TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

VOICE

FOR THE DEFENSE

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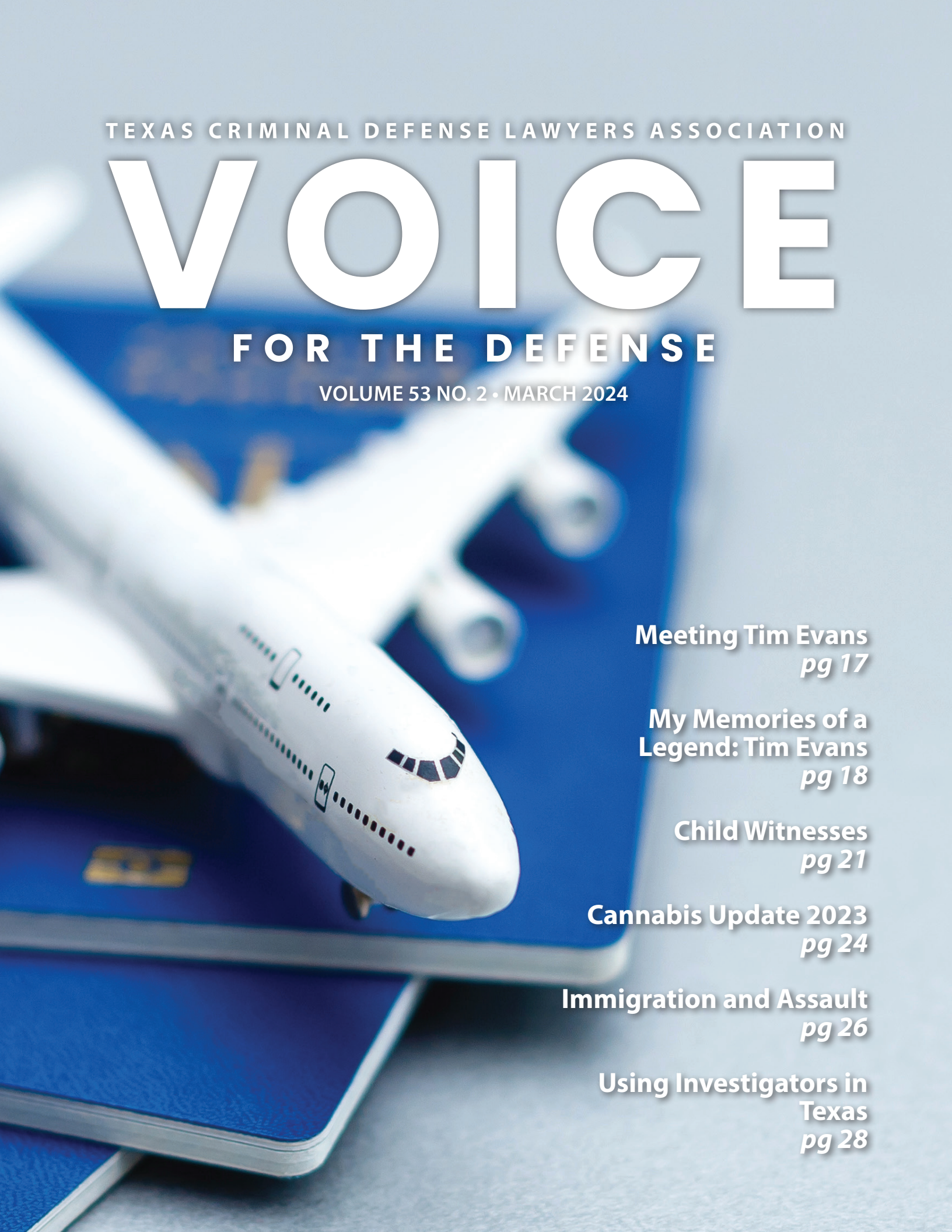

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Features

Columns

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March

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

March 2
TCDLA Board & CDLP Committee Meetings
Sugar Land, 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 | New 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
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 19-20
CDLP | Fiesta *w/ SACDLA*
San Antonio, 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 13
CDLP | Mindful Monday: Mitigation Solutions for Dual Diagnosis Addiction & Mental Health
Webinar

May 15
TCDLA | New Lawyer - Different Types of Clients
Webinar

June

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 Course
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

August

August 1
CDLP | Building Blocks for a Next Level Criminal Defense Attorney
Austin, TX

August 1-2
CDLP | Innocence Work for Lawyers *w/ Innocence Project of Texas*
Austin, TX

August 7
TCDLA | New Lawyer - Do's & Don'ts
Webinar

August 16
TCDLA | 22nd Annual Top Gun DWI
Houston, TX

August 19
CDLP | Mindful Monday: Guardianship & Criminal Law
Webinar

August 22-23
CDLP | 2nd Annual Floyd Jennings Mental Health Symposium
Fort Worth, TX

August 23-25
CDLP | Mitigation Bootcamp
Fort Worth, TX

August 29
TCDLEI Board Meeting
Zoom

September

September 5-6
TCDLA | Stand Up for Freedom
Dallas, TX

September 6
TCDLA Executive & Legislative Committee Meetings
Dallas, TX

September 7
TCDLA Board & CDLP Committee Meetings
Dallas, TX

September 18
TCDLA | New Lawyer - Mental Health
Webinar

September 19
TCDLA | Bill of Rights Reading

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TCDLA | 12th Annual Round Top
Roundtop, TX

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President's Message

JOHN HUNTER SMITH

Who's Gonna to Fill Their Shoes?

On January 6, 2024, I sat in the sanctuary of a beautiful church in Fort Worth, Texas, as Past President of TCDLA Tim Evans's life was eulogized. As I sat in the sanctuary and looked around the room, I saw some of the best of the vest lawyers in the country honoring the man, the lawyer, and the friend. Tim was one of the most prominent criminal defense lawyers in the United States. Tim had a long and colorful career representing people from all walks of life, including CEOs, politicians, lawyers, judges, professionals, outlaw bikers, and most importantly Texans of all walks of life. During his career he secured acquittals in State and Federal Court. Tim's passion was to train and mentor lawyers. Tim's legacy will live on every spring at the Tim Evans Criminal Trial College.

As I sat there listening, my mind began drifting about Tim's accomplishments and successes. My mind began drifting to other lawyers who had passed away. I began thinking about their accomplishments. I wondered what character trait(s) all these great lawyers had in common. I started thinking about my favorite event at Rusty Duncan; that is the Hall of Fame luncheon. Listening to the stories of TCDLA Hall of Fame lawyers, like listening to Tim's stories, is always motivating and makes me proud of our profession and what we stand for each day in courts across the State of Texas.

Tim Evans

As my mind continued to drift, I started thinking about the lyrics from George Jones's song, "Who's Gonna Fill Their Shoes." Who are the chosen lawyers? Which lawyer will tear your heart out when they speak? Who will stand tall? Who's gonna give their heart and soul? I wonder who's gonna fill their shoes? Because of lawyers like Tim Evans, each one of us has the ability to fill those shoes, but there will only be one Tim Evans.

Thank you, Tim, for the legacy you left in the people you helped, the lawyers that you trained, and the lawyers that you mentored.

As my mind drifts, I ask myself what legacy I want to pass on to my clients and other lawyers. What legacy do you want to leave to this profession?

CEO's Perspective

MELISSA J. SCHANK

"To live in hearts we leave behind is not to die."
-Thomas Campbell

Celebrating Lasting Legacies

Every now and then, you encounter someone who captivates you – someone whose presence, family, and everything about them leaves a lasting impression. From the warmth of their smile to the genuine way they engage with you, you can instantly tell that they are truly a unique and authentic individual. Witnessing their interactions with others reveals a person who holds the utmost respect for and from everyone and who genuinely values what they have to say. When they smile at you, it feels as if you are the only person in the room, and their conversations are personal and attentive. Their energy is infectious, filling the room with positivity. They remain humble, always seeking to empower rather than gain. This is how I feel about Tim Evans.

I recall my early years at TCDLA when the Rusty Duncan membership party was a black-tie affair. There, I saw Tim and Rita Evans tearing up the dance floor to the Green Emerald Band. They beckoned me to join them and, despite my initial hesitation and self-doubt about my dance moves, they pulled me into a night of fun, dancing, and lots of laughter. From that moment on, whenever I saw them on the dance floor, I wanted to be right there with them, dancing away the night. Their ability to dance to any kind of music, and Tim doing the centipede, always made every moment memorable.

Tim was a thrill-seeker, and during one Rusty event featuring bull riding, he showcased his skill and stayed on for quite a while. I recall that at seminars and trips, Tim and Rita were the life of the group, not because of boastfulness, but because people were drawn to hear their stories. Every moment, whether serious or not, was accompanied by a good laugh. Whether you knew it or not, every encounter was a learning moment, I can't think of anyone who didn't learn from him.

When I started, I learned about the hardworking wives of past presidents who sold merchandise to fund the organization through the Texas Criminal Defense Lawyers Educational Institute (TCDLEI). Tim shared some history with me and introduced me to many and said, "good luck," and gave me his mischievous grin! I got to know many of the wives, including Rita, Lori, Terri, Sharon, Misty, and many others, who were all so welcoming. TCDLA owes these women a great deal for their behind-the-scenes contributions that helped us buy our first and second buildings and make payroll at times. They did whatever was needed including selling baked goods!

Tim and Rita played a crucial role in fostering inclusivity and introducing everyone. Initially intimidated about meeting many of the wives, I found their inclusivity encouraging and admired at how they led by example to build relationships. I am grateful for the bonds that were formed from their grace.

Tim's smile is something I will miss the most. He commanded the group in a rare way, and I regret not learning more from him. His life stories made me smile, and he had a wonderful life surrounded by those who loved him. He was a truly giving person with clear priorities and values that inspire me to do better. To learn more about Tim, listen to his interview on our website as a TCDLA Past President and Hall of Fame recipient.

Unfortunately, Tim wasn't the only one we lost at the beginning of the year. Rachel Ethridge from Lubbock, an emerging attorney, left a lasting impact on everyone she met through our programs and as a giving, passionate criminal defense lawyer. The support shown by our community and the Lubbock Criminal Defense Bar for her and her family was heartwarming. Rachel was taken from us too soon. Life is precious, and I am continually reminded of the overwhelming love we share for one another.

Rachel Ethridge

I'll conclude this article with photos of TCDLA staff engaging in community service. We prepared 31 plates of beef enchiladas, rice, beans, and salad for the Ronald McDonald House. I love our time together and being able to provide for those in need. I encourage each of you to take a moment to do something for no reason at all. Thank you to each of you for being yourselves, loving one another, and stepping up when it matters.

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Editor's Comment

JEEP DARNELL

The Opposite of a Butt Whooping

It always amazes me that people actually read the stuff I write in this magazine. I assume everyone reads articles by those who are actually writing about something intelligent and ignoring mine. Back in our December issue, I wrote a column entitled "A Butt Whooping," in which I waxed poetic about the less than happy side of this job, losing. I was touched and impressed by the outpouring of comments I received on that column. More than one of y'all texted or emailed to let me know that you, too, felt the gut punch on occasion. I also heard from some judges that my article was too sad, and I needed to make sure I wrote about something happy next time.

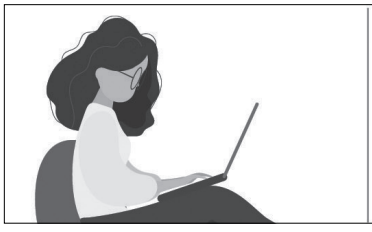
Well, here is my best attempt. I have two things to discuss: baseball and the Court of Criminal Appeals. I may have just lost many of the readers by joining one of those topics with the word "happy." However, for those of you who are still with me, I am happy to announce that as much as it sucked losing in the trial, nothing brings me back to life like the CCA denying the State's PDR on a murder conviction that we were able to reverse at the 8th Court of Appeals and granting our PDR on an injury to a child conviction all within a matter of a few months. Much like is said in Job 1:21 ("The Lord gives, and the Lord takes away"), Justice can be quite the evil lady who kicks us in the butt one second and then reminds us why we do this job the next.

As for the other topic, if you have ever been among the poor unfortunate souls to happen to read my column, you know my love of baseball, and baseball is back. Pitchers and catchers are less than a month away from reporting to spring training. As of the time I am writing this, college baseball has begun, and both my sons start their respective seasons in three days. It's still cold as can be on most days, but even Punxsutawney Phil is ready for baseball, as he just forecasted an early spring. I can hear John Fogerty playing in my head ("Put Me In Coach"), and I know the sweet sounds and smells of grass, dirt, metal and wood bats, and leather balls are just within reach. (Think Shoeless Joe Jackson in Field of Dreams, "Man, I did love this game. I'd have played for food money. It was the game... The sounds, the smells. Did you ever hold a ball or a glove to your face?").

Yeah, this job sucks really bad sometimes. But, after we take my advice from December and take stock of what we did wrong when we lost, we have to pat ourselves on the back for what we did right, and we have to make sure that we always find time to enjoy the finer things in life . . . like baseball. Because in the words of the immortal Terence Mann (I mean c'mon, you can't have too many Field of Dreams quotes), "This field, this game: it's a part of our past, Ray. It reminds us of all that once was good, and it could be again."

Be safe,

Jeep Darnell



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The Federal Corner

BROCK BENJAMIN

Zero Point Offender and Status Points Retroactivity

This year, the Sentencing Commission, with regard to Amendment 821, promulgated the notion that imprisonment for a longer time does not lead to better outcomes. The National Institute of Justice acknowledged this in 2016's article, "Five Things About Deterrence," when referencing Daniel S. Nagin's essay, "Deterrence in the Twenty-First Century."[1] One of the Five Things, thing two, is "Sending an individual convicted of a crime to prison isn't a very effective way to deter crime."[2] The United States Sentencing Commission this year took that route, and for the first time it provided language stating that if a person is in Zone A or B of the sentencing table and gets a § 4C1.1 reduction, "a sentence of other than a sentence of imprisonment… is generally appropriate."[3]

This is strong wording from a Commission whose policy in the very same §5C1.1 states, "If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term." §5C1.1. As practitioners will recognize, Zone A is where clients see probation, and practitioners see "convince Judge to let my guy stay out." (Insert "A"- all areas listed as Zone A are easiest to identify as 0-6 decreasing from Offense Level 8 towards Category VI Level 1 offenders).

