TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

VOICE FOR THE DEFENSE

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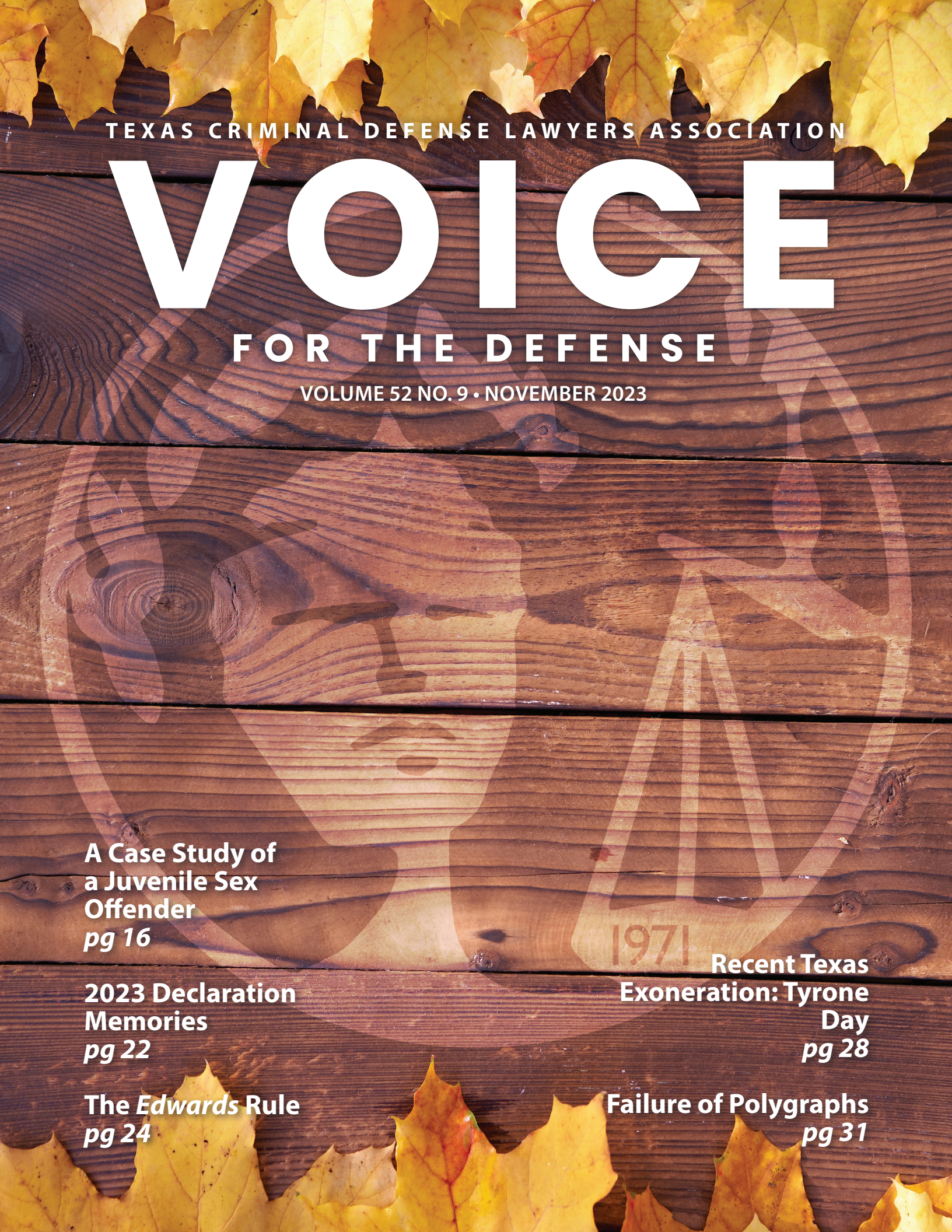

Texas Criminal Defense Lawyers Association

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VOICE
FOR THE DEFENSE

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Features

Columns

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November

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

November 16
CDLP | Capital Litigation
Dallas, TX

November 17
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Dallas, TX

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Round Rock, TX

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Round Rock, TX

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

December 15
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December 18
CDLP | Mindful Monday
Webinar

2024

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Lubbock, TX

January 4-5
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January 14
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Webinar

January 19
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January 26
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Austin, TX

January 26
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February 22
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February 23
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February 29
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March

March 7-8
TCDLA | From Start to End
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March 8
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March 9
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Galveston, TX

March 17-22
CDLP | 47th Annual Tim Evans Texas Criminal Trial College
Huntsville, TX

March 21-22
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New Orleans, LA

March 24-25
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April 11
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May

May 3
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May 13
CDLP | Mindful Monday
Webinar

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CDLP | Chief Public Defender & MAC Training
San Antonio, TX

June 12
CDLP |Capital Litigation
San Antonio, TX

June 12
CDLP | Indigent Defense Training
San Antonio, TX

June 12
CDLP | Mental Health
San Antonio, TX

June 13
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San Antonio, TX

June 14
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San Antonio, TX

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

June 14
TCDLA Annual Members' Board Meeting
San Antonio, TX

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President's Message

JOHN HUNTER SMITH

Where Did All the Statesmen Go?

It seems that everything in the media today puts dissension on display. Whether we find ourselves doom-scrolling social media, reading local current events, or catching up on national events on our favorite cable news network, it doesn't take long to find an endless amount of destructive and negative rhetoric. While a true statesman is believed to be a skilled, respected, and experienced political leader, most Americans see politicians as intelligent but not necessarily honest. According to data gathered by Pew Research Center, 55% of our nation's citizens feel that ordinary Americans would do a better job at solving the nation's problems than their elected representatives. At the national level, the number of well-meaning individuals constantly finger-pointing each other can be overwhelming. As with the saying, "So goes the leader, so goes the organization," it's no surprise that state politicians seem to follow this same low expectation. As I take time to self-reflect, I can't help but wonder if this has even trickled down to our daily interactions.

As trial lawyers, we generally have a distinct "win at all costs" attitude. If we are completely honest, we see ourselves as some of the best, brightest, most competitive individuals in the state. We have dedicated a great deal of blood, sweat, and tears to our clients and our profession. Still, we must question if we, too, have allowed the negative rhetoric to make its way into our daily lives and how we interact with prosecutors and even our clients. When we committed to the Texas Lawyer's Creed, we agreed that "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." As we practice this, we must be reminded of the importance of compromise. Statistics show that 49% of the public says they like elected officials who compromise, while 47% say they prefer those who stick to their positions. This insinuates that there is a time and place for both sticking to your guns and compromising. We must continually question, "How can I ensure that I am not part of the problem of polarizing rhetoric?"

In the book, I Remember Atticus, Jim Perdue writes that justice is a concept common to all faiths. Five hundred years before the birth of Christianity, Confucius taught, "Recompense injury with justice, and recompense kindness with kindness." Most of us have little to no aspiration of being a politician, but our aspirations should still include the attributes of a skilled, respected, experienced statesman both in and outside the courtroom.

CEO's Perspective

MELISSA J. SCHANK

"Gratitude makes sense of our past, brings peace for today, and creates a vision for tomorrow."

-Melody Beattie

Embracing the Spirit of Fall Holidays: Family, Community, and Tradition

The upcoming fall holidays are eagerly anticipated by me. I thoroughly enjoy the opportunity to dress up, transform my appearance into something delightfully scary, and challenge myself to create intricate costumes. Anyone who knows me is aware of my deep passion for dressing up, especially during our Rusty membership parties.

Upon moving to my new house, I was disheartened to discover that the tradition of children trick-or-treating wasn't a thing. To rekindle the Halloween spirit, I started returning to my old neighborhood to distribute candy. Now, with grandkids, I find immense joy in decorating my home and organizing spooktacular events for them, as the older kids have moved on to other ghastly Halloween activities with their friends.

As the season transitions from spooky to cozy, I switch out the eerie decorations, replacing them with warm fall ornaments to prepare the house for Thanksgiving. I take pride in roasting the largest turkey, ensuring there are plenty of leftovers to make delicious pot pies. Traditionally, I'd spend the early part of the week baking pies with my daughter, but her schedule has changed, leaving me to ponder my options. While taking the entire week off to bake with my son seems unlikely, I remain excited about cooking an abundance of food and inviting family and friends over to celebrate togetherness. My home is always open to anyone who wishes to join us.

In response to the curious questions my kids used to ask about why we extend our gatherings beyond our immediate family, I've had numerous conversations about the importance of surrounding ourselves with loved ones. Our family may have started small, but it has grown through the relationships and friendships I've gained throughout my life. Coming from a small family myself, I wanted to offer this sense of inclusivity to anyone who desired it. Additionally, being a part of TCDLA has had a overwhelming impact on my family's life, from our team to the members who have treated me and my family as their own.

The festive transition continues throughout the month as I decorate every door with a wreath and illuminate the dark evenings with twinkling lights. Beyond the decorations and feasts, I strive to engage in community activities with my friends and colleagues. In the past, we've adopted families in need or participated in gift-wrapping initiatives like Brown Santa. Unfortunately, last year, we couldn't wrap gifts due to a shortage, but this year, we plan to find meaningful community activities for our staff team and engage in personal acts of kindness as well.

I consider myself incredibly fortunate to be part of the TCDLA family, which truly feels like a second family to me. I'm well aware that in moments of need or sadness, there are many individuals I've met over the years who I can call upon for support. While pride may often get in the way, I remind myself continuously – I am not alone and neither are you! This sense of community warms my heart and embodies the essence of the holiday season when spent with friends and family.

I extend my warmest wishes to you during this holiday season and am truly thankful to have each of you in my life. If you ever find yourself in need of someone to talk to or email, please know that I am here for you. Happy holidays!

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

Limited Space

❑ 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?: _____

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

Us

Editor's Comment

JEEP DARNELL

One of the nicest parts about being Editor of The Voice for the Defense is that I get to read everyone else's columns and articles before I have to write mine. On occasion, I have writer's block and have no idea what to write about. Such is the case with this column. However, after reading our President's column and our Executive Director's column, I know exactly what I want to write about . . . all of you. Our members, my friends, and my other family make this Organization such a special group to be a part of. I have written many times about how special y'all are to me, but I was reminded by John and Melissa just how much y'all mean to me. I'm sure I haven't met every one of our almost 4,000 members, but I would bet I've met the lion's share of y'all. And among those nearly 4,000 members are some of my best friends. There are people I text on a regular basis; there are people who know when I need a friend and pick me up; there are people I'm not allowed to sit with at social functions because we get in trouble with our wives and usually HR; there are the people I call my Jiminy Crickets (if you don't know the reference, look it up); there are quite a few people I talk smack to and who talk smack to me during college football season; and there are a lot with whom I trade Christmas cards and whose friendships I cherish.

Am I friends with so many people in the Organization because we are all criminal defense lawyers? Or is it our type A personalities? Is it our hyper-competitiveness? Are we friends because of our TCDLA involvement? I don't think it's any of the above. I believe that below the sometimes rough, sometimes tough, sometimes crude, always defiant exteriors, it is our shared passion for the downtrodden, the forgotten, the damned, that brings us together. I have friends from other parts of my life who I love spending time with, but I don't dedicate nearly as much of my time or energy to causes with them. We all enjoy other aspects of our lives outside of the practice of criminal defense, but I would take any one of y'all with me to go get in a fight in a dark alley if it meant that one man or woman accused would go free. It's like almost 4,000 people collectively have a chip on their shoulders over a single issue that determines how they view their country. We have Democrats, Republicans, Independents, liberals, conservatives, straight men, straight women, lesbians, gays, bisexuals, transvestites, queers, asexuals, pansexuals, country folk, city folk, Caucasians, Hispanics, African Americans, Asian Americans, European Americans, and every other cross-section that I can think of, and others that I can't, within our TCDLA family. I am unsure of any other such group of people in America, frankly. But somehow, at the end of the day, we all manage to mostly get along because we love this Country and believe in what we do. As we all march toward the end of 2023, thank you for believing in that common bond, and thank you for all the work you do to protect the United States, one person at a time.

Be safe,

Jeep Darnell

Get Published!

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

The Federal Corner

GABRIELA VEGA

Drug Overbreadth Goes to the Supreme Court

You probably already know to challenge any prosecution under 18 U.S.C. § 922(g)(1) under the Second Amendment. But what may have escaped notice, amid all the excitement over *Bruen* and its implications, is that the Supreme Court may be opening yet another door for effective defenses to § 922(g)(1) — this time focused on prosecutions under the Armed Career Criminal Act ("ACCA").

ACCA enhances penalties for § 922(g)(1) crimes in a massive way. In short, it converts an otherwise absent mandatory minimum to a 15-year mandatory punishment floor and removes any punishment ceiling, authorizing up to a life sentence. 18 U.S.C. § 924(e)(1). Its application requires at least three prior felony convictions, which can qualify as ACCA predicates either as a "serious drug offense" or a "violent felony." 18 U.S.C. § 924(e)(1)–(2). Whether a prior conviction fits the definition of "serious drug offense" or "violent felony" requires application of what's known as the categorical approach. *United States v. Powell*, 78 F.4th 203, 206 (5th Cir. 2023). For purposes of this article, what's most important to note about the categorical approach is that the facts underlying the prior conviction do not matter. *Id.* Instead, a categorical match must exist between the elements of the prior offense and the federal definition of a prior conviction to qualify. *Id.* For a "serious drug offense," that means that the offense is:

> (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law[.]
>
> 18 U.S.C. § 924(e)(2)(A).

Additionally, if the government is relying on Texas drug priors to trigger ACCA penalties, you should also be aware of two recent Supreme Court certiorari grants, September 11, 2015, and December 20, 2018.

Certiorari Granted re: December 20, 2018

The first case arises from the Third Circuit, *United States v. Brown*, 47 F.4th 147 (3d Cir. 2022). Brown challenged ACCA's application by arguing that his marijuana convictions from Pennsylvania could no longer serve as predicates by the time of his sentencing due to the federal decriminalization of hemp. *Id.* at 148. The Third Circuit disagreed, holding that the "federal law in effect at the time of commission of the federal offense" controlled. *Id.* Brown committed his offense in 2016, pleaded guilty in 2019, and was sentenced in 2021. *Id.* at 148–49. His Pennsylvania marijuana convictions at issue in the case spanned from 2009 to 2014. *Id.* at 149. At the time of the federal offense — in 2016 — Pennsylvania and federal law defined "marijuana" "identical[ly]…in every material respect." *Id.* at 150. But that changed on **December 20, 2018**, when Congress removed "hemp" from the definition of marijuana. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490. The parties did not "dispute that Brown's prior state convictions would be ACCA predicates without th[is] change[] to federal law[.]" *Id.* at 150–51. "And the Government agrees with Brown that Pennsylvania's definition of marijuana is now broader than its federal counterpart." *Id.* at 151. Thus, to resolve the dispute, the Third Circuit had to decide whether the federal law at the time of the offense or at the time of the sentencing controlled. *Id.* It chose the former. *Id. See also United States v. Perez*, 46 F.4th 691, 700 (8th Cir. 2022) ("We find that the categorical approach requires comparison of the state drug schedule at the time of the prior state offense to the federal schedule at the time of the federal offense."); *United States v. Williams*, 48 F.4th 1125, 1141 (10th Cir. 2022) (same).

Certiorari Granted re: September 11, 2015.

The second case arises from the Eleventh Circuit and involves a drug overbreadth claim premised on ioflupane. On **September 11, 2015**, the Drug Enforcement Administration removed iofluplane from the schedules of the Controlled Substances Act. Schedules of Controlled Substances: Removal of [123 I] Ioflupane From Schedule II of the Controlled Substances Act, 80 FR 54715-01. "Prior to the effective date of this rule, ioflupane was, by definition, a schedule II controlled substance because it is derived from cocaine via ecgonine, both of which are schedule II controlled substances." *Id. Jackson* involved two alleged predicate "serious drug offense" convictions from Florida, both involving cocaine. *Jackson*, 55 F.4th at 850–51. The first dated to 1998 and the second to 2004, when "[t]he federal version of Schedule II also encompassed ioflupane." *Id.* at 850–51. But by "2017, when Jackson possessed the firearm that resulted in his federal conviction under 18 U.S.C. § 922(g)(1) here, ioflupane was not a controlled substance 'as defined ... [under] the Controlled Substances Act.'" *Id.* at 851 (quoting 18 U.S.C. § 924(e)(2)(A)(ii)). To determine whether the Florida law under which Jackson was convicted was "categorically broader than ACCA's definition," the Eleventh Circuit had to decide "which version of the federal controlled-substances schedules ACCA's definition of 'serious drug offense' incorporates: the one in place at the time of the prior state conviction, or the one in place at the time the defendant committed the present federal firearm offense." *Id.* at 851. The Eleventh Circuit held that "ACCA's 'serious drug offense' definition incorporates the version of the controlled-substances list in effect when the defendant was convicted of his prior state drug offense." *Id.* at 849. *See also United States v. Clark, 46 F.4th 404, 406 (6th Cir. 2022)* ("the proper reference is the law in place at the time of the prior convictions").

