. Crim. App. 2011) (citing Busby v. State, 253 S.W.3d 661, 673 (Tex. Crim. App. 2008)); see also Neville v. State, 622 S.W.3d 99, 104 (Tex. App.— Waco 2020, no pet.). Accordingly, because Lee inadequately briefs his sole issue, it presents nothing for our review and is overruled

Footnote 2:

[I]t appears that at least the "Argument" portion of the brief may have been prepared by artificial intelligence (AI).

* * *

Because we have no information regarding why the briefing is illogical, and because we have addressed the issue raised on appeal, we resist the temptation to issue a show cause order . . . or report the attorney to the State Bar of Texas for a potential investigation for a violation of the State Bar rules.

Comment. Read the brief here: Link Aside from the bad citations it is a sound (albeit short) brief. Interestingly the cover says, "Oral Arguments Requested." I am wondering who (or what) would have shown up had they been granted.

13th District Corpus Christi/Edinburg

Lopez v. State, No. 13-22-00171-CR (Tex. App.— Corpus Christi, Jul. 6, 2023)

Attorneys. John Lamerson (appellate), Ross Reifel (trial)

Issue & Answer. Case law permits a jury to consider alternate theories of murder even when those theories allege different subsections of the murder statute (intentional murder, felony murder, dangerous act murder). A jury's general verdict is supported by sufficient evidence even when the record fails to support one or more theories considered. But, does the jury's general verdict present a jury unanimity problem? **No.**

Facts. A jury convicted the defendant of murder. The State's indictment alleged six paragraphs containing alternate theories of murder: (1) intentional murder under Penal Code § 19.02(b)(1), (2) dangerous act with intent to cause serious bodily injury under Penal Code § 19.02(b)(2), and (3) felony murder under Penal Code § 19.02(b)(3).

Analysis. It is settled that the State may submit alternate theories of murder to the jury for consideration. When the jury returns a general verdict, it does not present a sufficiency of the evidence problem with relation to unsupported theories. *See Kitchens v. State*, 823 S.W. 2d 256 (Tex. Crim. App. 1991). Jury unanimity is not required for alternate theories. Unanimity requires jury agreement on the commission of a single offense, but not the manner and means. Murder is a result of conduct offense—the result is the offense and not how a defendant caused it. Even with their differing mental states, the different subsections of the murder statute merely set forth different manners and means of committing murder. Thus, there is no unanimity problem here.

Comment. Are we just slowly marching toward a world where indictments and jury charges say nothing more than "the defendant did a crime, don't ya think?"

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

- 3rd District Austin
- 6th District Texarkana
- 8th District El Paso
- 11th District Eastland
- 12th District Tyler
- 14th District Houston

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

Understanding the Role of Childhood Memory
Cross of Child

68

Sexual Assault Exams & Understanding Injuries
Preservation of Error & Jury Charges

Ethical Issues: Defense of Sex Crimes
Forensic Interviews & False Accusation Cases

64

Computer Crimes: Child Porn & Solicitation
Jury Selection

Punishment Phase: Pre-Trial & Trial Strategies
Plea Bargain Agreements & Consequences