SENTENCING TABLE
(in months of imprisonment)

		Criminal History Category (Criminal History Points)					
	Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41

The Commission's march toward this past Novembers' Zero Point Offender and Status Point retroactivity can be

1 *See* NIJ page **https://nij.ojp.gov/topics/articles/five-things-about-deterrence** citing to Nagin, Daniel S., "Deterrence in the Twenty-First Century," in Crime and Justice in America: 1975-2025, ed. M. Tonry, Chicago, Ill.: University of Chicago Press, 2013: 199-264. Last visited 12/9/2023.

2 *Id.*

3 §5C1.1 app.n 10(A).

seen as having started on April 10, 2014, when the Commission voted to reduce the applicable sentencing guideline range for drug offenses.[4] This amendment was referred to as "Drugs Minus Two Amendment." What made this more of a change was that on July 18, 2014, the Commission unanimously voted to give a "retroactive effect to the Drugs Minus Two Amendment thereby allowing eligible offenders serving a previously imposed term of Imprisonment to file a motion under 18 U.S.C. § 3582(c)(2) for a sentence reduction."[5] While the Commission's materials refer to this as the third significant reduction in drug penalties, it was in reality for most the first. The other two reductions had been focused only on crack cocaine. In July 2020 the Commission published Retroactivity and Recidivism; The Drugs Minus Two Amendment was the basis of a study.[6] The study had two groups: one group that was not affected by the Amendment and one that was. There was ultimately no statistical difference in recidivism rates even though the group that received the benefit of the study received 37 fewer months of imprisonment than their original sentence on average.[7]

This brings the Commission to this year's changes- the first true modification of the sentencing table and the elimination of one of the most applied issues in the undersigned's experience.[8] Both of the adjustments are an attempt to follow on the findings of the Drugs Minus Two study briefly mentioned above. Each is explained further below.

I. Zero Point Offenders-

The Sentencing Table has remained the same since it was first introduced in 1985. Practitioners always hear from individual clients or moms, but this is my first arrest. Surprisingly, that was never well reflected in the original Criminal History Categories. These are the columns of the Sentencing Table. (Insert "A"). The first Column I (0 or 1) was the same for an individual who had never been arrested as well as the individual who had been arrested for a DWI, Family Violence, assault, or another misdemeanor, and had received either deferred probation or a jail sentence under fifty-nine days. The

4 https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf. page 1.

5 *Id.*

6 *Id.*

7 *Id.* At 11.

8 The Status points affect many people. The Author has not found a good statistic, but they affect a great number of individuals.

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first criminal history category grouped together these individuals with individuals with no or "zero" criminal history points. This year, the Commission made several changes regarding this. First, while not explicitly changing the Sentencing Table, the Commission created a new section of the guidelines §4C1.1- Adjustment for Certain Zero Point Offenders. This section applies to most of our clients. It does have carve outs that the Commission chose for presumably policy reasons. The list of exclusions is not surprising apart from number (7).

1. the defendant has not received any criminal history points;
2. the defendant has not received an adjustment for terrorism (covered by § 3A1.4);
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 offense of conviction is not a sex offense;
6. the defendant did not personally cause substantial financial hardship (to be determined independently of the application of § 2B1.1(b)(c));
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 offense of conviction is not an offense involving individual rights (covered by § 2H1.1);
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.

If an individual meets the above criteria, the court is instructed to decrease the offense level determined under Chapters Two and Three by two levels. Two levels on the Guidelines is a 25% reduction, which is significant. However, it also cuts out those individuals who used to receive the benefit of category I criminal history.

II. Status Points-

The criminal history calculations in §4A1.1 have been modified and reordered. Previously §4A1.1(d) instructed to- "Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status." This portion has been modified, it is now in part (e) and instructs to add one point only if the client receives 7 or more points. This is a huge change as it does not add any points for the majority of individuals who have a misdemeanor or other history. The application notes state that this change is to "minimize problems with imperfect measures of past crime seriousness."[9]

III. Retroactivity-

Both of the above provisions are being applied retroactively. However, the Commission states that Amendment 821 "shall not be ordered unless the effective date of the court's order is February 1, 2024." The courts can impose this change as long as it does not become effective before that date. At least one El Paso Division Judge has started proceeding with the reductions. The Federal Public Defender will be appointed much like with the Drugs Minus Two prior retroactive adjustment. Clients can retain counsel and if the client is "not financially eligible for appointment or presents a conflict for the FPD are two other categories of clients that are not eligible for the FPD to handle automatically." It appears that this will be handled by way of a simple motion like the prior retroactive adjustment. Any attorney wishing to handle one for a client would simply have to enter on the client's behalf, contact the United States Probation office, and review the criminal history for one of the two qualifying reductions. Some of these reductions may be small and some could be quite large for individuals whose guidelines were much higher. Regardless, the starting point will be the Pre-Sentence Report and its review to confirm that the client is eligible. It is believed that the Commission will be identifying and sending a list to the local FPD offices of individuals that may qualify. That office would also be a good place to begin with for the client's benefit.

9 §4A1.1 app. n.5.

Brock Benjamin *is Board Certified in Criminal Law by the State Bar of Texas and has an office and associate in El Paso. They handle Texas, New Mexico state and federal cases. Brock is obsessed with finding fun and interesting cases to try. Trials are what keeps the blood alive. That and flying to Court! If you find something that would be worth litigating please feel free to reach out to 915-412-5858 or brock@brockmorganbenjamin.com and we can put the State in its place!*

Beyond the City Limits

CECELIA MORIN

Rural Committee Member

Advice for New Solo Practitioners in Rural Texas

I was licensed in October, 2020, in the middle of a global pandemic. At the time, and throughout law school, I had always thought I was going to be a prosecutor. However, in the middle of the pandemic, my post bar position with a DA's office was cancelled and many offices froze hiring. So, I started taking court appointments - first working in another attorney's office and later on with my own solo firm.

During the beginning months of my practice I took a case to trial, second chaired two others, argued a suppression hearing, and represented many clients during that time. I practiced in Wise, Jack, and Hood Counties; rural counties surrounding the Fort Worth area. My practice was busy but could also be lonely and isolating. Since court was weekly or monthly in these jurisdictions, there were many days where I was alone in my office all day.

While I enjoyed the freedom of solo practice, for my own sake I knew that I needed to look for a different job. When the opportunity to join the Abilene Office of the Concho Valley Public Defender's Office arose, I couldn't wait to start.

My experience at the Concho Valley Public Defender's Office has been unique in that we are opening the Abilene Office. We began taking cases in July of 2023 and have hit the ground running. And for myself, the opportunity to bounce ideas off of my colleagues has only made me better at the practice of law.

In the halls one day after court, a colleague and I were talking to a local attorney. This attorney expressed his belief that our office was good for holding the other side's feet to the fire. We had the time and the resources to be able to thoroughly argue suppression issues and hold the State to their burden.

This caused me to reflect upon the suppression hearing I had argued while I was in private practice. Since it was my first ever suppression hearing, I put many hours into preparing. Hours for which I would ultimately be paid very little since this was a court appointed case. Much of my knowledge and experience in private practice came at the expense of my own time and money.

I knew that for my own sake, I needed to get out of private practice and into an office. But for those of you who are newly minted solo practioners in rural areas, here is some advice:

1. Join local Bars and go to meetings. While you'll most often see your fellow attorneys in court, joining your local bar and going to the meetings will allow you to get to know them better. This networking will help you later when you know exactly who to go to in order to answer your question. Additionally, there will often be CLE presentations where you can get CLE hours.
2. Join the Rural Practices Committee. This committee meets regularly via Zoom and discusses all issues pertaining to rural practice in Texas. TCDLA also has a ListServ for the Rural Practices Committee you can join. It can be helpful to hear what other attorneys are experiencing across the State and the advice they receive in return. This also provides another outlet for you to meet and learn from other, more experienced attorneys.
3. Find a colleague you can work with. Find someone who practices in the same jurisdiction as you, who you can work with and who can help you. This help can include listening to your case ideas, giving your advice on your case strategy, helping you with research or investigation, appearing for you when you are unable to appear, and/or even agreeing to second chair each other's trials for the experience. Thank you to Jeff Shearer for all the cases he helped me with.
4. Take advantage of opportunities. One of the biggest opportunities I've had has been to be a part of the Future Indigent Defense Leader's Program. This

program, sponsored by Gideon's Promise, TCDLA, TIDC, and the Harris County PDO, has been so helpful in learning how to be client centered, preparing for trial, and practicing law. Every six months my class convenes for a weekend of learning (and fun). While in private practice, these weekends always reenergized me and allowed me to be a better attorney.

5. Always offer to second chair. During my time in private practice, I was able to sit second chair for two trials. This experience was well worth it. I was first able to second chair a case only a month before I was taking my own case to trial. Being able to go through the process so recently really helped alleviate some of the nerves I felt before my first trial. The other trial I second chaired was an intoxication manslaughter case and was my first felony trial. It was a weeklong trial where I learned so many helpful tips on trying serious cases. Thank you to Jon McCurley and Taylor Fergusen for letting me second chair their trials.

Hopefully this can help solo practitioners who feel isolated or feel that they are missing something in their practice of law. Practicing law is already difficult, but practicing in a vacuum makes it more difficult. Expanding your professional network - giving you access to more resources and other's resources - helps you be a better attorney and can improve your mindset.

Cecelia L. Morin *has been at the Abilene Office of the Concho Valley Public Defender's Office since April 2023. Before that she graduated from Texas A&M University School of Law in 2020, then worked for another attorney before starting her own criminal defense firm. She is happily married to Javier Rayo, who has always been supportive and encouraging. They have three cats together: Persephone, Nefertari, and Torbjorn. She can be reached at cmorin@cvpdo.org or 325-229-4634.*

State Bar of Texas Rusty Duncan Scholarship Opportunities

The Criminal Justice Section of the SBOT has allocated monies for scholarships for Rusty Duncan tuition (at the early-bird rate) and up to an additional $750 travel and accommodations expense stipend. The Scholarships may also be used to attend the SBOT Advanced Criminal Law seminar.

The Requirements:

1. Request an application at 2024 Criminal Justice Section Scholarship Application tab on the Criminal Justice Section website.
2. Applicants who have practiced 5 years or less will be given preference.
3. Applicants may apply for both seminars, but only one scholarship per applicant will be awarded, regardless of the number of seminars applied to.
4. The SBOT Advanced Criminal Law scholarship may be used to attend the "boot camp" offered as part of the Advanced Criminal Law seminar.
5. Applicants must be a member of the Criminal Justice Section of the SBOT, or, in the alternative, may join when they apply for the scholarship.

Deadline for applications is Monday, April 1, 2024, and recipients will be notified by Monday, May 20, 2024. You can email questions to Dwight McDonald at Dwight.Mcdonald@ttu.edu.

Texas Criminal Defense Lawyers Association

3.09 VOTE

The importance of voting in favor of 3.09 cannot be overstated. Even if the current version falls short of our ideal, abstaining from voting April 1-30, 2024 could lead to its failure, which would be far worse than having no version in place at all. For more information, read Mike Ware's article over *Proposed New Disciplinary Rules for Texas Prosecutors* in the December 2023 issue of the *Voice* at tcdla.com or scan the QR Code below.

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

Ethics and the Law

BOB GILL
TCDLA Board Member

A Potential Ethics Trap

There is a potential trap in the Texas Disciplinary Rules of Professional Conduct for all lawyers who practice criminal law. This writer became aware of the issue when called upon to assist a fellow criminal law practitioner in answering what began as a typical grievance received from a court-appointed client.

In this matter, an investigator for the State Bar of Texas had written the lawyer a letter outlining the grievance as submitted by the client. However, the letter was later supplemented to allege separate violations of two disciplinary rules that I had never seen employed in the context of a typical criminal grievance. The two supplemental allegations were made by the State Bar investigator and had not been alleged by the client.

The client's original grievance had claimed the usual: that the lawyer was not adequately representing the client because he allegedly did not communicate with the client frequently enough and had neglected a legal matter entrusted to the lawyer (translation: the lawyer had not yet been able to get the client the deal he wanted).

Not long after the grievance was submitted, the lawyer was able to get the client the deal that the client wanted. They then went to court and consummated the plea bargain. The plea proceeding was conducted on the record in a district court. During the plea proceeding, the lawyer asked the client about the grievance issue in the same fashion I have seen done in court many times before. The lawyer asked the client questions on the record to show that the client had filed a grievance, that the client was now satisfied with the lawyer's performance, that the client no longer wanted to pursue the grievance, and that all of their alleged differences were now amicably settled. The lawyer walked out of the courtroom that day believing that obtaining the client a deal that satisfied the client would end the grievance matter. The State Bar investigator obtained a copy of the plea transcript.

In addition to the allegations made by the client in the grievance, the investigator alleged violations of *Texas Disciplinary Rules of Professional Conduct* 4.03 and 1.05. Rule 4.03 outlines a lawyer's responsibilities in dealing with an unrepresented person during the lawyer's representation of the client. The Rule says that, in such a situation "a lawyer shall not state or imply that the lawyer is disinterested." The Rule goes on to say that when a "lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." The State Bar investigator's theory against the lawyer was that once the client filed a grievance, a separate legal action was instigated. On this separate legal action, the client was unrepresented and thus the lawyer violated Rule 4.03 by dealing with the client as if he represented the client on the grievance. Counseling with the client and then questioning the client about the grievance on the record in the eyes of the investigator was a violation of Rule 4.03. The State Bar investigator cited this rule in calling upon the lawyer to defend his counseling with and questioning of the client at the plea proceeding on the subject of the grievance.

The investigator also stated in the letter that the lawyer improperly used confidential information in his defense of himself in the grievance matter under Rule 1.05(b)(4). The investigator alleged that by using the favorable plea bargain agreement and their discussions regarding the agreement as leverage against the client's grievance during the plea proceeding, the lawyer both improperly used and improperly revealed confidential information. The investigator also alleged that the lawyer had no authority to reveal this confidential information and therefore violated Rule 1.05(c). The investigator's theory was that since it was the criminal case, and not the grievance matter that was being litigated at the time of the plea proceeding, that the lawyer had no consent to reveal confidential attorney / client communications in defense of himself. This is probably a hyper technical reading of the rules but illustrates that the State Bar is willing to stretch the rules in order to prosecute a complaint against a criminal defense attorney. As such, it is a landmine for any criminal defense attorney against whom a grievance has been filed to have on the radar.