Other Circuits have splintered off from both *Brown* and *Jackson*, deciding that the schedules in effect at the time of sentencing control. *See United States v. Abdulaziz*, 998 F.3d 519, 531 (1st Cir. 2021) (prior conviction did not qualify as a "controlled substance offense" under the guidelines because "hemp was not a 'controlled substance' within the meaning of the version of § 4B1.2(b) that was in effect at the time of Abdulaziz's sentencing); *United States v. Bautista*, 989 F.3d 698, 703 (9th Cir. 2021) ("a court must ask whether Bautista's prior crime qualifies as a 'controlled substance offense' under the CSA and the corresponding Guideline at the time of sentencing"); *United States v. Hope*, 28 F.4th 487, 504 (4th Cir. 2022) ("we will compare the definition of 'marijuana' under federal law at the time of Hope's sentencing, on August 12, 2020, with South Carolina's definition of 'marijuana' at the time he was sentenced for his state offenses on May 22, 2013"). Now entering the fray, the Supreme Court will definitively answer which version of federal law a sentencing court must consult under ACCA's categorical approach.

Application to Fifth Circuit Practitioners

Given that the Court may decide that the schedule at the time of the federal offense or federal sentencing controls, Fifth Circuit practitioners should consider preserving drug overbreadth challenges to Texas drug priors. In short, enough exists to clue in practitioners now that serious drug overbreadth challenges exist to Texas drug priors. First, on June 10, 2019, the Texas Legislature amended the definition of "controlled substance" to exempt "hemp, as defined by Section 121.001, Agriculture Code, or the tetrahydrocannabinols in hemp." Production And Regulation Of Hemp; Requiring Occupational Licenses; Authorizing Fees; Creating Criminal Offenses; Providing Civil And Administrative Penalties, 2019 Tex. Sess. Law Serv. Ch. 764 (H.B. 1325) (VERNON'S) (codified at Tex. Health & Safety Code Ann. § 481.002(5)). This raises the strong possibility that one could argue that the Texas Controlled Substances Act covered hemp prior to this amendment. Second, Texas *still* defines cocaine in a manner that arguably includes ioflupane. However, it bears noting that the Department of State Health Services delisted ioflupane from the Texas Controlled Substances schedule on November 3, 2015. *See* Tex. Health &

Safety Code Ann. § 481.102, https://www.dshs.texas.gov/sites/default/files/drugs/PDF/schedules/Schedules-Amendment-Dec2015.pdf. Third, the Fifth Circuit already recognized that Texas's "cocaine" definition does not categorically match the federal definition of "cocaine" because it includes position isomers of cocaine. *Alexis v. Barr*, 960 F.3d 722, 726–27 (5th Cir. 2020).

So, why has the Fifth Circuit not decided the timing question yet? Two theories.

First, the challenges have been subject to plain error review, so the Circuit need not decide the timing issue because, given the circuit split and lack of precedent, any error would not be clear or obvious. *See United States v. Nava*, No. 21-50165, 2021 WL 5095976, at *2 (5th Cir. Nov. 2, 2021) ("Nava argues that his prior marijuana importation offense cannot be considered a controlled substance offense under § 4B1.2 because the statute of conviction in 2009 criminalized hemp, which was no longer a controlled substance by the time he was sentenced as a career offender. Although other circuit courts have taken the position Nava urges, the question remains an open one in the Fifth Circuit, and [he] has failed to show that the district court's error, if any, was plain." (internal citations and quotations omitted); *United States v. Belducea-Mancinas*, No. 20-50929, 2022 WL 1223800, at *1 (5th Cir. Apr. 26, 2022) (citing Nava); *United States v. Rodriguez*, No. 21-50680, 2022 WL 1615333, at *1 (5th Cir. May 23, 2022) (same); *United States v. Ordunez*, No. 21-50869, 2023 WL 4015265, at *2 (5th Cir. June 14, 2023) (same).

Second, the Fifth Circuit's split en banc decision in *United States v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017), has prevented meaningful progress on drug-overbreadth claims. In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), *Duenas-Alvarez* argued that his California conviction under the California Vehicle Code did not qualify as a theft offense under 8 U.S.C. § 1101(a)(43). *Id.* at 185, 187–88. He agreed "that generically speaking the law treats aiders and abettors during and before the crime the same way it treats principals; and that the immigration statute must then treat them similarly as well." *Id.* at 190. But he submitted "that the California Vehicle Code provision in other ways reaches beyond generic theft to cover certain nongeneric crimes." *Id.* The Supreme Court rejected this interpretation, reasoning that "to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language." *Id.* at 193. "It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Id.* In *United States v. Castillo-Rivera*, 853 F.3d 218, 222–23 (5th Cir. 2017), a splintered Fifth Circuit decided en banc that the Supreme Court's actual-case requirement

in Duenas-Alvarez applied to facially-broader statutory language. But the majority of Circuits take the opposite view. *See Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017) ("The state crime at issue clearly does apply more broadly than the federally defined offense. Nothing in *Duenas–Alvarez*…indicates that this state law crime may be treated as if it is narrower than it plainly is."); *Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018) ("The realistic probability test is obviated by the wording of the state statute, which on its face extends to conduct beyond the definition of the corresponding federal offense."); *Singh v. Att'y Gen.*, 839 F.3d 273, 286 n.10 (3d Cir. 2016) ("Here, the elements of the crime of conviction are not the same as the elements of the generic federal offense. The Supreme Court has never conducted a 'realistic probability' inquiry in such a case. Accordingly, we believe this is a case where the 'realistic probability' language is simply not meant to apply."); *Gordon v. Barr*, 965 F.3d 252, 260 (4th Cir. 2020) ("when the state, through plain statutory language, has defined the reach of a state statute to include conduct that the federal offense does not, the categorical analysis is complete; there is no categorical match…. In such circumstances, the burden does not shift to the respondent to 'find a case' in which the state successfully prosecuted a defendant for the overbroad conduct."); *Gonzalez v. Wilkinson*, 990 F.3d 654, 660 (8th Cir. 2021) ("realistic probability was evident from the language of the statute itself"); *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009–10 (9th Cir. 2015) ("if a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime." (internal quotations marks omitted)); *Ramos v. U.S. Atty. Gen.*, 709 F.3d 1066, 1071–72 (11th Cir. 2013) ("*Duenas–Alvarez* does not require this showing when the statutory language itself, rather than 'the application of legal imagination' to that language, creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition."). Citing *Castillo-Rivera*, the Fifth Circuit nonetheless at least twice has acknowledged the drug overbreadth/categorical mismatch between Texas's cocaine definition and the federal cocaine definition without affording relief. See *Alexis v. Barr*, 960 F.3d at 729; *United States v. Kerstetter*, No. 22-10253, 2023 WL 6210601, at *3 (5th Cir. Sept. 25, 2023).

So, a defendant-friendly opinion in *Brown* and *Jackson* likely won't be enough for clients in the Fifth Circuit with Texas drug priors to obtain relief. The defense bar likely still will need to continue asking the Supreme Court to correct the Fifth Circuit on its application of *Duenas-Alvarez* and its strict actual case requirement too. But when the stakes are this high, informed and conscientious practitioners should consider challenging Texas drug priors, especially cocaine and marijuana-based convictions in district court, on drug-overbreadth grounds and be prepared to argue why *Castillo-Rivera* was wrongly decided.

Gabriela Vega *is an Assistant Federal Public Defender in the Northern District of Texas and works in the Dallas division. She graduated from Harvard Law School in May 2012 and joined the FPD's office in November 2017. She can be reached at Gabriela_Vega@fd.org.*

Beyond the City Limits

DEAN WATTS

Managed Assigned Counsel Programs What They Are, and Why You Should Care

Recently, at one of our rural roundtable discussions, the subject of managed assigned counsel arose from one of our members. An assortment of confused looks followed. Since rural practitioners seldom, if ever, encounter these programs, I reached out to Scott Ehlers, the Interim Executive Director of the Texas Indigent Defense Commission, to get some insight as to what managed assigned counsel programs are and why they are important.

Q. Scott, thank you so much for taking the time today to answer questions about managed assigned counsel programs. Can you tell us what exactly is the managed assigned counsel program?

A. Thanks for inviting me to have this important conversation, Dean. Managed assigned counsel programs (MACs) are a fairly new concept in Texas, so it is understandable that many attorneys from a state as big as ours may not know what they are.

A MAC is a governmental entity, nonprofit corporation, or bar association that determines what attorneys are eligible to receive appointed cases; appoints counsel; approves requests from assigned counsel for investigators, experts, and social workers; monitors attorney performance; and pays assigned counsel, investigators, and experts. They also do a variety of things to improve the quality of representation, like having mentorship programs, providing trainings, responding to complaints about attorney performance, and recruiting new attorneys, if needed.

The first MAC was established in Lubbock in 2009, two years before the concept was formally recognized in state law (art. 26.047, Texas Code of Criminal Procedure, and other statutes). Today, there are seven counties with a MAC, two of which specialize in the representation of defendants with mental illness:

1. Lubbock Private Defenders Office (LPDO; est. 2009/2011)
2. Capital Area Private Defender Service (est. 2014; Travis Co.)
3. Collin County Mental Health Managed Counsel Program (est. 2013)
4. McLennan County Managed Assigned Counsel Program (est. 2020)
5. Harris County Office of Managed Assigned Counsel (est. 2020)
6. Bexar County Managed Assigned Counsel (est. 2021)
7. North Texas Managed Assigned Counsel Office (TIDC grant approved-2023; Grayson Co.)

For the past few years, LPDO has operated the MAC that oversees the appointment of counsel for Operation Lone Star in multiple counties. Recently a new nonprofit MAC was formed, Lone Star Defenders Office, that is taking on that role.

Q. Most rural areas operate where judges appoint counsel from an appointment list. How is the managed assigned counsel program different than that system?

A. MACs effectively take over most of the indigent defense-related duties of judges and court staff. The judges designate the MAC to manage the appointment lists, appoint counsel, and approve vouchers through a county's indigent defense plan. As previously noted, MACs also approve attorney requests for investigators, experts, immigration consultations, and social service providers, and pay for those case-related services. The judges still set the fee schedule, however.

Q. How is the managed assigned counsel program different than a public defender's office?

A. Attorneys who represent indigent defendants assigned through a MAC are private attorneys (often called panel attorneys), while attorneys who work for a public defender office (PDO) are employees of that office. So, there is an employer-employee relationship between management and attorneys in a PDO, but not in a MAC. This allows for a level of supervision and direction from supervisors in a PDO that is not possible in a MAC because lawyers in a MAC are independent contractors. Because a PDO is effectively a law firm, conflicts arise and the office cannot represent

defendants where a conflict exists, like when there are co-defendants. A MAC does not have that problem because lawyers in different firms can represent those co-defendants.

There are attorneys who work for MACs, typically the director or others who serve in a role often called a resource attorney. Resource attorneys (and directors) can assist panel attorneys with their cases, provide trainings, monitor attorney performance, and respond to complaints about panel attorneys from clients and judges. Both MACs and PDOs often have social service providers like social workers or case managers who assist attorneys and their clients by providing mitigation and linking services to clients. Both may also have an investigator on staff, but most MACs use contract investigators. Both may also have an immigration attorney on staff to provide attorneys with Padilla advisals to inform them about the immigration consequences of a criminal conviction for their client.

Q. In your opinion, what do you think the benefits of a managed assigned counsel program are?

A. MACs provide benefits to defense counsel, the courts, counties, and defendants. They benefit defense counsel by providing added independence to attorneys by giving appointing and payment authority to an independent, defense-oriented entity. Defense counsel does not have to get approval from a judge for an investigator or expert; they are approved by the MAC. The MAC supports attorneys by providing case advice; technology support services like computer workstations to view discovery, print documents, and do legal research; rooms to meet with clients; social workers; training; and mentorship. MACs have also shown they can pay attorneys more quickly than the courts.

MACs provide benefits to the courts by taking over highly bureaucratic functions like maintaining the appointment lists, appointing counsel, and approving vouchers. Judges can also contact the MAC about attorneys with performance issues. If there are not enough attorneys to represent indigent defendants, MACs can recruit more attorneys or organize mentorship and training programs to prepare attorneys to receive appointments for the first time or provide representation in more serious cases.

MACs can benefit counties by ensuring quality counsel is being provided. They ensure mentally ill defendants are not languishing or decompensating in jail after being restored and serve as a centralized entity that ensures the indigent defense system operates efficiently and effectively.

Finally, MACs benefit defendants by appointing counsel quickly, improving representation, and addressing complaints about attorneys.

Q. What are the detriments?

A. I don't believe there are any detriments of MACs, but for small counties without many cases, it may not be cost-effective to have a single-county MAC. In such situations, it may make more sense to have a regional MAC or a regional public defender office. If a county is looking for a solution to attract new attorneys to a county, a MAC probably won't provide enough benefits to incentivize attorneys to move to a

new area and start up a private practice.

Q. What role do you see managed assigned counsel programs being for rural counties?

A. MACs can provide rural counties with all the benefits I described, just as they do for urban counties. As I noted, however, for very small counties without many cases, it may not be cost-effective to have a MAC with a full-time attorney employed as a director and full-time support staff. In such a situation, it may make more sense to have a regional MAC or use part-time staff. Grayson County is in the process of establishing the first rural MAC with the assistance of a TIDC Improvement Grant. I'm very excited to see it get started and show the many benefits a MAC can provide to rural counties.

Q. If a legal community is interested in finding out more information about this program, where should they go?

A. I would encourage folks who are interested in MACs to check out TIDC's publications, Primer on Managed Assigned Counsel Programs, and Managed Assigned Counsel Programs in Operation. They can be found on our publications page: https://www.tidc.texas.gov/improvement/publications/.

You might also check out the websites for the Lubbock Private Defenders Office (https://www.lpdo.org), the Capital Area Private Defender Service (http://www.capds.org/home.html), the Harris County Office of Managed Assigned Counsel (https://mac.harriscountytx.gov), and the Bexar County Managed Assigned Counsel (https://www.bexar.org/3587/Managed-Assigned-Counsel).

If you would like TIDC to develop a planning study for a MAC in your county, reach out to me and I will walk you through the process.

Q. Scott, thanks again for taking the time to answer these questions. Is there anything else you would like to pass along to TCDLA's rural practitioners about this program?

A. Rural practitioners have a tough job and I think MACs can provide them with support to make their lives easier and improve outcomes for their clients. Although we only have one rural MAC in Texas, I would love to see more.

TIDC helps counties establish MACs through our Improvement Grant program. You can find out more at: https://www.tidc.texas.gov/funding/improvement-grants/.

Well, there you have it. Now, when our urban colleagues bring up managed assigned counsel programs, we can sagely nod in agreement instead of giving them blank looks and hurriedly changing the subject. As always, good luck, take care and have fun.

-Dean Watts

Dean Watts *has been a TCDLA member since 1998. He's a graduate of SMU law school and the National Criminal Defense College in Macon, Georgia. He has been board certified in criminal law since 2004, has been selected to the Texas lawyers list for two years, and practices criminal law in Nacogdoches, Texas.*

Following the Juvenile Sex Offender to Adult Court: A Case Study of Juvenile Sex Offender After a Determinate Sentence Adjudication and Disposition

GREGORY FREED

Member of the TCDLA Juvenile Justice Committee

When representing a juvenile determinate sentence sex offender, it is important for the attorney to know that the adjudication and disposition of the matter is not the end of the case. The juvenile practitioner must understand and advise the child regarding major issues that will come up in the future. These issues include the possible transfer to adult court, sex offender registration, and early termination of probation if transferred to adult community supervision. These factors must be taken into consideration as part of the holistic representation of your client.

