TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

VOICE

FOR THE DEFENSE

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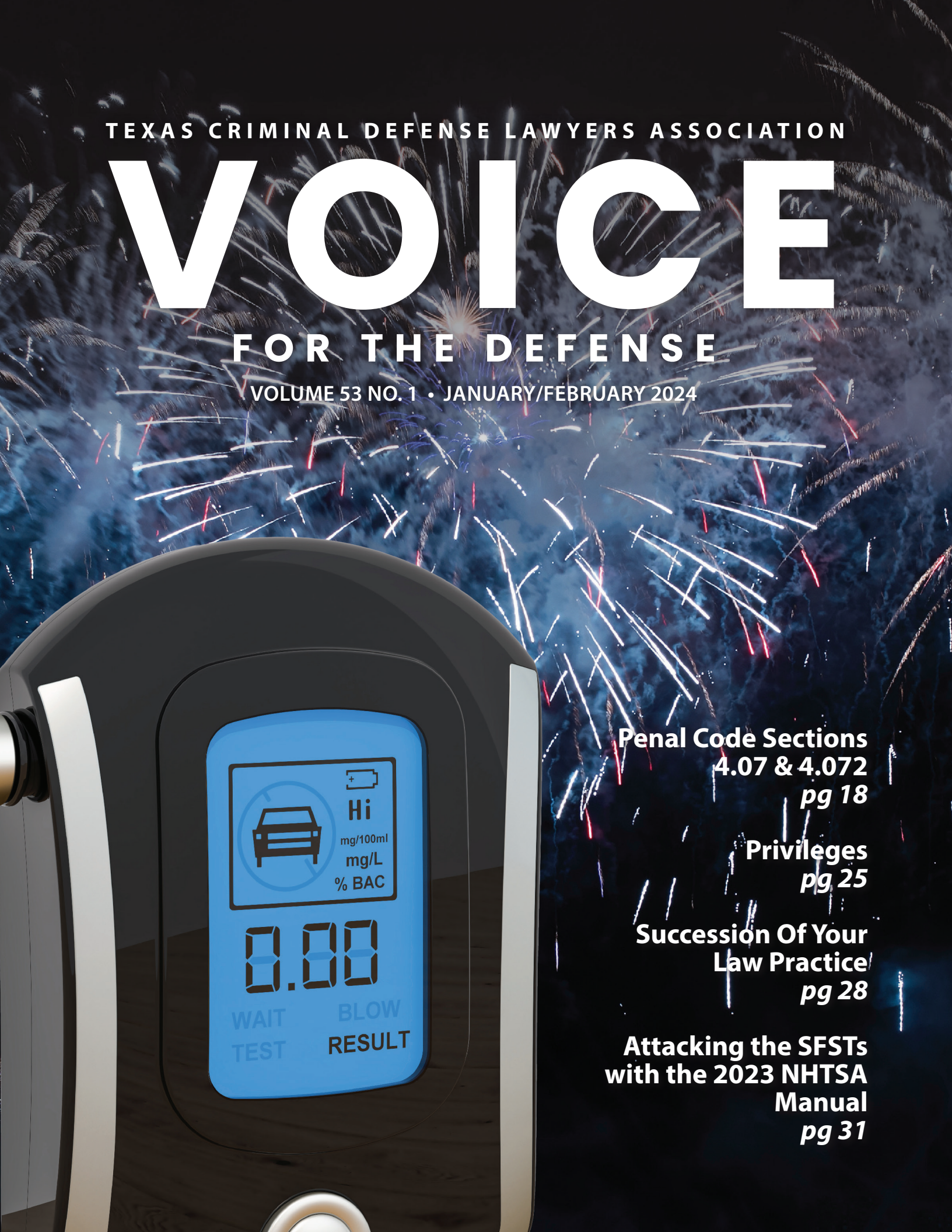

Texas Criminal Defense Lawyers Association

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THURSDAY

GETTING STARTED: CLIENT AGREEMENT, SAMPLE CONTRACTS, & ADVERTISING ..... LARRY MCDOUGAL SR.
INVESTIGATIONS: INNOCENCE TO MITIGATION ..... PORSCHA BROWN
CRIMMIGRATION ..... ADDIE MIRO
BONDS: WRITS, REDUCTIONS, & REVOCATIONS ..... MARK HOCHGLAUBE
EVIDENCE BOOT CAMP ..... JANI MASELLI WOOD
RECUSAL AND DISQUALIFICATION OF JUDGES, PROSECUTORS, & DEFENSE LAWYERS ..... BRIAN WICE

FRIDAY

SOCIAL MEDIA: FINDING IT, GETTING IT IN, & KEEPING IT OUT ..... STEPHEN ROSS JOHNSON
CONFRONTING THE EXPERT ..... MARK DANIEL
CELL PHONES: EXTRACTIONS, LOCATIONS, & EXCLUSION ..... JIMMY TAYLOR
PAROLE FOUNDATIONS FROM ELIGIBILITY TO PACKETS TO REVOCATIONS ..... DAVE O'NEAL
MOTIONS FOR NEW TRIAL ..... MANDY MILLER
MOTIONS TO REVOKE PROBATION OR ADJUDICATE ..... DAMON PARRISH

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VOICE
FOR THE DEFENSE

Volume 53 No. 1 | January/February 2024

Features

Columns

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Volume 53 No. 1 | January/February 2024

TCDLA CLE & Meetings: Schedule and dates subject to change. Visit our website at www.tcdla.com for the most up-to-date information. Register online at www.tcdla.com or call 512-478-2514

2024

January

January 4-5
TCDLA | 43rd Annual Prairie Dog
On Demand

January 12
TCDLA | A Guide to DWI Cases
Webinar

January 19
CDLP | Riding for the Defense
Waco, TX

January 26
TCDLA | Defending Vehicular Crimes
Austin, TX

January 26
TCDLA | Financial Friday - Marketing Your Practice
Webinar

February

February 1-2
TCDLA | Federal Law Gumbo
New Orleans, LA

February 7-10
TCDLA | DWI Defense Super Course SFST/DRE/ARIDE
Austin, TX

February 9
TCDLA | Financial Friday - - HR Basics: Sleeping with the Fishes Office
Webinar

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

February 16
CDLP | Indigent Defense
Dallas, TX

February 21
TCDLA | New Lawyer - Voir Dire 101
Webinar

February 22
CDLP | Mental Health
Houston, TX

February 22
CDLP | Setting Up the Appeal
Houston, TX

February 23
CDLP | Veterans
Austin, TX

February 23
CDLP | Capital
Houston, TX

February 24
CDLP | Career Pathways
Webinar

February 27
TCDLEI Board Meeting
Zoom

February 29 - March 1
TCDLA | From Start to End
Sugar Land, TX

March

March 1
TCDLA Executive & Legislative Committee Meetings
Sugar Land, TX

March 2
TCDLA Board & CDLP Committee Meetings
Galveston, TX

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

March 21-22
TCDLA | 30th Annual Mastering Scientific Evidence DUI/DWI *Co-sponsored w/ NCDD*
New Orleans, LA

March 27
TCDLA | Newy Lawyer - Effective Assistance
Webinar

March 29
TCDLA | Financial Friday - Paperless Office
Webinar

April

April 5
CDLP | Riding for the Defense
Longview, TX

April 11
CDLP | Juvenile Training Immersion Program - Fourth Amendment Challenges
Austin, TX

April 11
CDLP | Navigating a Changing World in Law and Inclusivity
Austin, TX

April 12
CDLP | Juvenile
Austin, TX

April 17
TCDLA | New Lawyer - Contracts
Webinar

April 19
CDLP | Riding for the Defense
College Station, TX

April 25-27
TCDLA | FIDL 3.0 & 4.0 Returner *w/ HCPDO & TIDC*
Austin, TX

April 26
TCDLA | Financial Friday - Cash Balance Plans
Webinar

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

May

May 3
TCDLA | 17th Annual DWI Defense: Defending Freedom with Cases Involving DWI, DUI, & Marijuana
Dallas, TX

May Continued

May 13
CDLP | Mindful Monday: Mitigation Solutions for Dual Diagnosis Addiction & Mental Health
Webinar

June

June 11
CDLP | Chief Public Defender & MAC Training
San Antonio, TX

June 12
CDLP | Capital Litigation
San Antonio, TX

June 12
CDLP | Indigent Defense
San Antonio, TX

June 12
CDLP | Mental Health
San Antonio, TX

June 13
CDLP | Women Defenders
San Antonio, TX

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

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

June 15
TCDLA Annual Members' Board Meeting
San Antonio, TX

July

July 3
TCDLA | Declaration Reading

July 10-14
TCDLA | Member's Trip
South Padre Island, TX

July 10
CDLP | Trainer for Trainers
South Padre Island, TX

July 11-12
CDLP | Riding for the Defense
South Padre Island, TX

July 13
CDLP | Orientation
South Padre Island, TX

July 19
TCDLA | Financial Friday - Divorce
Webinar

July 22
CDLP | Mindful Monday
Webinar

July 24
TCDLA | New Lawyer - Rural Smuggling
Webinar

Scholarship Information:

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

Seminars sponsored by CDLP are funded by the Court of Criminal Appeals of Texas. Seminars are open to criminal defense attorneys; other professionals who support the defense of criminal cases may attend at cost. Law enforcement personnel and prosecutors are not eligible to attend. TCDLA seminars are open only to criminal defense attorneys, mitigation specialists, defense investigators, or other professionals who support the defense of criminal cases. Law enforcement personnel and prosecutors are not eligible to attend unless noted "*open to all."

President's Message

JOHN HUNTER SMITH

February President's Article

This month's article is dedicated to you the Texas Criminal Defense Lawyer. During the month of November, I travelled to seven different counties to appear in state court and appear in federal court in the Eastern & Western Districts. During my travels, I had the opportunity to talk to and observe some very talented lawyers in action. During my conversations with these lawyers there was a central theme that resonated among all lawyers. You could hear it in their voice and see it in their body language that they truly cared about what they were doing and wanted to do a good job for their client. The sad part about our profession is that only our fellow lawyer recognizes and understands the internal agony of the practice.

Sometimes we have to deal with difficult clients, difficult prosecutors, and difficult judges. This is the nature of our profession. However, when I am faced with the difficult players in the criminal justice system, I can feel the stress both mentally and physically.

How many times have you heard one the following statements from a client: you're not fighting for me; you're working for the court; if I paid you more money you would fight harder; you're just a public defender or court appointed lawyer. When I hear these statements from a client it really ticks me off. Most of the time, our clients have no clue of the hurdles we have had to jump on their behalf.

For the past 22 years I have practiced criminal defense. My practice is made up of retained and court appointed case work. Regardless of how I come to be their lawyer, the challenges associated with clients are universal; they do not differentiate between the retained and court appointed cases. During the years that I have practiced law, I have had highs and lows in my practice and personal life. When the practice of law is kicking my butt, I take it out on the ones that love me most. When my personal life is in the toilet, my clients then become the appropriate target to take out my frustration. Whether it is my practice or my personal life, I can see the signs that my world is out of check. I am moody, irritable, isolated, depressed, sad, overwhelmed, scared, and the list can go on.

So, I ask myself from time to time the following question: "Why did you choose a profession that can give you joy in one minute and sorrow in the next?" As I sit here writing this article, I don't know that I can honestly answer that question. I know this, I enjoy the challenge, I enjoy my fellow lawyers, and love the feeling when I truly helped someone. I live for the moments when I know that I did a good job for a client. This gives me pride. I wish I could bottle up that feeling and take a sip of it when things are FUBAR at the office or home.

To my Brother and Sister criminal defense lawyers, I understand how much stress we are under in this profession. It is all right to admit that. It is all right to acknowledge that we cannot save everyone no matter how hard we try. It is all right to admit that we need someone to talk with about through the lows that we experience. NEVER be afraid or embarrassed to ask for help.

To my Brother and Sister criminal defense lawyers, I am proud of each one of you. KEEP YOUR HEAD UP. BREATHE. STAY IN THE FIGHT. NEVER GIVE UP.

CEO's Perspective

MELISSA J. SCHANK

"Here's to the year past and friends who have left us. Here's to the present and the friends who are here. Here's to the New Year and the new friends who will join us."

-Emily Post

Reflecting on the Milestones

As swiftly as December arrived, it whisked away, leaving behind a month filled with noteworthy events for our TCDLA community. We started the month with our stellar seminar on Defending Sex Crime Allegations: Adults and Children, led by Heather Barbieri, Jeff Kearney, and Ryan Kreck. Along with the seminar, we had several Committee meetings, setting the tone for a month of meaningful engagement and lots of fun!

The Legislative Committee, led by Allen Place, Jr., Head Legislative Counsel, have reported to our membership throughout the never-ending sessions on their implications for criminal defense. Finally, the special sessions have ended. The dedicated efforts of our legislative team were evident in the comprehensive updates available on our legislative platform. Members of TCDLA can access past posts on the listserv, although responses are not enabled. Don't hesitate to contact any member of our legislative counsel for further discussions.

A special shoutout goes to legislative counsel member Shea Place Taylor and Ross Taylor - congratulations on their new addition. Although it appears unlikely at the moment, our Legislative Committee is keeping an eye out for additional special sessions. Stay informed by acquiring our newly updated publications, including the code books featuring annotated cases — an indispensable tool for your legal arsenal.

Our Executive Committee met to ensure the smooth operation of TCDLA, followed by our foundation, the Texas Criminal Defense Lawyers Education Institute (TCDLEI). The TCDLEI board proposed the creation of the Distinguished lifetime fellow, requiring a minimum donation of $25,000. To secure TCDLA's future, we're exploring additional avenues for fundraising. Please get in touch with me if you know of potential donors outside the criminal defense realm. TCDLEI Board members are exceptional in their dedication to their mission. Looking ahead to Rusty Duncan, we're actively seeking silent auction items. The board also established audit terms for future audit expenses and timeframes.

A special acknowledgment to Sean Hightower for his generous $15,000 contribution to the foundation. As we dream of a $20 million fund, we will continue to strive to sustain TCDLA through interest, one donation at a time; your support is vital.

The Criminal Defense Lawyers Project met to discuss upcoming training sessions. Notable changes include onsite fees, so register early to avoid higher rates. No onsite fees will be waived for anyone due to penalties imposed by hotels. Additionally, we've introduced a pre-order option for vegetarian meal selections due to increased expenses and availability when requested onsite. Despite challenges, we appreciate your patience as we navigate rising costs for hotels, food, and audiovisual services. Since pre-COVID, we have not raised our seminar rates due to the understanding we are all in this together.

Our TCDLA Board had a productive meeting featuring insightful committee reports, highlighting many new services our committees are working on for our members. The motions included writing off uncollectable accounts, updating the Amicus Policy which can be found online under the Amicus Committee, and editing the Bylaws to modify the makeup of the Executive Committee. We concluded the week in Round Rock with our Nominations Committee, expressing gratitude to all applicants. While positions are limited, perseverance pays off—many successful members applied multiple times before securing a spot. If you weren't selected this time, consider using the following year to deeply engage with TCDLA through various opportunities: Trainer of Trainers, committee service, article contributions, mentorship involvement, and more. Let's chat about your passions and find the perfect fit for your talents! We want to thank all those who traveled from all over the state for our seminars and meeting – it was such a great time seeing everyone!

To wrap up the year, the staff engaged in a community activity by participating in the Angel Tree program with the Salvation Army. We adopted five families, and the staff's overwhelming generosity was truly heartening. Here's to a new year – here we are 2024!

TCDLA Staff with Angel Tree donations

Special Thanks to

Sean Hightower

TCDLA Super Fellow
Gideon's Trumpet Donation

(left to right) Superfellow Sean Hightower, TCDLEI Chair Kyle Therrian, TCDLA President John Hunter Smith

BYLAWS TO BE APPROVED AT JUNE 15 MEMBERS MEETING

TCDLA Executive Committee Meeting, October 19, 2023

MOTION to edit the By-Laws Sec. 2. Executive Committee – remove wording, "immediate past president" see below, made by David Guinn seconded by Jeep Darnell – motion carries.

Sec. 2. Executive Committee

The Executive Committee shall consist of the officers of the Association, the editor of the Voice for the Defense, ~~immediate past president,~~ and two members of the board of directors appointed by the President. The President may select Ex-Officio(s) in a non-voting capacity, to serve on the Executive Committee. The Executive Committee shall have such powers and duties as are provided in these bylaws and as may be prescribed by the Board of Directors. The CEO is a non-voting member of the Executive Committee.

The Business Side of Criminal Defense

Editor's Comment

JEEP DARNELL

I hate to somewhat exclude some of my public defender brothers and sisters from the heartburn I shall exude in this column, but trying to find good help these days is hard. We are currently hiring for a support position in our office and trying to find someone who: 1) is qualified; 2) can fit into our office dynamics; 3) has the requisite technical capabilities to oversee our office computer system; 4) won't lie, cheat, or steal; and 5) we can afford. Maybe it's the last one that some public defender offices don't have quite the hard time private attorneys have. but all of us, public defender offices and private defenders, have to deal with the hardship that comes with employing support staff.

We may want to think that we are kings and queens of the world and can control our own little fiefdoms, but we have to be considerate of who and what we are hiring when we bring someone into our offices.

Qualifications

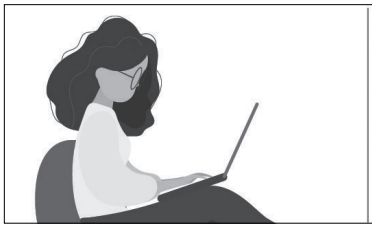
We would all love to have an IT professional who is trained in legal research and writing and can fix all of the problems that come up on a daily basis, but that person costs a lot of money. So, sometimes, we have to get lucky, find the right person, and probably be willing to train someone to help us in each of our own ecosystems. But what qualifications are most important to look for in hiring support paraprofessionals? Each of our offices probably needs someone a little different. Still, as I have been working through the hiring process, I have figured out that someone with some background in computer systems and who is very organized seems to be among the most important qualifications to look for.