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The matter ended on a good note for the attorney. The grievance was placed on the summary disposition docket and subsequently dismissed. However, in the meantime, the lawyer said that the matter cost him dearly and he retired shortly thereafter.

With this particular attorney, these allegations were an isolated matter. However, the State Bar could pursue similar allegations more zealously if made against a lawyer who either had multiple instances of this conduct or against a lawyer who had previously had a grievance that involved these allegations.

In a perfect world, the lawyer should not deal with the client while a grievance makes its way through the State Bar system. However, in this imperfect world this will not always be possible where the criminal case remains ongoing. It may be a separate violation of the Rules for the lawyer to receive a favorable plea bargain offer from the prosecutor and fail to immediately convey that offer to the client. In cases that are ongoing in the criminal system while a grievance is pending, the lawyer should probably communicate in writing to the client and make it clear that the lawyer does not represent the client on the grievance matter. The lawyer should then avoid all reference to the grievance matter while discussing the criminal case with the client. Be aware that there may be another preferable solution in another case depending on the facts of that particular case.

Bob Gill *is an owner of the law firm of Gill and Brissette (not a partnership) in Fort Worth. He is a former state district judge and senior prosecutor with the Tarrant County Criminal District Attorney's Office. Gill has been board-certified in criminal law since 1988. He can be reached at bob@gillbrissette.com or 817-803-6918.*

Meeting Tim Evans

TODD GREENWOOD

I was in law school, around 2007 or 2008, and was back home for the summer to clerk for a judge. An experienced trial attorney who knew Tim Evans and had worked with him on a couple of cases asked if I wanted to meet Tim.

Of course I wanted to meet the legendary trial lawyer. We drove down to Fort Worth one afternoon that summer. We were shown into Tim's office where we waited while he finished a consultation. I remember studying the framed front-page Star-Telegram clippings on the walls. Eventually, the man emerged from his office, and my initial impression was something like: "Well, he isn't very big, is he?" But also, wondering what put this nondescript man in a category with the likes of Percy Forman and Gerry Spence, both pretty big guys who were known to boom, thunder, and command a room with their presence alone? Richard "Racehorse" Haynes was not a big guy, but he was an ex-Marine. Tim came across as relaxed, even mild.

Tim walked us over to a nearby restaurant for steak. He and the attorney who brought me talked old cases the way old hand trial attorneys will. At some point, Tim turned me and asked me a couple of questions. I don't remember the questions or my answers. I know I was doing my best to make a good impression and not say anything stupid. (Wait for it, though.)

The attorney I was with got Tim talking about voir dire. This attorney was trying to impress upon me that winning trials was winning in voir dire. I probably wasn't getting it at the time.

I was enthusiastic about something that Tim said and cut in and asked a question. I might have even disagreed with a point, thinking this was lawyerly. I don't recall the 'question' or exactly what Tim had been saying. However, I do remember something in Tim's manner changing without any discernible movement or obvious change in his expression. His eyes shifted to the space between where he and I sat.

I've never seen so little in the way of nonverbal communication convey so much or so immediately sensed what is known in the military as 'command presence.' It straightened me up, shut me up, and prepared me to listen in silence; with rapt attention to the rest of what he had to say, without interruption.

I later met Tim again at the Trial College in Huntsville. That was a very different experience. He was far more approachable and gregarious - different setting, different purpose. But I never forgot that summer afternoon, and the realization that there was so much I did not know and would need to learn that I was not going to get in law school.

Thank you for Tim Evans.

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.*

MY MEMORIES OF A LEGEND: TIM EVANS

MARK G. DANIEL

To say that Tim Evans was special is an understatement. He was that and much, much more.

Tim passed away on December 23, 2023. He came in second place to his almost ten (10) year battle with Alzheimer's. That may be Tim's only second place finish.

I had the privilege of practicing criminal defense in the same office with Tim for 36 years. I had the undeniable blessing of working with him in countless criminal cases and trials. His judgment, wisdom, calm demeanor, work ethic, meticulous preparation, moral character and ability to communicate on behalf of a client were all second to none. Tim enriched my life and my professional career in ways I can never begin to describe.

So much can be said about Tim's professional accomplishments. His serving as President of TCDLA in 1991 stands out. Him being inducted into the TCDLA Hall of Fame in 2007 is certainly worthy of mention. His being the recipient of the Tarrant County Bar Association's prestigious Blackstone Award in 2011 brought well deserved local recognition. His being inducted into the American College of Trial Lawyers was an appropriate honor. His eleven (11) consecutive jury trial acquittals in complex federal criminal cases is absolutely worthy of accolade (I know exactly what you want to ask. What lawyer could possibly pull that off? Answer: Tim Evans).

Yes, we have heard of Tim's courtroom victories, his blue-ribbon clientele, his awards and his countless professional accomplishments. Curiously, however, we never once heard about those things from Tim himself. Tim never boasted about any of his personal or professional accomplishments. That is because this remarkable lawyer possessed genuine humility. Tim's personal humility was at the core of his very existence.

One must drill deep under the surface of all these awards and accomplishments to find the passion of this great lawyer and learn what truly motivated him. Tim despised bullies, misuse of government power, and actions that were unfair to the little guy. In 1993, the ATF invaded and attacked the Branch Davidian compound outside of Waco. Fifty-one (51) days later, the government set the Davidian compound ablaze killing seventy-five (75) men, women and children. The government's solution was to charge twelve Branch Davidians with murder and federal crimes, including Tim's future client, British citizen Norman Allison. Tim watched as the unfairness and injustices unfolded. I remember him saying one day, "I have just got to get involved in this case." And, so he did. He took the case pro bono and began his representation of Norman Allison. He prepared for more than a year and then spent seven (7) weeks in trial in San Antonio until he and Mr. Allison heard the words "Not Guilty." He then watched the British consul immediately shuttle his client safely out of the United States. Yes, Tim's client fled from our United States of America.

Tim later traveled to Washington D.C. and spoke before Congress about what had occurred and his profound concerns about the government and its subversion of the truth throughout this tragedy. He did

all of this with no compensation. He simply wanted to be part of something bigger than himself where he could make a difference and right a tragic wrong. That was Tim Evans at his best.

While it is easy to reminisce on the quality of Tim Evans as a criminal trial lawyer, his commitment and passion to improve the profession and the field of criminal trial practice was truly one of his greatest attributes. This is underscored by his leadership in the trial college that now bears his name: The Tim Evans Criminal Trial College. Each Spring, 60-70 young lawyers from all over Texas journey to the Sam Houston State University campus in Huntsville for a weeklong intense criminal trial training. Students practice, learn and hone their skills in jury selection, direct examination, cross examination, and jury argument. There was no lawyer in Texas busier and more in demand than Tim Evans, but he made this program a commitment and devoted countless hours to ensuring its quality.

Tim took over the Trial College in 1987 and immediately worked to upgrade every facet. He sought to raise up a new generation of committed and proficient criminal defense lawyers on his native Texas soil. Tim unflinchingly decided there would be no prosecutors included on the faculty. He spent the entire week in Huntsville each Spring when he had very little time to spare from a most demanding criminal trial practice. He scrutinized the faculty that he invited to ensure that they were providing instruction to students at a level that met his standard of excellence. He personally circulated throughout the classrooms to make certain that his standard of quality was upheld. He embraced the young lawyers and made a point to have dinner with several of the students each evening to encourage them and learn about their challenges. More than 1,800 lawyers came through this program during Tim's tenure. Each of these lawyers were enriched by the experience and Tim's commitment left our criminal defense bar in Texas better and better and better.

I miss Tim Evans. I miss his friendship. I miss his smile. I miss his wisdom. I miss his competence. I miss his generosity in providing counsel to other criminal defense practitioners. Lastly, I miss his passion to leave criminal defense practice better than when he found it. That he did so very well. Mission accomplished!

Tim, you were a lawyer's lawyer. You were a man's man. Equally important, you were a faithful husband, a wonderful father and the very best grandfather ever.

Tim Evans, may God bless you. You walked humbly but remarkably. You were more than special!

Mark G. Daniel *Member | Daniel, Moore, Evans, Biggs, Decker & Smid*

Mark G. Daniel practices in Fort Worth. Mr. Daniel is board certified in criminal law by the Texas Board of Legal Specialization and the National Board of Trial Advocacy. He is past president of Texas Criminal Defense Lawyers Association (TCDLA). He was inducted into the TCDLA Hall of Fame in 2021 and was selected as Percy Foreman Lawyer of the Year by TCDLA in 2009. He has been selected by Texas Monthly magazine as one of the top 100 lawyers in Texas (all categories) for many years. Mr. Daniel formerly served as an assistant district attorney for the Tarrant County District Attorney's Office. Mr. Daniel earned his J.D. from St. Mary's University School of Law and his B.B.A. from The University of Texas. He presently serves on the Texas Forensic Science Commission. He is a frequent author and lecturer throughout Texas on criminal law topics. He can be reached by phone at 817-332-3822.

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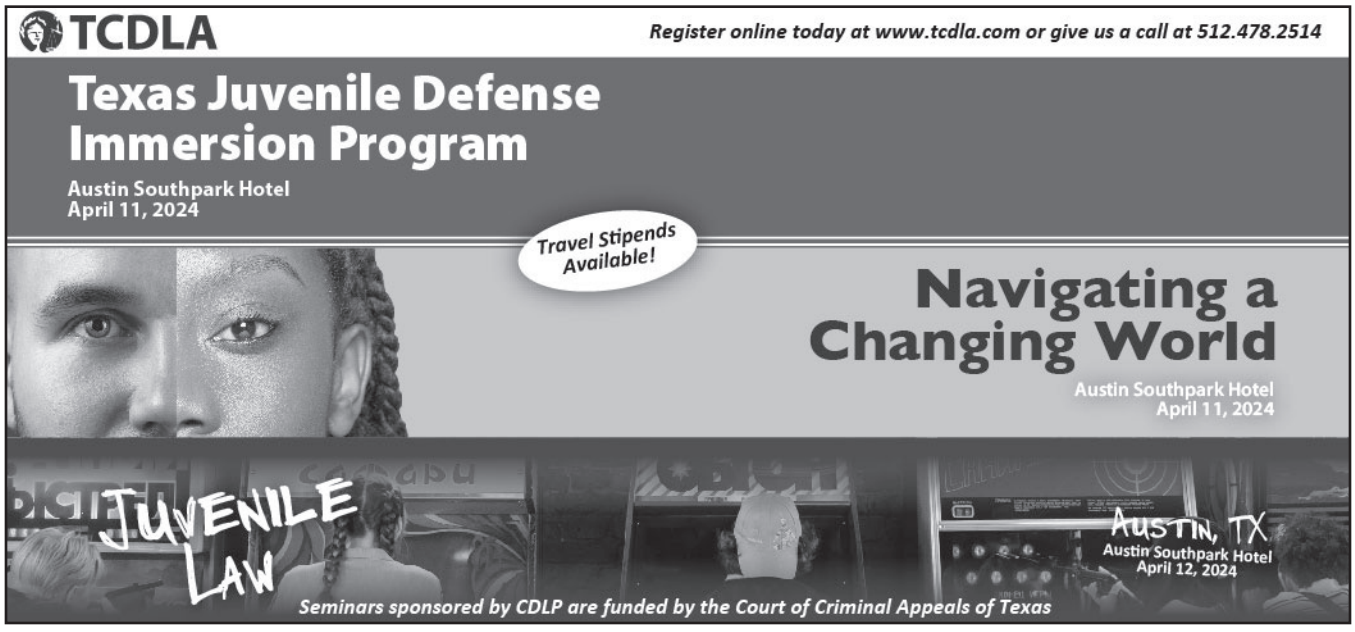


Child Witnesses

CLIFFORD DUKE

Article 2 of 3 in Series

From the mouth of babes can be one of the most terrifying situations to be in for a defense attorney. Attempting to cross examine a child that just broke down on the stand - hugging their lovey talking about their horrific experiences with your client - can seem almost impossible. Having a strong understanding of the law governing child witnesses and testimony can give you a foundation to start or potentially keep emotional outbursts from becoming an issue from the beginning.

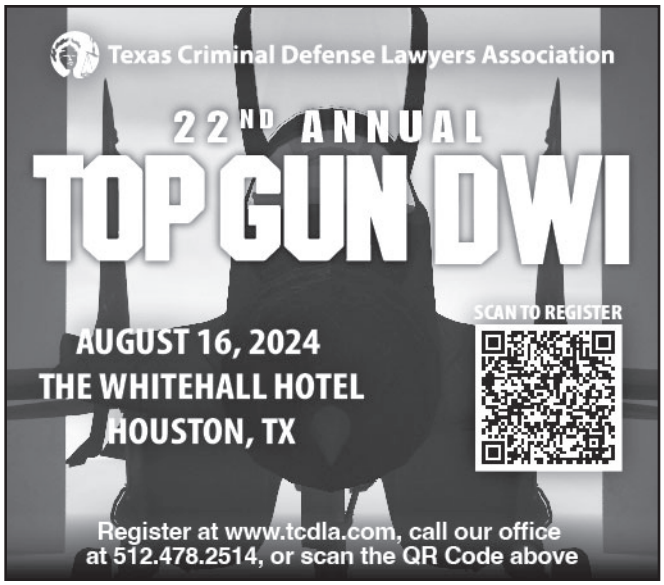
Let us start with a reminder that a witness, including a child witness, is any individual that has personal knowledge of the matter in question. Tex.R.Evid 602 Except for experts, a witnesses' testimony is limited to their direct observations and opinions that are rationally based on their perception and are helpful to understanding the testimony or determining a fact issue." Tex.R.Evid 701; *Osbourn v State*, 92 S.W.3d 531, 535 (Tex. Crim. App. 2002). Every witness is required to give an oath or affirmation to testify truthfully prior to testifying. Tex.R.Evid 603. Every person, unless found to be insane or lacking sufficient intellect, is competent to be a witness. Tex.R.Evid 601.