This case study is just one example where the holistic approach to determinate sentence representation of the juvenile sex offender can make a major difference in the outcome your client receives. I was appointed to handle a transfer hearing for a juvenile sex offender who had been found true of a determinate sentence aggravated sexual assault of a child and committed to the Texas Juvenile Justice Department. The sentence had been probated for ten-years.[1] His sex offender registration was deferred until he successfully completed treatment.[2] This young man was undergoing sex offender treatment but could not finish the same before his 19th birthday.[3]

TRANSFER OF DETERMINATE SENTENCE PROBATION TO APPROPRIATE DISTRICT COURT

After meeting with my new client and discussing transfer to adult court and what to expect, the first thing I did was to verify the State had filed a motion requesting transfer to adult court. Failure of the State to timely file this motion prevents the case from being transferred to adult court and the determinate sentence probation would automatically terminate on the 19th birthday.[4]

1 If a court or jury sentences a child to commitment in the Texas Juvenile Justice Department or a post adjudication secure correctional facility under Subsection (d)(3) for a term of not more than 10 years, the court or jury may place the child on probation under Subsection (d)(1) as an alternative to making the disposition under Subsection (d)(3). The court shall prescribe the period of probation ordered under this subsection for a term of not more than 10 years. (Texas Family Code §54.04 (q)).

2 After a hearing under Article 62.351 or under a plea agreement described by Article 62.355(b), the juvenile court may enter an order: (1) deferring decision on requiring registration under this chapter until the respondent has completed treatment for the respondent's sexual offense as a condition of probation or while committed to the Texas Juvenile Justice Department. (Texas Code of Criminal Procedure Article 62.352(b)).

3 If a sentence of probation ordered under this subsection and any extension of probation ordered under Section 54.05 will continue after the child's 19th birthday, the court shall discharge the child from the sentence of probation on the child's 19th birthday unless the court transfers the child to an appropriate district court under Section 54.051. (Texas Family Code §54.04 (q)).

4 On motion of the state concerning a child who is placed on probation under Section 54.04(q) for a period, including any extension

Next, I verified the hearing date had been set before my client's 19th birthday.[5] With both procedural requirements verified, we proceeded to prepare for a contested transfer hearing.

In preparing for a transfer hearing, one must understand it is conducted in the same manner as a hearing to modify disposition.[6] Therefore, the court may consider written reports from probation officers, professional court employees, guardians ad litem appointed to a dual system child, and professional consultants in addition to the testimony of other witnesses.[7] On or before the fifth day before the transfer hearing the court shall provide the attorney for the child and the prosecuting attorney with access to all written matterial to be considered by the court in deciding whether to transfer the child to adult court.[8]

At the transfer hearing, we called to testify my client's licensed sex offender treatment provider and probation officer, both who gave glowing reports. We also had his parents testify about how this experience has made him more mature, responsible, and empathetic. We presented peer reviewed articles on etiology and typologies of juveniles who have committed sexual offenses and the

ordered under Section 54.05, that will continue after the child's 19th birthday, the juvenile court shall hold a hearing to determine whether to transfer the child to an appropriate district court or discharge the child from the sentence of probation. (Texas Family Code §54.051 (a)).

5 The hearing must be conducted before the person's 19th birthday, or before the person's 18th birthday if the offense for which the person was placed on probation occurred before September 1, 2011, and must be conducted in the same manner as a hearing to modify disposition under Section 54.05. (Texas Family Code §54.051 (b)).

6 *Id* note 5.

7 Texas Family Code §51.11(a)(1) "Dual-system child" means a child who, at any time before the child's 18th birthday, was involved in the child welfare system…..."; Texas Family Code §54.05(e).

8 Texas Family Code §54.11(d).

likelihood of reoffending; the low recidivism rates of juvenile sex offenders who have undergone sex offender treatment; the reduction of risk based on time offense free in the community; and the barriers to sex offender reintegration if transferred. We also presented a risk assessment completed by his licensed sex offender treatment provider that came back as low/moderate risk to reoffend due to my client not having fully completed sex offender treatment.

Despite our best efforts, the juvenile district judge transferred him to adult court on his 19th birthday to finish out his ten-year probation.[9] The main reason given by the court for transfer was he had not successfully completed his sex offender treatment before his 19th birthday. Transfer orders are not appealable.[10]

Now transfer to adult court was imminent. We needed to correct my client's juvenile probation rules. This is best done at disposition, but I was not his attorney at that time. I requested amended rules of juvenile probation to clarify some of his juvenile probation requirements. I made sure it was clear certain fees were waived and there was not any room for adult probation to add conditions based on vagueness of the juvenile rules of probation. I also had the court specify the licensed sex offender treatment provider so my client could maintain continuity of treatment with a juvenile treatment provider. You must anticipate what rules and conditions adult sex offenders in your jurisdiction are required to meet and try to address and limit them in the juvenile probation order before transfer on the 19th birthday. The reason for this is the adult conditions of probation after transfer must be consistent with those ordered by the juvenile court.[11] In other words, adult probation cannot add a bunch of requirements and fees not present in the juvenile probation rules.

My client's juvenile probation was transferred on his 19th birthday and a hearing was set in district court to accept jurisdiction and have him sign his new adult probation rules. I got to district court and adult probation had my client's rules ready to go, all he needed to do was sign. The problem was they reflected requirements and fees standard for an adult being placed on sex offender probation in my jurisdiction. Further, one of the adult probation rules required my client register as a sex offender despite the fact he had a juvenile sex offender registration deferral order in place. These adult probation rules violated the requirement that adult conditions of probation be consistent with those ordered by the juvenile court.[12] This led to a bench conference with the judge, assistant district attorney, and adult probation representative. We were able to iron out the probation requirements and fees with substantial changes to his adult rules. The representative from adult probation was not happy with being required to make these changes, especially removing the requirement my client register as a sex offender. Thus, started my client's adult probation. I told him to contact me when he successfully completed sex offender treatment.

SEX OFFENDER REGISTRATION

About a year later my client reached out to inform me

9 If, after a hearing, the court determines to transfer the child, the court shall transfer the child to an appropriate district court on the child's 19th birthday. (Texas Family Code §54.051 (d)).

10 *In re J.H.*, 176 S.W.3d 677 (Tex. App.—Dallas 2005, no pet.) (an order transferring determinate sentence probation to criminal district court is not appealable).

11 A district court that exercises jurisdiction over a person transferred under Subsection (d) shall place the person on community supervision under Chapter 42A, Code of Criminal Procedure, for the remainder of the person's probationary period and under conditions consistent with those ordered by the juvenile court. (Texas Family Code §54.05(e).

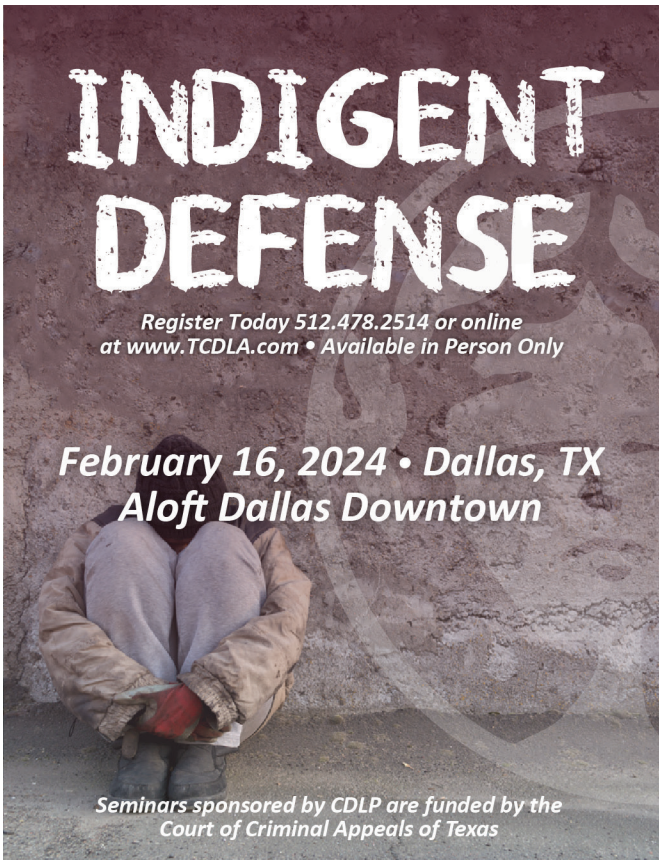
12 *Id.*

that he had successfully completed sex offender treatment. I asked his sex offender treatment provider to provide a risk assessment and it came back as low risk to reoffend. It was time to go back to court. My client had a sex offender registration deferral order in place and now it was time to get sex offender registration excused.

In the Texas juvenile justice system, a child who admits a registrable sex offense while a juvenile can have sex offender registration deferred after a hearing in front of the juvenile judge. Texas Code of Criminal Procedure, Article 62.351, informs, "during or after the disposition of an offense for which registration is required under this chapter, the juvenile court on motion of the respondent shall conduct a hearing to determine whether the interest of the public requires registration under this chapter."[13] After the Article 62.351 hearing, Texas Code of Criminal Procedure Article 62.352(b)(1) informs, "the juvenile court may enter an order deferring decision on requiring registration under this chapter until the respondent has completed treatment for the respondent's sexual offense as a condition of probation."[14] Here, his sex offender registration was deferred by the court after a 62.351 hearing. The following docket note was made:

"Sex Offender Registration Order - Sex Offender Registration is deferred until Respondent has completed sex offender treatment. Respondent shall not register as a sex offender pursuant to Chapter 62 of the Texas Code of Criminal Procedure until further order of this Court."

If the sex offender registration deferral is granted by the juvenile judge, and the child receives determinate sentence probation that cannot be completed by his 19th birthday, the juvenile judge can transfer the deferral to adult court.[15] The adult criminal court judge takes charge of the deferred registration order pending completion of sex offender treatment. Section 54.051(g) of the Texas Family Code, which addresses the transfer of determinate sentence probation to the appropriate district court, informs if the juvenile court places a child on probation for an offense for which registration as a sex offender is required, and defers the registration requirement



until completion of treatment for the sex offense, then the authority to reexamine the need for registration on completion of treatment is transferred to the court to which probation is transferred.16 For my client, when the transfer to adult court was granted, the deferral of registration was also transferred. This was why he could not be required to register as a sex offender by the adult probation department as a condition of his adult probation. The following is taken from the juvenile court docket note:

"I am going to transfer him to the adult court. I will defer registration to the adult court."

After transfer of a juvenile deferral of sex offender registration to adult court, Article 62.352(c) of the Texas Code of Criminal Procedure gives the adult criminal court jurisdiction and discretion to require or exempt the probationer from registration at any time during the sex offender treatment or on the successful or unsuccessful completion of treatment, except during the period of deferral, registration may not be required.[17] In this case,

13 Texas Code of Criminal Procedure Article 62.351.

14 (b) After a hearing under Article 62.351 or under a plea agreement described by Article 62.355(b), the juvenile court may enter an order: (1) deferring decision on requiring registration under this chapter until the respondent has completed treatment for the respondent's sexual offense as a condition of probation or while committed to the Texas Juvenile Justice Department. Texas Code of Criminal Procedure Article 62.352(b)(1) .

15 If the juvenile court places the child on probation for an offense for which registration as a sex offender is required by Chapter 62, Code of Criminal Procedure, and defers the registration requirement until completion of treatment for the sex offense under Subchapter H, Chapter 62, Code of Criminal Procedure, the authority under that article to reexamine the need for registration on completion of treatment is transferred to the court to which probation is transferred. TFC 54.051(g).

16 *Id.*

17 If the court enters an order described by Subsection (b)(1), the court retains discretion and jurisdiction to require, or exempt the respondent from, registration under this chapter at any time during the treatment or on the successful or unsuccessful completion of treatment, except that during the period of deferral, registration may not be required. Following successful completion of treatment, the respondent is exempted from registration under this chapter unless a hearing under this subchapter is held on motion of the

the adult district court had jurisdiction over the deferral order and could have ordered registration if he had been unsuccessfully discharged from sex offender treatment. However, upon successful completion of sex offender treatment the court's authority to register changes.

Article 62.352(c) of the Texas Code of Criminal Procedure dictates that upon the successful completion of treatment, the probationer is exempted from registration. Therefore, at the point of successful completion of sex offender treatment, exemption is automatic and the Court loses jurisdiction to register the probationer unless the prosecuting attorney files a motion to register.[18] Article 62.352(c) informs, "[f]ollowing successful completion of treatment, the respondent is exempted from registration under this chapter unless hearing under this subchapter is held on motion of the prosecuting attorney, regardless of whether the respondent is 18 years of age or older, and the court determines the interest of the public require registration."[19]

In this case, the district attorney's office received notice of successful completion of sex offender treatment with a low risk to reoffend. I then educated the adult assistant district attorney about juvenile sex offender recidivism rates and how they decrease over time. I forwarded peer reviewed articles to him for review. Finally, I had him talk to the juvenile court assistant district attorney and had her explain it was the juvenile court practice to excuse sex offender registration upon successful completion of sex offender treatment with a low risk to reoffend. The adult assistant district attorney decided not to file a motion to register. Therefore, my client was automatically exempted from registration following his successful completion of sex offender treatment and the judge was required to sign the excusal

prosecuting attorney, regardless of whether the respondent is 18 years of age or older, and the court determines the interests of the public require registration. Not later than the 10th day after the date of the respondent's successful completion of treatment, the treatment provider shall notify the juvenile court and prosecuting attorney of the completion. (62.352(c) TCCP).

18 *Id*

19 *Id*

order eliminating sex offender registration. The judge was reluctant to sign the order and tried to get me to put off my motion to excuse sex offender registration until successful completion of probation. However, signing the excusal order was not discretionary and it was signed by the court. Now that my client was excused from sex offender registration only one more issue remained: early termination of adult probation. For this next fight we were required to wait until he had finished one third of his ten-year probation, which was another six-month wait.

EARLY TERMINATION OF ADULT PROBATION

My client had now been on probation without any violations for one-third of his sentence. He had completed sex offender treatment with a low risk to reoffend, was current on all fees, and had completed all community service. The Texas Code of Criminal Procedure Article 42A.701(a) informs once a defendant has successfully completed one-third (1/3) of the original community supervision period, a judge may terminate the period of community supervision.[20]

It is at this point most adult criminal lawyers would say wait, this article of the code of criminal procedure does not apply to a defendant convicted of an aggravated sexual assault of a child.[21] And generally they would be right. However, my client did not have a final conviction of crime that would be a bar to early termination.[22] This is because his juvenile adjudication did not count as a conviction. [23] His adjudication as a juvenile for an offense which requires registration as a sex offender under Chapter 62 or a felony described by Article 42A.054 was not the same as being adjudged guilty of an offense.24 An order of adjudication or disposition in a proceeding under the Texas Juvenile Justice Code is not a conviction of crime and does not impose any disability ordinarily resulting from a conviction.

Therefore, we filed a motion for early termination of probation and set it for hearing. After reviewing the adult probation report, and before the hearing, the judge called me up to the bench and informed she would not grant the motion at this time. However, if I waived the hearing and came back after half his probation was served, she would terminate his probation if he continued to do well. I took this information to my client and he agreed to wait for his chance to have his probation terminate early. Just before he completed five years of probation on his ten-year determinate sentence, we filed a second motion for early termination of probation and it was granted by the court.

HOLISTIC REPRESENTATION OF THE DETERMINATE SENTENCE JUVENILE SEX OFFENDER

I hope this case study helps attorneys see the complex set of issues that await your client after a determinate sentence plea and disposition in a sex offense. If your representation terminates upon a determinate sentence adjudication and disposition, you have left your client to face many potential landmines in the future by themselves. The transfer to adult court, sex offender registration, and the possibility of early termination are all issues your client will face in the future. It is a much better practice when taking on a new client in this situation to advise him and his parents your representation should last until he is off probation so you can help him navigate through these issues. This holistic representation of your client will lead to better future results for your client.

Gregory Freed *received his Bachelor of Arts in History (cum laude) from Texas A&M University at College Station, Texas in August 1989. He returned to Austin and taught at risk youth at Porter Middle School before going to law school. He received his law degree from the University of Houston in December 1993. After law school he moved to Washington State and worked with the firm of Suk & Noach. He returned to Texas and was licensed to practice law in May 1995. From 1995 till 2001, he was in private practice in Austin, Texas focusing primarily on juvenile and criminal law. Since 2001, he has worked as an Assistant Public Defender with the Travis County Juvenile Public Defender's Office. He also teaches at the University of Texas School of Law, serving as an adjunct professor/lecturer with the Juvenile Justice Clinic. Mr. Freed is a member of the Texas Criminal Defense Lawyers' Association and the Juvenile Law Section, State Bar of Texas. He is Board Certified in Juvenile Law by the Texas Board of Legal Specialization. He has served on the Board of Law Examiners advisory commission for juvenile law. He has presented at numerous juvenile law seminars.*

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20 At any time after the defendant has satisfactorily completed one-third of the original community supervision period or two years of community supervision, whichever is less, the judge may reduce or terminate the period of community supervision. Texas Code of Criminal Procedure Article 42A.701(a).