Office Dynamics

Our office is larger than some and smaller than a lot, but I don't care if your office is you and one other person or if your office has a hundred people; we are not the kings and queens we think we are. Even a perfect employee on paper might not be perfect for our office if the personalities, senses of humor, interests, or rivalries don't align. No office will be perfect, that is for sure, but creating turmoil in an office by bringing in someone who will not fit in your office's dynamics can create more problems down the road. Once that turmoil rears its ugly head, the staff members whom you have already spent more time training and developing could become disgruntled, demand more money you cannot afford, or just quit and leave. Don't cut off your nose to spite your face; think about those dynamics before you fly off and hire just anyone. You might consider running potential candidates by employees and getting their input; the practice may give existing employees a greater sense of pride and ownership in your office helping avoid later problems.

Technical Capabilities

I know many of our members do not believe in the necessity of employing someone with an IT background. Still, the reality is that unless you can command your office IT system at all times without needing any further assistance, it might be a good idea to employ someone who can either run your office system or work with outside IT firms to make sure that you stay within the ethical requirements and protect the sensitive information that you maintain. Comment 8 to Rule 1.01 of the Texas



Get Published!

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

Disciplinary Rules of Professional Conduct requires that "Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law, including the benefits and risks associated with relevant technology. To maintain the requisite knowledge and skill of a competent practitioner, a lawyer should engage in continuing study and education." I have written before on this topic, but we cannot do everything ourselves in our offices, and employing someone to support our ethical responsibilities can serve us.

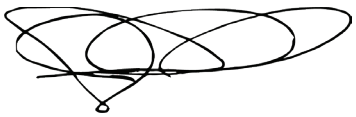
Lying, Cheating, and Stealing

This one is fairly self-explanatory, but most of us have fallen victim to dishonest employees. Very few things cause panic and general curmudgeonly, like having an employee lie to you about necessary work, cheating on their hours, or stealing money from you. There is no tried and true method that will ensure it never happens again. Still, we've all put enough people through the crucible of cross-examination that we should not be naïve and forget our professional skills when judging potential employees.

What Can We Afford?

At the end of the day, all of the other considerations pale in comparison to what we can afford to hire a new employee. I certainly cannot answer this question for any of my readers, but I will tell you that it is difficult for a small business to compete against the current pay rates that fast food restaurants and Walmart offer. I would never have imagined that most of Walmart's fast food tellers or checkers were qualified to work in my office. But, the pay rates offered at places like Kentucky Fried Chicken make the talent pool too thin. The best advice I can offer is to try to create a work environment that supplements the pay you can afford to offer. Make your office a place that engenders a family-like environment, where people want to work, where trust runs in both directions – between you and your employees.

Be safe,



Jeep Darnell

The Federal Corner

ROBERTO BALLI

Finally – Federal Sentencing Guideline Amendments

After years without a quorum, the United States Sentencing Commission finally met and passed some of the most significant and impactful guideline amendments in years. The two most impactful guideline amendments, effective November 2023, are already having the immediate effect of lowering the guideline scores in a significant number of cases. These amendments are the new "Zero Point Offender" guideline and the amendment to "status points" criminal history guideline. The amendments are referred to as Amendment 821. Importantly, both amendments will apply retroactively beginning February 1, 2024.

Zero Point Offenders

The first of these guideline amendments is the creation of a new Zero Point Offender guideline. The amendment creates a new sentencing guideline, §4C1.1, which gives a 2-point reduction to the guideline score to certain defendants that have zero criminal history points. Specifically, §4C1.1(a) provides a 2-level decrease from the offense level determined under Chapters Two and Three if the defendant meets all of the following criteria:

(1) the defendant did not receive any criminal history points from Chapter Four, Part A;

(2) the defendant did not receive an adjustment under §3A1.4 (Terrorism);

(3) the defendant did not use violence or credible threats of violence in connection with the offense;

(4) the offense did not result in death or serious bodily injury;

(5) the instant offense of conviction is not a sex offense;

(6) the defendant did not personally cause substantial financial hardship;

(7) the defendant did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(8) the instant offense of conviction is not covered by §2H1.1 (Offenses Involving Individual Rights);

(9) the defendant did not receive an adjustment under §3A1.1 (Hate Crime Motivation or Vulnerable Victim) or §3A1.5 (Serious Human Rights Offense); and

(10)the defendant did not receive an adjustment under §3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. §848.

Of note is that some of the excluding criteria relate to the defendant's conduct and some of the excluding conduct relate to the offense conduct. For example, (a)(3) states that "the *defendant* did not use violence … ," but (a)(4) states that the *offense* cannot result in death or serious bodily injury. *Emphasis added.* This is an important distinction because under (a)(3) the defendant would not be excluded from the Zero Point offender reduction in a case involving violence as long as he did not personally participate in the violence. On the other hand, under (a)(4), regardless of the defendant's conduct, if a person suffered death or serious bodily injury as part of the offense, the defendant would be excluded from the Zero Point Offender reduction.

Another interesting part of the Zero Point offender reduction is that it comes from Chapter 4. Since the sentencing guidelines are applied in the order of the guidelines, this means that the two-point reduction is applied after acceptance of responsibility (which is found in Chapter 3 of the Guidelines). Therefore, this does not affect a three-point reduction for acceptance of responsibility as opposed to a two-point reduction.

The last exclusionary criterion is significant because it excludes defendants in continuing criminal enterprise drug conspiracies who receive an aggravating role under the guidelines from qualifying for the Zero Point Offender reduction. The exclusion references 21 U.S.C. §848 for the definition of continuing criminal enterprise in drug cases and would require proof that the drug conspiracy involved at least five participants and that the defendant obtained substantial income or resources. Therefore, not every

person receiving an aggravating role in a drug conspiracy is excluded. Further, those receiving aggravating roles in non-drug conspiracies are not excluded from the Zero Point Offender reduction.

As part of the Zero Point Offender Reduction, an amendment was also made to Guideline §5C1.1. The new Application Note 10(A) of §5C1.1 states that for Zero Point offenders falling in "Zone A or B of the Sentencing Table, *a sentence other than a sentence of imprisonment . . . is generally appropriate.*" *Emphasis added.* This application note encourages the sentencing court to give a non-prison sentence to a defendant in Zone A and B. As defense counsel, we should be pointing out this part of the amendment to the courts in our sentencing memorandums in all of our cases that fall within Zone A or B.

Another important part of the Amendment is Application Note 10(B) of §5C1.1 which provides that for Zero Point Offenders, a *"departure, including a departure to a sentence other than a sentence of imprisonment, may be appropriate if . . . the defendant's applicable guideline range overstates the gravity of the offense because the offense of conviction is not a crime of violence or an otherwise serious offense."* This application note encourages sentences, other than prison sentences for Zero Point Offenders, regardless of the Defendant's guideline score, by reducing the score with a departure if the offense of conviction is *not a crime of violence* or a *serious offense*. It's difficult to say what a crime violence is anymore or to define what is a non-serious offense, but we must be creative in our arguments and ask for these departures when we feel appropriate. What is and what is not a "serious offense" will vary from judge to judge, but the case can be easily made in many white-collar offenses, misprisions, gambling offenses, and some gun charges.

Status Points

The second significant amendment is to the "Status Point" section in the criminal history guideline §4A1.1. Status Points are points given under §4A1.1 to defendant that "*committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.*" For years, a person would get two points added to their criminal history score as status points. This has always been the "double whammy" because the defendant got criminal history points for the original sentence and then the additional "plus two" because they are still under supervision. This amendment completely removes Status Points for defendants with fewer than seven criminal history points and lowers the Status Points from a two-level increase to a one-level increase for defendants with

seven or more criminal history points.

Retroactivity

Both the new Zero Point Offender guideline and the Status Point guideline will apply retroactively beginning February 1, 2024, as part of Amendment 821. Motions for retroactive application are filed pursuant to 18 U.S.C. § 3582(c), which provides the vehicle for filing a motion to reduce a sentence based on a guideline amendment that lowers a defendant's sentencing range. Courts are required to follow Guideline §1B1.10 to determine whether the sentencing reduction applies.

As part of a Court's analysis, pursuant to §1B1.10, the Court "shall determine the amended guideline range that would have been applicable to the defendant if the amendment . . . to the guidelines . . . had been effect at the time the defendant was sentenced." Further, the Court "shall leave all other guideline application decisions unaffected." *Id.* In other words, the Court should apply the new guideline to the old scoring, and not reconsider the prior guideline rulings from the original sentencing. However, in a resentencing for an amended guideline, the Court is prohibited from reducing the ". . . defendant's term of imprisonment . . . to a term that is less than the minimum of the amended guideline range . . .". *Id.* Therefore, the Court cannot revisit its rulings on other guideline applications at the original sentencing, and the Court cannot sentence the Defendant to a sentence that is lower than the bottom of the guideline range using the Zero Point Offender Guideline or when removing or lowering the Status Points.

The only exception to the rule prohibiting Courts from resentencing defendants to less than the minimum of the new guideline is for Defendants that had been given a departure for substantial assistance pursuant to U.S.S.G. §5K1.1 in the original sentencing. In such cases, the Court may re-sentence the Defendant to a ". . . reduction comparably less than the amended guideline range . . ." *Id.* What does this mean? "Comparably less" could mean either the same number of months that the original sentencing Court departed below the minimum of the guideline range at the original sentencing and subtracting that number from the new minimum guideline. It could also mean using a percentage formula; for example, if the original sentencing court granted a twenty-five percent reduction from the minimum of the old guideline, the Court could resentence the defendant to the same percentage below the minimum amended guideline.

When considering 3582 motions, Courts are conducting a resentencing and can consider the sentencing factors found in 18 USC § 3553(a). A Court can consider post-sentencing conduct such rehabilitative efforts or violations committed by the applicant while in custody. The Court could also consider family circumstances that may have changed. However, the rule that the Court cannot go below the amended minimum guideline still applies.

Once the Court receives a motion for retroactive application of the guidelines, the Court is not required to conduct a hearing.[1] Further, even if the Court decides to hold a hearing, pursuant to Federal Rule 43, the Defendant is not required to be present at the hearing. Finally, the Court is not required to appoint counsel for pro se defendants.[2] In practice, most of these sentencing reduction motions will be considered on the paper, so the quality of the motion along with any exhibits is important.

Our Thoughts

Having a quorum at the Sentencing Commission after

1 *See United States v. Alaniz*, 961 F.3d 998 (8th Cir. 2020).

2 *See United States v. Perez*, 623 F.App'x 282 (5th Cir. 2015)

years with no amendments gives the Federal Practice and the Federal courts some welcomed change. Defendants sentenced to lower terms of imprisonment are the ones least likely to benefit from the amendments to the guidelines, having probably already or nearly served their time. Defendants with intermediate and longer sentences will stand to benefit in large numbers. While it is easy to remember the Zero Point Offenders when it comes to resentencing, there will be some status offenders that benefit from resentencing as well. As the Sentencing Commission continues its work, more positive changes may be coming next year as the Commission considers either removing or reducing criminal history points for juvenile offenders.

Roberto Balli *is a board member of CDLP and practices State and Federal Criminal defense in Laredo, Texas, but travels to Federal Courts throughout the State and country. Roberto is a partner Balli & Balli Law Firm, LLP, and is married to his law partner Claudia V. Balli. Their firm is dedicated to Federal and State criminal defense and criminal appeals. Roberto has significant criminal trial and criminal appellate experience. He is a former First Assistant District Attorney in Webb and Zapata Counties. Roberto is Board Certified in Criminal Law by the Texas Board of Legal Specialization and by the National Board of Trial Advocacy. Roberto can be reached at robertoballi@sbcglobal.net or (956) 712-4999.*

TCDLA MEMBERSHIP Spotlight

Annie Scott

TCDLA Member Since: **2012**

Favorite Seminar: **Rusty is my favorite**

Law School: **Thurgood Marshall School of Law**

Length of Practice: **Since 2008**

Favorite TV Show: **I have strange watch habits. More than any other show, I think I watch Law and Order**

Advice for people to get more involved: **Be around people who can help to make you better**

Primary Cases: **I get court-appointed to all types of cases, and I take retained criminal cases of all types as well. Just recently, I also began taking personal injury cases.**

Free Time Activities: **I usually hang out on a sofa or in my bed in my free time**

Favorite Food: **I love seafood**

Most Successful Case and Why: **I think each one that I have tried has been successful, not by the result, but by the experience.**

Way to Relax: **I have regular, massage, facial, spa day, foot massage, manicures, pedicures, etc.**

Place to Travel: **I would go to a nice pretty body of water somewhere. I don't necessarily need to leave the States.**

Dream Car: **I am not that into cars, but I do the way some of them look. Right now, I value mpg over anything else, so I keep it related to the value that the car can bring to me etc...**

Life Motto: **Keep moving forward.**

Advice you wish you knew starting out as a lawyer: **I wish I knew how to run a business and to train and work with employees**

Beyond the City Limits

DEAN WATTS

Fingerprints Evidence in Drug Cases: An Underused Defense

Here is a common scenario: Two (or more) people in a car. They're pulled over for an insignificant traffic violation. The police sense something is up. The occupants are separated and questioned about where they're from, where they're going, and so forth. All the while, the police examine their demeanor during this routine questioning.

The vehicle's occupants, now standing alongside the road, are observed to be nervous, evasive, won't make eye contact, have conflicting stories, and so on. They're sweating it out while the computer ***slowly*** verifies their identity.

At some point in time, the police ask, "Are there any drugs in the car?"

"No," they say emphatically.

The police then follow up with, "Do you mind if I look for myself?" And someone usually gives permission. If not, the drug dog comes and alerts.

The police subsequently search the car and usually find the drugs in an out-of-sight but accessible container, generally a plastic baggie. Since no one owns up to it, everyone is arrested. The police send the drugs to the lab, and guess what, they're drugs. But you know what? They seldom, if ever, ask to have those plastic baggies checked for fingerprints. It would usually completely prove (or disprove) their case.

This scenario has always puzzled me, so I finally asked my good friend and retired fingerprint analyst for the Nacogdoches Police Department, Jerry Stone, a few questions about why this isn't done, how it could be done, and how we can use the absence of this evidence to help defend the citizen accused.

Jerry, thank you so much for talking with me today about fingerprint evidence. First, how did you become an expert on fingerprints?

I originally took a basic class offered at Angelina College that was 40 hours long. I then enrolled in a basic fingerprint identification school at the Texas Department of Public Safety Academy in Austin, Texas, which taught me how to classify fingerprints and identify latent fingerprints. This was an 80-hour class where we looked at thousands of fingerprints. I later took an advanced fingerprint identification class of 80 hours at the Texas Department of Public Safety Academy in Austin, Texas. I enrolled in an advanced fingerprint identification class at the Kilgore College police academy taught by a Federal Bureau of Investigations fingerprint training officer, which consisted of 40 hours of intensive training in fingerprint identification. I was an active member of the International Fingerprint Identification Group till my retirement. I have testified as an expert countless times on fingerprints in court and have been recognized by the courts as an expert in this field.

How can fingerprints be taken from plastic baggies?

Fingerprints can be developed on a plastic bag through a process of fuming the bag in a chamber that contains basically Superglue. Normally, this is an overnight process. Then, the developed prints are photographed. How the plastic bag was handled could affect the development of prints on it.

A fingerprint is made up of 98 percent water and 2 percent oils from the skin. The moisture evaporates, and what is left is the oils. That is essentially what you develop on the bag.

Are there any problems in taking prints in this way?

To do this first the alleged drugs would need to be removed, and this maybe a reason it is not done by someone without chemical knowledge of how to properly handle this evidence.

Does law enforcement have access to a lab where

this can be done? Is it expensive?

T*exas law enforcement has access to the state labs free of charge. The Texas DPS lab in Houston tests for DNA and basically anything to do with crime scene evidence. The Houston lab will send a crime scene crew out on major cases.*

Fingerprint processing of plastic bags would go to Houston or Austin. The wait time could be from three months or longer depending upon their caseload.

So there you have it. Although this may not be as great as a self-defense, it at least gives you something to point the dirty end of the stick at the prosecution. In closing argument, you can point out that the State sent the drugs to be tested for everything except fingerprints to prove who possessed them, which is the theme of this case. It's easy and relatively inexpensive. It could save someone's son or daughter from being wrongfully convicted. And the State never bothered….

By the way, if you ever need a fingerprint expert in the East Texas area, Jerry Stone lives in Lufkin, Texas and can be reached at 936-707-0122 or at his email address oldlawdog2@yahoo.com.

As always, take care, good luck, 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 three years, and practices criminal law in Nacogdoches, Texas.*

Ethics and the Law

BRENT MAYR

Ethical Pitfalls to Watch Out for with Payment Systems & Financial Transactions with Clients

As criminal defense lawyers, when it comes to collecting fees from clients, we are typically faced with multiple ethical issues. The most common issue involves the source of the funds used to pay those fees. However, with the advent of multiple payment systems such as Venmo, CashApp, PayPal, LawPay, LexCharge, and Zelle to name a few, we are now faced with new issues related to client confidentiality and ethically managing client funds. Becoming long gone are the days when fees for our services were simply paid by cash, checks, or wires. With more and more clients relying on credit cards and digital currency to pay their fees, it's important that we consider the ethical pitfalls that we need to watch out for when collecting payments from clients.