60

Pre-Trial Investigation & Motions
Experts Witness & Challenging Expert Testimony

Grand Jury Packets

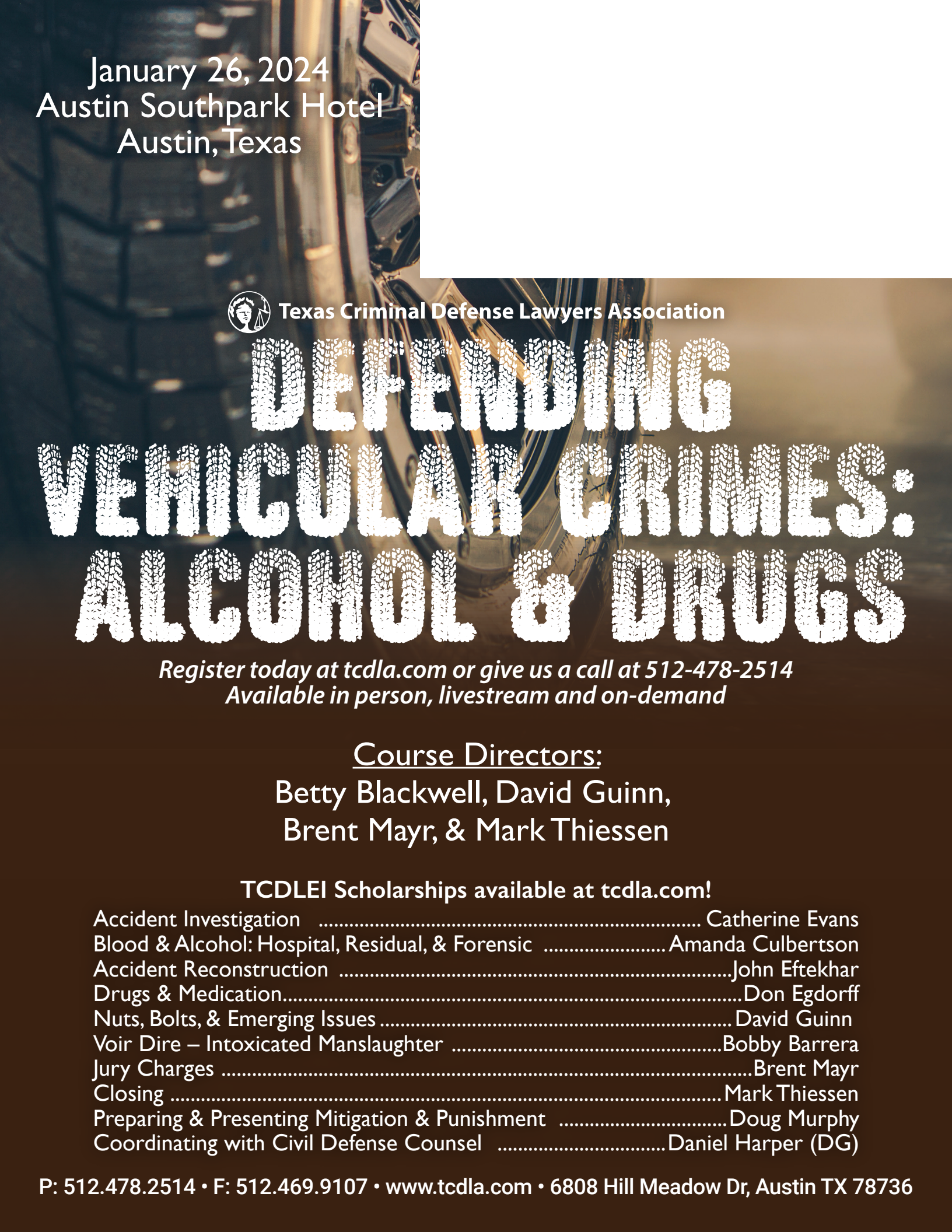
56

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



January 26, 2024
Austin Southpark Hotel
Austin, Texas

Texas Criminal Defense Lawyers Association

DEFENDING VEHICULAR CRIMES: ALCOHOL & DRUGS

Register today at tcdla.com or give us a call at 512-478-2514
Available in person, livestream and on-demand

Course Directors:

Betty Blackwell, David Guinn,
Brent Mayr, & Mark Thiessen

TCDLEI Scholarships available at tcdla.com!

Accident Investigation	Catherine Evans
Blood & Alcohol: Hospital, Residual, & Forensic	Amanda Culbertson
Accident Reconstruction	John Eftekhar
Drugs & Medication	Don Egdorff
Nuts, Bolts, & Emerging Issues	David Guinn
Voir Dire – Intoxicated Manslaughter	Bobby Barrera
Jury Charges	Brent Mayr
Closing	Mark Thiessen
Preparing & Presenting Mitigation & Punishment	Doug Murphy
Coordinating with Civil Defense Counsel	Daniel Harper (DG)

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