Remember that just becase a person qualifies as a witness does not mean they are admissible as a witness. "Preliminary questions of the admissibility of evidence are within the province of the trial court. The rules of evidence afford the court broad discretion in the determination of such questions." *McVickers v. State,* 874 S. W. 2d 662, 664 (Tex.Crim.App 1993), distinguished on other grounds by *Granados v. State,* 85 S.W.3d 217 (Tex.Crim.App. 2002). When examining your witnesses make sure to not just ask *can* they testify, but also *should* they testify.

There are several ways that a witness may be excluded. Relevance, prejudice, or lack of disclosure may keep a witness from taking the stand. For a child, their age alone may be a preclusion. There is no precise age below which a child is deemed incompetent to testify; each case must be determined on its own merits. *Fields v. State*, 500 S.W.2d 500, 502 (Tex. Crim. App. 1973); *See Clark v. State*, 659 S.W.2d 53, 54-55 (Tex. App. Houston [14th Dist.] 1983, no pet.) (three-year-old found competent to testify) *but see Rhea v. State*, 705 S.W.2d 165, 170 (Tex. App. Texarkana 1985, pet. ref.) (three-year-old found incompetent due to inability to relate transaction that was subject of questions).

Whether a child witness is competent to testify is an issue entrusted to the discretion of the trial judge. *Broussard v. State*, 910 S.W.2d 952, 960 (Tex. Crim. App. 1995); *Fields v. State*, 500 S.W.2d 500, 502 (Tex. Crim. App. 1973); *Hollinger v. State*, 911 S.W.2d 35, 38 (Tex. App. Tyler 1995, pet. ref.). The Texas Rules of Evidence authorize a trial judge to examine children and others who may not possess sufficient intellect to determine if they are competent to testify. *See* Tex.R. Evid. 601 (a)(2).

A child's competency is judged by essentially the same standards that apply to any other witness, specifically (1) the ability to observe the events in question at the time of the occurrence, (2) the capacity to recollect the events, and (3) the capacity to narrate the events. *Baldit v. State*, 522 S.W.3d 753, 761 (Tex.App. – Houston [1st Dist.] 2017, no pet.) *citing Gilley v. State*, 418 S.W.3d 114, 120 (Tex. Crim.App. 2014). Once raised, the court must make an independent ruling on competency to testify. *Gilley*, at 120 Tex.Crim.App. 2014). Failure to raise the issue of a witness's competency waives the issue for appellate review. *See DeLos Santos v. State*, 2219 S.W.3d 71, 80 (Tex. App.



– San Antonio 2006, no pet.); *Matson v. State*, 819 S.W.2d 839, 852 (Tex.Crim.App. 1991). The burden is upon the challenging party to establish incompetency. *Gilly,* at 120.

Do not take it on fact that a child, whatever age, is competent to testify. Separations in time, experience, and intervening people who may have distorted or influenced that testimony may keep the child witness from ever taking the stand.

Accommodations for Child Witnesses

If they do testify, child witnesses have additional protections on requirements to testify in specific cases. The Code of Criminal Procedure lays out specific requirements to protect children and prevent trauma from having to testify. This includes the judge administering the oath in a way the child can understand, limiting the time and duration of testimony, or set other limitations "that it finds just and appropriate, considering the interests of the child, the rights of the defendant, and any other relevant factors" Tex.Code.Crim.Proc. §38.074. A child may be allowed a toy, item, or even support person present during their testimony if the Court makes a finding by preponderance of the evidence that the child cannot reliably testify without it. *Id*.

Children may even be allowed to testify outside of the courtroom. Texas Code of Criminal Procedure 38.071 provides a litany of charges, assaultive and sexual in nature, that trigger the ability of special accommodations for child testimony. For any of these charges, a witness under the age of 13, if the court deems them 'unavailable', may be allowed to testify through closed circuit video or pre-recorded testimony away from the courtroom and Defendant or in a pre-recorded fashion to be played at trial. Tex.Code.Crim.Proc. §38.071.

In making the determination of the child's inability to testify in open court in front of the accused, the court must consider "the relationship of the defendant to the child, the character and duration of the alleged offense, the age, maturity, and emotional stability of the child, and the time elapsed since the alleged offense." Tex.Code.Crim.Proc. §38.071, Sec. 8. The court must also make a finding that the inability is due to current emotional or physical causes or a risk of undue psychological or physical harm by being forced to be part of the proceeding. *Id.*

If a child is allowed to testify outside of court and the presence of the accused, there still must be procedure that "ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation." *Coronado v. State*, 351 S.W.3d 315, 330 (Tex.Crim.App. 2011) *citing Maryland v. Craig,* 497 U.S. 836, 857 (1990). The Code of Criminal Procedure lays out base requirements including being placed under oath, being contemporaneously cross examined by counsel for the accused, and the accused being able to see the testimony and confer with their counsel during cross-examination. Tex.Code.Crim. Proc. §38.071, Sec. 3.

Additionally, statements made by the child and recorded prior to the filling of a complaint of indictment may be admissible. These types of statements are generally done through a forensic interview with a child advocate. The statute requires that the statement address some identity or factual account of the allegations and are "fully and fairly inquired into in a detached manner by a neutral individual experienced in child abuse cases that seeks to find the truth of the matter." Tex.Code.Crim.Proc. §38.071 Sec 2(a).

Admission of pre-indictment or complaint statements are only allowable if both the child and the interviewer in question are available to testify and are subject to cross examination. Tex.Code.Crim.Proc. §38.071. "Cross-examination means personal, live, adversarial questioning in a formal setting. It cannot have one meaning for some witnesses and another meaning for others." *Coronado* at 329 (Tex.Crim.App 2011).

Outcry Witnesses

Sometimes it is not the child you have to worry about, but rather someone the child outcried to will testify. While hearsay testimony is not generally admissible, Texas Code of Criminal Procedure Article 38.072 makes an exception in sexual and assaultive offenses committed against a child fourteen years or younger, or a person with a disability. Statements that were made by the alleged child victim to the first person, eighteen years of age or older, other than the defendant, about the offense will not be inadmissible under hearsay. Tex.Code.Crim.Proc. §38.072.

"In order for this hearsay exception to apply to such a statement, on or before the fourteenth day before

the proceedings begin, the party intending to offer the statement must notify the adverse party of its intention to do so…" *Josey v. State*, 97 S.W.3d 687, 692 (Tex.App. – Texarkana 2003, *no pet.*). The notice must also give the contact information for the individual and a summary of the intended testimony. *Id.* Failure to object to a lack of disclosure waives any appellate error. *Id. citing Rosas v. State*, 76 S.W.2d 771, 776-77 (Tex.App.-Houston [1st Dist.] 2002, no pet. h).

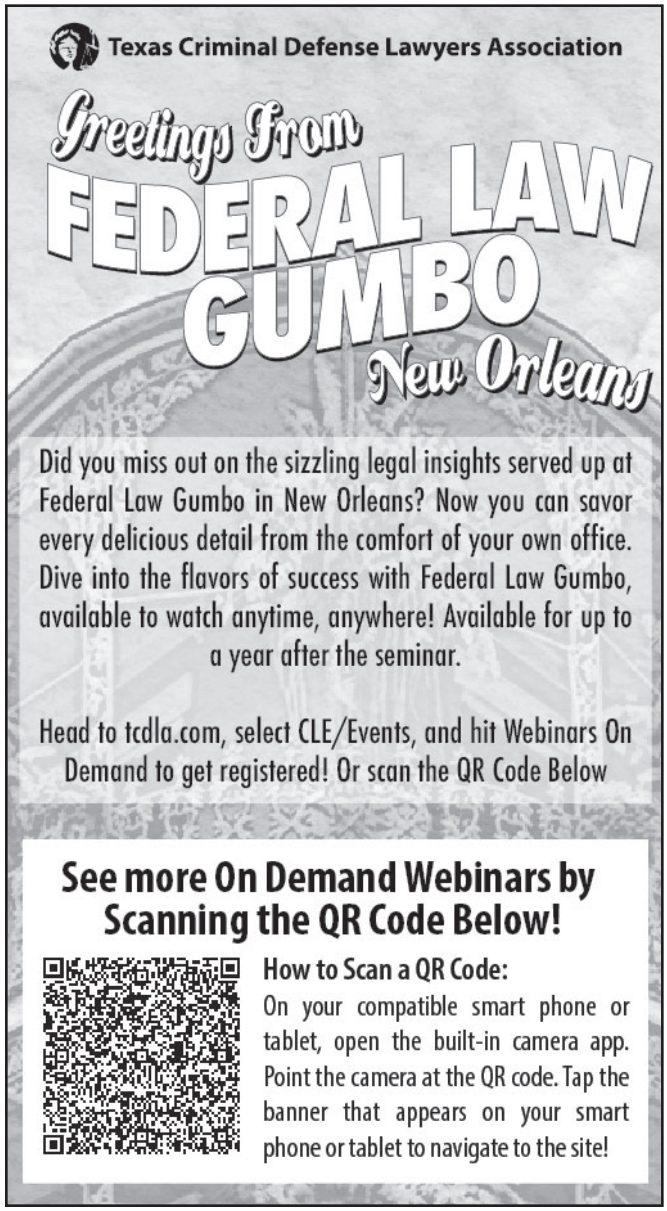
To qualify as an outcry statement, the court must find that the statement is reliable based on the time, content, and circumstance of the statement. Tex.Code.Crim. Proc. §38.072(2)(b). The child or person with disability must be available to testify. *Id.*

It is possible to end up with multiple outcry witnesses testifying about separate incidents of abuse. *Tear v. State*, 74 S.W.3d 555, 558 (Tex.App. – Dallas 2002, pet. ref'd). "To qualify as a proper outcry statement, the child must have described the alleged offense in some discernible way and must have more than generally insinuated that sexual abuse occurred. *Id. citing Sims v. State*, 12 S.W.3d 499, 500 (Tex.App. – Dallas 1999, pet. ref'd); *see also Garcia v. State*, 729 S.W.2d 88, 91 (Tex.Crim.App. 1990). If you anticipate that you will have an outcry witness or witnesses, file a pre-trial motion for disclosure and have a hearing to determine any appropriate outcry witness, if any.

Child witnesses are probably one of the most daunting prospects of having to challenge in court. However you choose to take them on the stand; soft and sympathetic, strong and challenging; or just bypassing them completely; make sure you're aware of and using the rules at your disposal to control or even exclude those witnesses. The best witness for your client may be the one that never testifies at all.

Read Article 1 of 3 of the series in the January/February 2024 issue of the Voice!

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.*



Cannabis Update 2023

ADAM TISDELL

Cannabis Committee Member

It has been four and a half years since Texas legalized hemp (i.e. cannabis sativa L less than .3% tetrahydrocannabinol by dry weight). Since then, our appellate courts have been silent on some important related issues: In that the smell of cannibis sativa L can be confused for illegal cannabis, it is noteworthy there are no decisions regarding the legality of dog sniffs, and specifically, whether current drug dogs should be retired and replaced by drug dogs that are not trained to smell and alert for cannibis sativa L. Additionally, in that the so called 1% testing for cannabis sativa L. is neither backed by scientific literature nor an accepted testing methodology in the scientific community, it is significant that there are no decisions from our courts regarding the admissibility of the test. So, what do we have? We have a string of bad decisions related to the smell of "marijuana" i.e. smell of cannabis sativa L. However, we do have one opinion out of the Fourth Court of Appeals that seems to be the way of the future for searches based on the smell of cannabis sativa L. This article will break down the string of bad decisions, why they are bad and analyze the Fourth Court's opinion Then, it will briefly talk about some of the good and utterly absurd positions that prosecutors have regarding the smell of cannabis sativa L.

All the bad case law out of the Fifth Court of Appeals started with *Stringer v. State*, 605 S.W.3d 693, 697 (Tex. App.—Houston [1st Dist.] 2020, no pet.). The *Stringer* opinion held, "a strong odor of marijuana from a small enclosed area, like a car, gives a peace officer probable cause to make a warrantless search of both the car and its occupants." The problem with this opinion is that the arrest date (which is not mentioned anywhere in the opinion) was March 16, 2018, prior to the legalization of hemp.

The *Stringer* case is then used by the *Cortez* and *Gonzales* opinions, without any reference to it being a pre-hemp arrest, as some type of support for their opinions. In *Cortez v. State*, No. 05-21-00664-CR, 2022 WL 17817963 (Tex. App.-Dallas Dec. 20, 2022, pet. ref'd) (mem. op., not designated for publication) the court concludes "that the odor of Cannabis sativa L. emanating from Cortez's vehicle gave the officer probable cause to search the vehicle, as well as its occupants." *Id.* at *17. The court's opinion cites directly back to *Stringer* opinion. In *Gonzales v. State*, No. 05-22-01154-CR (Tex. App.-Dallas Oct. 12, 2023), the court concluded that "the odor of cannabis sativa L. emanating from the vehicle in which Gonzales was an occupant gave officers probable cause to search the vehicle as well as the occupants." In support of its conclusion, the court in *Gonzales* cited to both its earlier opinion in *Cortez*, and *Stringer*. Both the *Cortez* and *Gonzales* opinions stand for the proposition that smell of cannabis sativa L is still probable cause without any other evidence.

However, the Fourth Court of Appeals opinion in *Issac v. State*, No. 04-22-0203-CR (Tex. App.-San Antonio Aug. 16, 2023) relied on the court's analysis in *Cortez*, and added to it. The *Issac* opinion concluded "that the odor of

marijuana, as well as its appearance, can at least be part of the totality of the evidence supporting probable cause to investigate." *Id* at *5. The court in *Issac* then goes into a totality of circumstances analysis to decide whether the officer had probable cause. Of note, both the *Issac* and *Gonzales* opinions look at case law on this issue from around the country to come up with their rationale. Unfortunately for the *Gonzales* opinion, they only include cases that stand for the proposition that smell alone is probable cause. The *Issac* opinion looks at those cases, plus three more cases that take the position of the totality of circumstances approach.