The first issue to recognize pertains to confidentiality. Rule 1.05 provides in relevant part that a lawyer shall not knowingly reveal confidential information of a client or a former client to anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm. "Confidential information" is not just "privileged information" that is protected by the lawyer-client privilege set out in various rules of evidence. It also includes "unprivileged client information" which means "all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client."

When you use a payment system to receive a payment from a client, the ethical concern arises with the disclosure or publication of the transaction and user-related information. For instance, when using Venmo, transactions can, by default, be published on the Venmo's user feed and made visible to their friends or users. Imagine a client wanting to keep a "minor indiscretion" private having it publicly disclosed to all their friends when they see a payment for $2,500 to "lawyer fees for criminal case"! Unless the client has given express permission, you should ensure that nothing about the transaction is made publicly available (Venmo, for instance, allows transactions to be set as "private" by default).

With other payment systems, such as PayPal, LawPay, and LexCharge, that do not publicly make transactions available, there is still an issue of disclosure to third parties of unprivileged client information such as account information and payor information, information that is considered "confidential" under our ethics rules. As lawyers are obligated to protect against the inadvertent disclosure of any confidential information, it becomes incumbent upon you to understand how those payment systems work and ensure that the service maintains adequate security measures and encryption to protect, not just your financial information, but the client's financial information as well.

But, at the end of the day, it all comes down to what the client authorizes. Obviously, when the client clicks the pay button, they intend to pay the lawyer for their services. The safest approach to maintaining compliance with confidentiality rules is to have the client's written consent to have this confidential information transmitted to and from the payment system provider. The easiest and simplest method for obtaining this consent is having additional language added to your contracts for employment such as the following which I include in my client contracts:

As a convenience to our clients, we accept payment for our services via certain online payment-processing services. The use of these services carries potential privacy and confidentiality risks. Before using one of these services, you should review and elect the privacy setting that ensures that information relating to our representation of you is not inadvertently disclosed to the public at large. By using an online payment-processing service or electing to pay by credit card, you hereby consent to the disclosure of information provided by you to facilitate the proper processing of payment.

Moving beyond the exchange of confidential information to facilitate the transaction, the next issue involves the actual transfer or movement of funds from

one account to another. Once funds are transferred from the client, as Rule 1.14 requires, the attorney must hold those funds in a separate trust or escrow account until they are fully earned and can then be moved into the lawyer's operating account.

When a client uses Venmo or PayPal, for instance, the problem is that neither of those payment systems are set up as a bank account — much less a trust account — that complies with Texas' IOLTA rules. Other payment systems may also collect funds from clients paid, for instance, by credit card or digital currency, and hold those funds in an account that is not set up as a trust account before ultimately transferring the funds to the attorney as payment of their fees.

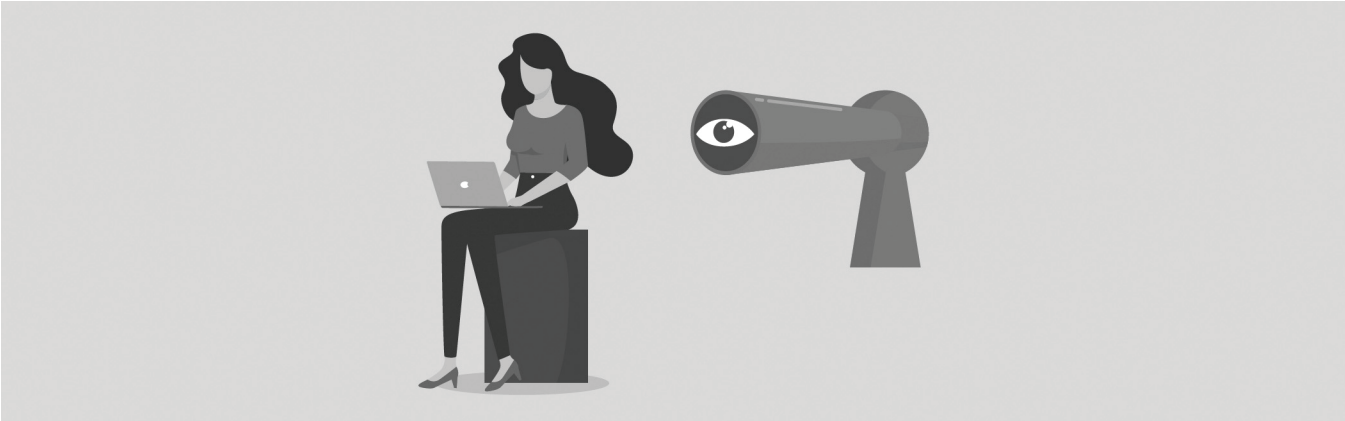
Fortunately, Texas' ethics rules provide for some flexibility. Comment 2 to Rule 1.14, for instance, recognizes that "[l]awyers often receive funds from third parties from which the lawyer's fee will be paid," and explains that, "[t]hese funds should be deposited into a lawyer's trust account." With this flexibility in mind, the key to maintaining compliance with the ethics rules is ensuring that, once funds are released by the client to a third-party payment system, you as the lawyer swiftly transfer those funds into your trust account.

While getting those funds into a trust account is critical, equally important is also ensuring that any processing fees for the transaction charged by the payment system provider are not *removed* from the trust account. Many credit card processing companies understand these limitations and will set it up so that, when a credit card is charged, the funds charged to the client are directly deposited into your trust account, while the credit card transaction processing fees are debited from your operating account. This may not be the case, however, with apps like Venmo and CashApp; you need to be certain that transaction fees are handled separate from fees for your services. Beyond transaction fees, you must also ensure that any payment system provider does not deduct any client funds from the trust account in the event of a chargeback or payment dispute.

This leads to the final issue: using third party lenders to facilitate payments. LawPay, which advertises as being "Committed to IOLTA Account Compliance," recently partnered with Affirm to offer a service titled, "Pay Later." In addition to accepting payments from clients (which are deposited directly into the lawyer's IOLTA account), the service is made available for clients to apply for financing to obtain funding for their attorney's fees. Of course, both the ethical issues discussed previously come into play. Before any client information is transferred to Affirm (or any other third-party lender), it is important to notify the client of the necessary disclosure of their information and to obtain their consent before having them or you share that information with the third-party lender. Secondly, it is equally important that the client understand — and the third-party lender make it explicit — that any additional fee or interest charged by the third-party lender is entirely separate from the fee for your services which, as with other payment systems, will be deposited into your trust account. Along those lines, you should also make it clear that the lending agreement with the third-party lender is entirely separate from the contract for your services.

As technology advances with payment systems, there will surely be more issues that arise in the future. The key is to stay abreast of that technology, your ethical obligations, and most importantly, making sure the client is fully aware of both and consents to the exchange of confidential information to facilitate the transaction.

Brent Mayr *is the managing shareholder of Mayr Law, P.C. based in Houston. He is Board Certified in Criminal Law by the Texas Board of Legal Specialization, a former briefing attorney to Judge Barbara Hervey on the Texas Court of Criminal Appeals, and a former Assistant District Attorney for the Harris County District Attorney's Office. He is presently co-chair of the TCDLA Ethics Committee and a member of the Board of Directors of the Harris County Criminal Lawyers Association.*



Facially Constitutional Challenge of Penal Code Sections 4.07 & 4.072, Harassment and Stalking, following *Counterman v. Colorado*

THAD DAVIDSON & TODD GREENWOOD

In June 2023, the United States Supreme Court decided the felony stalking case of *Counterman v. Colorado,* wherein it held the State must prove the defendant had some subjective understanding of the threatening nature of his statements. The Court held the First Amendment necessitates a minimum *mens rea* of recklessness, which, under Texas law, requires that the defendant consciously disregarded a substantial risk that his statements would be viewed as threatening violence.[1] Importantly, neither the Colorado Stalking statute that was at issue in *Counterman*, nor Texas' Stalking and Harassment statutes, require an element of defendant's subjective intent.

The implications for those accused under the Texas Stalking and Harassment statutes are potentially widespread, given the similarities between the Colorado and Texas statutes.

Criminally Culpable or just Creepy?

From 2014 through 2016, Billy Counterman sent hundreds of Facebook messages to the complainant.[2] The two had never met and the complainant did not respond. The complainant repeatedly blocked Counterman, but he, in turn, repeatedly created a new Facebook account and resumed contacting her. Some of the messages were unremarkable yet inappropriate to send to a stranger, for example: "I am going to the store would you like anything?" Other messages suggested Counterman might be placing himself in physical proximity to the complainant via a vantage point from which he could observe her. Still others conveyed hostility toward her or wished physical harm upon her, for example, "Fuck off permanently" and "Staying in cyber life is going to kill you." Counterman also sent, "[y]ou're not being good for human relations. Die."[3]

The messages put the complainant in fear and disrupted her life.[4] Traumatized, she stopped walking alone, declined social engagements, and canceled some of her performances as a singer and musician. Believing Counterman was putting her life in danger and afraid she would be attacked; she began to carry a gun. Her mental health declined; she eventually fled Colorado for the East Coast. Nonetheless, Counterman's messaging continued. Eventually, the complainant contacted law enforcement.[5]

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1 *Counterman v. Colorado*, 600 U.S. 66, 1, 143 S. Ct. 2106, 2112, 216 L. Ed. 2d 775 (2023). Justice Elena Kagan authored the 7-2 majority opinion from which Justices Amy Coney Barrett and Clarence Thomas dissented. *See* Tex. Pen. Code § 6.03(c) (2022).

2 *Counterman*, 600 U.S. at 1.

3 *Counterman*, 600 U.S. at 1.

4 *Counterman*, 600 U.S. at 1-2.

5 *Counterman*, 600 U.S. at 1-2.

Counterman's Proceedings in the Colorado State Courts:

Colorado charged Counterman under its stalking statute which prohibits "[r]epeatedly . . . mak[ing] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress."[6] Counterman moved to dismiss the charge on First Amendment grounds, arguing his messages were not "true threats" and therefore could not form the basis of a criminal prosecution.[7] The trial court rejected his argument under an objective 'reasonable person' standard by which the State had to show a reasonable person would view the messages as threatening.[8] Under its statute, Colorado was not required to prove Counterman had any kind of "subjective" intent to threaten the complainant.[9]

The trial court decided, after "considering the totality of the circumstances," that Counterman's communications "rose to the level of a true threat," thus the First Amendment posed no bar to prosecution. The court sentenced him to four and a half years.[10] Counterman's conduct/communications fell outside First Amendment protection. The U.S. Supreme Court subsequently granted certiorari, noting lower courts are divided about (1) whether the First Amendment requires proof of a defendant's subjective mind set in true-threats cases, and if so, (2) what *mens rea* standard is sufficient.[11]

Counterman, the First Amendment, and "True Threats:"

In *Counterman,* SCOTUS grappled with tension between the competing priorities of the doctrine of "true threats" within First Amendment free speech jurisprudence and the requirement of proof of intent in criminal cases.[12] The term "true threats" remain loosely undefined. The Court imposed a duty upon the State to prove an alleged threatening statement by the defendant must have been made with the defendant's subjective intent to threaten the victim via a recklessness standard, rather than Colorado's objective non-defendant specific reasonable person standard of negligence.[13]

The true threat doctrine dates to the Civil Rights Era.[14] In *Watts v. United States* the Warren court held "a threat must be distinguished from what is constitutionally protected speech."[15] The Court noted "uninhibited, robust, and wide open" political debate can at times be characterized by "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," deeming robust debate and even excoriating criticism necessary for a functioning democracy. [16] The *Watts* court justified limitation on speech conditioned on the considerations of preventing fear, preventing the disruption that follows from that fear, and diminishing the likelihood that the threatened violence -- provided such limitations did not abridge constitutionally protected speech.[17]

What is a "True Threat" and Why Recognize One?

To establish a statement is a "true threat" unprotected by the First Amendment for which the accused could be subject to criminal culpability, the state must prove she/he: 1) made such a threat and 2) had some subjective understanding of the statements' threatening nature, at minimum to standard of recklessness.[18] The Supreme Court held that true threats are "serious expression[s] conveying a speaker means to "commit an act of unlawful violence."[19] The "true" in that term

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6 Colo. Rev. Stat. 18-3-602 (2022). The statute also proscribes, inter alia, "[r]epeatedly follow[ing], approach[ing], contact[ing], or plac[ing] under surveillance" another person. The Court noted the State lacked evidence Counterman spied on the complainant or physically followed her such that Colorado's prosecution went forward solely based upon Counterman's communications to the complainant. Yet the Supreme Court did not limit its holding to communications alone; rather, the ruling appears to have invalidated the statute in its entirety.

7 *Counterman*, 600 U.S. at 3.

8 *Counterman*, 600 U.S. at 3.

9 *Counterman*, 600 U.S. at 3.

10 *Counterman*, 600 U.S. at 3.

11 *Counterman*, 600 U.S. at 3-4.

12 *Counterman*, 600 U.S. at 5-10.

13 *Counterman*, 600 U.S. at 5-10.

14 *Is the True Threats Doctrine Threatening the First Amendment? Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists Signals the Need to Remedy an Inadequate Doctrine*; Weiss, Lori, vol. 72, Fordham L. Rev., 2004, p. 1283.

15 *Watts v. United States*, 394 U.S. 705, 707-8, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (*per curiam*).

16 *Watts*, 394 U.S. at 708.

17 *Watts*, 394 U.S. at 707-8.

18 *Counterman,* 600 U.S. at 5-10.

19 *Counterman,* 600 U.S. at 6 (*citing Virginia v. Black,* 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003)).

distinguishes what is at issue from jests, "hyperbole," or other statements that when taken in context do not convey a real possibility violence will follow.[20] And while the existence of a threat does not depend on "the mental state of the author," but rather on "what the statement conveys" to the person on the receiving end, the First Amendment may still demand a subjective mental-state requirement shielding some true threats from liability.[21]

The Court reasoned that bans on speech which take the form of criminal prosecutions have the potential to chill, or deter, speech outside their boundaries. Justice Kagan noted an important tool to prevent that outcome is to condition liability on the traditional requirement of the State's showing of a culpable mental state.[22] That kind of "strategic protection" features in the Supreme Court's precedent concerning the most prominent categories of unprotected speech.[23]

The Court noted a speaker's fear of mistaking whether a statement is a threat, fear of the legal system getting that judgment wrong, and fear of incurring legal costs all may lead a speaker to swallow words which are in fact not true threats.[24] This would be self-censorship for fear of violating a statute with no subjective *mens rea* requirement in the mind of the speaker or actor, which the *Counterman* court ruled is unconstitutional.[25]

Making the Counterman Challenge

Facial constitutionality of a statue can be raised through pre-trial *habeas* under *Ex parte Lo*.[26] Separately, a motion to quash can be employed to challenge defects in the indictment such as lack of notice due to an absence of facts pleaded in the indictment or to raise federal / state constitutional arguments other than a facial challenge.[27] Only pre-trial habeas is appealable by the defense prior to trial.[28] The State can appeal a ruling quashing the charging instrument.[29]

Counterman's Subjective Recklessness Requirement – a Texas Case Study

Client, an elderly widower who lives alone and has no criminal history to speak of, is almost entirely deaf and mostly mute because of a gunshot wound to the head years before. Client was accused of stalking by a neighbor on adjoining rural land in an infamous East Texas County. The defense investigation conducted by Kayla Walker of *P.I. Endeavors* in McKinney ruled out any cognizable motive for Client to stalk or harass the complainant and instead revealed through witnesses, letters discovered through means other than disclosure by the state, and maps, that the neighbor-complainant had a history of bullying neighbors, shooting others' dogs (including on their own property as opposed to that of the complainant), tailgating people at extremely close range in a menacing manner, aiming rifles and talking conversationally about the possibility of pulling the trigger and, on one occasion, the complainant taking a chainsaw to the accused's trees inside the accused's own fence line. The neighbor-complainant on several occasions flew a drone over Client's property at low altitude to harass and annoy the accused and his invitees. Walker's thorough investigation demonstrated the neighbor-complainant had a longstanding relationship with a local public official. The investigation revealed sufficient evidence to raise a defensive issue as to whether the pattern of harassment and criminal complaint by the neighbor/complainant was undertaken to force a sale or seizure of Client's land.

Client's case was dismissed/declined prior to indictment on Monday, August 15 of last year following submission of a brief by defense counsel on *Counterman* and the Texas Stalking statute.

Note: The 'reasonable person' negligence determination is subject to interpretation from whatever is put before the fact finder. Conversely, the *Counterman* requirement (that the State must prove the client consciously disregarded a substantial and unjustifiable risk his conduct would cause harm to the alleged victim) removed this case from the terrain of a he said/he said prosecution in a 'good ole boy' rural context to one in which the State was forced to concede it lacked evidence to support the element of reckless criminal intent. The case at hand was never a Stalking case; it was something else entirely.

T.W. Davidson

20 *Counterman,* 600 U.S.at 10 (*citing Watts,* 394 U.S. at 708).

21 *Counterman,* 600 U.S.at 13 (*citing Elonis v. United States*, 575 U.S. 723, 733, 35 S.Ct. 2001, 192 L.Ed.2d 1 (2015)).

22 *Counterman,* 600 U.S at 2 (*citing Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958)).

23 *Counterman,* 600 U.S.at 5 (*citing Gertz v. Robert Welch*, 418 U.S. 323, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)).

24 *Counterman*, 600 U.S. at 9.

25 *Counterman*, 600 U.S. at 9.

26 *See* 424 S.W.3d 10 (Tex. Crim. App. 2013).

27 *Ex Parte Smith*, 178 S.W.3d 797, 801 (Tex. Crim. App. 2005).

28 *Greenwell v. The Court of Appeals for the Thirteenth Judicial District*, 159 S.W.3d 645, 650 (2005) (Tex. Crim. App. 2006) .