21 This article does not apply to a defendant convicted of: (1) an offense under Sections 49.04-49.08, Penal Code; (2) an offense the conviction of which requires registration as a sex offender under Chapter 62; or (3) a felony described by Article 42A.054.

22 Except as provided by Subsections (d) and (e), an order of adjudication or disposition in a proceeding.under this title is not a conviction of crime. Except as provided by Chapter 841, Health and Safety Code, an order of adjudication or disposition does not impose any civil disability ordinarily resulting from a conviction or operate to disqualify the child in any civil service application or appointment. TFC § 51.13(a).

23 Id.

24 *TCCP Art 42A.701(g) (2-3), TCCP Art 42A.054(a).*

2023 Declaration Memories: Politically Incorrect Fun

CHUCK LANEHART

Robb Fickman of Houston and I enjoyed coordinating the statewide criminal defense lawyers Declaration readings again this year. We wound up with readings in about 145 communities, including readings in Alabama, California, Colorado, Kansas, Wyoming and Switzerland.

I received few anecdotes worthy of this year's report on our Declaration readings, so I thought I'd recount my own sort of politically incorrect but enjoyable experiences.

We were greeted with Chamber of Commerce weather the morning of June 30, but the crowd was slow to gather. From the venerable Lubbock County Courthouse Gazebo, one of our entertainers—Mackenzie Patton—began singing beautiful country and country-rock songs, accompanying herself on her amplified acoustic guitar. I was thrilled when she played a few Chicks (née Dixie Chicks) tunes. In Lubbock, playing a Chicks' song is quite politically incorrect, even though the outspoken lead singer of the band, Natalie Maines, is a home-town girl. It seems Natalie is—OMG!—a liberal. Yet no one complained.

Mackenzie's music attracted a large crowd, including judges, clerks, kids, prosecutors, pets, two TV cameramen and a newspaper reporter. We began our ceremony. Organizer Rusty Gunter opened with a few politically incorrect comments (comparing our state political leadership to King George III). Avery Stangl belted out the Star Spangled Banner, everyone cheered, and the powerful words of the Declaration and the Bill of Rights were read by about a dozen Lubbock Criminal Defense Lawyers Association members. Mackenzie and LCDLA member Lorna Bueno sang "God Bless America," "America the Beautiful," and everyone joined in on the finale, "This Land is Your Land." At my request, Lorna and Mackenie included Woody Guthrie's often forgotten—and politically incorrect—last verse:

"There was a big high wall there that tried to stop me;
Sign was painted, it said private property;
But on the back side it didn't say nothing;
That side was made for you and me."

LCDLA members and groupies gathered for the traditional group photo on the courthouse steps, I changed into my jeans and old flag shirt and headed to Post. On the way, I called my buddy, Garza County Attorney Ted Weems, and I asked him to meet me on the courthouse steps to take my picture. When I arrived a half hour later, to my surprise, Ted had gathered everyone from the courthouse—about a dozen people—and the local newspaper editor. I read the Declaration, we pledged allegiance to the flag, Ted took my picture, I had a short but pleasant visit with the crowd, shook hands and drove on down the road to less enthusiastic Declaration-reading venues in Sweetwater and Horseshoe Bay. I did a drive-by reading in Snyder with a middle-finger salute. It was politically incorrect, but certain towns don't deserve much respect.

Another successful Declaration reading effort is in the books, and we can't wait to do it again next year.

Welcome New TCDLA Members!

September 16, 2023 - October 15, 2023

Regular Members

Miguel Aguilera - Austin
Endorsed by Jorge Vela

Tanya Anderson - Edinburg
Endorsed by Hector Bustos

Tabatha Branch - Conway
Endorsed by Emma Guzman Ramon

Mary Y. Bunn - Kyle
Endorsed by David Glickler

Susan Clouthier - The Woodlands
Endorsed by Michael Faulkenberg

DeAnne Cummings-Scott - Austin

Darcy Deno - Southlake
Endorsed by Anthony Green

David Wayne Dumas - Waco
Endorsed by Matt Smid

Derek Wayne Dumas - Aledo
Endorsed by Matt Smid

Corey Travis Fawcett - Houston
Endorsed by Nicole DeBorde Hochglaube

Matthew Gilliam - Houston
Endorsed by Danny Easterling

Jackeline Gonzalez - Pasadena

Michael Gonzalez - Brownsville
Endorsed by Cesar DeLeon

Kelly Green - San Antonio

C. R Harrell - Kaufman

Brett Landriault - Dickinson

Jessica Larson - Houston
Endorsed by JoAnne Musick

Mikayla Lewison - Addison
Endorsed by Niles Illich

Ryan Patrick Nolan - Lampasas
Endorsed by Zachary Morris

Charles Moses Raadt - McAllen
Endorsed by Hector Bustos

Michael Ratliff - Bowie

Barbara Rowan - Austin
Endorsed by Gene Anthes

David Smith - Houston
Endorsed by John C. Caldwell

Patrick Smith - Fort Worth
Endorsed by David Stiller

Alan K. Taggart - McKinney
Endorsed by Tom Pappas

Travis Lain Wiebold - Lubbock
Endorsed by Fred Stangl

Investigator Members

Dionne Hiebert - Leander
Endorsed by Katherine Mayer

Paralegal Members

Dillon Smith - Houston
Endorsed by Jacklyn Varela

Student Members

Andrew Preston Brown - Houston
Endorsed by William E. Harrison

Christopher Ty Gaines - Groveton

Public Defender Members

Michael Andrew Cruz - Amarillo
Endorsed by Jason Howell

Reuben Delgado - Laredo
Endorsed by Omar Villarreal

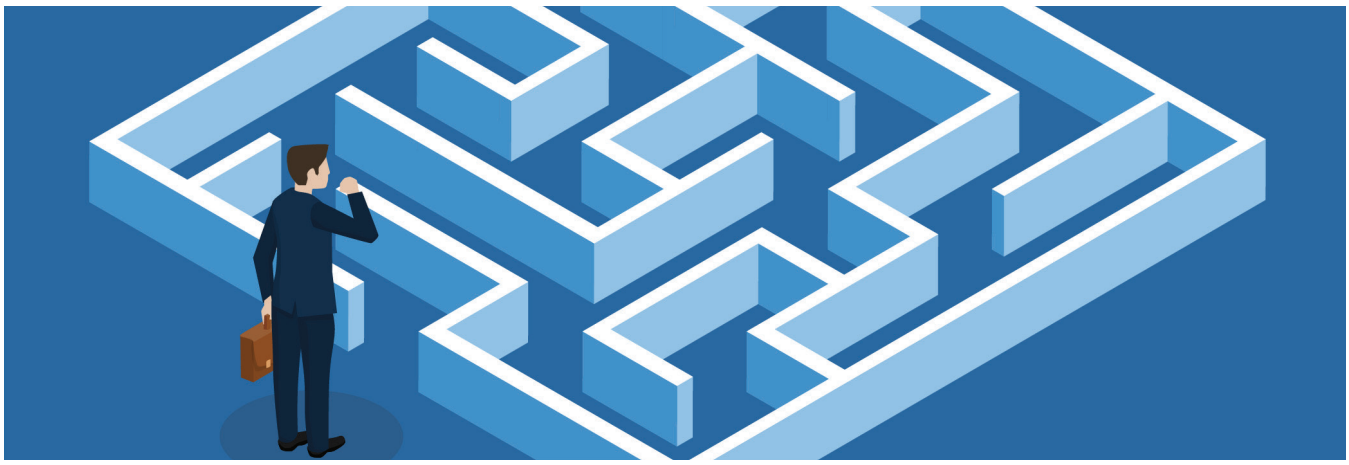
Samual Foreman - Houston

Brian Gaither - Houston
Endorsed by Kristen Gavigan

Tanya Mercedes Pezina - Houston
Endorsed by Porscha Brown

Colton Risinger - Amarillo
Endorsed by Jason Howell

Belinda Wright - Austin



The Edwards Rule: Finding Your Path to Suppression

JOSEPH ESPARZA

Imagine the following hypothetical scenario in any of your criminal cases:

Defendant was arrested for a lesser felony offense and interviewed by Detective X on day 1. During this interview, the Defendant was in handcuffs and in an interrogation room. Det. X mirandized your client and client answered the Det's questions about his knowledge of an extraneuous offense. At one point in this interview, Det. X changed topics and began to question your client about the more serious offense. Your client stated, "I would like a lawyer." Det. X then left the interview room. No further interview occurred on this date. Approximately three (3) months later on day 90, Det. X approached your client a second time, this time at the County Jail, to interview him only about the more serious offense. Acknowledging his custodial situation, Det. X mirandized your client again and conducted her interrogation. Your client remembered Det. X and chose to talk to her. Your client waived his rights and discussed the more serious offense. At no time during the second recording did your client ever ask for his lawyer. After this second interview, your client was indicted for the more serious offense.

Is there a problem with your client's interview? Assuming your client's Miranda rights were properly read each time and assuming substantial compliance with Art. 38.[1] and a valid waiver of those same rights, is there a successful attack you can make in regard to your client's statements in this case?

Your client was in custody each time. A person is in custody if his freedom from movement is restrained by a showing of police authority. The test is objective: would a reasonable person in that situation feel constrained from movement due to the showing of police authority?[2] Interrogation is police conduct that is likely to elicit an incriminating statement from an accused. The test is whether the comment or question was reasonably likely to elicit an incriminating response from the accused.[3] Interrogation is judged primarily upon the perceptions of the suspect, rather than the intent of the police.[4]

At the time of the client's questioning in either of his two oral statements to Det. X in this scenario, the client was in the continuous custody of law enforcement and was either under control of the police department and Det. X or the County Sheriff's Department. He had not been convicted of any crime. A reasonable person would feel constrained due to the showing of law enforcement authority over his person. In the instant case, Det. X recognized the Defendant was in custody because she mirandized him each time she sought to question him, and received notice that he was invoking his right to counsel during the first interview involving the case at bar.[5] But then, months later, he agreed to speak to her a second time after a valid rights advisement and waiver. What now?

The Edwards Rule. As a matter of federal constitutional law, after the Fifth Amendment right to counsel has been invoked in a custodial interrogation, interrogation must cease and **may begin only if counsel has been made available, or the accused himself initiates further communication, exchanges, or conversations with the**

police.[6] This is the Edwards rule. Texas follows this rule.[7] In our scenario, the client did not invite or initiate any communication with Det. X after the first interview and did not request to speak to her about the instant case. His prior invocation requesting counsel remained intact when Det. X approached him on her own for his second interview. This violated the Defendant's Fifth Amendment right to counsel. Period. This also violated the Edwards Rule.

The Texas Court of Criminal Appeals has previously noted, "[T]he Edwards rule does not take into account the good intentions of the individual police officer, the lack of official coercion or badgering in a particular case, or actual voluntariness of a person's custodial statement."[8] No reapproach is possible without the Defendant's invitation. Even to reapproach a suspect about a different offense is impermissible after a rights invocation.[9] Where an accused has made it known that he intends to deal with law enforcement only through counsel, counsel must be present at the time the accused is approached for further interrogation.[0]

What about the 3 months in between? Isn't there a time issue here?

The United States Supreme Court later revisited *Edwards* to decide whether a break in custody ends "the presumption of involuntariness" as established in *Edwards v. Arizona*.[11] In *Maryland v. Shatzer*, the Supreme Court carved a narrow fourteen (14) daybreak between questioning as an exception to the *Edwards* rule. In *Shatzer*, the police were investigating Shatzer for sexually abusing his 3-year-old son. Shatzer was already convicted of another offense and in prison when the first interview by law enforcement was attempted.[1] When Shatzer was mirandized, he invoked his rights and declined to speak without an attorney present.[1] Two years and six months later, a different Detective came to interview Shatzer, who was still incarcerated in prison. Shatzer was mirandized again and waived his rights on a standard department form.[14] Shatzer was interviewed for 30 minutes and made inculpatory admissions. He was charged with second degree sexual child abuse and assault, and he moved to suppress his statements under the *Edwards* Rule.[15] The trial court denied suppression because of the long break in custody between his two interrogations for *Miranda* purposes. While making the fourteen (14) day exception, The Supreme Court in *Shatzer* stated:

> "*Edwards* held: '[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. . . . [He] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' *451 U.S., at 484-485, 101 S. Ct. 1880, 68 L. Ed. 2d 378.*
>
> *The rationale of Edwards is that once a suspect indicates that 'he is not capable of undergoing [custodial] questioning without advice of counsel,' 'any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling* **[*105]** *pressures' and not the purely voluntary choice of the suspect.' Arizona v. Roberson, 486 U.S. 675, 681, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988). Under this rule, a voluntary Miranda waiver is sufficient at the time of an initial attempted interrogation to protect a suspect's right to have counsel present, but it is not sufficient at the time of subsequent attempts if the suspect initially requested the presence of counsel. The implicit assumption, of course, is that the subsequent requests for interrogation pose a significantly greater risk of coercion."*[16] *[Emphasis added]*

They further reasoned, "Edwards' presumption of involuntariness... [has as] [i]ts fundamental purpose to preserve the integrity of an accused's choice to communicate with police only through counsel."[17]

For purposes of our analysis, unlike Shatzer, who was convicted of a separate crime and incarcerated in prison at the time of his interviews, which the *Shatzer* Court likened his life in prison to his normal life due to his post-conviction sentence he was serving, your client has not been convicted and was in continuous pretrial custody during both of his interrogations. As the *Shatzer* Court said plainly:

"It is easy to believe that a suspect may be coerced or badgered into abandoning his earlier refusal to be questioned without counsel in the paradigm Edwards case. That is a case in which the suspect has been arrested for a particular crime and is held in uninterrupted pretrial custody while that crime is being actively investigated. After the initial interrogation, and up to and including the second one, he remains cut off from his normal life and companions, "thrust into" and isolated in an "unfamiliar," "police-dominated atmosphere," Miranda, 384 U.S., at 456-457, 86 S. Ct. 1602, 16 L. Ed. 2d 694 , where his captors "appear to control [his] fate," Illinois v. Perkins, 496 U.S. 292, 297, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990)."[18]

The Court noted that unlike *Edwards*, *Roberson*, and *Minnick*, a suspect who had been released from pretrial custody and who returned to his normal life for some time before the later attempted interrogation, there would be little reason to think a change of heart regarding interrogation without counsel had been coerced.[19] In our scenario, the client has been in continuous pretrial custody at all times prior to both of his interviews with Det. X. This

was custody for *Miranda* purposes. As the Court noted in *Shatzer*, who himself was convicted and behind bars in prison at the time of his interviews, "[n]o one questions that Shatzer was in custody for *Miranda* purposes during the interviews with Detective Blankenship in 2003 and Detective Hoover in 2006."[20]

"This is in stark contrast to the circumstances faced by the Defendants in *Edwards*, *Roberson*, and *Minnick*, whose continued detention as suspects rested with those controlling their interrogation, and who confronted the uncertainties of what final charges they would face, whether they would be convicted, and what sentence they would receive."[21] It is wholly irrelevant that your hypothetical client answered any questions during the second interview conducted by Det. X. That interview in its entirety is subject to suppression because: (1) Your client did not initiate communication with or request to talk to Det. X prior to the second interview (*Edwards* Rule violation), (2) Your client had previously and unequivocally invoked his right to counsel to Det. X in his first interview (when the questioning shifted to the more serious offense) which she acknowledged by her actions, and (3) Det. X's violation of the *Edwards* Rule in interviewing your client was complete when she approached him and began to interview him a second time about the case at bar. Without an attorney present for the client or consulted prior to this interview, there is no basis by which this interrogation survives legal scrutiny. This violation mandates total suppression of the second interview under *Edwards* and its companion cases. The first interview itself is inadmissible for our purposes because it does not involve the more serious case at bar at all and is entirely extraneous for trial purposes, but for the fact it contains the client's unequivocal rights invocation.[22]

The two correct rights advisements and the two valid waivers, etc., do not matter in our hypothetical given the violation of the *Edwards* Rule by Det. X. Prosecutors hate the *Edwards* Rule and many will always be quick to cite *Shatzer* in opposition and argue incorrectly that any break longer than fourteen (14) days means that *Edwards* does not apply and that subsequent advisements and waivers control the admission of any subsequent statement. Remember, *Shatzer* applied that fourteen (14) day exception to individuals in a post-conviction status who are incarcerated in prison and distinguished the exception from those in pretrial custody status as in *Edwards*. It does not apply to those in pretrial custody and who are reapproached without permission, even if the break is longer than fourteen (14) days, as it is in our hypothetical scenario at three (3) months.