As for state prosecutors, they have taken various approaches to this issue of smell of cannabis sativa L. There are several prosecutors in the panhandle that have adopted the totality of the circumstances approach and have reached out to their local law enforcement to let them know smell of cannabis sativa L, alone, is not enough for a search.

There are also numerous prosecutors in the state that have concocted a "hemp requires paperwork approach." The argument goes like this: hemp handlers are required to have a license and the appropriate paperwork and without that paperwork, it is a crime to "handle" hemp.

Of interest on this topic, The State Prosecuting Attorney's Office wrote a pretend 40-page brief on this issue, titled *State of Texas v. Ivan Drago*. https://www.spa.texas.gov/media/1286/tdcaa-states-brief-final.pdf.

The problem with the above argument is that The Texas Agriculture Code, Title 5, Subtitle F, Chapter 122 contains all the rules and regulations for the cultivation, production, handling, and transporting of hemp. These rules are for the hemp businesses and do not talk about consumers anywhere in the text. No hemp companies in this State are required to give end use consumers paperwork for possessing hemp. If that was going to be required, it would have been included in the Texas Agriculture Code Chapter 122.

One final note is that this issue is still unresolved in the State of Texas, but now you can argue that the "smell alone" probable cause is flawed because all the opinions out of Fifth Court of Appeals cite back to a 2018 pre-hemp arrest and 2020 opinion as some sort of authority. Remember to review the arrest dates on all these opinions as it may be purposedly excluded like Stringer's was.

Adam Tisdell *is the founder of Tisdell Law Firm, P.L.L.C. Mr. Tisdell is exclusively devoted to Cannabis Defense and Federal Drug Crimes. He has extensive knowledge of cannabis laws and cannabis testing requirements and holds a Lawyer-Scientist designation with the American Chemical Society. Mr Tisdell has been rated as a Super Lawyer for the previous three years under Cannabis Law.*

Immigration and Assault

KRISTA HARVEY

Crimmigration Committee Member

We know when a client is a noncitizen (not "illegal" or "alien"), there are many other factors that come into play in their case. We should always ask for everyone's immigration status at the beginning of their case and not when we are reviewing admonishments while filling out plea paperwork. Whether they are Legal Permanent Residents, visa holders, or undocumented, each case needs a little extra attention. Unfortunately, there's not a one-size-fits-all approach, but there are a couple general rules for charges like Assault Family Violence.

Immigration law uses their own terms when it comes to "crimmigration" matters. For purposes of this limited article we will stick to the terms involving Assault Family Violence: Crime of Violence ("COV"), Crimes of Domestic Violence ("CODV"), Crimes Involving Moral Turpitude ("CIMT"), and Aggravated Felonies ("Agg Fel"). TPC 22.01 can fit all of those descriptions and none of them.

From the top, a COV is defined as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another."[1] A CODV is defined as a crime of violence committed against a "protected person."[2] Note, an offense can be a CODV even if a finding of family violence is waived by the State in criminal proceedings. There is no formal definition of a CIMT, but it is generally held to be "conduct that shocks the public conscience."[3] Lastly, an Agg Fel is a term of art used to describe a category of offenses carrying particularly harsh immigration consequences for noncitizens convicted of such crimes. As you can probably guess, these charges include things like rape and murder. But, some offenses, like assault, only become an aggravated felony when the potential sentence is one year or more in confinement.[4] To be clear, just because someone is convicted of Aggravated Assault does not mean immigration would be held to be an Agg Fel in immigration proceedings. Without going into the weeds too much, convictions to these types of crimes can affect deportability, inadmissibility, and eligibility for relief if they are placed in removal proceedings, which vary depending on specific immigration status.

For many years, an assault family violence conviction meant certain deportability and/or deportation for all our noncitizen clients. It was effectively an automatic crime of violence and domestic violence, which placed clients into removal proceedings and made some ineligible for relief. Adding a sentence of a year or more meant certain deportation even for permanent residents. This ended with *Borden v. U.S.*, 141 S. Ct. 1817 (2021). Essentially, *Borden* said an offense cannot be a crime of violence if it could have been committed recklessly. This made mens rea a much more important factor; arguably, the most important factor. In practice, any conviction with that magic word "recklessly" cannot be a COV. In immigration proceedings, an offense cannot be one of domestic violence if it is not first a crime of violence. It also cannot be an aggravated felony without being a crime of violence. So, if an offense could be committed recklessly, it is not a crime of violence, crime of domestic violence, or an aggravated felony, regardless of a family violence finding or the sentence. This is a HUGE decision for our noncitizen clients. Things are a little more complicated

1 18 U.S.C. § 16: (a)

2 INA § 237(a)(2)(E)

3 *Medina v. United States*, 259 F.3d 220, 227 (4th Cir. 2001)

4 8 USC § 1101(a)(43)

when it comes to CIMTs.

It's easy to forget about subsections. Plea paperwork is a thick stack of papers and most clients are more concerned with probation conditions and time in custody, but the subsection is the real star when it comes to family violence cases with noncitizens. We always need to check the subsection and mens rea language in the charging instrument and plea/judgment documents. Some counties blindly track statute and include "reckless" as matter of procedure, but some you may have to be more specific in the plea paperwork to get around it.

Depending on your county of practice, it may or may not be feasible to have the prosecutor re-file or re-indict a case to amend or add "recklessly" into the charging instrument. If ever possible, plea to TPC 22.01 (a)(1) Assault.

Cheat sheet:
(a)(1) safest- not COV, not CODV, not CIMT, not Agg Fel
(a)(2) likely COV and CIMT, can be CODV, but not Agg Fel (because potential sentence is less than one year) safe to assume CIMT, but the case law on threat statutes is mixed
(a)(3) not CIMT and not Agg Fel (unless plea is to one year, either probated or time to serve)

DISCLAIMER: As a final note, do not let this article replace an immigration consultation- especially if your client is a DACA Recipient. TPC 22.01 (a)(1), (a)(2), (b)(1), (b)(2)(A), (b)(2)(B), (b-3) and/or anything with family violence finding (other than a class C) are all bars to DACA. Remember you are still bound by *Padilla v. Kentucky* obligations to provide your client will sufficient immigration consequences of a plea. As aforementioned, there is not a one-size-fits-all approach and each case needs a little extra attention. Any time you have a noncitizen client- reach out to an immigration lawyer. If it is a court-appointed client, you may be eligible for a free memo from www.myPadilla.com.

Krista Harvey *started her legal career exclusively in immigration defense removal proceedings, but eventually made her way into criminal defense. She is a former myPadilla immigration consultant, but is now a criminal lawyer with the Wichita County Public Defender's Office. In efforts to have the best of both worlds, she still moonlights with immigration consults while practicing criminal defense full time. She is available at Krista.Harvey@co.wichita.tx.us or 254-913-9248.*

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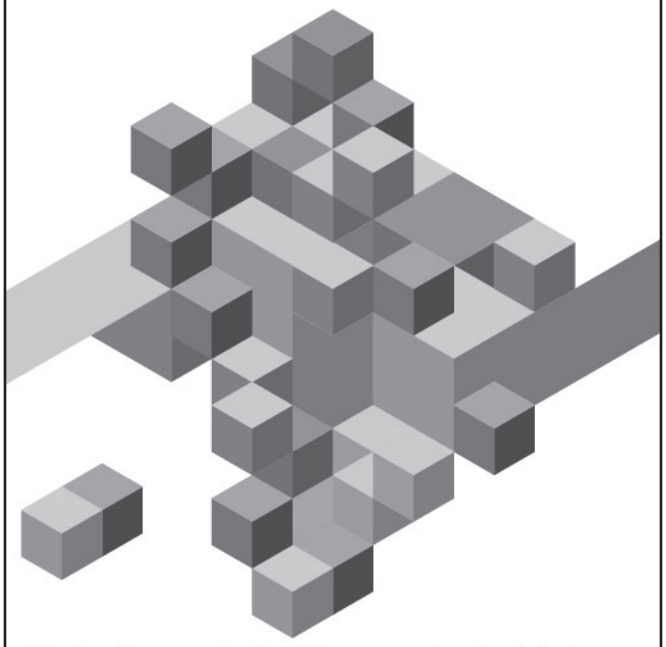

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In the spring of 2020, thanks to our investigator, I learned something new. At the time I was a public defender in Lake Charles, Louisiana, and had just been assigned a second-degree murder case. Second-degree murder is a life without parole offense in Louisiana, so this was a high-stakes matter. After the first meeting with my client, I returned to the office to ask our investigator about a curious statement my client made during our visit. He told me that he acted in self-defense after the decedent walked in on my him having intercourse with a woman who was living with the decedent. The decedent rushed my client, started punching and shoving him, then unholstered his gun, and began pistol whipping my client. During this assault, my client was able to disarm the decedent, take possession of his gun, and, ultimately, fatally shoot him after the decedent ignored multiple warnings to "get away or I'm going to shoot you." My client told me towards the end of his account that all this was filmed in real-time because the woman was a "cam girl."

Call me naïve, but I had been in practice for about a decade then and had never heard that term nor did I fully understand the significance of this information. Our investigator, on the other hand, knew exactly what a cam girl was and quickly found the live stream

of the entire incident on Black media outlets that were unknown to me. After downloading the video, I called up the prosecutor, made an appointment, and showed him irrefutable evidence that my client acted in self-defense. The case was no-billed three weeks after he was arrested.

I thought of this anecdote as I was reading, "Evaluating Investigator Use by Defense Counsel in Texas: A Report for the Texas Indigent Defense Commission."[1] The Texas Indigent Defense Commission (TIDC) applied for a grant from the Federal Bureau of Justice Assistance to examine investigator usage in court-appointed cases after discovering that 54% of Texas counties reported no expenditures for defense investigation in 2020. Most of the jurisdictions reporting no or low expenditures for investigators were small, rural counties.

The study concluded that "the underutilization of defense investigators in indigent defense cases is a widespread problem in Texas."[2] Both investigators and defense attorneys characterized their relationship as positive, "with roughly 90% of both groups either agreeing or strongly agreeing that investigators were valued members of a defense team." However, both groups also identified areas that needed improvement to better utilize and increase the use of investigators:

- Many investigators reported that courts often limit funding to 10 hours of work and, even when additional hours are requested, they are given in limited quantities.
- Payment from the court could be delayed for months (or sometimes years) which deterred participation in court-appointed cases.
- Investigators noted that attorneys sometimes fail to give clear instructions on what the investigator is being asked to do or to provide clear deadlines for the work.
- Attorneys and investigators sometimes disagreed on the tasks investigators were most frequently being asked to conduct; for example, 90% of investigators reported that they frequently, or almost always, review body-worn camera and other video footage for a case, while only 35% of attorneys reported assigning these tasks with frequency.[3]

The authors made the following recommendations:

1. Shift the review and approval of requests for defense investigators and the payment for investigator services from the judiciary to public defense service providers.
2. Increase investigator usage in misdemeanor and juvenile cases.
3. Promote early access to investigator services.
4. Pool resources and develop hubs for defense access to investigator experts.
5. Identify areas of "investigator deserts" and promote greater access to investigators in these regions.
6. Improve investigator compensation practices.
7. Provide regular training for investigators, defense lawyers, members of the judiciary, and the community on the role and importance of defense investigators.
8. Improve data collection and transparency regarding investigator expenditures and usage.
9. Develop specialized grant opportunities to facilitate implementation of these recommendations.

Two trainings will be held this spring to bring lawyers and investigators together to facilitate increased use of investigators and better utilization of their unique skillsets. The first of the trainings, sponsored by TCDLA, the National Association of Criminal Defense Lawyers, TIDC, and PI Education, is at Texas Tech Law in Lubbock on March 28-29, 2004. Registration information and CLE agenda is available here: https://www.nacdl.org/Landing/STS-Lubbock-TX-Training-2024.

Indigent defense attorneys and investigators are encouraged to attend, as it's a great opportunity for both groups to meet and learn how they can better work together. And who knows, you might learn something new that could get a murder charge no-billed.

Natasha L. George
Senior Policy Analyst
Texas Indigent Defense Commission

Natasha George *is a Senior Policy Analyst at the Texas Indigent Defense Commission. Upon graduating from Louisiana State University's Paul M. Hebert School of Law in 2011, she spent the next decade as a felony, then capital, public defender in rural parishes across Louisiana. She returned to her hometown of Tulia, Texas in 2021 and soon after accepted a first-degree felony attorney position with the Panhandle Area Public Defender's Office (formerly, the Potter & Armstrong Public Defender). She now applies her knowledge and experience to furthering TIDC's mission of "protecting the right to counsel, improving public defense." She can be reached at ngeorge@tidc.texas.gov.*

1 This Report is available at: https://www.nacdl.org/getattachment/da5b08fb-21d5-4176-a5d6-061af15dccf6/tidc_long_report_sts.pdf.

2 Evaluating Investigator Use by Defense Counsel in Texas, p. iv.

3 *Id.*

Shout-Outs!