29 *Harkcom v. State*, 484 S.W.3d 432, 434 (Tex. Crim. App. 2016).

Comparison of the Colorado and Texas Statutes at Issue

Colorado Revised Statute § 18-3-60	Texas Penal Code § 42.072
1. A person commits stalking if directly, or indirectly through another person, the person knowingly: a. Makes a credible threat to another person and, in connection with the threat, repeatedly follows, approaches, contacts, or places under surveillance that person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship; or b. Makes a credible threat to another person and, in connection with the threat, repeatedly makes any form of communication with that person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship, regardless of whether a conversation ensues; or c. Repeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication with another person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship to suffer serious emotional distress. 2. For purposes of this part 6: a. Conduct "in connection with" a credible threat means acts that further, advance, promote, or have a continuity of purpose, and may occur before, during, or after a credible threat. b. "Credible threat" means a threat, physical action, or repeated conduct that would cause a reasonable person to be in fear of the person's safety or the safety of his or her immediate family or of someone with whom the person has or has had a continuing relationship. The threat need not be directly expressed if the totality of the conduct would cause a reasonable person such fear.	(a) A person commits an offense if the person, on more than one occasion and pursuant to the same scheme or course of conduct that is directed specifically at another person, knowingly engages in conduct that: (1) constitutes an offense under Section 42.07, or that the actor knows or reasonably should know the other person will regard as threatening: (A) bodily injury or death for the other person; (B) bodily injury or death for a member of the other person's family or household or for an individual with whom the other person has a dating relationship; or (C) that an offense will be committed against the other person's property; (2) causes the other person, a member of the other person's family or household, or an individual with whom the other person has a dating relationship to be placed in fear of bodily injury or death or in fear that an offense will be committed against the other person's property, or to feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended; and (3) would cause a reasonable person to: (A) fear bodily injury or death for himself or herself; (B) fear bodily injury or death for a member of the person's family or household or for an individual with whom the person has a dating relationship; (C) fear that an offense will be committed against the person's property; or (D) feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended.

Similarities: (1) both statutes employ similar language, (2) present an objective 'reasonable person' standard (criminal negligence) regarding whether a victim has suffered the kinds of harm depicted in the statutes, (3) criminalize conduct or communication which may express words, no words, or even silence and (4) both lack a *mens rea* element which looks to the intent of the accused as to whether, while committing the act alleged, the accused *consciously disregarded a substantial and unjustifiable risk his conduct will cause harm to another*—e.g., the recklessness standard.

Note: Harassment, codified at § 42.07, is substantially similar to the felony statutes above in that it employs similar terminology and lacks a *mens rea* element in the mind of the accused. Consequently, it should be our position that the Harassment and Stalking statutes must include a recklessness element as follows: "The accused consciously disregarded a substantial and unjustifiable risk his conduct will cause harm to another." Otherwise, our argument is the Harassment and Stalking statutes are facially unconstitutional per *Counterman.*

FACIAL CONSTITUTIONAL CHALLENGE: APPLICATION FOR WRIT OF HABEAS CORPUS AND/OR MOTION TO QUASH INDICTMENT

CAUSE NO. _____

UNITED STATES [STATE OF TEXAS]

V.

JANE DOE [OR EX PARTE JANE DOE]

RE. FACIAL CONSTITUTIONAL CHALLENGE OF TEXAS PENAL CODE § 42.072 (STALKING)

1. On June 27, 2023 the United States Supreme Court decided *Counterman v. Colorado. Counterman v. Colorado*, No. 11-138, 600 USC __ (June 27, 2023). The court held that the Colorado felony stalking statute, Colorado Revised Statute § 18-3-602, was unconstitutional because it incorporated an objective 'reasonable person' standard rather than, at minimum, a subjective standard of recklessness. *Id.*
2. The instant statute through which the Defendant has been indicted, Texas Penal Code § 42.072 is substantially identical to the facially unconstitutional Colorado statute in those particulars which rendered that statute offensive to the first amendment of the federal constitution. Specifically, the holding in *Counterman* deemed unconstitutional the objective, 'reasonable person' standard, requiring instead an objective standard of at least recklessness. *Counterman,* 600 USC __ at 10. Under Texas law the requisite standard would be that the Defendant "consciously disregarded a substantial and unjustifiable risk his conduct would cause harm to another." Tex. Pen. Code §§ 6.02-6.03 (2022).
3. However, Texas Penal Code Section 42.072 includes the following provision: "that the actor knows *or reasonably should know* the other person will regard as threatening: (A) bodily injury or death for the other person; (B) bodily injury or death for a member of the other person's family or household or for an individual with whom the other person has a dating relationship; or (C) that an offense will be committed against the other person's property; (2) causes the other person, a member of the other person's family or household, or an individual with whom the other person has a dating relationship to be placed in fear of bodily injury or death or in fear that an offense will be committed against the other person's property, or to feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended; and (3) *would cause a reasonable person* to: (A) fear bodily injury or death for himself or herself; (B) fear bodily injury or death for a member of the person's family or household or for an individual with whom the person has a dating relationship;" Tex. Pen. Code. § 42.072 (2022)[mphasis mine].
4. This language is substantially identical to that of the offending statute, Colorado Revised Statute § 18-3-60 and is inconsistent on its face with the requirement articulated by the Supreme Court in *Counterman.* It is, therefore, unconstitutional on its face.
5. For these reasons, this Court should grant relief/grant this [APPLICATION / MOTION] and [QUASH THE INDICTMENT / ISSUE THE WRIT] dismissing the instant matter.

Respectfully submitted,
/s/ You, Esq.
[signature block]
[Certificate of Service / Compliance]
[Order attached]

PROPOSED STALKING JURY INSTRUCTION
PENAL CODE, SEC. 42.072

MEMBERS OF THE JURY: The defendant, AB, stands charged by indictment with the offense of stalking, alleged to have been committed on or about __ [*date*], in _____ County, Texas. To this charge, the defendant has pleaded not guilty.

A person commits an offense if the person, on more than one occasion and pursuant to the same scheme or course of conduct that is directed specifically at another person, knowingly engages in conduct, that:

(A) _____ (the person knows or reasonably should know the other person will regard as threatening _____ bodily injury or death to the other person; bodily injury or death for a member of the other person's family or household; bodily injury for an individual with whom the other person has a dating relationship; that an offense will be committed against the other person's property; causes the other person or a member of the other person's family or household, or an individual with whom the other person has a dating relationship to be placed in fear of bodily injury or death or in fear that an offense will be committed against the other person's property, or to feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended;

and

(B) would cause a reasonable person to fear bodily injury or death for himself or herself; fear bodily injury or death for a member of the person's family or household; bodily injury for an individual with whom the person has a dating relationship; fear that an offense will be committed against the person's property;

and

(C) That _____, Defendant, consciously disregarded a substantial and unjustifiable risk his/her conduct would cause harm to the alleged victim, _____, in this case.

T.W. Davidson *practices criminal defense in Northeast Texas, from misdemeanors to murders, trials, appeals and writs. Davidson occasionally takes on cases a far distance from home via his small fast experimental airplane, Pegasus, who generally gets him where he needs to be. Davidson's most well known case is State v. Patrick Kelly in the now infamous set of Mineola Swingers Club cases out of the black hole otherwise known as Smith County. The Kelly and MSC cases are the subject of an HBO docu-series entitled "How to Create a Sex Scandal." Davidson was a defense attorney in Wisconsin before he came to Texas. He composes music and writes stories in his spare time. He previously served as an officer and aviator in the Marines.*

Todd Greenwood *defends attempted deprivations of freedom by the government across Northwest Texas to include criminal, juvenile and appellate matters. He is a former sergeant of Marines and print journalist who writes songs and stories, enjoys the outdoors and the company of good friends.*

Welcome New TCDLA Members!

November 16, 2023 - December 15, 2023

Regular Members

Timothy E. Adams - Houston
Endorsed by Molly Bagshaw

Maxine Madrid Breedlove - San Angelo
Endorsed by Jessica Skinner

Carolina Campos - Dallas
Endorsed by S. Coleen Tennent

Leslie A. Cross - Houston
Endorsed by Sam Adamo

Gabriela Del Castillo - Houston
Endorsed by Ryan Fremuth

Guillermo M. Flores - Irving
Endorsed by Robert Barrera

Jeff Lanier Frazier - New Braunfels
Endorsed by Robert Matthew Kyle

Jared Gilthorpe - Beaumont
Endorsed by Dustin Galmor

Stephanie E. Inman - Prosper
Endorsed by Camille Knight

Alexander Michael Kolodin - Phoenix
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Alesha Nichols - Denton
Endorsed by Tim Powers

Pauline Portillo - San Antonio
Endorsed by Christopher Castro

Janisha Romero-Rodriguez - Dallas
Endorsed by S. Colleen Tennent

Shanae Salter - Lubbock
Endorsed by Philip Andrew Johnson

Pamela Cook Sirmon - Amarillo
Endorsed by Jeff Hill

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Endorsed by Tom Pappas

Trevor Theilen - Plano
Endorsed by Kyle Therrian

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Endorsed by Douglas Gladden

Investigvator Members

Michael Vandenberg - Spring Branch
Endorsed by Cliff McCormack

Expert Members

Steven Scott Broderhausen - San Antonio
Endorsed by Bobby Barrera

Don Egdorf - Houston
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Student Members

Erick Rodriguez - San Antonio
Endorsed by Sarah May

Public Defender Members

Juan C. Duron - Uvalde
Endorsed by Kimberly Simmons

Charles Martin, III - Conroe
Endorsed by Sheila Keis

Candace Norris - Amarillo
Endorsed by Jason Howell

Shout-Outs!

Have to admire Brian Schmidt, Mike Head, and Justin Weiner! The cases against a former Athens school bus driver, charged with Negligent Homicide and Injury to a Child in an auto-train collision, were dismissed. The team fought the case over years, against multiple elected DAs, and against the Attorney General's Office. Lesser lawyers would have taken an easier way out. Ultimately, the AG's Office decided to re-present the case to the grand jury. With new evidence, the grand jury "No Billed" the case, and the AG dismissed the pending indictment. **Stupendous work!**

Fantastic job by Todd Greenwood! He won a not guilty in a Wichita Falls child abuse case with pretty hairy political interests. His client was was the nanny of the Wichita Falls mayor's kids - and the prosecutor was an in-law of the mayor. Jury was out 4 hours. **Congratulations!**

TCDLA SHOUT OUT!

Brag on Yourself or a Colleague
No feat too big, no case too small!

Say it loud & proud in the *Voice for the Defense*!

Have you or someone you know:

- Won an evidentiary hearing, trial, or appeal;
- Helped make improvements in the criminal justice system;
- Received an award relating to criminal defense; or
- Gone above & beyond for exemplary service to criminal defense?

Send in a few sentences to voice@tcdla.com for a chance to be recognized in print!

Privileges

CLIFFORD DUKE

Article 1 of 3 in Series

1. Privleges

In general, no person has the ability to refuse to be a witness, disclose any matter, refuse to produce an object or writing, or prevent another person from doing so. Tex.R.Evid 501. There are exceptions though. The most well-known exception is the privilege against self-incrimination, pursuant to the Fifth Amendment to the United States Constitution, and Article I Section 10 of the Texas Constitution. That foundational privilege against self-incrimination will even trump other constitutional rights of the accused. Notably, the defendant's right under the Confrontation Clause does not trump a witness' right to invoke the Fifth Amendment right against self-incrimination. *See United States v. Ramos*, 537 F.3d 439, 448 (5th Cir. 2008) (quoting *United States v. Goodwin*, 625 F.2d 693, 700 (5th Cir. 1980)) ("When these two constitutional rights intersect, '[a] valid assertion of the witness's Fifth Amendment rights justifies a refusal to testify despite the defendant's Sixth Amendment rights.'").

Additional privileges require asking the following questions: who the privilege belongs to and who can invoke it.

A. Attorney Client Privilege

Texas Rule of Evidence 503 provides a client the right to refuse to disclose, and prevent any other person from disclosing, any communication "made to facilitate the rendition of professional legal services to the client." Tex. R. Evid 503. This includes any representatives of the client or the lawyer facilitating the legal services. *Id.* Criminal law clients have the additional privilege of preventing disclosure of any fact that comes to the knowledge of the attorney by reason of the attorney client relationship.

The exception to this rule is known as the *crime fraud exception*. "If the lawyer's services were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." Tex. R. Evid 503(d)(1). Just being aware of continuing or future crime is not enough to overcome the privilege. The attorney's services must be sought to aid in the commission of the crime. *Henderson v. State*, 962 S.W.2d 544, 552 (Tex.Crim.App. 1997).

B. Spousal Privileges

Spousal privilege generally allows an individual to refuse to disclose and to stop others from disclosing any communication made to their spouse that was confidential. Tex. R. Evid 504(a)(2). Additionally, an accused's spouse has the right to not be called to testify for the State in criminal matters. Tex. R. Evid 504(b)(1). If invoked, the State is allowed to comment on the lack of testimony if the accused fails to call their spouse to testify. Tex. R. Evid 504(b)(2). That right not to testify is the spouse's to claim, not the accused. Tex. R. Evid 504(b)(3).

There are exceptions to the spousal privilege. The first is the crime fraud exception discussed above. Additionally, the privilege does not apply where a party is accused of a crime against the spouse or a member of the household or a charge of bigamy. Tex. R. Evid 504(b)(4)(A); Tex. Code Crim. Proc. §38.10. Additionally, it does not apply to communications that occurred *before* the marriage. Tex. R. Evid(b)(4)(B). If you wanna shut it, you'd better put a ring on it.

C. Privilege of the Clergy

Rule of evidence 505 provides for a person to refuse to disclose, and prevent others from disclosing, any communication to a "clergy member" Tex. R. Evid 505(b). The definition of clergy member is broad, including any "functionary of a religious organization" or even someone the person "reasonably believes is a clergy member." Tex. R. Evid 505(a).

On its face, the clerical privilege seems absolute. There are at least two statutory exceptions to the privilege. The Texas Family Code provides that, with the exception of attorney client privilege, no privilege can be claimed regarding the abuse and neglect of a child. Tex. Fam. Code § 30.04. Additionally, any privilege can be waived if an individual is called to testify as a character witness on behalf of an accused. Tex. R. Evid 511.

D. Physician-Patient Privilege

You may be surprised to learn that there is no physician-patient privilege in criminal cases, with a small exception. Tex. R. Evid 509(b). The only confidential communication is when an individual is under treatment for or being examined for admission for treatment for alcohol or drug abuse. *Id.*; Tex. Code Crim. Proc. §38.101. The same is true for mental health professionals. Tex. R. Evid 510.

Just because there is no evidentiary privilege does not mean that medical providers or medical records are automatically free game. The Health Insurance Portability and Accountability Act of 1996, (HIPAA) as well as the Texas Medical Records Privacy Act (TMRPA), found in the Texas Health and Safety Code, put severe limitations on disclosure and redisclosure of private health information without authorization. Make sure that your witness has the authorization to testify, or look to those rules if you're trying to keep a witness from the stand.

E. Journalistic Privilege

Outside the rules of evidence, the Texas Code of Criminal Procedure codifies the ability of a journalist to refuse to testify on any unpublished material or the confidential source of published or unpublished material. Tex. Code Crim. Proc. §38.11 Sec. 3(a)1-2. The exception to that privilege is if the information was obtained by the journalist committing a felony, was a confession by another to committing a felony, or the journalist is a party to a felony offense. Tex. Code Crim. Proc. §38.11 Sec. 4 Those exceptions also require that the person seeking the information has exhausted all other alternative means of obtaining the information. Disclosure can be compelled to stop or prevent "a reasonably certain death or substantial bodily harm." Tex. Code Crim. Proc. §38.11 Sec. 4 (4).

Journalistic privilege does not apply when the disclosure or communication to the journalist was itself a criminal act. Tex. Code Crim. Proc. §38.11 Sec. 4(b). An example would be a grand juror breaching confidentiality to give a journalist information about a proceeding. Additionally, unpublished nonconfidential information may be compelled to be disclosed if all other reasonable efforts to obtain the information have been made and the information is relevant and material to the proper administration of an official proceeding or central to the investigation or prosecution of a criminal case. Tex. Code Crim. Proc. §38.10 Sec. 5. The statute requires courts to perform a balancing analysis of any subpoena or motion to compel testimony against the public interest of gathering and discriminating news.

F. Confidential Informant Privilege

An individual or entity that provides information confidentially to any Federal, State, or local law enforcement agencies can be protected from disclosure. Tex. R. Evid 508. Interestingly the privilege is not the informant's to claim, but the "representative of the public entity to which the informer furnished the information."

Id.

The privilege can be breached by a voluntary disclosure or if the individual is called as a witness. *Id.* It can also be ordered to be disclosed if there is a showing that the CI can give testimony "necessary to a fair determination of the issues of guilt or innocence on the charged offense." *Anderson v. State*, 817 S.W.2d 69, 72 (Tex.Crim.App. 1991). "Mere conjecture about possible relevance is insufficient to meet this threshold burden." *Bodin v. State*, 807 S.W.2d 313, 318 (Tex.Crim.App. 1991). If the identity is not disclosed, the Defendant on their motion may move the Court to dismiss the charges that the testimony would relate to. Tex. R. Evid 508(c)(2).

G. Waiver of Privilege

As noted above, with the few limitations on clerical privilege, any privilege can be waived by the holder of the privilege by voluntarily disclosing the privileged matter, or if they call the person to whom the privileged communication was made to testify on their behalf. Tex. R. Evid 511. There are limitations on those waivers for attorney client privilege.