The Supreme Court has praised *Edwards* because it provides clear guidelines for law enforcement.[23] Once the *Edwards* protections are triggered in a custodial

interrogation setting, the rule operates as a bright line.[24] If you think you have an *Edwards* rule violation, always file that motion to suppress regardless of any proper *Miranda* warnings given or any valid waivers made in a recorded interrogation. Unless the State can show at a suppression hearing that your client reinitiated contact with law enforcement and invited the subsequent interview or that there was an attorney available to advise the client regarding questioning, this bright line rule was violated, and suppression of your client's statement is the only lawful result. Good luck!

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Endnotes

1. Tex. Code Crim Proc. Art. 38.22.

2. *California v. Beheler*, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983); *Orozco v. Texas*, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed. 2d 311 (1969).

3. *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

4. *Moran v. State*, 213 S.W.3d 917 (Tex. Crim. App. 2007).

5. *Smith v. State*, 779 S.W.2d 417 (Tex. Crim. App. 1989)(Where a suspect simply asks for "his attorney," he has sufficiently invoked his right to counsel.).

6. *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Holloway v. State*, supra.

7. *See Murphy v. State*, 801 S.W.2d 917 (Tex. Crim. App. 1991), citing *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990).

8. *See McCarthy v. State*, 65 S.W.3d 47, 51 (Tex. Crim. App. 2001).

9. *See Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988)(holding that reapproach is impermissible even if the officers do so concerning a different offense than that with regard to which the suspect earlier invoked his right to counsel if no attorney provided).

10. *Minnick v. Mississippi*, supra; also *Murphy v. State*, supra.

11. *See Maryland v. Shatzer*, 559 U.S. 98, 100, 130 S.Ct. 1213, 175 L.Ed.2d 1045 (2010).

12. *Id.*

13. *Id.*

14. *Id*

15. *Id. at* 102.

16. *Maryland v. Shatzer, supra*, at 103-104.

17. *Id. at* 106, citing *Patterson v. Illinois*, 487 U.S. 285, 291, 108 S.Ct.2389, 101 L.Ed.2d 261 (1988).

18. *Maryland v. Shatzer, supra,* at 106.

19. *Id.* at 107.

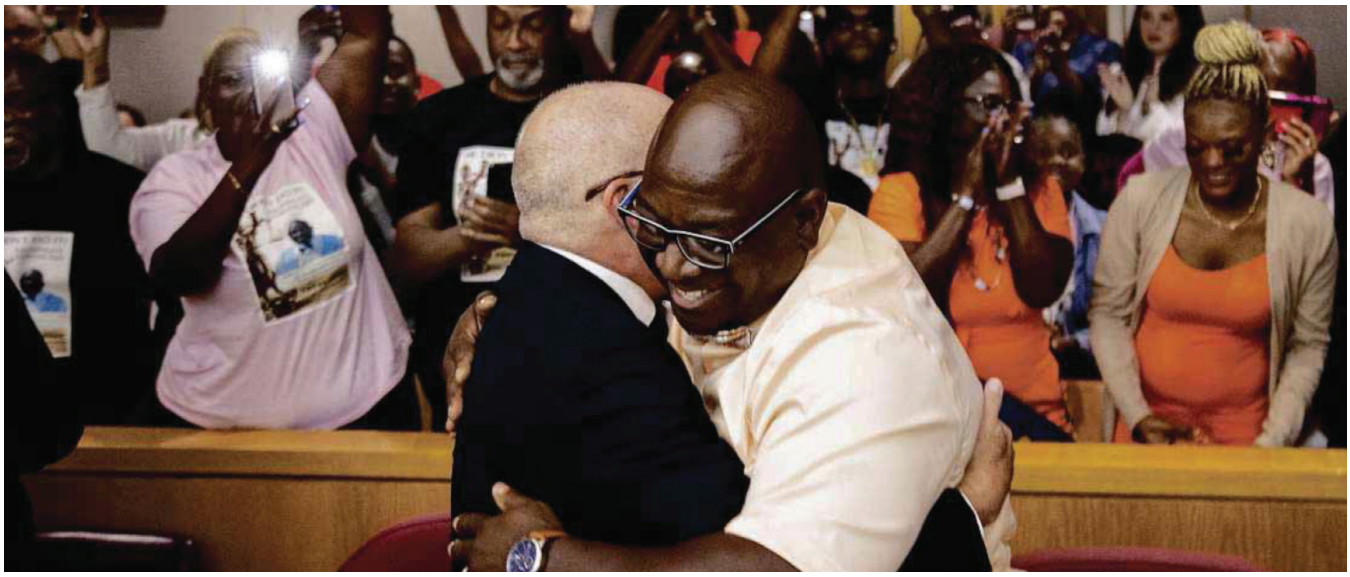
20. *Maryland v. Shatzer*, *supra at* 112.

21. *Maryland v. Shatzer*, *supra at* 114.

22. The first interview is inadmissible generally because of Texas Rules of Evidence 401, 402, 403, and 404(b), as the interview dealt with an entirely separate accusation apart from the more serious felony in our hypothetical case, that occurred on a prior date, and did not involve any parties from the more serious felony. Its admission at trial is extraneous and not relevant to the case at bar in our hypothetical.

23. *Montejo v. Louisiana*, 556 U.S. 778, 795, 129 S.Ct. 2079, 173 L.Ed. 2d 955 (2009).

24. *Id.*



Recent Texas Exonteration: Tyrone Day

GARY A. UDASHEN

Background of Case

At 2:00 a.m. on October 25, 1989, the Dallas Police Department responded to a location near Fair Park in Dallas where an 18-year-old woman told them she had been sexually assaulted. The young woman, identified as AC, was unable to hear or speak and communicated with the police by writing out what happened.

AC told the police that a man approached her while she was walking with a friend and offered her drugs. She said she refused the offer, and the man then forced her into an apartment where, along with two other men, he sexually assaulted her.

Tyrone Day, who was then 19 years old, was walking in the location where AC was talking to the police. AC pointed him out to the police and said he was one of the men who sexually assaulted her. Day was arrested and charged with sexually assaulting AC.

Day was placed in the Dallas County Jail and a lawyer was appointed to represent him. Day maintained his innocence. However, he was told by his lawyer that a jury, hearing that a young black man sexually assaulted a white, deaf, young woman, would likely give him a life sentence if he went to trial.

The state made a plea offer of 40 years in prison, and Day was told he would serve about four years if he accepted the offer. At the time, Day was suffering with health problems, which further deteriorated during his stay in the Dallas County Jail. He was told that he would receive better health care in prison than he was receiving in the Dallas County Jail. He also had two young daughters and he thought that his best hope of being reunited with his daughters was to accept the 40-year plea offer. Based on these factors, Day accepted the 40-year plea offer and pled guilty to sexually assaulting AC. Day served 26 years before he was finally released on parole.

Post-Conviction Investigation and Court Proceedings

On March 10, 2023, after new evidence became available, Day, through his attorneys, Vanessa Potkin of the National Innocence Project, Paul Genender and Jenae Ward of the Dallas law firm of Weil, Gotshal & Manges, LLP, and Gary A. Udashen of the Innocence Project of Texas, filed an application for writ of habeas corpus challenging his conviction. This new evidence consisted of:

1. Extensive STR, Y-STR, and mitochondrial DNA testing. This DNA testing showed that Day was not one of the people who had sexual intercourse with AC the night of this incident. This DNA testing also identified two men who did have sexual intercourse with AC that night.
2. In 2018, Cynthia Garza and Brittany Dunn, Assistant District Attorneys with the Dallas County *Conviction* Integrity Unit, along with a CIU investigator, located and interviewed AC. This interview was conducted with the aid of a Certified American Sign Language interpreter. In this interview, AC stated:
    a. AC was looking for drugs that night. Her statement to the police that she had turned down an offer of drugs was false. She agreed with a man that

approached her on the street to exchange sex for drugs. However, after engaging in sexual intercourse, the man refused to give AC the drugs. As a result, she claimed she had been sexually assaulted. AC also told the CIU prosecutors that, if the man had given her the drugs, she would not have claimed she was sexually assaulted.

b. AC also told the CIU prosecutors that when she identified the person walking in the area as her attacker, he was on an upstairs breezeway of an apartment complex, and she was a substantial distance away and never got out of the police car to get a closer look. AC told the CIU prosecutors that she did not identify the man by his face. Rather, she identified him based on his hat and nothing else. She also told the CIU prosecutors that the person she identified as being involved may have been a completely different person than the persons actually involved.

c. One of the men identified by DNA as having sexual intercourse with AC admitted that he had agreed to trade drugs for sex, but refused to give her the drugs once he had sexual intercourse with her. This man also told the CIU prosecutors that Tyrone Day may have been in the vicinity, but he never approached AC.

On April 26, 2023, the Court of Criminal Appeals granted the habeas application and vacated the conviction under the new science provision of Article 11.073 of the Texas Code of Criminal Procedure based on the DNA evidence that showed Day was not involved in the incident.

On May 21, 2023, John Creuzot, Dallas County's District Attorney, and the District Attorney's Office's Conviction Integrity Unit, submitted a motion to dismiss the indictment. The dismissal motion stated that,

> Newly-available DNA evidence has not only identified the individuals who came into sexual contact with the complainant, but also excludes Day as a contributor. Further investigation, including interviews with the newly identified individuals, corroborates these findings. During the course of its investigation, the CIU interviewed the complainant, learning, among other things, that her identification of Day was not based on any distinguishable physical characteristic(s); rather it was based on the fact that one of the participants on the night in question had on a generic hat and Day happened to be wearing a similar hat when she identified him to police from a long distance away. Further, documents reviewed by the State fail to show that the complainant was ever presented with a photo lineup, or made any additional identification of Day. There is no doubt that a case such as this would be investigated differently today than it was in 1989.

The motion concluded,

> . . . the state moves for a dismissal of this indictment . . . on the basis that no credible evidence exists that inculpates Tyrone Day. Further, the state moves to dismiss the indictment in this cause on the basis of Tyrone Day's actual innocence.

The dismissal motion was granted by Judge Carter Thompson, and Tyrone Day was found to be actually innocent.

Lessons Learned

1. Shoddy police work leads to wrongful convictions. AC's story was not investigated at all by the police or the District Attorney. Her identification of Day as one of her alleged attackers was obviously questionable based on the distance he was from her when she made the identification. Yet the police failed to follow up with any further identification procedures. The result of the poor police work was Tyrone Day being arrested and charged with a sexual assault that he had nothing to do with and, in fact, did not even happen.

2. Ineffective representation by defense counsel can lead to wrongful convictions. Had Day's attorney investigated the case, including AC's story and her identification of Day, it is possible that some of the evidence that later exonerated him would have been discovered prior to him pleading guilty.

   Moreover, incorrect information from defense counsel about how long Day would have to serve on a 40-year sentence induced his guilty plea. Defense counsel should be careful and accurate in explaining the consequences of a guilty plea to a client.

3. Many wrongful convictions are the result of guilty pleas. According to statistics compiled by the Innocence Project, over 25% of exonerations following wrongful convictions nationwide were the result of guilty pleas. The true number of wrongfully convicted persons who pled guilty is likely much higher than these statistics indicate based on the difficulty of obtaining an exoneration after

entry of a guilty plea.

4. False information provided to law enforcement officials is a leading cause of wrongful convictions. The most recent statistics from the National Registry of Exonerations indicates that over 60% of wrongful convictions are the result of perjury or false accusations.

5. The vast majority of convictions that were later shown to be invalid by DNA evidence were based on erroneous eyewitness identifications. Eyewitness identifications are notoriously unreliable and an extensive body of scientific literature examining the causes of wrongful eyewitness identifications has been published. Defense attorneys (and prosecutors) dealing with eyewitness identifications should carefully evaluate the circumstances surrounding eyewitness identifications and consult experts to determine if any recognized factors that lead to invalid eyewitness identifications are present.

6. Collaborative work between prosecutors and lawyers for convicted persons is crucial in finding and rectifying wrongful convictions. It is always difficult to obtain an exoneration of an innocent person when the prosecutors are resisting, rather than assisting, in the investigation. The Day case is a good example of cooperation between a Conviction Integrity Unit and a team of Innocence Project attorneys leading to the exoneration of a wrongfully convicted person. The active cooperation of the Conviction Integrity Unit was essential to achieving Day's exoneration.[1]

1 This story of Tyrone Day's exoneration is the third of what will be a recurring feature in the Voice. Mike Ware, Executive Director of the Innocence Project of Texas, Allison Clayon, IPTX Deputy Executive Director, and Gary Udashen, IPTX board member and former board present, will write periodic articles concerning particularly interesting exonerations from around the State of Texas. For purposes of these stories, the term "actual innocence" will follow the use of that term in the Texas statute providing compensation for the wrongfully imprisoned. (§103.001, Civil Practice & Remedies Code). Under that statute, wrongfully imprisoned persons are entitled to receive state compensation if they have received a pardon based on innocence, they have been granted writ relief by the Court of Criminal Appeals based on actual innocence, or they have been granted writ relief by the Court of Criminal Appeals on some other basis and the State's Attorney dismisses the charge on the basis that no credible evidence exists that inculpates the defendant and that the State's Attorney believes the defendant to be actually innocent.

Gary Udashen *is a senior attorney with Udashen/Anton in Dallas. He is board certified in criminal law and criminal appellate law. Udashen is also a board member of the Innocence Project of Texas and served for nine years as board president.*

Failure of Polygraphs

GEMMA MOFFA & MICHAEL PARSON

In the 1980's, there was a popular television series called Knight Rider, which starred David Hasselhoff and his artificially intelligent, wise-cracking car, K.I.T.T. A fan-favorite episode of Knight Rider included an evil twin version of K.I.T.T. called K.A.R.R. Both K.I.T.T. and K.A.R.R. were indestructible and formidable, but polar moral opposites, and they rivaled each other as the show's forces for good and evil. Ultimately, the rivalry came head-to-head, or bumper-to-bumper, and was framed by the show's writers in the philosophical question: "What do you do when an unstoppable force meets an unmoving object?"

This dilemma, the unstoppable force versus the unmovable object, is common in the juvenile system where stiff requirements of rehabilitation meet the limited time for rehabilitation. This is particularly true in using polygraph exams in juvenile sex offender cases to determine whether to revoke the juvenile on probation or to require the juvenile to register.[1] In both instances, polygraphs can have serious, long-lasting consequences that extend long beyond the client's juvenile case.

A court can only place a juvenile on probation until their 18th birthday.[2] However, the violation of a juvenile younger than 18 who is on felony probation could result in placement at the Texas Juvenile Justice Department.[3] What makes things more difficult is that while there are possible placements that may accept clients who are 17, very few, if any, take clients who are 18, much less those adjudicated on a sex offense. Accordingly, a judge has little to no options for a 17 or 18-year-old who has been adjudicated on a sex offense and who has violated their probation, even for something as minor as failing a polygraph exam.

Equally as troublesome are cases in which the juvenile has completed all the requirements of treatment and has been discharged (whether successful or unsuccessful) from their sex offender program, but, based solely on negative polygraph exam results, the State seeks sex offender registration.[4] Each of these situations set a direct collision between the unstoppable force, i.e., the reliance on a polygraph exam to support revocation or sex offender registration, and the immovable object, i.e., the jurisdictional limits of the court and the lack of available placements.

Polygraph exams are problematic. In "The Polygraph Test Strikes – and Strikes Out – Again," Scott Lilienfeld, Ph.D., attempts to correct the public misperceptions about polygraph tests.[5] He asserts that polygraph exams are not 100 percent accurate, pointing to one study that actually places the accuracy of polygraph exams at 70 percent. *Id.* Additionally, he states that contrary to popular belief, polygraph machines are not "lie detectors;" rather,

1 The use of polygraphs in certain juvenile sex offender cases are authorized by Texas Family Code Section 54.0405(a)(1)(B).

2 *See* Tex. Fam. Code § 54.04(l).

3 See Tex. Fam. Code § 54.04 (q). It should also be noted that if the Motion to Modify is filed prior to the client's 18th birthday, the juvenile court still retains jurisdiction to sentence the client to the Texas Juvenile Justice Department, even if the client turns 18 during the pendency of the case.