Kudos to Mike Elliott and Annie Scott! They were appointed to represent a 16-year-old child facing charges of Capital Murder in the death of another 16-year-old. The incident unfolded at the home of the CW, where their kid client and his friend had gathered at the CW's community pool. Once they finished they walked back to the home of the CW. The CW, in and out of the house, displayed his gun collection while our kid and his friend waited for their Uber. Minutes before the incident, he and his friend stood up and walked out to the driveway and then walked back to the house, and the CW opened the door for them. The State disputed this, claiming that he and his friend sat peacefully on the porch for over 15 minutes, then decided to break in and commit a robbery. Following the shooting, he and his friend fled the scene, leaving behind several vape pens and $120 in the house. Surveillance footage and our arguments challenged the State's narrative, emphasizing self-defense and disputing the alleged robbery. The hearing aimed to determine if the kid should be certified and tried in adult court. After successfully challenging the initial charge of theft, the legal team continued to argue against Murder charges, focusing on saving the child from the adult system. Subpoenaing over 20 witnesses, they presented a compelling case, leading the Judge to find that the juvenile justice system could offer the necessary help and services for the child's rehabilitation. They still have to fight this case in trial at a later date, but could not ask for a better forum than the juvenile jurisdiction of the Court. **Great work!**

Shout out to Clay S. Conrad and Wade B. Smith! In 2020, their client faced charges of Continuous Sexual Abuse of a Child following an outcry in 2018. Their client denied allegations and cooperated with police investigations. But, charges were filed against him despite no evidence to substantiate the girl's allegations. Wade discovered numerous instances of the accuser making false allegations through CPS records, therapy records, and conducting interviews. Prosecutors brought in another witness with similar accusations against our client, but Wade's investigation of the second witness revealed major credibility issues and ulterior motives. Wade and Clay enlisted an expert in child sexual abuse and psychology to address the flaws in the forensic interview. Clay crafted pretrial motions, and they insisted on a hearing regarding admissibility of the state's additional witness. After their pretrial hearings on motions and admissibility of the second witness ended, Wade and Clay prepared for trial. The day before it was set to start, prosecutors announced they would be dropping charges against their client. **Way to go!**

Congratulations to Houston attorney Alexander Houthuijzen and Austin co-counsel Scott Chapman for achieving a not guilty verdict following the jury trial of Dominique Dickerson in the 337th District Court, Harris County, on the charge of Theft Aggregate >=300K, which concluded on January 24th. Scott and Alexander maintained Mr. Dickerson's innocence from the outset, waging a hard-fought battle in a complicated case in which they ultimately prevailed. **Amazing!**

TCDLA

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Significant Decisions Report

KYLE THERRIAN

Eddie Cawlfield, a good friend and colleague, used to tell me, "The law is a rumor." I was younger when I rolled with Eddie—too young to appreciate the brilliance of the statement at the moment. These five simple words absolutely undress the legal system when you stop and think about it. Not ironically, it does so in multiple layers. The first one is kind of sarcastic. A who frickin' knows type of comment (like, why are there so many laws?). But then there's the technical side. What is the common law but a rumor? It is the dissemination of opinions that are sometimes wrong and sometimes right. But the real poetry comes in the cynicism. Judges, prosecutors, and even an alarming number of criminal defense lawyers spend minimal (sometimes no) effort reading the law. No. They rely on what they once learned about the law, what they think they remember from a CLE a long time ago, or what was told to them by the colleague they keep on speed dial in lieu of having a Westlaw subscription. If repeated enough, an idea of the law supplants the actual thing. If this is what Eddie meant by his commentary, then Eddie and Leonardo DiCaprio have more than good looks in common. They are both prophetic about the power of ideas: "Once an idea has taken hold of the brain, it's almost impossible to eradicate." INCEPTION (Warner Bros. 2010). I call the phenomenon the Restatement (Second) of The Way We Do Things 'Round Here'. One of my law partners calls it the Westlaw of [Name]'s Mind." Whatever you call it in your neck of the woods, I'm sure you're like me and have fallen victim to self-gaslighting after a rumor-based law was asserted with equal amounts of confidence and inaccuracy. Anyway . . . I've totally forgotten why I'm sharing this, and now I'm re-tracing my footsteps to remember. I probably read something that didn't sit well with me. If only I reserved my snark for the truly bad cases, I could probably pinpoint it. Maybe you can figure it out . . . read these rumors below.

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 (but I hear one or two are coming . . .).

Fifth Circuit

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

Texas Court of Criminal Appeals

Ex parte Gayosso, No. PD-0513-23 (Tex. Crim. App. Dec. 6, 2023)

Attorneys. Paul Mewis (appellate)

Issue & Answer. The Damon Allen Act passed in 2022 significantly changed the process for setting bail by giving magistrates better information about the defendant, including their criminal history and any required conditions, prohibiting the release of a defendant on personal bond in certain situations, and increasing educational requirements for magistrates. The bill requires magistrates to consider a "public safety report" pertaining to the individual defendant. Did the magistrate here err by failing to consider a public safety report?

Facts. This is an appeal from a trial court's refusal to reduce bail or to release the defendant pursuant to CCP 17.151 based on the State's unreadiness for trial. The court of appeals affirmed the decision of the trial court, and the defendant filed a petition for discretionary review with the Court of Criminal Appeals. This is when the defendant's appeal became about the Damon Allen Act. The Court of Appeals mentioned it in a footnote of its opinion:

> It is unclear whether the recently passed Damon Allen Act applies to appellant's case. See Damon Allen Act, 87th Leg., 2d C.S,, ch. 11, Tex. Gen. Laws. The Act applies only to persons arrested on or after January 1, 2022. See Damon Allen Act, 87th Leg., 2d C.S., ch. 11, § 24. The record does not indicate when appellant was arrested. The Act created a "public safety report system," developed and maintained by the Office of Court Administration of the Texas Judicial System, which compiles background information about defendants for use by magistrates at article 17.15 bail hearings. *See* Damon Allen Act, 87th Leg., 2d C.S., ch. 11, g 5, arts. 17.021, .022 (codified as Tex, Code Crim, Proc. arts. 17.021, ,022). The Act clarifies a list of offenses that will preclude an individual fromobtaining release on personal bond. See Damon Allen Act, 87th Leg., 2d C.S., ch. II, § 5–7 (codified as Tex. Code Cam. Proc. arts. 17.03 (b-2), (b-3), .027). Assuming the Damon Allen Act applies to appellant's case, the record does not refer to or address the public safety report. However, it appears that the trial court considered appellant's criminal background history, which would have been drawn in part from the public-safety-report system. There is no argument on appeal that the trial court did not consider all the circumstances and factors required by law. *See* Damon Allen Act, 87tih Leg., 2d C.S., ch. 11, § 5. art. 17.028 (codified as Tex. Code cam. Proc. art. 17,028) ("a magistrate shall order, after individualized consideration of all circumstances and of the factors required by Article 17. 15(a), that the defendant be . . . granted surety or cash bond with or without conditions").

Analysis. The Damon Allen Act requires the preparation and consideration of a "public safety report" by magistrates setting bail. The Act applies to a person arrested after January 1, 2022, and permits an exemption for courts conducting hearings before April 1, 2022. The court of appeals was mistaken about what the record reveals regarding the date of the defendant's arrest. The defendant's arrest post-dated the new law's effective date, and the trial court's hearing to reconsider the initial bond amount took place after the law's stated exemption period. An appellate court may not dismiss the trial court's failure to consider a public safety report by declaring that the trial court effectively considered everything that would have been contained in a public safety report.

Comment. In addition to public safety reports, the

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Hot Off The Press - This manual, originally created by Cynthia Hampton, guides the practitioner through the litigation which often follows a trial. It has been updated and supplemented by Rick Wardroup and interns from the Texas Tech School of Law. This manual is packed with rules, case citations, forms, and checklists. Essential for all practitioners—newbies and veterans alike!

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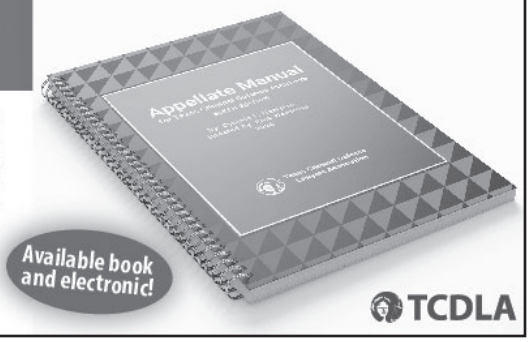

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Damon Allen Act requires every person's bond in the State to be uploaded to a database maintained by the Office of Court Administration: https://topics.txcourts.gov/BailPublic.

Flores v. State, No. PD-0562-22 (Tex. Crim. App. Dec. 13, 2023)

Attorneys. Charles Medearis (appellate), Kevin Rekoff (trial)

Issue & Answer. "Can a trial court expand its jurisdiction and hold a hearing on a motion for new trial outside the 75-day plenary period pursuant to [SCOTX and CCA COVID-19 orders]?" **No.**

Facts. The trial court sentenced the defendant to 15 years confinement. The defendant timely moved for a new trial shortly before the beginning of the pandemic in 2020. The trial court had until April 25, 2020, to rule on the motion for new trial. Prior to this the CCA and SCOTX issued its joint order regarding the COVID-19 Pandemic ("Pandemic Orders"). In relevant part, it provided:

> 2. Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—without a participant's consent:
> a. Modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than 30 days after the Governor's state of disaster has been lifted . . . .

Within the court's plenary jurisdiction period, the defendant moved to extend the court's jurisdiction pursuant to the Pandemic Orders. The trial court conducted a hearing and granted a new trial on May 8, 2020.

Analysis. A trial court cannot expand its jurisdiction by relying on emergency orders authorizing the suspension of deadlines and procedures. About this much the Court has been consistent in similar issues arising during the Pandemic. *See In re State ex rel. Ogg*, 618 S.W.3d 361 (Tex. Crim. App. 2021). The requirement that the court have jurisdiction is not procedural. The trial court did not have the authority to grant a new trial.

Comment. The claims were for ineffective assistance of counsel. They were raised in 2020, and now they will have to be raised 4 years later in habeas.

Johnson v. State, No. PD-0055-23 (Tex. Crim. App. Dec. 20, 2023)

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

Issue & Answer. Can a trial court order restitution as a judgment obligation on an offense that did not cause the injury or damage for which restitution shall be made? **No.**

Facts. The defendant ran his car into a utility pole and an antique truck. He drove on for 1,000 feet until his vehicle became inoperable. The defendant provided his identifying information to the police but did not have insurance. The police charged him with two offenses: failing to perform his duty after (1) striking a fixture and (2) striking a vehicle (the duty being to take reasonable steps to provide information to the owner of the fixture). The jury convicted the defendant of the lesser included offense of criminal attempt (attempt to commit those offenses). The trial court imposed restitution of $10,200.

Analysis. The defendant contends that the offenses of conviction did not cause damage to the pole and the truck and therefore cannot be made to pay restitution. Article 42.037 addresses restitution and is supportive of the defendant's argument. It includes language such as:

- (b)(1) If the offense results in damage . . .
- (b)(2) If the offense results in personal injury . . .
- (b)(2)(A) expenses incurred . . . as a result of the offense
- (k) . . . the amount of loss sustained by a victim as a result of the offense . . .

Some courts have found it appropriate to order restitution as a condition of probation when a defendant's offense required proof of injury or damage. The fact that trial courts ordered such restitution as a condition of probation makes such cases distinguishable from the instant case—one involving a restitution order as a judgment obligation. Arguably, a trial court has greater discretion in considering restitution as a condition of probation.

Dissent (Newell, J.). The collision is the focal point of the offense. Without a collision, there can be no prosecution. The offense may not have caused the damage, but it resulted in the damage.

Comment. "The State also suggests that limiting restitution might motivate the State to overcharge just to obtain restitution. That cannot dictate our resolution of the issue here." What a mafioso way of prosecuting . . . "nice justice system you have here; it'd be a shame if something were to happen to it."

Reed v. State, No. PD-0918-2020 (Tex. Crim. App.—Dec. 20, 2023)

Attorneys. Mary Hennessy (appellate), Craig Greaves (trial)

Issue & Answer. When consent or lack thereof is the focal point of a sexual assault trial, is jury charge error regarding the permissible physical violations constituting sexual assault egregiously harmful? **No.**

Facts. The State indicted the defendant for sexual

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MEMBERSHIP Spotlight

Rocky Ramirez

TCDLA Member Since: 2019

Favorite Seminar: The FIDL program is unforgettable. I love the Advanced Skills Training in Round Top and the Public Defender training seminar before Rusty Duncan. Trainer of Trainers in Padre is also a blast!

Law School: Western State University College of Law in Fullerton, California

Length of Practice: I started practicing in 2019

Favorite TV Show: My favorite shows that I watched this year were; Andor, Arcane, Ahsoka, Last of Us, Foundation, Mrs. Davis, Vox Machina, Invasion, Silo, For All Mankind – more or less in that order.

Advice for people to get more involved: The criminal defense landscape is changing fast. Many young people now pursue law school to become defense attorneys instead of opting for traditional legal careers. It's crucial to reach out to these individuals with tailored training materials for future engagement.

Primary Cases: 100% indigent defense

Free Time Activities: I've heard rumors of this free time thing. I might check it out sometime.

Favorite Food: Street tacos, NO cilantro.

Most Successful Case and Why: My first trial resulted in a Not Guilty for domestic assault, a memorable victory. However, my greatest success came when I took on a Failure to Register case pro bono for a client unjustly treated by the State in a Child Sex Assault matter. With the help of a generous attorney, we achieved a Not True on the Motion to Proceed and a Not Guilty on the Failure to Register. The judge discharged my client from supervision on the spot, and the relief on his face when he realized he could legally have a beer that night was truly my greatest success to date.

Way to Relax: I've heard rumors of this relaxing thing. I might check it out sometime.

Place to Travel: I'd enjoy a week on the moon, although I'm not fond of flying, so Spain by boat sounds appealing too. I typically go to Padre with my friends, and for personal trips, I like staying at Hotel Turkey in Turkey, TX, to catch their weekend shows whenever I can.

Dream Car: A subscription valet service app for a fully automated travel shuttle with a noise-cancelling 360-degree black-out window shell, wraparound touch screen monitor, reading area with an Eames lounge chair, well-lit work desk with bookshelf, sensory deprivation sleep pod, and a weight room.

Life Motto: New Mexico's State motto is 'It Grows as it Goes' and I have no idea what that means, but I live 'by' New Mexico.

Advice you wish you knew starting out as a lawyer: No one will ever tell you if 1) your shirt collar is popped up in the back, 2) if your zipper is down, or 3) if you have a dryer sheet hanging out of your suit cuff. It doesn't matter how long you are in court that day; no one will say a single word to help you out. You will, as a rule, only figure it out once you get home.

assault: organ-to-organ penetration. The jury convicted the defendant of the lesser-included offense of attempted sexual assault. The trial court failed to instruct the jury that it was limited to considering organ-to-organ sexual assault when evaluating the lesser-included offense (it left open the possibility of all statutory means). Some evidence at trial suggested that the defendant may have used his mouth rather than his sexual organ when assaulting the victim. Specifically, during police interrogation, the defendant explained various versions of events ranging from nothing at all, to oral sex, to "very possibl[y]" organ-to-organ penetration. The court of appeals found that the trial court's jury charge egregiously harmed the defendant.