Attorney-client privilege waiver, when made at a Federal or State proceeding, only fully waives the privilege if that was the intention, the disclosed and undisclosed communications are of the same subject matter, and they ought to be considered together. Tex. R. Evid 511(b)(1). For example, a judicial confession to a crime in a Federal proceeding would waive confidentiality in a State proceeding without some agreement or clarification to the contrary.

Disclosure that is made under compulsion, or before an individual has had a chance to claim their privilege, is not waived. Tex. R. Evid 512. Additionally, the rules specifically state that matters of privilege cannot be commented on in trial, and that claims of privilege are not suggested to a jury. Tex. R. Evid 513.

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

Succession Of Your Law Practice: What to do Before You're No Longer Here

PHILLIP GOFF

"I just found out my lawyer died. I gave him every dollar I had, I can't reach anyone about getting it back, and my court date is tomorrow. What do I do?"

Broke, without a lawyer, and staring down the barrel of a prosecution – the abandoned client is in a desperate situation. Most judges would likely give a break on scheduling, should the person brave it to court alone. However, we all know of judges who would make the situation even more terrifying.

Feeling sympathy for the person's plight is a given. No one hires a lawyer expecting the lawyer to die during the representation, and what lawyer would seek cases knowing of impending death? Criminal defense attorneys regularly deal with people in dire straits, but few of us cause those circumstances. No one should expect the lawyer to take on the burden of that newly abandoned person's plight, though.

The public expects lawyers to be reliable, and we usually are, but even the most reliable person can't be so from the grave. Preparation is the only reasonable way to prevent this poor soul's situation. We deal with people in some of the most vulnerable points in their lives. What we do has profound effects on the remainder of our clients' lives. We owe a professional and personal duty to them to make succession plans.

Lawyers in firms may have someone to immediately step up to the plate. Partners, for instance, already have shared responsibilities and fees to common clients, so corrective actions may be minimal. If you are in a firm with such "built-in" succession, consider taking steps to address the topic formally. For instance, you may want to insert new or tailor existing language contemplating death or disability in your client contract and other documents.

Those in solo practice are exactly that, solo. Whatever backup exists is either planned by the solo practitioner or someone else, much like the classic testate versus intestate situation.

A lawyer who dies, or is unexpectedly disabled, heaps a load of responsibility on others. Most resources on this topic seem to focus on death, but many of the same considerations apply for situations involving short or long-term disability. Lawyers who may want to help may be deterred from volunteering. They may not even know there is a reason to inquire, if they even knew who to ask.

Without a plan in place, the Texas State Bar, a client, or "any interested person" may file a petition for custodianship proceedings.[1] Of course, that takes time. Whatever the reason for delay, clients suffer.

Granting a petition then lays upon the custodian what may be a far more daunting task. Deciphering details about how you ran your office can be immensely challenging. Simple things like finding the appropriate keys and locating your files may be anything but simple without your advance guidance. The custodian may even be a friend who is not firing on all cylinders mentally or emotionally because they are grieving you. All indicators point to what we all should do: prepare.

1 Texas Rules of Disciplinary Procedures 13.04

Avoiding formal legal proceedings when an easier, painless process is available is a no-brainer.

Much like having an estate plan in place for your loved ones, having a succession plan in place demonstrates you care about everyone associated with your practice. Don't think clients are the only concern. Others will feel your loss. Colleagues, employees/staff, and your family and friends will be impacted by your loss. [In case you don't believe this, please seek help now. Call 1-800-343-8527 for an immediate response or visit https://www.tlaphelps.org/ - This isn't a footnote because it's that important.]

By the time you are done with this article, my hope is you will designate a successor TODAY, at the very least. It literally takes a few minutes, if that. If you already know who you want to designate, stop reading and do it now. [2]

Ideally, though, you will take a more thorough approach to preparing for what will happen in the event of your death or disability.

* * *

My Journey as a Case Study

Why I Started My Succession Plan

I don't claim to be the authority on all things succession, nor have I always prepared my practice for my absence. You should tailor your plans to your practice and personal preferences.

The opening paragraph of this article was inspired by a true story. Ultimately, the client's legal situation worked out better than he imagined, but it was a bit unnerving to have a client repeatedly ask me about my well-being and health during representation.

From that point forward, I began actively thinking about what would happen to my clients, should I die. Before then, I ran my practice in ways that suited my tastes alone, aside from what was professionally required. I started to revise my procedures with an eye toward what another attorney might need to have available to take my place, should I die.

We all know it's better to have a will than to die intestate, if for nothing more than to ensure the identity and independence of the estate's executor. While meaningful, that's still the bare minimum. You should do at least the bare minimum, right?

The Bare Minimum

Naming a successor takes literally a few minutes, far less than it takes to execute a will. Admittedly, it took me years to do so. I thought about it for a few moments and came up with not one, but two attorneys I consider trustworthy and capable. They also are decades younger than me, so I presume they will be around when they are needed. I texted them, and they both graciously and immediately accepted the responsibility. They got the bonus experience of validation that a fellow lawyer thought so highly of them he would make such a request.

I logged into the state bar page, selected the drop-down menu for naming a successor and an alternate successor, and entered their names and emails. They received emails from the bar notifying them of my action, and they promptly responded. That was it! It was all the same day, and the actual time expended was less than 5 minutes, excluding the lag time between messages.

I suggest you stop reading for a moment and make a short mental list before continuing to read. Once you've done that, why wait? Contact them now. Get back to reading the article after you've done that. Seriously, it won't take long. When they tell you "yes," stop reading again and designate them on the State Bar website.

How I Went About Organizing What I'll Leave

Many of us are less organized than we would prefer. I know I am. I've made progress, though, and you can, too. No perfect time to start exists. If it's not today, put it on your calendar and chip away at it until it's done.

It took me years to set up my practice for another lawyer to step in for me, due to one thing: thinking about this no-brainer preparation, rather than doing it. When I finally imagined myself in the place of a lawyer trying to make sense of my mess, I had to make it easier on that lawyer.

Quite literally, getting in the office door is a consideration. Where is a key? Who has a key? Who can let another lawyer in the door? How will the key holder know it's the right thing to do, that it's even legal to do so? Do the keyholder a favor. Don't leave those questions unanswered.

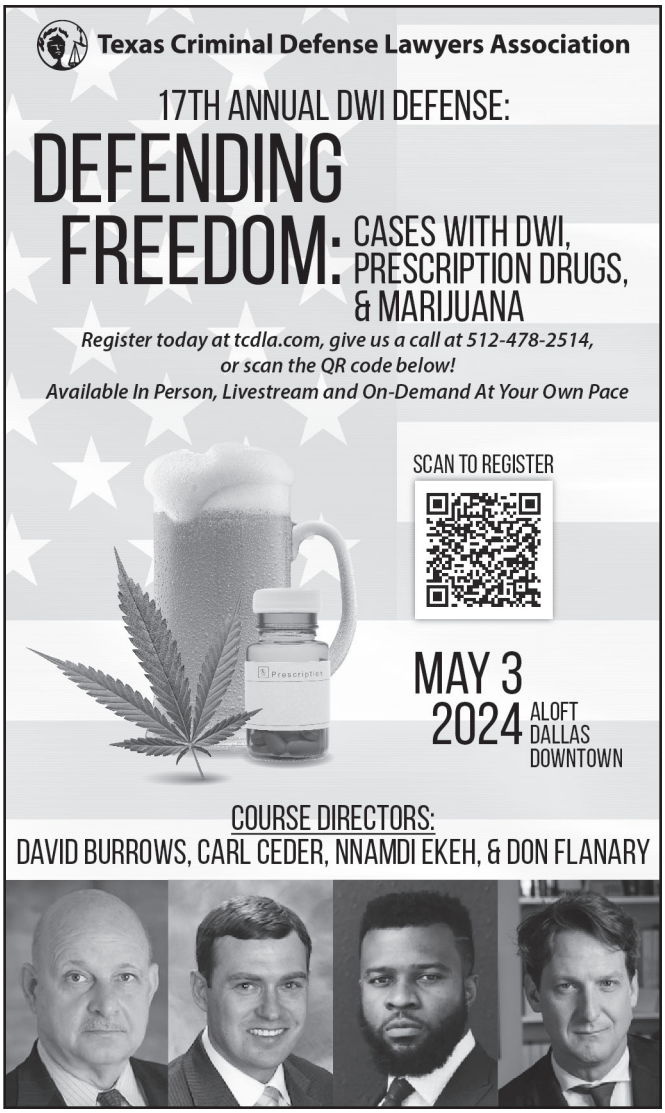
As in all succession plans, I recommend you put your intent and instructions in writing and make sure the people who are left behind are aware of its existence and how to access it.

Passwords are essential in a digital world. Your chosen successor could sit at a computer and access anything from bank accounts to digitized case files. Walking into your office at least doesn't create an impossible barrier like not knowing a password or how to recover one.

Your passwords should be both secure and accessible to those who will need them to close out your professional and personal affairs. Several people know exactly where to find my list and how to access it. I put an action item on my calendar to update that list at regular intervals.

The more digital your professional life becomes, the easier it will be for your successor to navigate. Your

2 https://www.texasbar.com/AM/Template.cfm?Section=Succession_Planning&Template=/Succession/vendor/Instructions.cfm - Select 1) "Advance Designation of Custodian-Attorney Instructions," if you don't already know what to do or why, or if you want to designate using paper; or 2) "Electronic Designation Form," if you already know who you want to designate.



successor stands a much better chance of getting a handle on everything if it's digitized, organized, and all items are kept in their proper places. Having a digital calendar can immediately put your successor in a position to take the first actions on the most pressing matters.

Case Files

Of course, organizing your files should be a prime consideration. If you have personal files mixed in with your professional files, or you keep them in the same place, separate them immediately. Your successor should easily be able to discern professional from personal, as well as closed from open files.

My contracts include a notice providing for destruction of files within a certain time. I don't want an endless obligation in every case, and I want to be as clear as possible when the case is closed. When I close a file, I try to return everything I can to the client. I keep digital files whenever possible. If I could go 100% paperless, I would.

Our court files are different than others in that we are not allowed to give discovery to clients without a court order. Your successor ought to have a grasp of criminal law, especially about what can and cannot be provided to the client. Otherwise, that needs to be specifically addressed in writing.

Beyond the Minimum Role

A successor doesn't need to take over your practice, nor should you expect it to happen. That's a much larger responsibility to assume than simply providing clients with their files and helping them with impending deadlines. You may, however, want to point clients to a good lawyer.

I've produced a letter to my clients with a recommendation to allow my chosen successor to continue representation. The client is still free to choose any attorney to continue the representation. However, the client chose me at least in part for my judgment, so I presume my judgment about a successor will be trusted.

I don't expect my successors to represent my client's pro bono. Unearned fees are in my trust account where they belong. My successor will have access to my contracts, dictating when fees are earned and files that show what has been done. Unearned fees can be returned or put toward my successor's efforts. Earned fees can be used to pay necessary debts and be handled in probate.

* * *

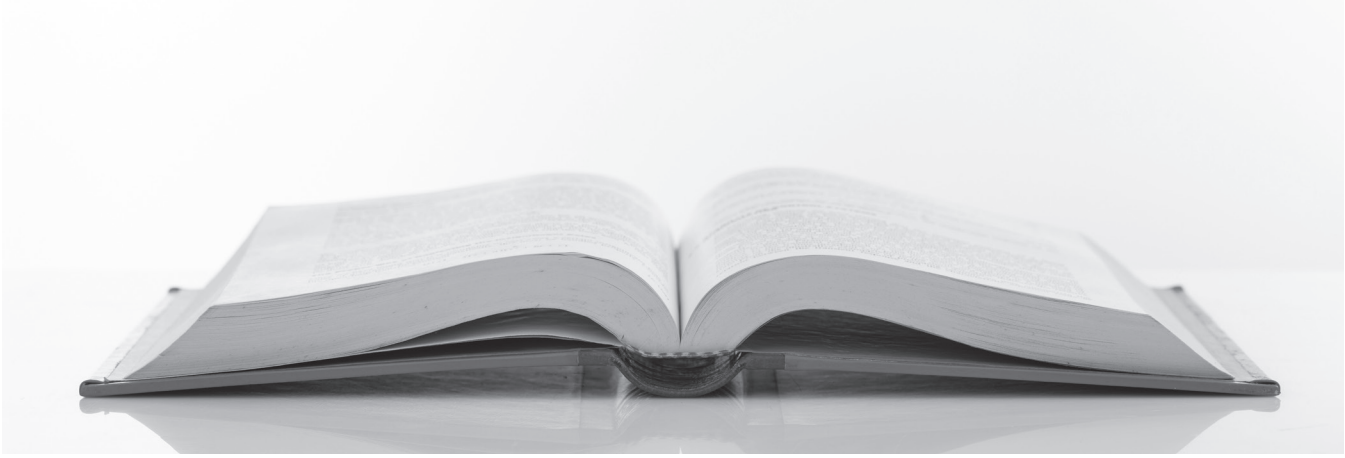
Go Ahead, Get Started

You don't have to start from scratch. The State Bar of Texas has a guide to get you started.[3] From personal to professional affairs, thinking about exactly what must be done by those who close out your affairs can go a long way toward making it easier on them and assuring it will be done the way you wanted.

We all come to an end of our careers. Please take care to provide a smoother path for everyone who remains. Your plan can be as detailed as you want it to be, but I implore you to at least take the minimum steps.

Phillip W. Goff *has been practicing criminal defense in South Texas since 1996, primarily in DWI defense. He resides in Corpus Christi and first joined TCDLA in 1997. Being at least a little better than he was yesterday is his goal today. He's curious about too many topics to list, and the list would be outdated by the time it was published, anyway. He may be reached at 361-592-4357 and www.southtexlawyer.com.*

3 https://blog.texasbarpractice.com/law-practice-management/succession-planning-toolkit



Attacking the SFSTs with the 2023 NHTSA Manual

MARK RYAN THIESSEN

This article utilizes the new 2023 National Highway Transportation Safety Administration (NHTSA) Standard Field Sobriety Test (SFST) manual to attack the SFSTs and not the officer.[1] With every new edition, NHTSA systematically excises portions of the SFST manuals that are relied heavily upon by criminal defense lawyers. For example: NHTSA removed the language "If any one of the Standardized Field Sobriety Test elements is changed, the validity is compromised."[2] In the new 2023 manual, NHTSA subtracted some helpful angles of attack; however, they also added some new gems for cross examination. Through careful and precise cross-examination, the trial lawyer will be able to show the jury just how meticulous these tests are graded and ultimately very difficult to pass. Remember, this isn't about attacking the officer, but rather attacking the archaic design and validation of the SFSTs. Honestly, being designed and validated in the seventies and re-analyzed in the nineties, the SFSTs are nothing more than outdated, ridiculous coordination exercises designed to facilitate arrests. It is essential to a just verdict of Not Guilty to educate jurors about the truth behind the SFSTs.

The Officer Is Just Doing His Job

The Officer is not the villain. Gerry Spence teaches lawyers to find the "villain" in the case. Who can the jury blame? Most officers are not bad people or bad officers and are simply following their training. However, sometimes you will encounter a "bad" officer who is the villain. A "bad" officer is one that can't remember their training; doesn't know how to properly administer or evaluate the SFSTs; and makes improper arrests of people. In the cases where the officer just doesn't know what he is doing, remind him that he was certified to administer the SFSTs in the academy. Remind him that he should be taking proficiency updates yearly or every other year according to his employee manual. Additionally, remind him that he was trained using the NHTSA SFST manual. Lastly, ask him if he agrees that the manual is the authority on how to administer the SFSTs. This lays the foundation for the learned treatise exception to hearsay.[3] According to the learned treatise exception, the lawyer may now read from the NHTSA manual; however, cannot admit it in to evidence.[4] Depending on the court, some judges or officers may try and frustrate your cross examination by requiring the manual that the officer was certified using. If you know you could be in a hostile setting such as this, be proactive and subpoena duces tecum the officer to bring his manual to trial. Or, you can find a version of every manual quickly online through the Washington State Patrol website.[5]

To lay the predicate for cross examination using the 2023 NHTSA SFST manual, it's helpful to know the police agency's policy regarding the frequency for recertifying or proficiency testing of the SFST certification. When in doubt,

1 Thank you to my co-author Frank Sellers on the original article Back to the Basics; Attacking the SFSTs, Not the Officer and TCDLA for publishing it in the Voice in February 2020.

2 NHTSA SFST Student Manual HS 178 R2/06 VIII-19 (February 2006)

3 Texas Rules of Evidence 803(18).

4 *Id.*

5 https://www.wsp.wa.gov/breathtest/dredocs.php

issue a Freedom of Information Act (FOIA) request to the agency asking for the police officer handbook and any policy regarding SFST proficiency, recertification, or refresher courses. Additionally, you may request an officer's personnel file through FOIA to determine their actual last refresher course. Lastly, when unknown, just ask the officer if they have learned from the newest NHTSA SFST 2023 manual and whether they recognize it as authoritative for the current administration and analysis of SFSTs.

At the end of the day, we are not after the officer; unless he really should go back to school and not wrongfully arrest any more people. We are attacking the system. We are going to educate the jury about how easy the tests are to fail and how meticulously they are graded. The officer is simply an employee following his training and has a very low threshold of probable cause to effectuate an arrest. The officer is taking suspected intoxicated people off the street and giving us clients…so be nice.

Standard Field Sobriety Test Hard Truths

Many other articles have examined the pitfalls and biases of the original test development and validation studies. Concocted in the 70s, and validated in the 90s, these tests are now 40+ years old and haven't been revalidated in the last 30 years. SFSTs are not grounded in the laws of physics or science. SFSTs cannot accurately encompass the performance of the modern population while ruling out incoordination, nervousness, inexperience, or unfamiliarity. These are simply coordination exercises created by police and "scientists" in the 70s to provide police a tool to conclude intoxication. Honestly, with the technology we have now, NHTSA should revamp the entire system and start over.