4 See Tex. Code of Crim. Proc. §§ 62.351 & 62.352.

5 Lilienfeld, Scott, Ph.D. *The Polygraph Test Strikes – and Strikes Out – Again.* Psychology Today. (July 21, 2019). Available at: https://www.psychologytoday.com/us/blog/the-skeptical-psychologist/200907/the-polygraph-test-strikes-and-strikes-out-again.

polygraph machines only detect autonomic arousal, a state which could result from telling a lie, but that could also result from guilt stemming from malfeasance, such as the anxiety at the prospect of failing the test, or perhaps even guilt from merely having just fantasized about the crime. *Id.*[6]

Equally as important to understanding the use of polygraphs in the juvenile system is the fact that the client is a child, and the statistics regarding rehabilitation and recidivism of juvenile sex offenders work against prosecutors. In 2017, the Association for the Treatment of Sexual Abusers issued guidelines advocating against the use of polygraphs for juveniles,[7] particularly because they found no evidence that links polygraphs with a reduction in recidivism.[8]

Further, they found no evidence specific to juveniles that polygraphs even help to enhance treatment goals or outcomes. The organization correctly noted that polygraphs were designed for adults and that their use to detect honesty in children could be coercive. With juveniles, there are simply "more variables for uncertainty." They also found that existing research supports that juvenile sex offenders are more like juvenile offenders charged with non-sex offenses than they were to adult sex offenders. Such findings bely the need to segregate out juveniles who commit sex offenses from other juvenile offenders for specialized treatment purposes.[9]

Despite these studies, polygraph tests are used regularly to ensure compliance with juvenile sex offender program requirements and to inquire into the juvenile's sexual history. In many cases, these inquiries are vital to the completion of sex offender treatment,[10] and the failure to "pass" a polygraph exam could render rehabilitation incomplete by the standards of the therapist.[11]

And yet, the polygraph questions asked of a juvenile can be so incredibly vague that it would be difficult for an adult, much less a juvenile, to answer them with any certainty. Such questions include:

- "Did you knowingly leave out any sex crime victim?"
- "Prior to being on probation, how many times did you have sexual contact with someone who was unaware or did not consent?"
- "Have you ever committed a no-contact sexual act without consent of the other person?"
- "Social media is the use of any computing device, including a computer, game console, a cell phone, a tablet or any other device capable of transmitting or receiving electronic information or images. This will include any use of the internet or apps for communicating with other people. Do you understand the meaning of social media?"
- "Did you lie on your statement today?"
- "Are you minimizing the number of times you had sexual contacts with any of the victims?"
- "Besides what you have disclosed, did you have any other sexual contacts with the victims?"[12]

It is easy to understand why a juvenile might fail a polygraph exam when they are having to recall periods of time when the juvenile may have been suffering with raging hormones, social awkwardness and anxiety, gender and sexual identity issues, identification of proper social boundaries, or impulsiveness. Frankly, how is a juvenile supposed to answer questions with any certainty when the juvenile lacks such certainty about his or herself?

Further, the influence of a parent or guardian can also have an adverse effect on juveniles subject to polygraph exams. Generally, a strong support system is considered a plus in the juvenile system, but what happens when this support begins to create a cognitive dissonance that threatens the reliability of a polygraph? A strong advocate who is "very protective of [the child] and provided strong supervision for"[13] the juvenile, who also may continually insist their child is innocent, can force the juvenile to choose between pleasing his treatment team or his very involved and caring parent.

As we have seen above, polygraphs are unreliable. Should we really be basing years of children's lives on how their undeveloped emotions and brains perform on a

6 In the article, Dr. Lilienfield relays the story of one of his colleagues who was required to take a polygraph examine for a high-level government position and failed. He believed the failed exam resulted not because the colleague had been guilty of any misconduct, but because the colleague felt guilt by even the mere thought of committing the misconduct.

7 *ATSA Practice Guidelines for Assessment, Treatment, and Intervention with Adolescents Who Have Engaged in*

Sexually Abusive Behavior. Association of the Treatment of Sexual Abusers. (Apr. 24, 2017). *Available at:*

https://www.atsa.com/Members/Adolescent/ATSA_2017_Adolescent_Practice_Guidelines.pdf

8 *Id.*

9 *Id.*

10 In one case of mine, the juvenile's failure to pass the polygraph exam resulted in a report stating that, even though the juvenile participated in treatment, "Due to his refusal to complete his Sex Life History treatment work," and "unwillingness to participate in treatment," he was being terminated from the program.

11 It should be noted that while some Texas counties require the polygraph exam as a part of treatment, the Texas Juvenile Justice Department has severely limited the practice. See Tex. Admin. Code § 380.8789.

12 These are questions which have been posed to my own clients during their sex offender treatment.

13 This is wording used in the psychological assessment of a juvenile denoting the clear understanding by all the parties that parental involvement would likely cause an issue with polygraph exams.

highly subjective test? Should this performance continue to haunt them on their road to rehabilitation? Should the failure of polygraph exams by juveniles result in their incarceration or registration?

The prosecutor's argument is simple: "Your client was ordered (or agreed) to complete sex offender treatment. Because he didn't complete sex offender treatment, he violated his probation. I understand that the termination was based on polygraph test results, but his failure of the test is not relevant. He did not complete the program."

Thankfully, courts recognize that, due to their unreliability, polygraph results are not admissible as evidence in a trial. The Court of Criminal Appeals of Texas addressed this exact issue in *Leonard v. State*, 385 S.W.3d 570 (Tex. Crim. App. 2012), wherein the adult appellant was revoked from deferred adjudication community supervision based on, among other allegations, the results of polygraph examinations.[14]

In *Leonard*, the State had two arguments for the admission of the polygraph results. First, Rule of Evidence 703 does not require that the "facts or data" upon which a polygraph examiner bases their opinion to be admissible for evidence of the opinion of the examiner as to deceptiveness to be admissible. Second, since the taking and passing of the polygraph exam was a condition of community supervision, the results had to be admissible or else there would be no way for the trial court to enforce the condition. There, the *Leonard* court held that Rule 703 does not allow an expert to present opinion testimony based on scientifically unreliable facts or data and that the "show no deception" requirement in the terms of the appellant's community supervision does not provide a basis for admitting unreliable evidence. See *id.* at 583.

At the core of the *Leonard* court's rejection of the State's arguments is the due process rights of the probationer or person on deferred adjudication. It stated, "Though defendants are not entitled to community supervision as a matter of right, once a defendant is assessed community supervision in lieu of other punishment, this conditional liberty 'should not be arbitrarily withdrawn by the court."[15] The Court found that while it was in his power to attend and participate in treatment, it was not in his complete power to "successfully complete" the program; rather, the therapist had the discretion to terminate the probationer if the therapist thought that the probationer was being dishonest.[16] "Mere caprice" is an inappropriate reason to discharge from treatment or to use that discharge as a basis to revoke probation.[17]

The Court further rejected the notion that a therapist's alleged expert status transforms evidence that is inadmissible into evidence that is admissible. The Court further elucidated:

> Total reliance on inadmissible and untrustworthy facts cannot be reasonable. Nor would such an opinion achieve the minimum level of reliability necessary for admission under Rule 702." Rule 703 is not a conduit for admitting opinions based on "scientific, technical, or other specialized knowledge" that would not meet Rule 702's reliability requirement. If the methodology or data underlying an expert's opinion would not survive the scrutiny of a Rule 702 reliability analysis, Rule 703 does not render the opinion admissible.[18]

However, the Court stopped just short of calling the practice heinous, tailoring the finding to avoid colliding with the imposition of polygraph exams as a condition of probation: "Whether requiring the appellant to submit to a polygraph examination is reasonable condition is an issue we are not called on to decide today. What we decide is that any such requirement does not justify admitting legally unreliable evidence."[19]

But *Leonard* is important. So important, in fact, that, in 2015, the Texas legislature made the sole use of polygraph exams to revoke adult probationers or adults on deferred adjudication improper.[20] Interestingly enough, the Texas legislature failed to codify the ruling in *Leonard* in the Texas Family Code. In particular, the Texas Family Code does not include the language of sections 42A.108(b) or 42.751(h) of the Texas Code of Criminal Procedure.[21] Arguably, though, because Due Process rights and evidentiary rules provide the bases for the Court's finding in *Leonard*, *Gault*[22] should make *Leonard* applicable to juvenile cases.

Now in our protracted physics demonstration, let's

14 It should be noted that in the *Leonard* case, all other basis of revocation were dropped by the State.

15 *Id.* at 577.

16 *Id.*

17 *Id.*

18 *Id.* at 582.

19 *Id.* at 583.

20 ***See* Tex. Code of Crim. Proc. §§ 42A.108(b) and 42.751(h).** Unfortunately for Christopher George Arnone, the illegitimacy of polygraph exams to revoke adult probationers and adults on deferred adjudication came too late, as he was sentenced to imprisoned for almost thirteen years before the Texas Court of Criminal Appeals granted his writ of habeas corpus and set aside his adjudication of guilt. As a double slap, when he sued those responsible, his case was dismissed. See Arnone v. Syed, Civil Action No. 3:17-cv-03027-E (N.D. Tex. May. 10, 2021). However, the case does seem to carve out a path to sue parties for trying to revoke probationers or persons on deferred adjudication/prosecution based solely on the failure to pass polygraph exams.

21 ***See* Tex. Fam. Code § 51.17(b) and (c).**

22 *In re Gault*, *387 U.S. 1 (1967)*.

say we manage to navigate past being revoked for failing to comply with a polygraph. The road is clear, right? No such luck, because now we have come to the roadblock of registration.

According to the Juvenile Law Center, "approximately 200,000 people in 41 states are currently on the sex offender registry for crimes they committed as children."[23] We slap on the label of sex offender and have our children carry it into their adulthood despite only 3% of youth reoffend.[24] Much like how an object in the road can force you onto the shoulder, these registration requirements can force a youth to the fringes of society. It separates them at school, in the community, and in every other part of their lives. As risk increases when driving on a narrow and dirty shoulder, marginalization caused by registration increases a child's risk for suicide and opens them to being the target of hate or violence. We are spending over $3 billion a year nationally on administering registries that stall out a youth's chance to be fully rehabilitated.[25]

In a juvenile case, a court has the discretion to defer its decision to require a juvenile to register. The court can use its discretion to make the final determination for registration at any time during the treatment or at completion of the probationary period. The discretionary decision[26] to require registration can be ordered whether a juvenile was successful on probation or not. The criteria for registration is whether (1) the protection of the public would not be increased by registration of the respondent; or (2) any potential increase in the protection of the public resulting from registration of the respondent is clearly outweighed by the anticipated harm to the respondent and the respondent's family that would result from registration[27]. While the court must enter an order exempting registration if either of these criteria are true, the criteria are clearly so vague as to embue the court with judicial discretion.

A stop-gap solution to this problem might be to file a request for findings of facts and conclusions of law and hope that the court includes that its ruling requiring registration is based solely on a report of a failed polygraph exam. Unfortunately, it is unlikely that a judge would make such a finding, as the respondent's attorney should have already made this argument at the registration hearing.

What is needed is a paradigm shift in the juvenile courts with regards to the use of polygraph examinations. Polygraphs should not be used as a monitoring tool. The focus of the juvenile justice system is about rehabilitation and the focus of polygraphs in such a system should be as well. In the juvenile system context, the questionable accuracy of polygraphs, while still material, matters less than in an investigative setting.

Failed polygraph tests may warrant further scrutiny but should not lead to a definitive outcome such as registration or revocation. Clearly this is already the view of many treatment teams. For example, sometimes the therapist will recommend that a juvenile not be required to register despite failed polygraph tests. If a treatment team is happy with a juvenile's progress despite failed polygraph exams, we, as legal professionals, should listen to them and allow K.I.T.T a clear road.

23 *Sex Offender Registration of Children (SORNA)*. Juvenile Law Center. *Available at*: https://jlc.org/issues/juvenile-sex-offender-registry-sorna.

24 *Id.*

25 *Id.*

26 *See* Tex. Code Crim. Proc. art. 62.351(a).

27 *See* Tex. Code Crim. Proc. art. 62.352(a).

Shout out to Adriana Arce-Flores and Juan Ramon Flores! On September 29, 2023, Adriana Arce-Flores (former United States Magistrate Judge) and Juan Ramon Flores, obtained two NOT GUILTY verdicts on a conspiracy and importation of close to 300 kilograms of methamphetamine. The client was a 24-year-old owner/operator. Substantial evidence of the legitimacy of the shipment and the lack of knowledge was presented by the defense through the client's business partner as well as another logistic company owner, who was involved in the shipment. The government sought to exploit minor discrepancies in his statements, but the jury was able to sort things out and hold the government to its burden, coming back with a fairly quick decision. Case was tried in the Southern District of Texas-Laredo Division.

Kudos to Erin Kelley and Huma Yasin on a Not Guilty verdict ! The State tried a Capital case three times. The State's theory of robbery was very flimsy since there were drugs and other valuables left in the apartment. The entirety of the "robbery" came down to a back-pack that allegedly belonged to the decedent. The police zeroed in on the client from the start and did nothing to investigate any other suspects. The victim was a known drug dealer and sold to people out of his apartment, yet none of his other contacts were interviewed. The family of the victim and of the client told the police about a potential suspect that was not interviewed until after my client was arrested. This same individual successfully avoided all DA attempts at a subpoena to testify at the trial. The first trial they had a hung jury 8-4 in favor of guilt. At that trial, a detective testified that there was 24 hours of outstanding footage of the apartment stairwell where the decedent lived collected by the State prior to the discovery of decedent's body. Erin pointed out at trial and subsequently that this was never disclosed to the Defense. At trial two, after the jury had been sworn in and after testimony of at least one witness, the DA came back and said he just discovered that we had not been disclosed evidence. Due to the inability to try the case without reviewing the evidence, a mistrial was declared. Trial three, with the evidence in hand, the Defense procured a not guilty based on sloppy police work, circumstantial evidence, and tunnel vision. There was no direct evidence that our client had murdered the deceased, only that he was one of the last known people who had visited him. **Way to go!**

Congrats to Frank Sellers and Aaron Clements! Their case was an appeal from a trial court's restitution order from a plea bargain deal with an appellate waiver in place, where restitution was ordered pursuant to the Mandatory Victims Restitution Act (MVRA). It arose out of a multi-level, years-long set of fraud conspiracies at an auto dealership chain that involved several different fraud types (false flooring, double flooring, check kiting, etc.). The trial court's order found the defendant responsible for restitution across the entire set of conspiracies, when he joined in to only one specific type of fraud, several years into its course. The Fifth Circuit ultimately agreed (1) that since the restitution order arose under the MVRA, as opposed to other restitution statutes, the appellate waiver did not apply; and (2) the restitution order did, indeed, exceed the statutory maximum because it held him accountable for types of fraud he did not engage in, and for time periods when he was not part of the conspiracy. **Great work!**

Amazing work by John A. Peralta! He won a federal suppression hearing in the EDTX. District Judge Marcia A. Crone found that exigent circumstances for the warrantless search of the defendant's home did not exist, and that the good faith exception did not apply. Wow!

Round of applause to Clint Broden, a Waco defense attorney, who secured a significant outcome in a complex case associated with the 2015 Bandido and Cossack Motorcycle Club shootout. This event resulted in over 100 arrests but no convictions. Seth Sutton, who represented the Bandidos, formed his own club (Red Mouse Motorcycle Club) to keep up with the Bandidos after legal proceedings ended. This caught the eye of the Waco PD, which conducted an undercover operation that was eventually halted after no evidence was found. The undercover officer, under alias Scott Payne, did not follow commands of his superiors, and still participated in the club and became a full-fledged member. Payne went to his bosses – who had no clue he continued participating – with evidence. According to Payne, Seth was plotting to kill a family friend (and another attorney), Marcus Beudin, after Seth's step-daughter made an outcry of inappropriate contact. In the trial, State relied on Payne's testimony of what was discussed & intended. The defense argued that Seth's actions did not amount to solicitation, and emails were shown proving that Payne and law enforcement were upset that he "beat them" with the biker gang. The jury deliberated over 12 hours before a mistrial was declared, 9-3 for guilt. It is unknown if the case will be retried. Despite this, Clint's closing argument was legitimately one of the best closings I've ever seen. He tried a hell of a case. **Wow!**

Shout-Outs!