Analysis. Unobjected-to jury charge error is analyzed under *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 2022). Almanza looks to (1) the entire jury charge, (2) the state of the evidence, (3) the final arguments, (4) other relevant information. After balancing these considerations, the court will reverse if the record reveals egregious harm. It is significant that the jury charge properly limited the manner and means as organ-to-organ penetration in the application portion of the greater offense. It would require "mental gymnastics" for a juror to acquit on a properly limited greater offense and to then flip back to the open-ended abstract part of the charge and apply a different manner and means to convict a defendant of the lesser-included offense. The state of evidence did cut both ways, given the contrasting accounts of oral contact versus organ-to-organ penetration. Neither party encouraged conviction on a lesser-included offense, but defense counsel stated that "attempted sexual assault would mean that he attempted to stick his penis in her vagina and was not successful." This was a correct articulation of a hypothetically correct jury charge. Neither party argued that a conviction or acquittal should rely on the defendant's purported performance of oral sex only. Finally, the parties focused their voir dire and opening statements on issues unrelated to oral penetration.

Comment. There was no evidence that the defendant "attempted to stick his penis

in her vagina and was not successful." Finding evidence in the record to support the hypothetically correct lesser-included charge requires at least as much mental gymnastics as assuming the defendant attempted but failed to perform oral sex.

Williams v. State, No. PD-0099-23 (Tex. Crim. App.—Jan. 10, 2024)

Attorneys. Jemadari Williams (appellate, pro se), Brett Ferguson (trial)

Issue & Answer. Some penal statutes create different methods of committing the same offense. Can the State rattle off every method in the indictment and make the defendant guess which one he should defend himself from? **Yes.** Even when the defendant asks nicely for the State to specify? **Yes.**

Facts. The State indicted the defendant for aggravated promotion of prostitution. That offense makes it an unlawful to:

- own,
- invest in,
- finance,
- control,
- supervise,
- or manage

a prostitution enterprise that used at least two prostitutes. The State's indictment tracked the language of the statute. The defendant filed a motion to quash asking the trial court to order the State to identify which method or manner and means it intended to prove at trial.

Analysis. The defendant does not contend that the six "methods" of committing aggravated promotion of prostitution constitute separate offenses, nor did the court of appeals when it ruled in the defendant's favor. For purposes of the instant case, the CCA assumes the six methods of committing aggravated promotion of prostitution are alternative methods of committing the same offense. The court of appeals relied on *Ross v. State*, 573 S.W. 3d 817 (Tex. Crim. App. 2019): "If the prohibited conduct is statutorily defined to include more than one manner or means of commission, then the State must, upon timely request, allege the particular manner and means it seeks to establish." But the court of appeals improperly construed this to mean that the State had to pick one of the methods allowed by statute and alleged in the indictment. This is an oversimplified synopsis of the rule of law and an exception. The rule and exception are properly stated as follows:

- Rule: when a statutory term or element is further defined by statute, the charging instrument does not ordinarily need to allege the definition. Typically, the definition of terms and elements is regarded as an evidentiary matter.
- Exception: when the definition of the statutory term or element includes more than one manner or means of commission.

In articulating this exception, the CCA explained that the State's indictment could properly allege every method of committing the offense if the State intended to show *every* method of committing the offense at trial.

Dissenting (Yeary, J.). An indictment must allege the elements of an offense, if the six ways of committing this offense are separate offenses, it dictates what must appear in the indictment and the facts upon which the jury must agree unanimously.

Dissenting (Newell, J.). "And while I agree that the State is entitled to prosecute a criminal defendant under multiple different theories for the same crime, the State can only do so if it believes it has evidence to support those theories. If the State does not believe it has evidence to support every theory it alleged, it must elect which theories it thinks it can prove. Under the Court's holding today, the State no longer needs to be sure of the facts of the case before charging every possible theory."

Comment. Are they saying I discharged a firearm in public or that I exposed my anus? *See* Tex. Penal Code § 42.01. They can't expect that I remember this kind of stuff . . . it was a Friday night? Please tell me how my conduct was disorderly. "No." *Williams v. State*, No. PD-0099-23 (Tex. Crim. App.—Jan. 10, 2024).

Nicholson v. State, No. PD-0963-19 (Tex. Crim App. Jan 17, 2024)

Attorneys. Gary Udashen (appellate), Shana Faulhaber (trial)

Issue & Answer. A person commits the offense of evading arrest if the person "intentionally flees from a person he knows is a peace officer or federal special investigator attempting to lawfully arrest or detain him." Must the State prove the defendant both knew the person attempting to arrest him was an officer and attempted arrest was lawful? **No.**

Facts. A police officer caught the defendant littering and made him pick up his trash. While the defendant was picking up trash the officer learned the defendant had multiple warrants for his arrest. The officer attempted to handcuff the defendant, but the defendant got in his vehicle and drove away.

Analysis. Grammar would suggest "that the word 'knows' distributes evenly to the entire subordinate remainder of the sentence." But it is not unreasonable to read the statute in a manner which applies the element

of knowledge only to the fact that it is an officer who attempted to conduct an arrest or detention. In 1993 the legislature deleted the phrase "it is an exception to the application of this section that the attempted arrest is unlawful or the detention is without reasonable suspicion to investigate." At the same time the legislature added the word "lawfully" to the description of the offense. It is likely that the legislature intended the same exemption to apply by the addition of the word "lawfully" and the deletion of the exception clause. Moreover, "[r]equiring the State to prove that a suspect knows that the seizure of his person is unlawful at the time of his arrest or detention leads to absurd results." Fourth amendment jurisprudence is voluminous and legally technical. It is not something that laypersons should be expected to understand. Permitting suspects to flee because they erroneously believe the officer's conduct is unlawful incentivizes flight and the exception would swallow the enforceability of the evading arrest statute.

Concurring (Yeary, J.). "The Court says that this statute does not require the accused to know that the officer's attempt to arrest him is lawful. I strongly disagree." Plain language controls before considering other rules of statutory construction. . . . This provision contains one obvious nature-of-conduct element: flight. That nature-of-conduct element carries its own culpable mental state "intentionally." But flight by itself is not illegal . . . the crux of the statute is only fully revealed in the context of all of its accompanying circumstances, which take up the remainder of the statute: that the flight is "from a person [who] is a peace officer . . . attempting to lawfully arrest . . . him." The mens rea of "knowing" must assign to all the circumstances that make the offense an offense.

Comment. If a defendant wishes to preserve the right to complain about the officer's legal error, I think that the defendant should have to shout objection before or while fleeing from the officer.

State v. Green, No. PD-1182-20 (Tex. Crim. App. Jan. 17, 2023)(consolidated)

State v. Lennox, No. PD-1213-20 (Tex. Crim. App. Jan. 17, 2023)(consolidated)

Attorneys. Vincent Botto (appellate-Green)(trial-Green), Troy Hornsby (appellate-Lennox), David Turner (trial-Lennox)

Issue & Answer. Prior to 2017 the offense level of forgery was (in most cases) defined by the type of writing forged by the defendant. In 2017 the Legislature created an "alternate value ladder" defining the offense based on the value of property or services obtained or sought on account of the forgery. Both ways of classifying a forgery offense level now exist side-by-side. When conduct can fall under either classification system (i.e. a counterfeit $20 bill, or a forged check) is the defendant subject to a felony conviction (because of the type of writing) or a misdemeanor conviction (because of the low dollar amount)? **Misdemeanor. The value-ladder-classification amendment creates a distinct "forgery-to-obtain-property-or-services offense."**

Facts. This is a consolidated opinion addressing identical issues raised in *State v. Green* and in *Lennox v. State*. Green created a counterfeit $20 bill. He used his fake $20 to buy a $2 cigarette lighter. Forging a $20 bill is a third-degree felony (type-of-writing classification). Forging something to obtain less than $100 is a Class C Misdemeanor (value-ladder classification).

Lennox forged three checks, each less than $750. Forging a check is a third-degree felony (type-of-writing

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Rusty Duncan	*David Isern*	*Ebb Mobley*	*Doug Tinker*
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Elaine Ferguson		*Harry Nass*	

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Texas Criminal Defense Lawyers Educational Institute

classification). Forging something to obtain less than $750 is a Class B Misdemeanor.

Analysis. In addition to creating a value-ladder provision in its 2017 amendment to the forgery statute, the Legislature kept but modified the type-of-writing classifications with the addition of a clause stating that such classifications and associated punishments shall be subject to the new value-ladder classification system. This makes the old type-of-writing classification system subservient to the value-ladder classification system. In cases where the facts trigger the value-ladder system, the value must operate as an element of the offense. The court of appeals correctly acknowledged the supremacy of the value-ladder classification but mistakenly reconciled the overlap between the two classification systems by holding that the State must prove a non-monetary non-property motive of the defendant before availing itself to harsher consequences of the type-of-writing classifications. The appropriate way to reconcile the two competing provisions is to allow the State to charge a type-of-writing forgery and permit the defendant to raise the State's mistaken charging decision and assert his right "to be convicted and punished under the provisions in the value ladder." In cases implicating value-ladder classifications, the value ladder must operate as an element of the offense.

Comment. The Court relied heavily on the principles of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) for the proposition that any fact that subjects a defendant to increased punishment must be treated as elemental. It is hard to imagine a scenario where the value-ladder is not triggered—it would have to be a forgery committed just for the fun of it, or perhaps to embarrass or harass another person.

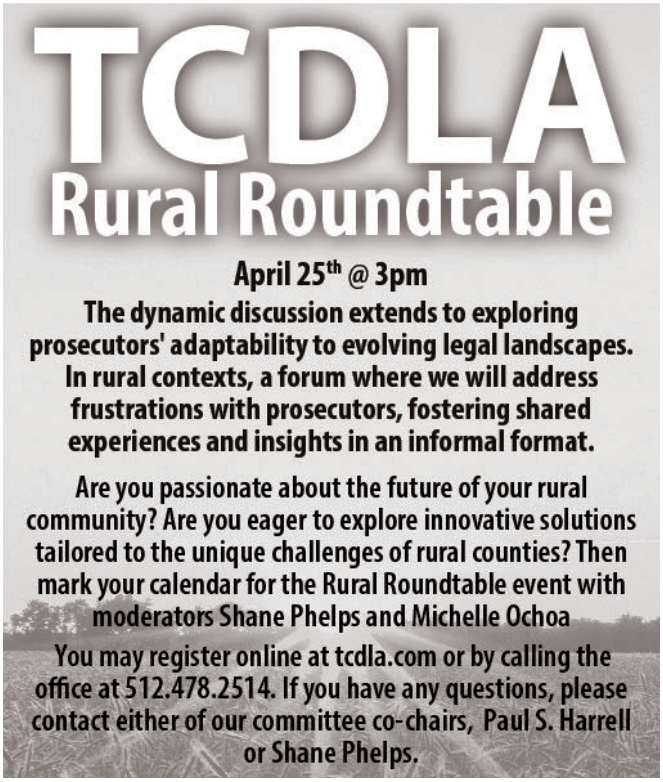
1st District Houston

Vasquez v. State, No. 01-22-00326-CR (Tex. App.—Houston [1st Dist] Dec. 12, 2023)

Attorneys. Ted Wood (appellate), Daniel Werlinger, Jr. (trial)

Issue & Answer. When a defendant enters a plea agreement and his boilerplate certification of appellate rights indicates he waives the right to appeal any non-sentencing matters, may he raise on appeal: (1) improper assessment of court costs? (2) trial court failure to inquire about his ability to pay costs? (3) trial court failure to admonish regarding loss of firearm rights? (4) trial court failure to admonish regarding loss of voting rights? **(1) No, (2) No, (3) No, (4) No.**

Facts. The State charged the defendant with continuous sexual abuse of a minor. The defendant accepted a plea recommendation and entered a guilty plea. The trial court assessed punishment pursuant to that agreement—10 years' incarceration.



Analysis. The record contains written admonishments regarding the defendant's limited right to appeal. At least one collateral consequence is contained in the written admonishments (firearm rights). Notwithstanding the record failing to reveal the other matters the defendant raised on appeal, he waived the right to raise them on appeal and the court of appeals is without jurisdiction by virtue of his waiver.

Comment. I think the validity of waivers should always be fair game on direct appeal. Using the Westlaw-of-my-mind I think that the State has the burden of proving valid waivers on appeal—that they were bartered for somehow rather than signed off on like a cell phone contract.

Tolentino v. State, No. 01-22-00442-CR (Tex. App.—Houston [1st Dist] Jan. 9, 2024)

Attorneys. Cheri Duncan (appellate), Matthew Perez (trial)

Issue & Answer. If a Nahuatl speaking defendant says he doesn't understand Spanish sufficiently to understand the proceedings can the trial court rely on a detective's opinion that the defendant understood Spanish during his brief and somewhat stilted interrogation to deny the defendant a Nahuatl interpreter and instead provide a Spanish interpreter? **No.**

Facts. Defendant's trial counsel filed a motion for the appointment of a Nahuatl interpreter—the defendant's native language. Prior to the filing of this motion trial

Gideon's Day

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

Join public defender offices across the country in celebrating the anniversary of this decision on Monday, March 18, 2024. Spend the day, or even just an hour, to reflect on the opinion, the differences it has made, and the work still yet to do. Don't forget to pat one another on the back and thank each other for all of the hard work that goes into being a public defender or court-appointed attorney. You deserve it!

Ways to Celebrate on March 18, 2024

- Watch the documentary **"Defending Gideon: A Documentary,"** available on YouTube
- Watch **"Gideon's Army,"** available on Amazon Prime
- Watch **"Strong Island,"** available on Netflix
- Watch an episode or two of **"Time: The Kalief Browder Story,"** available on Netflix
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counsel had communicated with the defendant using a family member who spoke Spanish—a language the defendant could somewhat understand. "At a later hearing, the trial court acknowledged that Nahuatl interpreters were available, but either they would need an additional interpreter to translate from English to Spanish and then from Spanish to Nahuatl or the English-to-Nahuatl interpreter would have to translate remotely because they were unable to physically attend trial. Ultimately the trial court decided it would only provide a Spanish interpreter and cited the testimony of the investigating detective who indicated that the defendant spoke Spanish fluently during his interrogation.