It's important to note that the history and statistics of the SFSTs were removed from the 2023 manual. While most states won't allow you to go into the accuracy percentages, the new officers will not even be trained on them. The 2023 NHTSA SFST Student manual replaced all the history and validation with wild statistics about drunk driving; times of night for drunk driving; and how many drunk drivers get away.[6] Be ready for new objections under expertise and prejudicial effect to combat these new statements.

How the Officer is Trained to Administer the SFSTs

Before we dive into the actual SFSTs it's important to educate the jury on just how this officer was trained and who trained them. Set the stage to illustrate the difference between how they were graded on their SFST proficiency test and how they now grade people on the SFSTs. "Before we get into the tests, can we just explore how you learned to give these tests?" Officers are usually happy to boast about their training. Start by establishing when the Officer was first certified to administer the tests. It's usually in the academy.

- And how long was your course? (Usually 24-40 hours, around a week.)
- Who trained the officer? (Other officers.)
- When you were trained, did you come in the first day and did your police officer teacher tell you how to administer the tests and then just grade you on administering them?
- No, you were provided a textbook - the SFST manual? You still have it? Did you bring it today?
- Officer, you were trained according to the NHTSA student manual? And you agree it's authoritative on how to administer these tests?

Get the 2023 Manual in, if it helps your case.

- You recently took a refresher course that included the 2023 NHTSA SFST manual? Or, you've heard that there is a new 2023 SFST manual? And you would agree that the most recent manual is how NHTSA wants you to evaluate people suspected of DWI?
- You would agree with me that the 2023 SFST manual is what NHTSA wants officers to follow who are currently arresting people for DWI?
- Now show how the Officer learned and was graded.
- When you were trained, you got to practice administering these tests?
- You were allowed to study the entire week? You were allowed to practice the entire week?
- You knew at the end of the week you would be tested?
- You knew that you would be tested on the clues, the definitions, and administration?
- In fact, the 2023 Manual has the final test at the end of the manual?[7]
- And you had to get a 70, 75, 80% grade to pass?
- Not even that, if you don't pass the test that is given to you ahead of time: you will be allowed to take a "make up" exam at a future date not less than 15 days nor more than 30 days from the completion of the course.[8]
- Now when graded, you got credit for the answers you got right?
- Just like in school and every test you've ever taken?
- On a 100-question multiple choice test, you miss 6, what's your grade?
- That's because you get credit for every answer you got right?
- If your kid came home from school missed 6 and had an F written next to that 94, what would you do?

FEAR is the Leading Deterrent.

The new 2023 NHTSA SFST manual actually states: the fear of arrest is the leading deterrent in the general deterrence of DWI.[9] "Law enforcement officers must arrest enough

6 2023 NHTSA SFST Student Manual; Chapter 2, pgs. 2-12.

7 2023 NHTSA SFST Student Manual: Chapter 15: Written Examination and Program Conclusion (revised 2/2023)

8 2023 NHTSA SFST Student Manual; Chapter 15, pg. 8.

9 2023 NHTSA SFST Student Manual; Chapter 2, pg. 13.

violators enough of the time to convince the general public they will get caught, sooner or later, if they continue to drive while impaired."[10] Sounds to me like that old saying: when you're a hammer, everything's a nail. If we are training officers to go out and make a lot of DWI arrests just to make the public afraid of getting arrested, seems that they are training their officers to presume guilt and arrest just to terrorize the people.

NHTSA even put this in the new 2023 manual: "Enforcement is the mechanism for creating and sustaining a fear of being caught for DWI. No specific deterrence program can amount to much **unless police officers arrest large numbers of violators; no punishment or rehabilitation program can affect behavior on a large scale unless it is applied to many people.** General deterrence depends on enforcement—**the fear of being caught is a direct function of the number of people who are caught."**[11]

Educate the jurors that the police are being trained to arrest large numbers of people; presume guilt; and be arrest happy officers. Help the jury understand that NHTSA believes the best way to control the people is through fear of being arrested. Educating the jury that the client is simply here because he got arrested by an officer trying to instill fear in the public and make a lot of DWI arrests, may not be the look that NHTSA intended, but we certainly appreciate their honesty.

"Officer, I'm Not Here to Bust Your Chops"

Say it 10 times during your cross. Do not attack the officer—attack the tests. "Officer, I know these aren't your tests. You didn't design them. You are just following what you were trained to do. So, I'm not busting your chops." Repeat this over and over. Let the jury know we are not attacking this officer. We are not beating up the officer. We are beating up the system.

"But officer, if someone admits to drinking or you think they might be intoxicated, you are going to give them these tests in this same standard way." Start putting the jurors' minds in the shoes of the client. Many times, I've even gestured around the entire courtroom and stated "so everyone in this entire courtroom, as long as they are not intoxicated, should be able to pass these tests? Judge, reporter, bailiffs, people in the gallery, everyone in this whole courtroom?" Purposefully leave out the jurors to avoid any potential objection. Remind the jury that the officer has no medical training and wasn't trained by any doctors or nurses. "But again, officer, I'm not here to bust your chops, let's examine these tests so that if anyone wanted to try them out, they could know what to look for and how to grade them."

As a side note, before examining the SFSTs, it's helpful for the jury to visually understand the tests and clues. Whether you bring an easel and butcher paper, your tablet on the screen, or even a dry erase board, make sure it's a large and colorful demonstration.

DWI Investigation Field Notes

New to the 2023 NHTSA SFST manual is the discussion and suggestion of DWI Investigation Field Notes.[12] "One of the most critical tasks in the DWI enforcement process is the recognition and documentation of facts and clues that establish legal grounds to stop, investigate, and subsequently arrest person suspected of DWI. The evidence gathered during the detection process must establish the elements of the violation and must be **completely documented to support successful prosecution of the defendant."**[13] NHTSA provided a Field Note Taking Guide[14] in the 2023 manual because the officer "also must completely document [their] observations and describe them clearly and convincingly to secure a conviction."[15] Prior to trial, you must subpoena an officer's Field Note

10 2023 NHTSA SFST Student Manual; Chapter 2, pg. 13.

11 2023 NHTSA SFST Student Manual; Chapter 2, pg. 22.

Photo Courtesy of Sam Adamo

12 2023 NHTSA SFST Student Manual; Chapter 4, pg. 15-18.

13 2023 NHTSA SFST Student Manual; Chapter 4, pg. 15.

14 2023 NHTSA SFST Student Manual; Chapter 4, pg. 27.

15 2023 NHTSA SFST Student Manual; Chapter 4, pg. 15.

Taking Guide. Failure to provide written evidence may lead to suppression of the Officer's entire testimony.[16]

Horizontal Gaze Nystagmus (HGN)

Most jurors have seen some sort of advertisement or video of an officer waiving a pen in front of the eyes. That's the HGN. Before getting into the HGN, dive a little deeper into their training. Explore their range of knowledge. "Officer, you know there are many different types of nystagmus, 88 actually?" It's unimportant how many types of nystagmus the officer knows, but he will always agree there are many. Only a few are listed in the NHTSA student manual. Most officers have only read about these other types, or maybe seen them on video, but very few have actually seen them in person or done testing and seen these. It's important to educate the jury that there are so many different ways the eyes can jerk and for a variety of medical, environmental, or natural conditions. Additionally, the jury needs to know who trained the police officer to distinguish the minute jerks of the eye.

- Now, Officer, I'm not busting your chops, but were you trained by an ophthalmologist?
- Optometrist?
- Nurse?
- Person who worked for Lens Crafters?
- Anyone wearing a white lab coat?
- The police officer that trained you, he didn't show you the other types?
- Have you ever heard of Bruns, latent, pendular, vestibulo ocular, spasms, or rebound nystagmus?
- Has anyone showed you the difference between those and horizontal gaze nystagmus?
- In your manual, you have optokinetic, rotational, post rotational, caloric, and positional alcohol?
- Have you ever even seen those?
- And those look just like horizontal gaze, but for non-intoxicated reasons?

Now start demonstrating the HGN main points for the jury to see. Write HGN in black on the top of the pad on your easel. "How far do the eyes have to jerk in order to be counted as a jerk?" Most officers get confused and hesitate. "If we wanted to put a ruler underneath the human eye, the jerk of the eye is millimeters, right? Maybe a centimeter? "So how far does the NHTSA manual say the eye must jerk in order to be counted as a jerk? How many millimeters?" If the officer continues to hesitate, rescue him: "Sorry, officer, I'm not busting your chops, there is no definition, right?"

Write: No Def. of How Far Jerk (mm). "How many times does the NHTSA manual say the eye must jerk in order to be counted as a clue of intoxication?" Write: No Def of # of Jerks. Some officers may try and get cheeky and say it just has to be distinct and sustained. Break it down for the officer, gently. "Distinct means you clearly see it. And sustained means it must be continual. And that's just for the second pass when you are holding it out for at least 4 seconds. What about in the first clue – lack of smooth pursuit? How many times does it have to jerk when you are just going side to side? And then in the third clue – onset prior to forty-five degrees, how many times does it have to jerk before forty-five degrees for you to stop your pen before you get to their shoulder?" Most officers will state just once. If they are still being evasive, rely back on the learned treatise NHTSA manual. "Show me in this manual, where it says once, twice, three times a lady that it had to jerk?" "Officer, I'm not trying to bust your chops, this is not your test, you did not design these tests. Nowhere in this manual, did anyone ever state how far or how many times the eyes had to jerk?"

Most prosecutors have already bored the judge and jury to death with the timing of the HGN. Usually, the officer has been properly woodshedded by the state and knows the HGN timing. If he doesn't, or did it grossly wrong on the video, you may want to show the jury the difference between NHTSA standardized timing and how the officer administered.

However, this article suggests a different tactic in attacking the HGN; one that is not based on breaking down the timing. The HGN is not a divided attention test like the Walk and Turn (WAT) or the One Leg Stand (OLS). The officer will agree. If not, the NHTSA manual defines the WAT and OLS as divided attention tests.[17] The manual defines HGN as an involuntary jerking of the eyes as they gaze toward the side.[18] Nothing about HGN or Nystagmus says divided attention. Remember to be careful with your words here, "nystagmus does not measure mental or physical faculties?" No, it doesn't. Inexperienced officers will try and argue that it does. To combat this, simply illustrate that nystagmus is an "involuntary" jerking and cannot be controlled by our eye muscles, as much as we may want to. And we cannot make our brains control this involuntary jerking, as much as we want to. Some persistent officers will continue to argue, at which point you may need to distinguish where the loss of mental or physical faculties come into the WAT and OLS and how that's not possible in the HGN. Nowhere in the NHTSA manual does it say loss of mental or physical for HGN. Depending on the remarks in the video, if the officer just will not agree nystagmus doesn't measure mental or physical, ask them about the client's performance, try this:

- He had no problem following your stimulus?
- Never had to tell him not to move his head?
- So, he displayed good mental faculties is following your instructions?
- He displayed good physical faculties in watching your stimulus and not moving his head."

The jury will be turned off and the officer will damage credibility by continuing to argue.

16 Texas Rules of Evidence 615(e).

17 2023 NHTSA SFST Student Manual; Chapter 1, pg. 12.

18 *Id.*

Under your HGN heading, write: Does Not Measure Mental or Physical Faculties. After this amount of cross, the officer has already established a reputation with the jury. Discuss the findings on the HGN. "You found 6 out of 6 clues on my client? That's all of them, maxed out?" Write: 6/6 on the board in the top left in red. We will come back to this at the end of all the SFSTs. "There is no way that I can prove you didn't see those little jerks? Stimulus is 12-15 inches from their face, your face is about another 12-15 inches from your hand. That's 24-30 inches from his eye, at night, looking for millimeters of jerks." The jury gets it. "You never stated out loud when you saw these clues on camera? You never said lack of smooth pursuit, maximum, onset into your mic while you were doing them? In fact, you wrote down how many clues you saw when writing your report? You wrote your report after you had determined he was intoxicated? After you had arrested him? After you towed his car?" Some officers may say they are prohibited from stating the clues on the video by law, which is correct under Fischer.[19] "Well you could have said them and then we just would have muted it, but it could serve to remind you which clues you actually saw? But you remembered later, you saw all of them? We just got to trust you?" Write: "Trust Me" in big red letters on the tope right of the board.

The Walk and Turn (WAT)

The WAT is a divided attention test, meaning that it is supposed to measure your mental faculties and physical faculties.[20] In plain English, they want to see how well you can listen to instructions (mental) and then perform (physical) what you just heard. The WAT is a test where the video will actually show us the client's performance. There is no "trust me" in the WAT. The overall intent in dissecting this test is honestly for the jury to go home, try it, and realize how absolutely ridiculous this test is and how strictly it's graded. Slowly break down this test to the jury using the officer and the NHTSA manual.

Turn to a new page on your easel and write: WAT in big black letters at the top of your display. Then lay out the eight clues of intoxication NHTSA established. Know them by heart, it's your profession. Start writing them down on the board as you recite them. "The first two clues come in the Instruction Phase, meaning they have to stand like this while you give the instructions and demonstrate. 1. Can't Maintain Balance; 2. Starts too Soon. The next six come during the Walking Phase. 3. Steps Off Line. 4. Misses Heel to Toe. 5. Raises Arms. 6. Stops While Walking. 7. Incorrect Number of Steps. 8. Improper Turn." Now the jury can clearly see what the test is graded on.

Next, show the jury how the test is really administered. Ask the judge to stand up and demonstrate portions.

- "Officer, this test has 18 unique instructions? Don't worry, I'm not quizzing you, let's go through them together: (count these out on your fingers as you go so that the jury can follow along)
  - 1. Place your feet on a line,
  - 2. In a heel-to-toe manner,
  - 3. Left foot behind right foot,
  - 4. With arms at sides and give a demonstration. Tell subject
  - 5. Not to begin until instructed to so do and asks if subject understands. Tell subject to take
  - 6. Nine,
  - 7. Heel-to-toe steps,
  - 8. On the line and demonstrates. Explain and demonstrate the turning procedure:
  - 9. Lead foot planted,
  - 10. Take a series of small steps,
  - 11. To the left direction. Tell the subject to
  - 12. Return on the line,
  - 13. Taking nine,
  - 14. Heel-to-toe steps.
  - 15. Count out loud.
  - 16. Look at feet while walking.
  - 17. Not raise arms from their sides. And
  - 18. Do not stop once they have started. Do they understand?[21]

Write: 18 Instructions on the board top left in red. "How many times did you demonstrate the test?" Write: 1x Demo or whatever they say. "How many times did you allow him to practice this test before grading him?" Write: 0 Practice. "Did you tell him the clues you would be grading him on?" Write: 0 Clues Given. "Did you give him credit for all the good stuff he did right?" Some may argue or be confused. Circle back to their training and their testing and how they were given credit for all the answers they got right. Hell, every test anyone has ever taken they got credit for the stuff done right! "You agree, age, weight, leg, back or neck injuries may affect an individual's performance on this test?" Write: whatever issue your client has. "Now tell the jury how many clues equals failure or the decision point?" Write: 2= Intox.

Next show the jury how meticulous the test is scored. Go through each of the clues and define them. When you get to heel-to-toe, ask the officer to show the jury with his fingers just how far someone has to miss heel-to-toe in order to be counted as a clue of intoxication. And make sure to ask if that half inch is between his fingernails or finger beds, on just one step. Write: the measurements of ½" and >6" next to heel-to-toe and raises arms. Be sure to put green check marks next to all the clues your client didn't exhibit. When you get to improper turn you should slow down and explain to the jury that there are three ways you can get that clue: series of small

19 *Fischer v. State,* 252 S.W.3d 375 (Tex.CrimApp. 2008).

20 2023 NHTSA SFST Student Manual; Chapter 1, pg. 12.

21 2023 NHTSA SFST Student Manual; Chapter 8, pg. 43.

steps, leave the lead foot planted, and turn to the left. Let the jury see all of the ways there are to get a clue of intoxication.

Bring it home for the jury. Ask the officer how many clues your client exhibited. Write 4/8 or whatever it was. "So, you're telling me that every single sober person in here has to get a 0 or 1 on this test? Cause 2 equals intoxication?" Look at the jury after the officer admits this. Share that common ground with them. "So you're telling me, if someone were to go home and try this test, not that anyone would, but now knowing all of the clues and how it's graded, they should be able to get a 0 or a 1 on it?" You have to love the zealous officer that will not only agree, but add that the tests are easy or that he sees plenty of people pass them.

Finish off the cross with a final blow. "Officer, is this a normal or abnormal way to walk?" Most officers will never admit it's "abnormal." Ask them: who else walks like that? Most either can't think of it or don't want to say it: gymnast on a balance beam, but they get to balance with their arms to the side; and tight rope walkers, but they get that long bar. Write: Abnormal in the top left in red. "Now I'm not busting your chops, these aren't your tests, but you're supposed to judge whether someone has lost the normal use of their mental and physical faculties on an abnormal test? And, you still didn't arrest my client after this test?"

The One Leg Stand (OLS)

Very similar to the WAT, lay out the OLS. Start with the clues: 1. Sways, 2. Hops, 3. Drops, and 4. Raises Arms. Count out the instructions: 1. Stand straight, 2. Place feet together, and 3. Hold arms at sides. 4. Tell subject not to begin until instructed to do so and if they understand. 5. Raise one leg, either leg, 6. Approximately 6 inches from the ground, 7. Keeping the raised foot parallel to the ground and give a demonstration. Tell subject 8. Keep both legs straight and 9. Look at the elevated foot. 10. Count out loud, in the following manner: 11. One thousand and one, one thousand and two, one thousand and three, 12. Until told to stop. And give demonstration.[22]

Follow the pattern in the WAT and write: 12 Instruction, 1x Demo, 0 Practice, 0 Clues Given, 0 Credit given, age, weight, back, leg or neck injuries may affect. 2= Intoxicated.