Fantastic job by Mishae Boren and Thad Davidson! Last May they took trial against a district judge and alleged "victim" (Kerry Russell, 7th District Court) who engaged in a vendetta campaign against his former court coordinator (Toni White) and persuaded an out-of-county prosecutor to indict her on a second degree felony. Mistrial was declared on the first round after the defense exposed impeachment evidence emails between Russell and the special prosecutor. Russell engaged in misconduct as a judge and unethical behavior as a man in a position of power over a woman who was not. The second trial was supposed to start on October 23, and after months of preparation, the State filed a motion to dismiss and the judge signed it. The team took on and beat a district judge who was never a victim, and picked on anyone he believed he could frighten, intimidate, or cower into submission. Their client, formerly the most beloved person in the courthouse, stood up to him, and he went after her. Thanks to our team, P.I. Melinda Carroll, whose investigative skills and trial prep work is outstanding, and Bobby Mims for advising Mishae and I. We had a long road with the best ending. **Great job team!**

Three cheers for Michael King! He had a murder case go to trial in the 364th District Court, Lubbock. The State tried to throw all sorts of evidence at the jury, including the backpack (which contained a pistol - not the murder weapon), photos upon photos of the shells left on the street and found in the car, DNA evidence on the gun, and a rap video that showed the client singing about gunning someone down in the street. They were able to keep the backpack out of evidence, but the rap video came in against arguments that it was unfairly prejudicial and irrelevant to the case. The week-long trial ended on a Friday morning with compelling closing arguments that had everyone biting their nails as the jury deliberated for 3.5 hours, but Michael argued that the State failed to prove that his client was in the car at the time of the shooting and none of the eye-witnesses could place his client there or at the scene. Ultimately, the jury came back with a NOT GUILTY that set his client free after being incarcerated on these allegations for over 2 years. **Way to go!**

Shout out to Matthew Allen, Aaron Diaz, Roland Garcia, John Gilmore, and Amanda Hernandez! On September 14, 2023, the St. Mary's Criminal Law Association hosted a Question & Answer panel at the St. Mary's Law Alumni Room with SACDLA & TCDLA Board Members. The purpose of this Panel is directly in line with the Law School Committee's Mission:

"[T]o familiarize students with the responsibilities which come with representing citizens accused of crimes, to make them aware of the resources available to criminal defense practitioners and to introduce them to the fellowship and camaraderie shared by those who stand between the government and the individual accused of a crime."

TCDLA is proud to have sponsored this informative event. **Excellent work!**

From left to right: Roland Garcia, Matthew Allen, Amanda Hernandez, Aaron Diaz, and John Gilmore

Significant Decisions Report

KYLE THERRIAN

They should call this the Significant Decisions and Stuff Rio Grande Legal Aid is Doing at the Border Report (technically I think I can change the title, but I don't like to find out I don't have the power to do things I pretend to have). In the last two submissions, we saw some successes from the lawyer insurgency fighting against Operation Lone Star ("OLS")(an operation to twist and bend Constitution and rules of procedure to detain Hispanics at or near the border). Those successes were in the arena of equal protection arguments raising the fact that OLS targets only Hispanic men. This month we have an interesting Fourth Amendment issue and a case exploring the appropriateness of pretrial habeas as a vehicle to challenge illegal arrest. I say this only half-jokingly: I am on the lookout for the OLS v. Team-Rules-and-Rights saga to soon bring us our first-ever Third Amendment case. I mean if your home is the place you live and a jail is a place you live only once the government establishes probable cause, I think there is an argument that the government is quartering soldiers in some people's homes . . . maybe . . . (don't listen to me; I just really want a Third Amendment case).

Among other things that get me all jacked up is a scathing dissent. It's towards the end of the report, so you will have to read all my rantings to find it. But when you do . . .

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

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

Texas Court of Criminal Appeals

Huggins v. State, No. PD-0590-21 (Tex. Crim. App. Sep. 6, 2023)

Attorneys. Alan Bennet (appellate), Gregg W. Hill (trial)

Issue & Answer 1. When the record reflects that the defendant generally knew how difficult it is to represent oneself without a lawyer, is a specific admonishment on the dangers and disadvantages of self-representation a precondition to a defendant's lawyer-less trial? **No.**

Issue & Answer 2. The Code of Criminal Procedure permits a defendant to withdraw a waiver of counsel "at any time." Does this mean the right to withdraw a waiver is absolute? **No.**

Facts. The defendant "represented himself at the beginning and the end of his case, but he was otherwise represented by two attorneys appointed in succession during most of the approximately 22 months that this case was pending in the trial court." While the venire was standing by on the first day of trial the defendant attempted to revoke or withdraw his waiver of counsel and asked the trial court to appoint a third attorney. The trial court refused and forced the defendant to defend himself per his previous election. At this juncture the trial court did not admonish him about the dangers and disadvantages of self-representation (nor did the trial court admonish him in relation to his previous waivers).

Analysis 1. The only pre-condition to a defendant proceeding pro se is that he or she knows the dangers and disadvantages of self-representation. "There is no formula or script that must be read to a defendant who asserts his right to self-representation." The question is whether the defendant made a knowing, voluntary, and intelligent choice to represent himself. Throughout his case, the defendant received the following: 21 months of attorney representation, an explanation from the court on the significance of his enhancement paragraphs, an explanation from the trial court regarding his right to retained or appointed counsel and his right to represent himself, an explanation from the trial court that he could revoke his waiver of counsel, an opportunity to negotiate with the prosecutors, an admonishment that his case was "a fairly serious matter," an admonishment against self-representation. The defendant expressed on several occasions the difficulties he was having in self-representation but continued to express a desire to represent himself and expressed that "a fool represents himself." This continued until an inopportune time for the trial court, the jury, and the prosecutor. At the moment of his prior waiver, the record reflected that the defendant was literate, that he understood the perils, and that he even once represented himself unsuccessfully in a previous case. "Thus the record shows that [the defendant] waived counsel with eyes open . . ."

Analysis 2. Article 1.051 permits a defendant who is representing himself pro se to withdraw his waiver of counsel "at any time." But "[t]he Statute says 'at any time' and not 'under any circumstances.'" If the Legislature meant for a defendant to withdraw under any circumstance it would have said so. Manipulating the court would constitute an inappropriate circumstance for withdrawing waiver, and the trial court does not have to indulge the defendant's perpetual vacillation in choice.

Dissenting (Yeary, J.). The Legislature requires a trial court to indulge a defendant's choice to withdraw a waiver. The Legislature said "at any time" and the courts don't get to "tinker with [the law] according to our own notions of courtroom efficiency."

Comment. I think I agree with the outcome but not the rationale. The United States Supreme Court requires specific warnings about dangers and disadvantages of self representation, and it requires the record to reflect those warnings be given as admonishments. *Faretta v. California*, 422 U.S. 806 (1975). However, there are few rights, if any, that are implemented in a manner that allows a criminal defendant to play cat-and-mouse. I think it would have been cleaner just to say that. I agree with Judge Yeary on the second issue and answer. The "at any time" and "under any circumstance" is a distinction without a difference—circumstances happen on a continuum of time where any circumstance may happen at any time and thus "any time" incorporates "any circumstance."

McPherson v. State, No. PD-0635-22 (Tex. Crim. App. Sep. 27, 2023)

Attorneys. R. Keith Walker (appellate, trial), Sajeel Khaleel (trial)

Issue & Answer. A person tampers with evidence if they conceal it. When a person throws evidence from their window while being pulled over and the officer later discovers that the thing thrown was evidence, does the officer's subsequent discovery negate the act of concealment? **No.**

Facts. This is a tampering with evidence by concealment case. The defendant threw weed out of his

car window while being stopped by an officer. The officer confronted the defendant about what he saw thrown from the window and the defendant asserted that it was "nothing. It was napkins." The officer let the defendant go after issuing a speeding ticket. Later the officer searched the area and found marijuana where the defendant discarded the items in question.

Analysis. A person tampers with evidence if "knowing that an investigation is in progress, he conceals anything with intent to impair its availability as evidence in the investigation. An item is concealed if it is hidden, removed from sight or notice, or kept from discovery or observation." An officer successfully locating something does not negate the fact that it was removed from sight or kept from discovery or observation. This case is different from a similar one where the officer never lost sight of the contraband the defendant was attempting to conceal (held: not concealment, not tampering). Here, the officer saw the defendant throw something from his vehicle, did not know what those things were, lost sight, and did not discover them until later. This was concealment.

Ex parte Vieira, No. PD-0690-22 (Tex. Crim. App. Sep. 27, 2023)

Attorneys. James Siscoe (appellate)

Issue & Answer. How many years is two years? **Two.**

Facts. The State charged the defendant with aggravated assault by a public servant. Because the underlying offense is an assault, the statute of limitations is two years. The State alleged the offense occurred on July 7, 2019 and filed their indictment on July 9, 2021. Defendant filed a pretrial writ of habeas corpus asking that the case be dismissed and alleging that the prosecution was time barred. The trial court denied relief. The court of appeals upheld the trial court and explained that the Code of Criminal Procedure does not include the date of the offense or date of indictment in calculating the statute of limitations (the alleged offense day was July 7, 2019, the first day of the limitations period counted is July 8, 2019, the two-year date was July 8, 2021, the must-be-filed-by date was by the end of the day on the next calendar day: July 9, 2021)

Analysis. "This period of time exceeds two years under any accepted definition of 'year.'" The calculation begins on July 7, 2019 and it must end on the same day of the month (two years later), July 7, 2021. The indictment here, filed on July 9, 2021, falls outside of this calculated period. The State unpersuasively attempts to combine several time-counting statutes to skip multiple days at the beginning of the time-counting calculation. Two years is two years.

Comment. Do we have to have these fights? It seems Harris County has a disproportionate number of silly cases.

Ex parte Escobar, No. WR-81,574-02 (Tex. Crim. App. Sep. 27, 2023)

Attorneys. Benjamin B. Wolff (writ)

Facts. This is a death penalty case. This is the defendant's third writ of habeas corpus, and it alleges due process and false evidence based on a Texas Forensic Science Commission ("Commission") audit of the Austin laboratory conducting forensic DNA testing in his prosecution. The Commission reported "general deficiencies" in the laboratory and the defendant claims this new evidence was not available at the time of his previous writs of habeas corpus. The convicting court found that relief should be granted, and the State agreed. SCOTUS remanded this case to the CCA (after the CCA previously rejected the instant habeas) to consider the significance of the State's "confession of error." Upon a new evidentiary hearing to supplement the record, the defendant raised concerns about 700 new files in the State's possession containing evidence tending to negate the defendant's guilt and asserted he would present the testimony of various doctors in support of his writ. This information was presented in a single-page cover sheet simply stating that the evidence and witnesses exist and could be presented.

Analysis. Each piece of the defendant's new evidence suffers from at least one of the following flaws: (1) does not articulate the evidentiary value, (2) does not articulate how it could not have been presented in previous writs of habeas corpus, or (3) has actually been presented in previous writs of habeas corpus. The lab errors do present evidence that moves the needle in the defendant's favor in that they reduce the probability of DNA matching the defendant. However, "as we explained in our prior order, correctly revised estimates would still inculpate [the defendant] for some of the mixtures . . ."

1st District Houston

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

2nd District Fort Worth

Mayfield v. State, No. 02-22-00199-CR (Tex. App.—Fort Worth, Sep. 7, 2023)

Attorneys. Steven Miears (appellate), Edwin Youngblood (trial)

Issue & Answer 1. When the State has the burden of proving the non-consent of a complaining witness, must the State prove this fact by direct evidence? **No.**

Issue & Answer 2. The most serious habitual offender

enhancements require the State to allege and prove a non-state-jail felony as the underlying offense of prosecution. In a fraudulent possession / use of identifying information prosecution, the level of offense is tied to the amount of identifying information possessed. In reaching the appropriate offense level must the State show that each qualifying piece of identifying information belongs to a different victim? **No.**

Issue & Answer 3. The legislature sometimes creates a literal presumption of guilt despite a well-known part of the constitution that says "don't do that." Courts are required to fix this with a jury instruction that converts the mandatory presumption to a mere suggestion. Did the trial court err here when it failed to give this instruction? **Yes, but harmless.**

Facts. This is a fraudulent use of identifying information case (enhanced by virtue of an elderly victim). The complainant is an individual who had his financial information hacked. Someone changed his passwords and opened lines of credit. The complainant filed reports with the police, the FTC, and the FBI. Months later police arrested the defendant for shoplifting and discovered "multiple cards and sticky notes with other people's names and other information on them." The complainant's information was among that held by the defendant upon his arrest. The State charged the defendant with "fraudulent use or possession of five or more but less than ten items of identifying information of an elderly individual." The State enhanced his sentencing range as a habitual offender. A jury convicted the defendant and sentenced him to 60 years imprisonment.

Analysis 1. In evaluating sufficiency of the evidence, circumstantial evidence is just as good as direct evidence. The State is permitted to prove lack of consent by circumstantial evidence. "In a legal-sufficiency review, the question is not what evidence there isn't; it's what evidence there is." Here there was ample evidence: the complainant pulled his credit reports and saw fraudulent activity, he had never met the defendant and had never given the defendant his identifying information (despite the defendant's contention when police arrested him).

Analysis 2. Texas Penal Code § 32.51 makes fraudulent possession or use of identifying information a felony greater than a state jail if the "the number of items obtained, possessed . . . or used, is five or more but less than 10." The defendant possessed more than 10 pieces of identifying information, but from fewer than five people. Notwithstanding the smaller number of victims, the defendant met the threshold for a third degree felony by virtue of the number of pieces of information he possessed. The court disagrees with the defendant's contention that the gravamen of the offense is identity theft (and not information theft). Texas courts have consistently interpreted the statute as creating an allowable unit of prosecution based on each separate item of identifying information, regardless of the total number of identities or persons to whom the information belonged. With this understanding the State properly charged the defendant with an underlying non-state-jail felony offense that could be enhanced under Texas's habitual offender statutes.

Analysis 3. The trial court erroneously instructed the jury on the presumption of intent that attaches when a defendant possesses a requisite number of pieces of identifying information. The trial court was required to convert the mandatory presumption into an optional presumption. Unobjected-to jury charge error is reviewable for "egregious harm." Here the evidence was really good evidence, and the jury charge was also really good (except this one spot, where it wasn't). The error is harmless.

Comment. The good old Texas Rule of Appellate Procedure 13th juror trick. An appellate court absolutely cannot be a 13th juror to question a conviction. But as long as it doesn't acknowledge that harm analysis requires it to act as a 13th juror, being a 13th juror is okay . . . to affirm a conviction.

4th District San Antonio

Attorneys. Kristin Etter (appellate), Billy Pavord (appellate)

Issue & Answer. Is a pretrial writ of habeas corpus raising a violation of the Fourth Amendment an appropriate vehicle for dismissing a criminal prosecution? **No.**

Facts. This is an Operation Lone Star case. Because it cannot be said enough, here is the 2022 summary of what that is.

[Operation Lone Star's] concentration of law enforcement and military resources along the border has produced roughly four thousand arrests for misdemeanor

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

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

In this case, the OLS people arrested the defendant for trespassing in a place where it is impossible to trespass—a vacant lot without a fence or posted no-trespassing signage. The defendant "filed an application for writ of habeas corpus seeking dismissal of the criminal charge on Fourth Amendment grounds."

Analysis. This is an as-applied challenge.

Pretrial habeas corpus is available "only in very limited circumstances." As-applied challenges are generally not cognizable. However, certain types of as-applied challenges may be raised by pretrial habeas where the rights underlying those claims would be effectively undermined if not vindicated before trial.

* * *

Colin-Tapio's habeas petition is predicated on a factual dispute regarding an element of the alleged offense—the presence (or lack) of fencing or signage providing notice that entry was forbidden. Such a factual dispute is precisely the type of claim appropriately vindicated at trial. In other words, this case does not involve the type of constitutional right that would be effectively undermined if not vindicated prior to trial.

The State did not have a fair opportunity to develop the facts, despite the record showing the State's presence, awareness, and participation in the pretrial habeas hearing. The State should be afforded the opportunity to continue to detain the defendant until trial and prove their elements (or not). If a trial judge or jury convicts him unconstitutionally, he can take advantage of the direct appellate process.

Comment. The facts were well enough developed for the Fourth Court of Appeals to declare in its first factual recitation that the defendant was a noncitizen. Don't worry . . . nobody saw that (except me and my little Significant Decisions Report). Also . . . what makes this an "as-applied" challenge?