When examining each clue be sure to establish there is no distance for sway as defined by NHTSA. No definition of how many inches or how long someone must sway. Write: ?" You don't need to save the abnormal surprise; the jury gets it. "Is this a normal or abnormal way to stand? Even the Karate Kid got to raise his arms for balance?" And then bring it home, "so everyone in this room better be able to get a 0 or 1 on this test? And all humans have a natural sway when standing on one leg? So that's one clue already with no definition of how far or how long one must sway? That means everyone should be able to stand on one leg for 30 seconds without dropping it, and not raise their arms or hop the entire time? Not that anyone would ever try that at home."

Before you wrap up your cross, come back around to the HGN. "My client got 4/8 on the WAT and 2/4 on the OLS, right? Never maxed out any of these tests as we can clearly see on video. But after you arrested him, towed his car, and got to write your report you wrote 6/6 on the HGN?" The jury sees where you are going. The officer sees where you are going. It's a rhetorical question, let the jury ask it and answer it in their heads. "So, we just have to trust you that he failed that miserably, but on the video, he looked good (we probably are not in trial if he doesn't look good)?"

Lastly, bring the fear home. "Not to bust your chops officer, cause these aren't your tests, but if someone is pulled over on the way home from dinner and smells like alcohol or admits to drinking at dinner, they could have to do these tests? And then if they do these tests, you will have to administer it in the standardized manner only and grade it just like we saw? 0 or 1 to go home?" This will resonate with everyone. As you can tell, breaking down these tests, they are next to impossible. We as defense lawyers know these tests and on any given day with the weather, nerves, and our conditioning, we couldn't pass these. To assume regular, everyday people who don't know these tests are capable of passing . . . Let's be honest: it's whether the officer wants to arrest you or not. They are purely subjective.

The BEST Parts of the 2023 NHTSA SFST Manual

In 2023, NHTSA chose to incorporate an entire page dedicated to the Mellanby Effect.[23] "A person feels more impaired while his/her BAC is still rising than at the same level while his/her BAC is declining. The person is not less impaired, but they "feel better;" (the "Mellanby Effect") which makes them more likely to drive while impaired."[24] This suggests that the person will not feel as intoxicated or show as much loss of mental or physical faculties if they have been drinking for longer periods of time that day. This invites a tolerance argument where someone may be intoxicated but doesn't appear intoxicated. The issue is, then why were they arrested? Officers are supposed to arrest based on the definition of intoxication, not people who look sober but may technically be over the limit. Why NHTSA suddenly wanted to introduce the Mellanby Effect into the SFST manual seems strictly counterintuitive. It seems to only be added to allow officers to arrest people who look good, but the officer still wants to arrest. That would certainly help keep the public at fear of being arrested as their intended general deterrence.

In 2023, NHTSA chose to venture into the metabolization of alcohol and what people should look like at a specific blood/breath alcohol concentration.[25] For that, we say THANK

22 2023 NHTSA SFST Student Manual; Chapter 8, pg. 50.

23 2023 NHTSA SFST Student Manual; Chapter 2, pg. 43.

24 *Id.*

25 2023 NHTSA SFST Student Manual; Chapter 2, pg. 36-42.

YOU. Defense lawyers no longer have to wait to cross examine a blood analyst or breath test technical supervisor, who have a degree in science and are very tough witnesses. We can cross examine the Officer, usually with minimal scientific knowledge or training regarding the effects of alcohol on the human body. Before, we relied on Dr. Dubowski's chart in his peer reviewed article[26] or Gariott's text book.[27] Now, NHTSA provides its own chart own on the typical effects at certain BACs.[28] At just a .10, clients should show a clear deterioration of reaction time and control.[29] At .15, clients should exhibit far less muscle control than normal and vomiting may occur.[30] Additionally, clients should exhibit significant loss of balance at .15.[31] These are fantastic predicted behaviors for the disconnect defense. If a client does not exhibit these typical effects at that BAC then either the machine is broken or their body defies the laws of science. And, don't let the police officer opine about tolerance. Most officers have zero expertise in tolerance and there simply can't be learned tolerance on abnormal coordination exercises that the client has never performed before. NHTSA didn't need to incorporate this chart at all, but their overzealousness and righteousness may be the ammunition defense lawyers need to pit the officer's expert opinion against the analyst. Done right, this is simply the most wonderful new material that NHTSA has produced.

And lastly, NHTSA even included a section about preparing testimony. "The foundation for preparation and successful testimony is the relationship between the law enforcement officer(s) involved with the arrest and the prosecuting attorney(s) associated with the case. Effective communication and a clear understanding of each groups' objectives and expectations is essential for a successful prosecution."[32] Nothing about the division of power or justice, but rather successful prosecution. The jury needs to understand that just because probable cause may have existed for the police to arrest, in America we do not convict on probable cause. And, we certainly don't convict when NHTSA wants officers probable cause to put fear in the population.

CONCLUSION

This article is not suggesting that no tests should be given to suspected drunk drivers. Rather, it breaks down the simple reality of how stringently, and subjectively, these tests are graded. Unfortunately, many people who "fail" these tests will not have the ability to fight these tests; be it for financial reasons, time constraints, or hiring an attorney who doesn't want or care to fight it. The jury and everyone reading this must understand the immense difference between probable cause to get arrested and the State's ability to prove a crime occurred beyond a reasonable doubt. NHTSA's attempt to place the public in fear must never override a person's presumption of innocence.

We, as trial lawyers, must know these tests and manuals better than the officers. Only once you truly understand these tests and the 2023 nuances can you simplify their basic elements and effectively communicate their unfairness to a jury. Many times, at the end of a trial, jurors will remark how they are never drinking and driving again because there is no way they can pass these tests. Now, I expect they will also all discuss how NHTSA is trying to control the population through fear. Jurors are normal people, just like our clients. The officers did not create these tests and probably don't even recognize the brain washing they are undergoing by NHTSA. It's an unfair testing system now being encouraged to arrest more people than ever. Jurors can feel confident in a not guilty verdict for standing up against unfair tests by a government organization literally encouraging officers to arrest so many people that they have instilled fear in the population. Break the SFSTs down to the basics - (1) make it about the tests, not the officer, and (2) educate the jurors on the true NHTSA agenda. Jurors can still respect law enforcement officers while finding the client not guilty even after "failing" these unfair "tests."

Mark Thiessen *is a criminal trial lawyer and the Chairman/CEO of the Thiessen Law Firm in Houston, Texas and Aspen, Colorado. Mark is the only lawyer in the world that is Board Certified in (1) Criminal Law by the Texas Board of Legal Specialization; (2) DUI Law by the DUI Defense Lawyers Association; and (3) DUI Defense Law by the National College for DUI Defense through the American Bar Association. Mark earned the American Chemical Society-Chemistry and the Law (ACS-CHAL) Forensic Lawyer-Scientist designation, which is the highest form of scientific recognition available for lawyers. Mark is on the Board of Directors for Texas Criminal Defense Lawyers Association (TCDLA), was the 50th President and on the Board of Directors for Harris County Criminal Lawyers Association (HCCLA) and the current President and Charter Member of DUI Defense Lawyers Association (DUIDLA). But, better than all of this hard work, Mark treasures that he was supremely lucky to marry Taly and have wonderful adventures with his family.*

26 *Dubowski, Kurt M.*, Alcohol Determination in the Clinical Laboratory; Am. J. Clin. Path 74: 747-750 (1980).

27 *Caplan, Yale H.; Goldberger, Bruce A.*; Garriott's Medicolegal Aspects of Alcohol; Sixth Edition, pg. 28 (2015).

28 2023 NHTSA SFST Student Manual; Chapter 5, pg. 5.

29 *Id.*

30 *Id.*

31 *Id.*

32 2023 NHTSA SFST Student Manual; Chapter 4, pg. 20.

Significant Decisions Report

KYLE THERRIAN

Preparing the SDR is sometimes a rollercoaster ride. When you think you're on top of things, the Eastland Court of Appeals drops a 60-pager, the Second Court of Appeals says something that foments commentary, and the CCA releases six published opinions that you know TDCAA will soon summarize incorrectly. Sure, it would probably behoove me to have less of a Dude-like inner monologue telling me that "this aggression will not stand . . . man." But that ain't me (give me a White Russian and hand me a keyboard).

This month is slow, and for that, I am grateful. But I am also reflective. Having few cases of "significance" to report, I realized that I've never really reduced to writing fleeting thoughts of what makes a case significant. I usually tell people, "If it ain't published, it ain't goin' in." Frankly, that's a way to avoid telling someone I didn't see or know about *their case*. Sometimes, unpublished cases do grab my attention. Justices, Judges, and colleagues send me cases, dissenting and concurring opinions catch my eye, and I typically catch wind of significant litigation through my role on the TCDLA Amicus Committee. But what is it about an un-West-worthy case that makes it significant enough to share with the SigHead community? Where does the Venn Diagram of what matters to this author and what matters to those who write the common law diverge? It's not ironic that you can find the answer in the TCDLA Store (come, let me take you on a journey).

Yes, I am absolutely a shill for TCDLA products, but I think this builds up to something poetic (I doth think?). If you are reading this in electronic format and clicked on the link, you should have seen shirts that say things like "Got justice," "Make 'em prove it," and "#TCDLA STRONG." It's a veritable marketplace of ideas. A place where we say, "yes, I'll pay $20.00 plus tax and the cost of shipping to brandish that statement across my chest." That TCDLA sells these slogans and the membership buys them tells an outsider what they need to know about criminal defense lawyers; whether you are the Percy Foreman Lawyer of the Year or a dude in La Grange, Texas, trying to be, you're a fighter. This year, lawyers like Kristen Etter, Billy Pavord, Allison Clayton, Caitlin Gilbert, Mike Ware, Gary Udashen, Mark Nelon, Angelica Cogliano, Keith Hampton, Mark Bennett, Lane Haygood, Jani Maselli Wood, Michael Gross, David Cunningham, David Adler, Jack Carnegie, John Hagan, Christene Wood, Jadd Masso and so many others have shown us the importance of fighting. They went to the mat for something important.

Here, the fight matters. Our system of justice is a symphony of rights and rules, burdens and presumptions, arguments and counterarguments. But the system no more implements itself than the instruments comprising the orchestra. Here, advocates matter. And to that end, the talent, vigor, and dedication they apply to their craft matters too. Fighting in the margins where others seek to reap injustice is the only way we achieve the lofty notion of "adversarial." If a man standing in front of tanks in Tiananmen Square is one of the most iconic images of all time, it is no wonder that I am still struck by the simple phrase "hold on" in *In re Ramos*, No. 13-22-00497-CR (Tex. App.—Corpus Christi / Edinburg, Jan. 13, 2023). This phrase spoken by a defense lawyer to a judge who insisted on doing things his way (the wrong way) is all of us. We are the conductors gesticulating at the woodwinds who have fallen out of tempo. And in case you thought

I'd lost track of my metaphors, let me close the loop on this one, too: we have the backs of our brothers and sisters when they are about to be run over by a tank. Here, camaraderie matters.

No, I might not always catch your case. But if you fight the good fight, if you stand against the odds, if you embody the phrase "hold on," then you exude the indelible traits of a criminal defense lawyer, and your case is significant. Not just to me but to all of us. As Chief Justice John Roberts once said in t-shirt-worthy fashion: "[prosecutors], when they rise in court, represent the people of the United States, but so do defense lawyers—one at a time." *Kaley v. United States*, 571 U.S. 320, 358 (2014)(Roberts, C.J. dissenting).

Significant.

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

***Galbraith v. Hooper*, 85 F.4th 273 (5th Cir. 2023)**

Attorneys. Nicholas Trenticosta

Issue & Answer 1. When a prisoner challenges his sentence pursuant to a federal writ of habeas corpus, the prisoner must generally bring his claim within a year of the date sentence is imposed. Is this limitation applicable to a parole board's determination to rescind parole after issuing its formal decision but prior to the parole effective date? **No.**

Issue & Answer 2. Does Louisiana law create a constitutionally protected liberty interest once a parole board issues a Certificate of Parole? **Yes.**

Facts. The State of Louisiana sentenced the Galbraith to 71 years of "hard labor" for committing manslaughter and attempted aggravated rape. After 16 years imprisonment and an unstated amount of hard labor, Galbraith applied for parole. Pursuant to Louisiana law the Parole board notified the victim's surviving spouse and the victim's mother and advised them of their rights to present testimony at the Galbraith's parole hearing. After correcting a mailing error, a pre-parole investigation report was prepared which contained opposition statements from the victim's husband, the victim's mother, the prosecuting attorney, the sheriff, and the sentencing judge. After the

Parole Board unanimously voted to grant parole the prosecuting attorney sent three letters to the Parole Board requesting reconsideration. When his attempts failed, the prosecuting attorney and the victim's husband aired their displeasure with the press. Political intervention ensued. Due to negative media attention and pending criminal justice reform, the Governor's Office and Parole Board officials worked to reverse the Parole Board decision. They ultimately rescinded Galbraith's parole, citing "Other There may have been techical [sic] irregularity to victim notice." This was an apparent invocation of the mis-mailed notice to the victim's surviving husband—a notice he nonetheless received with legally sufficient time to prepare his statement of opposition. Galbraith sued the Parole Board for civil rights violations under 42 U.S.C. § 1983 and filed a federal writ of habeas corpus under 28 U.S.C. § 2241.

Analysis 1. 28 U.S.C. § 2241 grants authority to federal district courts to grant writs of habeas corpus to individuals who are in state or federal custody. 28 U.S.C. § 2254 significantly limits that authority when the individual seeking relief is serving a sentence pursuant to a state court judgment. However, when an individual brings a claim about the duration of confinement as determined by prison authorities, a Section 2241 writ of habeas corpus is an appropriate vehicle. Properly characterized as a writ of habeas corpus, Louisiana invoked Section 2254 and asserted that Galbraith failed to bring his claim within one year of the event triggering the claim. [Editorial note: the opinion is somewhat unclear about this, but it seems that Louisiana asserts that Galbraith is barred from asserting his habeas claim more than one year after his sentence was *imposed*]. But Galbraith's challenge is not to the sentence itself but to the manner of sentencing execution, thus the one-year statute of limitations does not apply.

Analysis 2. Despite granting Galbraith a Certificate of Parole, Louisiana claims that an individual cannot obtain a liberty interest until setting foot outside of the prison. Louisiana attempts to characterize Galbraith's claim as an appeal from a denial of parole, but the comparison is not analogous. The Parole Board rescinded its parole after its formal grant but before the effective date of release.

The Constitution does not protect a right to parole, but it does guarantee that parole is not revoked without due process once granted. Whether and when a state's parole laws create a liberty interest depends on how the law is crafted and the law surrounding the state's attempt to revoke that interest. Here, Louisiana law does not

permit unlimited Parole Board discretion to revoke its decision to grant parole—the Parole Board could rescind for misconduct or for a violation of terms. Thus, Galbraith had a liberty interest in maintaining his parole absent one of these two statutory triggers. The Parole Board's citation to a bogus procedural defect deprived Galbraith of his liberty without due process.

Comment. Does the rationale apply to the revocation of bail in state court? Yes.

United States v. Johnson, 85 F.4th 316 (5th Cir. 2023)

Attorneys. John R. Guenard

Issue & Answer 1. The "prosecutor's fallacy" occurs when a juror is told the probability a member of the general public would share the same DNA is 1 in 10,000 (random match probability), and he takes that to mean there is only a 1 in 10,000 chance that someone other than the defendant is the source of the DNA. The prosecutor committed this error in argument, but did the prosecutor's unobjected-to error rise to the level of plain error in this case? **No.**

Issue & Answer 2. Federal Rule of Evidence 804(b)(3) permits the Government to present hearsay statements made against the penal interest of an unavailable declarant if: (1) the declarant is unavailable, (2) the statement tends to subject to the declarant to criminal liability, and (3) the statement is corroborated by circumstances indicating trustworthiness. When a co-conspirator makes a statement to a third party in which he takes some responsibility but also shifts some blame, is the inherent untrustworthiness of co-conspirator statements enough to exclude the hearsay testimony? **No.**

Facts. The Government charged the defendant with (1) conspiracy to obstruct commerce by robbery, (2) obstruction of commerce by robbery, and (3) using, carrying, brandishing, and discharging firearms during and in relation to a crime of violence, causing death. The Government charged 5 other individuals as co-defendants. At trial, the Government showed that the defendants attempted to rob an armored vehicle and opened fire on a guard who was outside of the armored vehicle and another guard who was inside the armored vehicle. The Government theorized that the defendant fired at the vehicle but could not show who fired the fatal shot at the outside guard. To prove the defendant's involvement in the offense, the government offered: (1) a statement from a non-testifying co-defendant, (2) eyewitness testimony putting the defendant in the proximity of the vehicle at another location, and (3) DNA evidence linking the defendant to a bandana found in the vehicle used by the shooters.

Analysis 1. The prosecutor incorrectly argued to the jury that the DNA expert showed that the DNA discovered inside the shooters' vehicle proved to be a match with only a 1 in 4,100 chance of erroneously implicating the defendant. To determine whether the error constitutes harmful reversible error the court must consider the comment in context with the trial as a whole. Here, context proves the error was not particularly harmful. The State's expert properly characterized the DNA result in layperson terms, defense counsel properly stated the statistic in closing, and the State encouraged the jury to consider other evidence besides the DNA evidence.

Analysis 2. The Government presented the statements of a co-conspirator through a hearsay witness who discussed the facts of the offense with the co-conspirator. According to the hearsay witness, the co-conspirator claimed to be the first shooter, shifted some blame to other co-conspirators, and identified the defendant as one of the individuals present during the shooting.

A co-conspirator statement is admissible under Federal Rule of Evidence 804(b)(3) if: (1) the declarant is unavailable, (2) the statement tends to subject the declarant to criminal liability, and (3) the statement is corroborated by circumstances clearly indicating trustworthiness. Here, the defendant challenges the second and third prong. As it relates to the second prong, the defendant claims that the co-conspirator accepted some responsibility but also shifted responsibility to other accomplices. But the main thrust of the statement was one of accepting responsibility for involvement in a fatal shooting. As it relates to the third prong the defendant challenged the inherent untrustworthiness of accomplice witness statements. But here there were circumstances seemingly corroborating and bolstering the truth of the co-conspirator's statement: the co-conspirator shared his account with a friend rather than with the police during a custodial interview, the co-conspirator made at least one other statement acknowledging personal responsibility in a separate conversation, and the testimony of an eyewitness put the defendant together with other shooters shortly before the shooting. The Government satisfied all three prongs of the co-conspirator hearsay exception.

Comment. Slippery slope: fine. Strawman fine: ad hominem: actually written into law (Article 38.37). Of all of the prosecutor fallacies, this one is *the* prosecutor's fallacy . . . ?

United States v. Kersee, 86 F.4th 1095 (5th Cir. 2023)

Attorneys. Marjorie A. Meyers, Evan Gray Howze

Issue & Answer. Is there a right to confront witnesses in a supervised release revocation hearing? **Yes, at least a qualified one.**

Facts. The defendant was serving a period of supervised release (federal parole). The defendant then got into the following "trouble": (1) arrest then dismissal

of criminal mischief charge (uncooperative girlfriend complainant), (2) arrest then dismissal of aggravated robbery (uncooperative girlfriend complainant), and (3) arrest then dismissal of assault family violence (uncooperative girlfriend complainant). Notwithstanding the dismissals, the defendant's federal supervision officer submitted a petition to revoke the defendant's supervised release. To prove the violations the Government submitted sworn complaints and body camera footage containing interviews of other witnesses and synopses of investigations. The defendant objected claiming he had a due process right to confront and cross-examine witnesses and submitted an affidavit from the defendant's girlfriend recanting her accusations in all three dismissed cases. The district court revoked the defendant's supervised release and sentenced him to six months in custody and extended his supervised release an additional three years.

Analysis. "The Confrontation Clause is not applicable in a supervised release revocation hearing. But because a person's liberty is at stake in a revocation proceeding, due process entitles the defendant to a qualified right to confront and cross-examine adverse witnesses." Denial of confrontation in such circumstances requires a finding of good cause. Here the district court did not make a finding of good cause, and none was apparent from the record. Significant here was the fact that the court was required to make a credibility determination between the complainant's accusations and the complainant's recantations. The defendant had a right to confront the person who was the subject of such a credibility determination.

Concurrence (Ho). Writes separately to stress that the Court's opinion does not come from insensitivity to domestic violence but from fidelity to the rights of those accused:

> Violent criminals should be prosecuted, convicted, disarmed, and incarcerated."
>
> But we don't presume that citizens are dangerous criminals. We presume they're innocent. And to overcome that presumption, we require more than just notice and a hearing. We afford the accused with assistance of counsel and a meaningful opportunity to present evidence and confront adverse witnesses. We impose a robust burden of proof on the government. And when in doubt, we err on the side of liberty.

Comment. I didn't realize that when I was crossing the Delaware in my introduction to this SDR that Justice Ho was going to grab an oar.

Texas Court of Criminal Appeals

***Ex Parte Thomas*, WR-94,420-01 (Tex. Crim. App.—Nov. 8, 2023) (not designated for publication)**

Attorneys. Caitlin Gilbert (habeas), Mike Ware (habeas), Gary Udashen (habeas), Brett Ordiway (habeas), Mark Nelon (habeas)

Issue & Answer. Should the Court of Criminal Appeals abandon its precedents and hold that "knowing use" and "unknowing use" of false testimony claims should employ different standards of materiality or, in at least some cases, be susceptible to different standards of harm? **No.**

Facts. The State convicted the defendant and sentenced him to life imprisonment without parole. At trial the State relied on accomplice-witness testimony and DNA evidence and cited insurmountable probabilities that the defendant was a contributor to the DNA discovered on the murder weapon. In 2015 the court permitted post-conviction DNA testing. This testing resulted in the discovery of evidence that called into question the defendant's conviction—namely that the new analysis excluded the defendant as a contributor. The State agreed that the DNA testing produced exculpatory results and agreed that relief should be granted on the basis of false testimony. In its order setting issues for submission, the Court of Criminal Appeals instructed that it would "determine whether 'knowing use' and 'unknowing use' of false testimony claims should employ different standards of materiality or, in at least some cases, be susceptible to different standards of harm."

Analysis. The Court of Criminal Appeals has held consistently since 2009 that knowing use and unknowing use false-testimony claims should not be treated differently in a post-conviction habeas analysis. When the false testimony creates a reasonable likelihood that the testimony affected the judgment of the jury the defendant should be granted a new trial. Equally consistent has been the Court's practice of granting relief upon a showing of materiality without additional harm analysis. The issue of considering a distinction between "knowing use" and "unknowing use" of false testimony claims was improvidently granted. Because the defendant has shown that the DNA testimony was false (under present scientific standards) and that the testimony was material, he should be granted a new trial.

Comment. We live in an era where people in power doing the right thing is so contrary to expectations that we use words like "brave" and "heroic" to describe their actions. I hate what that says about our expectations of people in power. But I still love to see it! Kudos to the Tarrant County District Attorney's Office for doing the right thing in this case (and in *ex Parte Storey,* a case I hope to soon summarize).

Ex parte Whillhite, No. WR-94,154-01 (Tex. Crim. App. Nov. 22, 2023)(not designated for publication)

Attorneys. Angela Moore (writ)

Issue & Answer. The defendant received substantial concurrent sentences on two convictions, but trial counsel failed to recognize the unconstitutionality of a statute underlying one of the convictions. Are the convictions and sentences in this case intertwined in a manner that makes it likely that counsel's deficient performance resulted in a greater sentence on the legitime conviction because the sentencing judge probably accounted for the defendant's commission of two crimes? **Yes.**

Facts. The defendant was serving deferred adjudication community supervision for two offenses: sexual assault of a child and online solicitation of a minor. After the trial court revoked the defendant's probation and assessed punishment at 75 years imprisonment, the defendant appealed. That factual summary of that appeal

appeared in the June 15, 2021 publication of the Significant Decision Report:

> . . . The defendant appealed but his counsel filed an Anders brief alleging no meritorious grounds for appeal. Defendant filed a pro se petition for discretionary review with the Court of Criminal Appeals and the case was remanded on grounds that appointed counsel should have presented argument on the unconstitutionality of the online solicitation statute as determined in Ex parte Lo, 424 S.W.3d 10 (Tex. Crim. App. 2013)(Online Solicitation *statute facially overbroad).*

As to the defendant's conviction for online solicitation, the Austin Court of Appeals reversed and rendered a judgment of acquittal. The defendant's sexual assault of a minor conviction remained intact and is now the focus of the instant habeas litigation. The defendant contends that counsel was ineffective for failing to challenge the online solicitation charge and counsel's deficient performance resulted in a harsher punishment reflective of the defendant having committed two offenses rather than one.

Analysis. "The trial court has found that the sentence issued at adjudication would likely have been different had the parties and judge realized that one of the charges had already been declared unconstitutional . . . . We agree. Relief is granted."

Dissent (Yeary, J.). The defendant's plea to sexual assault of a child was voluntary. He would have pled guilty to that offense even had he known the online solicitation statute was unconstitutional. Offense or not, the conduct underlying the online solicitation charge would have been admissible in the defendant's trial for sexual assault.

Comment. Talk about untangling knots. First this guy had to *Gideon* his way into a legit direct appeal, then newly appointed appellate counsel came in with a scalpel to get him back to a state of un-messed-up-edness.

2nd District Fort Worth

***Chavez v. State*, No. 02-22-00090-CR (Tex. App.—Fort Worth, Nov. 19, 2023)(not designated for publication)**

Attorneys. Gary Udashen (appellate)

Issue & Answer. Consistent with the Sixth Amendment right to confrontation, can a trial court prohibit the defendant from asking the mother of two outcry witnesses about her U-Visa (crime victim visa) application if the mother is foggy about the details surrounding her application? **Yes.**

Facts. A jury convicted the defendant of continuous sexual abuse of a young child and indecency with a child. At trial the State showed that the victim reported her abuse to her mother and to a SANE nurse. During the investigation, a forensic interviewer spoke with the victim's sister who also reported that the defendant sexually assaulted her. "At Chavez's jury trial, Shelly, Tonya, Mother, the forensic interviewer, and the SANEs testified about Chavez's acts of sexual abuse." The defendant attempted to show that the mother of the two sisters applied for a U-Visa immediately following the outcries. The apparent theory of defense was that the outcries were a ruse to obtain lawful status in the United States as crime victims. The trial court would not allow the defendant to present this information through cross-examination.

Analysis. A trial court's decision to exclude topics from cross-examination is reviewed for an abuse of discretion. A defendant has a Sixth Amendment right to confront witnesses and to attack a witness's credibility, bias, or motive, however the right is not unqualified. The trial court can limit cross-examination so long as it does not "infringe upon the Confrontation Clause's guarantee of an opportunity for effective cross-examination." Here, in a hearing outside the presence of the jury, the mother testified that: (1) she had heard about a thing known as a U-Visa from a colleague before the outcries, (2) she applied for a U-Visa after someone from the Child Advocacy Center told her about, and (3) she did not recall when she applied for the U-Visas. The timing of these events makes the U-Visa application irrelevant. For this testimony to have been relevant the defendant would have shown that the ulterior motive coincided closely with the timing of the outcries. Additionally, the defendant did not

show how the mother's U-Visa motivation would have impacted the truthfulness of the allegations made by the mother's daughters. The defendant also did not show that the mother coached the daughters or that the daughters were aware of some immigration complication that required a U-Visa.

Dissenting (Walker, J.). It is wrong for the majority to start the inquiry with an analysis of relevance. The CCA does not require a fact firmly established for it to meet the cross-examination relevance standard. "A brick is not a wall." Courts have recognized U-Visa applications as "prototypical impeachment evidence." The trial court committed constitutional error by preventing the defendant from building his U-Visa defensive theory.

Comment. Imagine a scenario where the entirety of the State's evidence against a defendant is rendered irrelevant so long as the defendant takes the stand and says he didn't do it and doesn't really recall any of the State's facts.

Bittick v. State, No. 02-22-00283-CR (Tex. App.—Ft. Worth, Nov. 16, 2023

Attorneys. Max J. Striker (appellate), Mark D. Scott (trial), Adam Burney (trial)

Issue & Answer 1. Engaging in organized criminal activity (EOCA) as a member of a criminal street gang is an offense that is coupled with other conduct to create a greater criminal offense. A person cannot be lumped in with a criminal street gang unless the State can show the defendant's "individual participation in [gang] crime." Here, where the State alleges EOCA with a predicate offense of aggravated assault, can the State double-dip in the following manner: rely on the commission of the aggravated assault to establish membership in a street gang, then convict the defendant of EOCA (street gang) aggravated assault? **Yes.**

Issue & Answer 2. Technically, aggravated assault is a lesser-included offense of EOCA-aggravated assault. When the State convicts the defendant of both offenses, has the State violated Double Jeopardy? **No.**

Facts. The State charged the defendant with (1) aggravated assault with a deadly weapon (hands or feet or hard surface), and (2) engaging in EOCA by committing aggravated assault as a member of a criminal street gang. The evidence at trial showed that the defendant and his two associates jumped a guy at a 7-Eleven. Later a third associate showed up on a motorcycle and left. Camera footage showed the defendant wearing a green plaid shirt and all three of the defendant's associates wearing black shirts with green lettering. The State alleged that the defendant and his associates were members of a criminal street gang known as the Vagos.

Analysis 1. A person cannot be lumped in with a criminal street gang unless the State can show the defendant's "individual participation in [gang] crime." *Martin v. State*, 635 S.W.3d 672, 679 (Tex. Crim. App. 2021)**.** *Martin* involved an allegation of unlawful carrying of a firearm by virtue membership in a criminal street gang. The concept of membership in a criminal street gang appears identically under the statute criminalizing EOCA. Thus, the rule in *Martin* (proof of individual participation in gang crime) applies equally under the EOCA statute. But this case is slightly different than *Martin*—the offense of engaging in organized criminal activity enhances the severity of an already-unlawful act. [Ed. note: without much analysis the Second Court declares] the State's use of the defendant's commission of an aggravated assault both to establish the gang membership predicate and the ultimate offense of EOCA aggravated assault is acceptable.

Analysis 2. Normally, Double Jeopardy prohibits the State from convicting a defendant of both a greater and lesser-included offense. *Blockburger v. United States*, 284 U.S. 299, 304 (1932). However, *Blockburger* does not operate to override clearly expressed legislative intent. Double Jeopardy is not violated where the legislature, by design, meant for a defendant to be convicted of both a greater and lesser-included offense. The Court of Criminal Appeals has consequently held that the Double Jeopardy Clause permits separate punishments for both EOCA and for the underlying predicate crime. Here, the legislature authorized convictions for both EOCA aggravated assault and aggravated assault.

Comment. I had to dig in a footnote for the analysis: Texas Penal Code § 71.03 says that it is no defense to an EOCA prosecution that the defendant is already convicted of the predicate offense.

4th District San Antonio

State v. Gomez, No. 04-22-00872-CR (Tex. App.—San Antonio, Nov. 15 2023)

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

Issue & Answer. When the government arrests and prosecutes thousands of Hispanic men for criminal trespass and releases 100% of women who commit the same offense, can the government survive an equal protection challenge by telling the court it lacks resources? **No.**

Facts. Pursuant to Governor Abbott's Operation Lone Star (OLS), law enforcement agents target Hispanic men for arrest in counties along the border of Texas and Mexico. The law enforcement tactic is to make criminal trespass arrests and to initiate prosecutions to buy time for federal immigration authorities to swoop in and deport the defendant. Recently defendants such as Gomez have

begun challenging their selective prosecutions on equal protection grounds.

Claudia Molina is an official with the Laredo Private Defenders Office, an office tasked with providing indigent defense to those arrested under Abbott's OLS. Molina presented the following data from the months of August 2021 to October 2022:

- 5,700 of 7,750 OLS cases have involved criminal trespass.
- 4,800 of 7,750 OLS cases arise in Kinney County.
- 3,700 Kinney County defendants were charged with criminal trespass.
- No women have been arrested for criminal trespass.
- Detained women are referred to border patrol instead of prosecuted.

Captain Betancourt is a DPS officer who oversees aspects of OLS. He testified regarding an email to county prosecutors in August 2021 specifically outlining a strategy of targeting Hispanic men. That email read as follows:

> We will continue to arrest those immigrants who are trespassing on private property (Only in Val Verde and Kinney County) where the landowner has either agreed to file a complaint or agreed to have us sign them on their behalf. The criteria has been expanded to include the majority of single adult males. While it would be difficult to cover every single scenario, below are some examples:
>
> Father, Mother, and Child under 18 – Family Unit. Release to BP.
>
> Father, Mother, and Child over 18 and are trespassing-Male father will be arrested. Mom and adult child will be released to BP.
>
> Uncle and adult nephew and are criminal trespassing – Arrest both.
>
> Uncle and child nephew – Family Unit, refer to BP.
>
> The basic common denominators are:
>
> If there is a child who is part of a family[,] [w]e will refer to BP.
>
> If the family consists of male adults (18 and over) [,] we will arrest, if they are trespassing.
>
> Please let me know if you have any questions.
>
> Joel A. Betancourt
> Captain
> South Texas Region – Del Rio

Analysis. An equal protection challenge to selective prosecution involves shifting burdens. The defendant must first make a prima facie showing of selective prosecution, then the prosecution must justify the discriminatory treatment. To make a prima facie showing of selective prosecution, the defendant must show: (1) a prosecutorial policy, (2) a discriminatory effect, and (3) a discriminatory motivation. Here, this meant that the defendant had to show similarly situated individuals of the opposite sex were not prosecuted for the same conduct and that the State's decision to prosecute was motivated by gender. The defendant sufficiently made this showing through arrest data and a written law enforcement policy. The State presented no evidence to discharge its burden, only argument. The State cited a lack of resources but did not substantiate its claim, explain nuances, or articulate why gender-based discrimination was the best solution for its resource problem. In this case, the implementation of Abbott's OLS program violated both state and federal equal protection guarantees.

Comment. A challenge to the cognizability of Equal Protection claims in pretrial habeas was rejected out of hand based on the court's recent opinion in *Ex parte Aparicio*, 672 S.W.3d 696 (Tex. App.—San Antonio 2023, pet. granted).

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

- 1st Districk Houston
- 3rd District Austin
- 5th District Dallas
- 6th District Texarkana
- 7th District Amarillo
- 8th District El Paso
- 9th District Beaumont
- 10th District Waco
- 11th District Eastland
- 12th District Tyler
- 13th District Corpus Christi/Edinburg
- 14th District Houston

SCOTUS: Supreme Court of the United States;
SCOTX: Supreme Court of Texas;
CCA: Court of Criminal Appeals;
COA: Court of Appeals;
AFV: Assault Family Violence;
IAC: ineffective assistance of counsel
Defendant: Appellant
CCP: Texas Code of Criminal Procedure

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