9th District Beaumont

Swanzy v. State, No. 09-22-00136-CR (Tex. App.—Beaumont, Sep. 27, 2023)

Attorneys. Bryan Laine (appellate), Rife Kimler (trial)

Issue & Answer. In 1979 a defendant could receive a form of deferred adjudication probation for a DWI offense. The Code of Criminal Procedure at the time prohibited the use of the defendant's guilty plea when the defendant successfully completed this version of probation. Is a jury's DWI 3rd verdict resting upon a 1979 DWI deferred probation supported by insufficient evidence? **Yes.**

Facts. This is a DWI 3rd case in which a jury sentenced the defendant to 99 years incarceration based on habitual offender enhancements. At trial the State proved the defendant had two prior DWI cases but proved up the defendant's 1979 case with a packet containing a probation judgment without a judgment of conviction. The defendant proved—by pointing to the State's own exhibit—that his successful completion of probation resulted in the dismissal of the 1979 case. Notwithstanding the state of the evidence, the trial court denied the defendant's motion for an instructed verdict.

Analysis. The 1965 Code of Criminal Procedure governs the analysis of the defendant's contention regarding his 1979 DWI. The law then provided that a defendant's guilty plea resulting in probation and subsequent dismissal may not be used for any future purpose, except a determination of whether the defendant is deserving of future probation sentences. Here, the State's

DWI 3rd conviction may not rest upon the defendant's 1979 DWI probation. The remedy is not acquittal, but remand to the trial court for sentencing within the range of punishment for a Class A Misdemeanor.

Comment. Flipping a 99-year sentence makes me think of Jay-Z . . . trapped in the Kit-Kat again…

10th District Waco

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

11th District Eastland

Gonzales v. State, No. 11-19-00274-CR (Tex. App.—Eastland, Sep 29, 2023)

Attorneys. Cythia Orr (appellate), Dante Dominguez (appellate), Daniel Hurley (trial), Bobby Barrera (trial)

Issue & Answer 1. Is an expert required to testify about how far an AK-47 flings shell casings after firing? **Yes.** Does exclusion of layperson testimony here violate a defendant's constitutional right to present a defense? **No.**

Issue & Answer 2. Must a trial court grant a motion for new trial on undisclosed *Brady* evidence when it is disputed whether the *Brady* evidence (known at least to federal authorities) was ever made known to the state prosecutors? **No.**

Facts. The defendant shot and killed a person, but he claimed he acted in defense of a family member. One way the State refuted this defense was by showing where shell-casings from the defendant's AK-47 landed. The State's theory was that the defendant pursued the victim past his own property. The defense sought to show that an AK-47's expulsion of shell casings is an unreliable method of demonstrating the location from which a shooter fired an AK-47. Specifically, the defendant's trial counsel brought to the trial court's attention an experiment conducted by his law partner where shell casings flew up to 25 feet after fired. Because of the late notice, defense counsel made three requests: (1) expert testimony without proper notice, (2) lay witness testimony on the AK-47 shell casing expulsion, and (3) an order to conduct an independent examination of the defendant's AK-47 shell casing expulsion pattern. The trial court ordered the independent examination but ultimately prohibited the defendant from presenting his proposed witnesses under a belief they were unqualified to render their proffered opinions.

The State also presented the testimony of the victim's wife who downplayed the victim's propensity toward violence and anger. After the trial, defense attorneys learned that the victim's wife was under federal investigation for a fraud conspiracy.

Analysis 1. "[T]he crux of the [defendant's] offered testimony was that, based on the location of the shell casings recovered from the scene, [the defendant] was standing on his property when firing the AK-47." Shooting a gun and looking at the ground is a technical skill that requires a crime scene investigator or ballistics expert. The testimony of random non-experts firing an AK-47 and looking at where the casings land, without more, is "abstract . . . and does not aid the jury in analyzing the location of shell casings to determine where [the defendant] was standing when firing at [the victim]."

Analysis 2. Defense counsel contended in his motion for new trial that, had the State disclosed their witness was under federal fraud investigation, he would have used that information to show that her testimony was influenced by a desire to curry favor with federal prosecutors. Because there was a factual dispute about whether the State knew

about the federal government's investigation into its witness, the trial court's ruling denying a motion for new trial alleging the State's misconduct was not erroneous.

Comment. It seems the defendant was not trying to show where the defendant was standing by testimony of an expert. The defendant was trying to show that the location of shell casings is an unreliable method of determining where someone was standing when shooting an AK-47. These are two very different showings.

It is clear that the federal government knew about their own investigation into the State's witness. Brady is not contingent on the culpability of the prosecutor. If the "government" withholds evidence, the government withholds evidence. This divide and conquer, right-hand-of-government-left-hand-of-government, who had what and told the prosecutor about it is not the correct analysis.

12th District Tyler

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

13th District Corpus Christi/Edinburg

***Saldivar-Lopez v. State*, No. 13-22-00242-CR (Tex. App. Corpus Christi-Edinburg, Sep. 14, 2023)**

Attorneys. Hon. Susan J. Clouthier (appellate)

Issue & Answer. Is a trial court's purported abuse of discretion in denying a motion for mistrial evaluated under a standard that is superficially a more rigorous harm analysis set forth in the Texas Rules of Appellate Procedure? **Yes, but it doesn't help here.**

Facts. This is a continuous sexual abuse of a child case. A jury convicted the defendant and sentenced the defendant to 25 years incarceration. The facts relevant to the issue on appeal involve the testimony of the defendant's ex-wife who is also the mother of the victim. In a pretrial hearing the trial court admonished the ex-wife to not mention "any alleged abuse towards [her], any incidents involving guns, any girlfriends or relationships that [the defendant] may have had with adult women or adult men, for that matter, period." In response to a question regarding the ex-wife taking safety precautions in anticipation of a meeting to confront the defendant about his alleged crime, the ex-wife testified: "I have—I have my weapon. I wasn't going to do anything with it, but I was scared that he was going to come, because he has weapons himself." The defendant objected and moved for a mistrial.

Analysis. A trial court's denial of a motion for mistrial is reviewed for an abuse of discretion. The focal point of the dispute on appeal is the standard for determining an abuse of discretion. The defendant contends a three-factor test applies: (1) the severity of the misconduct, (2) curative measures by the court, and (3) the certainty of conviction absent misconduct. *Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998). The State contends that an alleged abuse of discretion in denying a mistrial is analyzed under the plain and simple harm analysis set out under Texas Rule of Appellate Procedure 44.2. The defendant is correct

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in his reliance on the three-factor *Mosley* test, but an analysis under the *Mosley* test does not support reversal. The witness's misconduct was not egregious. She did not testify about "an incident involving a gun" but rather the defendant's history of possessing guns. Even assuming this was a violation of the trial court's admonishment, and even when coupling it with the fact that the trial court took no curative action, "it is unlikely that one witness's single sentence about an ancillary issue over a two-day trial affected the jury's verdict."

Chumacero v. State, No. 13-22-00367-CR (Tex. App.—Corpus Christi-Edinburg, Sep 28, 2023)

Attorneys. Ed Stapleton (appellate), Hon. Elia Cornejo-Lopez (trial), Hon. Luis S. Sorola (trial)

Issue & Answer 1. Can a trial court defer its judgment on a transfer of venue until after the parties conduct voir dire? **Yes.**

Issue & Answer 2. Is "I base my decision on an evaluation of the credibility of the witness" a phrase that will uphold nearly any trial court ruling? **Pretty much.**

Facts. This is a change of venue case in a murder prosecution. In support of his motion, the defendant presented:

- Evidence the victim was a beloved high school athlete.
- Evidence that the local schools held a vigil in honor of the victim.
- Evidence that the local community held a blood drive in honor of the victim.
- Evidence of the news coverage, including reports that the defendant confessed to the offense(s).
- Testimony from two members of the community giving opinions that the media coverage was sufficiently pervasive to affect opinions regarding the defendant's guilt.

The State countered the defendant's evidence with two affidavits and generally argued against venue transfer. The trial court ruled that it would wait until after the parties conducted voir dire to make a determination on the venue transfer. The trial court then denied the defendant's motion to transfer venue after voir dire produced the following:

- Five members indicated they knew about the case.
- Three members indicated they knew the victim's family.
- A single member indicated she could not be fair.
- A single member indicated he donated to a scholarship fund in the victim's honor.

Analysis 1. The defendant relies on *Henley v. State*, 576 S.W.2d 66 (Tex. Crim. App. 1978) for the proposition that a trial court commits reversible error by deferring a ruling on a motion to transfer venue until after the parties conduct voir dire. The defendant sort of gets *Henley*

wrong. In *Henley* the Court of Criminal Appeals held that it was reversible error for the trial court to not conduct a hearing on a motion to change venue and to rely solely on the voir dire process to determine whether transfer was appropriate. Since *Henley*, the Court of Criminal Appeals has explicitly held that it is appropriate for the trial court to conduct a hearing before voir dire and to reserve its judgment until after the completion of voir dire. This is what occurred here. Though there were some comments by the trial court suggesting that it would put near dispositive weight on the voir dire process, the trial court ultimately explained that it would afford the defendant the court's full exercise of discretion following voir dire.

Analysis 2. At trial the State presented evidence of the defendant's videotaped confession. The confession was obtained (and videotaped) by the defendant's co-conspirators. The defendant testified in a pretrial hearing that his co-conspirators threatened to kill him and his family if he did not confess on video. The trial court, in denying the defendant's motion to suppress, issued findings of fact—among them was a finding that he did not find the defendant's testimony credible. A finding of credibility is afforded "almost total deference" (editorial note: "total deference").

Comment. I love a case from the 1800s. This one, cited by the court, explains the distinction between (and reason for having both) a mechanism for challenging jurors for cause, and a mechanism to transfer venue.

> [T]he jury is obtained and impaneled under [the] rules of law, and the law providing for [a] change of venue proceeds upon the hypothesis that the prejudice may be so great and universal in the county as that improper jurors may be obtained, notwithstanding every test may be applied to them. If there were no danger of obtaining prejudiced jurors on the panel, then the law providing for a change of venue upon this ground has no foundation in reason. If obnoxious jurors could be detected and kept from the panel by the question[s] provided for in the Code, then there would be no reason for a change of venue. But . . . the law providing for the change proceeds upon the assumption that, notwithstanding all tests are made, there may be such a prejudice in the county as will render it probable that an impartial juror might serve.

Meyers v. State, 46 S.W. 817, 818 (Tex. Crim. App. 1898).

14th District Houston

***In re Johnson*, No. 14-23-00634-CR (Tex. App.—Houston [14th Dist.], Sep. 7, 2023)(not designated for publication)**

Attorneys. Pro se.

Issue & Answer. Must a defendant who has not been given an appointed attorney litigate his request for an attorney to the standard of an attorney (must he produce a sufficient record that he has properly requested an attorney by filing a motion and making presentment)? **Yes.**

Facts. This is a petition for mandamus filed pro se, seeking the appointment of an appellate attorney. The defendant wants his constitutional right to an attorney on appeal. Having none, he has had difficulty asking for one in an appropriate lawyerly manner (according to the 14th Court of Appeals).

Analysis. The defendant has not produced a record sufficient for the court of appeals to determine whether the defendant has made an appropriate motion in the trial court to obtain a lawyer and brought it to the trial court's attention. The record [prepared by the lawyerless defendant] is insufficient to grant mandamus relief [in the form of giving the lawyerless defendant a lawyer].

Dissenting (Spain, J.). Justice Spain . . .

> A jury found relator guilty of burglary of a habitation with the intent to commit the felony of injury to a child. Tex. Penal Code Ann. § 30.02(a)(1). Relator pleaded true to two previous felony convictions. The trial court assessed punishment at imprisonment for 27 years and pronounced that sentence in open court. Relator filed a notice of appeal. On May 18, 2023, the trial court granted trial counsel's motion to withdraw and signed an order appointing counsel to represent appellant on appeal but did not write in the name of that appointed counsel. I know this because these facts are in the clerk's record and reporter's record in relator's appeal in case number 14-23-00375-CR, of which I take judicial notice. I also take judicial notice of relator's motion to obtain free transcript records, which was filed in this court on August 24, 2023, stating in part:
>
> The Defendant was convicted and sentenced in the 263rd District Court of Harris County, Texas on May 18, 2023. After the Defendant was convicted and sentenced, his trial counsel, Ted R. Doebbler, gave notice of appeal and immediately withdrew from the Defendant's case without filing a motion for new trial. No other attorney has been appointed to the Defendant's case to handle his appeal. The Defendant received a letter from [the] Deputy Clerk of this Honorable Court dated Monday, July 17, 2023. In this letter, she is informing me that the appellant's brief [is due] in this Court 30 days from the date above. The

Defendant currently has no transcript records, nor have [sic] the Defendant been appointed council to handle his appeal.

. . .

In the instant case, the Defendant's case is currently on appeal. He is indigent and has no means of paying for his transcript records. He has not been appointed counsel to handle his appeal and meet the deadline in filing an appellant's brief. For these reasons, the Defendant should obtain free transcript records.

Finally, I take judicial notice of this court's electronic docket, which does not reflect that any appellate counsel for appellant has appeared. Relator's petition for a writ of mandamus alleges that he has filed motions, sent letters, and called the trial court requesting appointment of appellate counsel for the prosecution of his appeal in case number 14-23-00375-CR. He includes an unsworn declaration: "I, David Joel Johnson, do hereby swear under penalty of perjury that the foregoing [is] true and correct." 3 This presents an unusual situation in which (a) relator has sworn under penalty of perjury both that he has no appellate counsel and has requested the trial court to appoint counsel and (b) this court's records reflect that no appellate counsel has appeared. We could ask for a response based on this petition and record. Instead, the majority falls back on the shameful "extra rules" that place an impossible burden on incarcerated persons, that they must provide either a file-stamped copy of the motion or other proof that the motion in fact was filed and is pending before the trial court.1 The majority knows or should know that no appellate counsel has appeared and that the appellant's brief is due on September 7, 2023. I would request a response from both the respondent trial judge and the real party in interest, the State. Counsel for the State has an ethical duty to do justice;

[FN1: As I wrote in In re Williams: But it is not enough for the court to merely deny fundamental fairness and allow notice and an opportunity to cure. The court goes further and once again invokes the heads-I-win-tails-you-lose caselaw from this court that requires incarcerated individuals to go beyond offering evidence by means such as unsworn declarations, requiring them instead to provide to this court file-marked copies of documents from the trial court. See, e.g., In re Henry, 525 S.W.3d 381, 382 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding) (corrected op., per curiam). I strongly disagree with that caselaw. See, e.g., In re Pete, 589 S.W.3d 320, 323–24 (Tex. App.—Houston [14th Dist.] 2019, orig. proceeding) (Spain, J., concurring); *see also* MKM Eng'rs, Inc. v. Guzder, No. 14-23-00160-CV, slip op. at 2 (Tex. App.—Houston [14th Dist.] May 18, 2023, order) (Spain, J., dissenting) ("This subjective rejection of statements made under penalty of perjury of some appellate parties is shameful. How do we know who the next Timothy Cole or Michael Morton will be? . . . Beyond the issue of access to photocopiers, it is possible these individuals may be unable to provide such file-marked copies of documents from the trial court because none were sent to them by the trial-court clerk.").

No. 14-23-00091-CR, 2023 WL *3828805 (Tex. App.—Houston [14th Dist.] June 6, 2023, orig. proceeding) (Spain, J., dissenting). perhaps the prosecutor will do what the majority will not—assist relator in getting the counsel appointed to which he is constitutionally entitled so that the companion appeal isn't stuck in limbo. I would not do nothing, allowing the appeal to go nowhere. I strongly dissent.*

Comment. Good for you Justice Spain. It may not be a published opinion in West, but it is now published here FWIW. Sometimes I wonder whether some appellate judges longed for a day when they would take the bench so they could do the important work of disposing of appeals without reaching the merits. Some faith restored here.

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

- 2nd District Fort Worth
- 3rd District Austin
- 5th District Dallas
- 6th District Texarkana
- 7th District Amarillo
- 8th District El Paso

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≠

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Pretrial Motions on Difficult Subjects Such as Touhey, Kastigar, & Garcia ..... David Gerger
Parallel Civil/Criminal Proceedings & Joint Defense Agreements ..... David Botsford
Attorney-Client Privilege & Privilege Logs ..... Cynthia Orr
Grand Jury Problem Areas ..... Ed Mallett
Restitution Strategies & Problem Areas ..... Michael Gross
5th Circuit & Supreme Court Update ..... Judy Madewell

Friday

Pre-Trial Release ..... Brent Mayr
Ethics ..... Judge Saldana
404 (b) & Other Problem Areas in the FRE ..... Frank Morales
Stark, Ani-Kickback, FCPA, & Other White-Collar Strategies ..... Michael McCrum
Healthcare Fraud ..... Gerry Morris
Traffic Stops & Roving Border Stops ..... Roberto Balli

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