Analysis. Denial of an interpreter necessary for the defendant to understand the proceedings violates fundamental fairness and due process. The State argues that Spanish is close enough to Nahuatl and cites a similar Portuguese-Spanish dilemma resolved in the State's favor. *Martins v. State*, 52 S.W.3d 459 (Tex. App.—Corpus Christi 2001). But in Martins the defendant did not object nor did he provide the trial court with any indication that he could not understand Spanish. Here the defendant objected and the only indication that he could understand the proceedings was a detective's biased recitation that the defendant's demonstrated the ability to speak Spanish during an underwhelming interrogation.

3rd District Austin

***Laird v. State*, No. 03-21-00631-CR (Tex. App.—Austin, Dec. 22, 2023)**

Attorneys. Vikash Bhakta (appellate)

Issue & Answer. Is this nearly six-year delay a speedy trial violation? **Of course not.**

Facts. The defendant manipulated a 14-year-old into having sex with him. Although the complainant initially represented herself as a 19-year-old, when the defendant's insistence turned to pushiness and extortion the complainant told the defendant she was 14. The State arrested the defendant on March 22, 2016, and did not bring him to trial until November 1, 2021 (nearly six years after his arrest). The defendant insisted on a speedy trial as early as March 22, 2019. He did so by sending letters to the State and trial court. This was followed by monthly pro se motions demanding a speedy trial and dismissal of charges. The defendant's requests were ignored, and the case proceeded on a timeline of the lawyers' and judge's choosing. When the defendant's case ultimately proceeded to trial, he testified in his own defense and admitted to having sex with the complainant and admitted to knowing she was underage.

Analysis. Speedy trial rights are analyzed under the *Barker v. Wingo* factors (legend below). A significant portion of the five-plus-year delay was attributable to the defendant complaining about his court appointed lawyers. Another portion of the delay was attributable to concerns about the defendant's competency. The trial court declared the defendant incompetent for a period of 15 months. The defendant's attorneys also filed motions to continue. The COVID-19 pandemic also contributed to the delay. "Thus, because the delay in this case was either attributable to Laird (his incompetency, constant changes in counsel, and motions for continuance) or to matters that weighed only slightly against the State, we find that this factor weighs heavily against finding a speedy-trial violation."

Although the defendant filed letters and motion pro se demanding a speedy trial "a trial court is free to disregard any pro se motions presented by the defendant." Moreover, many of his motions also requested dismissal in the alternative. This request was reflective of a desire for dismissal not speedy trial.

Finally, the defendant's articulated prejudice was exhaustive but dealt primarily with the woes of pretrial incarceration and the collateral consequences associated with being charged with a criminal offense. The defendant "fails to distinguish between the consequences of delay and the more general drawbacks of a criminal accusation and pretrial confinement." Whatever negative impact the delay had on the defendant's ability to defend himself was overborne by the strong evidence of guilt, including the defendant's admission to having sex with a minor in his testimony at trial.

Comment. This guy may not have been competent during periods of the prosecution, but that does not change the fact that he was consistent in his complaints: he wanted a trial and he wanted to get rid of his attorneys (at least one of whom did not want the defendant to have a trial). I don't know how a court can simply ignore a defendant's insistence on speedy trial because he was represented by counsel (that the defendant didn't want). At a minimum, the trial court should have an obligation to bring the defendant and the attorney before the court and to conduct an inquiry and provide admonishments about pro se filings.

Here are some other intellectually dishonest doctrines we use to write speedy trial out of the law: "if you mention dismissal you didn't want a speedy trial," "prejudice associated with the stigma of being charged is not prejudice," "prejudice of being incarcerated for an irresponsible amount of time is not prejudice," "delay attributable to broken parts of our criminal justice system (competency restoration, COVID-19 protections, etc.) is a neutral reason for delay."

4th District San Antonio

Trejo v. State, No. 04-21-00529-CR (Tex. App.—San Antonio, Dec. 6, 2023)

Attorneys. Matthew Allen (appellate)(trial)

Issue & Answer 1. A driving record is insufficient and inadmissible to prove a prior conviction in a punishment trial. Can the State instead use a driving record as evidence of bad acts? **Maybe.**

Facts. The defendant ran a red light purportedly travelling 70 miles per hour in a 40 miles per hour zone. His blood alcohol concentration was 0.04. A jury convicted him of criminally negligent homicide and simple assault. In sentencing the State presented his driving record as proof of his bad character.

Analysis 1. In a punishment trial, the court may admit any evidence relevant to sentencing, including a prior criminal record, evidence of bad character, and evidence of extraneous crimes and bad acts. As a threshold matter to admitting bad acts the State must show they occurred beyond a reasonable doubt and "proffer its evidence before the trial court may admit it for the jury's consideration." Certified judgments prove a crime was committed. Driving records do not. Instead, the State may offer driving records under a theory that they constitute bad acts. If those bad acts are relevant to the defendant's punishment, they are admissible after the trial court conducts its initial beyond a reasonable doubt threshold inquiry. Here the defendant did not raise the issue of a driving record's capability of proving bad acts beyond a reasonable doubt. Instead, he merely complained that they were insufficient proof of his prior convictions.

Analysis 2. When a party raises an objection to the admissibility of expert testimony the trial court must decide whether the expert and the proposed testimony satisfy Rule 702 based on the rule's three constituent parts regarding qualification, reliability, and relevance: (1) The witness qualifies as an expert by reason of his knowledge, skill, experience, training, or education; (2) the subject matter of the testimony is an appropriate one for expert testimony; and (3) admitting the expert testimony will actually assist the fact-finder in deciding the case.

The Sixth Amendment guarantees the right to cross examine experts whose analytical functions the State relies upon. It does not, however, disqualify an expert because he is unable to answer all of the defendant's questions on cross examination.

Here, the defendant complains that the accident reconstructionist should not have been permitted to testify because he did not have sufficient knowledge regarding the software used to perform the investigation. "To the extent that [the defendant's] cross-examination revealed the limits of [the expert's] knowledge of [software] he used to perform his investigation, we disagree that [the defendant] has established a basis for witness exclusion . . . ." Notwithstanding the applicability of Rule 702, the defendant contends that the Sixth Amendment works to exclude testimony about accident reconstruction when the State fails to present a witness who can explain how the necessary software works. The defendant's contention is wrong, the innerworkings of the software programming are not testimonial and the coders who wrote them are not similarly situated to the types of lab analysts the courts have required as witnesses in the Sixth Amendment context.

Comment. I don't know. We put a lot of faith in computers and software, and nobody really knows how they work. I once had a client with an interlock bond violation and I insisted on a competent witness to explain the "inner workings" of the interlock device (reliability,

accuracy, method, is it science? is it magic?). A 45-minute debate ensued and ultimately ended when I pointed out that the interlock report accusing my client of having a 0.03 was also accusing him of blowing into the interlock device in the North Atlantic Ocean. We're all conspiracy theorists, until we're not.

7th District Amarillo

McBeath v. State, No. 07-23-00006-CR (Tex. App.—Amarillo, Dec. 8, 2023)

Attorneys. Jessica Graf (appellate), Frederick Stangl (trial)

Issue & Answer. A successful probationer may obtain an order that sets aside the verdict, withdraws the defendant's plea, dismisses the accusation and charging document, and orders the defendant "released from all penalties and disabilities resulting from the offense . . . ." This is commonly referred to as judicial clemency. Does judicial clemency grant a defendant immunity in a future case from the State presenting the facts underlying his set-aside conviction as prior bad acts? **No.**

Facts. The defendant shot at and missed a bunch of people outside of a strip club. He was convicted of deadly conduct and in his sentencing hearing the State offered evidence that he previously engaged in conduct constituting the offense of money laundering.

Analysis. The defendant was "released" from "penalties and disabilities resulting from the offense." He was not released from the reality that the underlying conduct occurred. The facts underlying the conviction subject to clemency remain fair game (at a minimum).

Comment. This makes sense, but according to the Appellant's brief his former probation officer testified regarding not only the facts underlying the offense but also his terms and conditions of probation and his performance as a probationer. I think a hearsay objection would have been merited here as well.

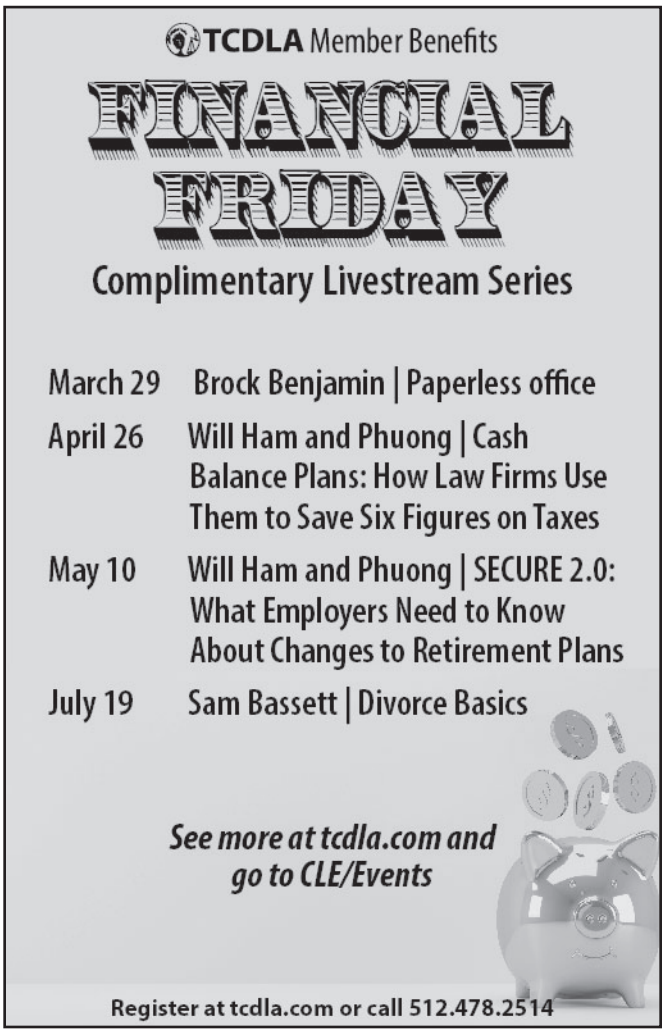
8th District El Paso

Ex parte Morales, No. 08-23-00285-CR (Tex. App.—El Paso, Dec. 20, 2023)

Attorneys. Kristen Etter, Billy Pavord

Issue & Answer. Is a claim of selective prosecution cognizable in a pretrial writ of habeas corpus (under equal protection principles)? **Yes.**

Facts. The defendant is a noncitizen arrested under Operation Lone Star (OLS) and charged with criminal trespass. He filed an application for writ of habeas corpus in which he requested an evidentiary hearing and dismissal of the charges. He claims the State's selective prosecution violates state and federal equal protection guarantees. The trial court denied the writ without a hearing shortly



before the Fourth Court of Appeals declared OLS to be in violation of the state and federal equal protection clauses. With the benefit of the Fourth Court's opinion, the defendant filed a second writ of habeas corpus—the instant writ—denied by the trial court on the merits. The facts here are the same as they are in so many other OLS cases: under OLS the State only arrests Hispanic men for criminal trespass prosecution and they let the women and children go.

Analysis. This case was transferred to the Eighth District Court of Appeals from the Fourth District Court of Appeals. This Court must apply the law as decided in the Fourth District Court of Appeals. The State does not dispute that they intentionally engage(d) in discrimination. The only contention raised by the State is that an equal protection selective prosecution claim is not cognizable in a pretrial writ of habeas corpus. This was squarely decided by the Fourth Court of Appeals in *Ex parte Aparicio*, 672 S.W.3d 696 (Tex. App.—San Antonio 2023, pet. granted). This court rejects the State's contention that *Aparicio* was wrongly decided. With regard to the defendant's appellate remedy:

> This appeal presents a fork in the road. One path is to reverse the trial court's denial of Ramos-Morales's habeas application and remand the case to the trial court to hold an evidentiary hearing, make findings of fact and conclusions of law on the relevant issues, or both. Another path is to reverse the trial court's decision and remand to the trial court with instructions to grant the writ and dismiss the misdemeanor criminal trespass charge. To avoid needlessly driving this case from pillar to post at the sacrifice of judicial economy, we choose the latter path

Comment. I'd like to meet the 19-year-old that says "I think I want to go to law school and become a lawyer who argues against equal protection." I assume they must exist.

10th District Waco

Guedea v. State, No. 10-22-00366-CR (Tex. App.—Waco, Dec. 14, 2023)

Attorneys. Shelly D. Fowler (appellate), Johnna McArthur (trial)

Issue & Answer. Article 38.37 permits the State to present evidence in a continuous sexual abuse trial showing that the defendant committed other extraneous acts of sexual abuse. Such evidence must be nonetheless excluded if its prejudicial value substantially outweighs its probative force under TRE 403. Is the probative value of the defendant's sexual abuse committed against another victim 30 years prior substantially outweighed by prejudice? **No.**

Issue & Answer 2. Is a defendant declared indigent for purposes of court-appointed representation presumed to remain indigent for purposes of assessing costs and fees? **Yes.**

Facts. The state charged the defendant with one count of continuous sexual abuse of a young child and a jury found him guilty. At trial the State presented testimony of a person the defendant victimized as a child (on multiple occasions) in 1990. The defendant complained that these extraneous acts were too remote and that the trial court should exclude them under Rule 403 despite their Article 38.37 admissibility.

Analysis 1. Remoteness is not enough to exclude evidence under Rule 403. Applying the *Gigliobianco* factors (see legend below).

> [W]e cannot say that the complained-of evidence tended to distract the jury from the main issue of whether [Appellant] abused the victim as alleged in the indictment; that the jury gave the evidence undue weight because it had not been fully equipped to evaluate the evidence's probative force or that the evidence consumed an inordinate amount of time.

Analysis 2. The defendant complains that the trial court improperly assessed fines, costs, and other fees without conducting a hearing on his indigence. The record reflects that the trial court appointed counsel after finding the defendant indigent. That finding of indigence persists unless shown in a hearing otherwise. The trial court did not conduct a hearing on the defendant's indigence, thus the defendant's presumed indigence remained intact. Accordingly, the court must delete the assessed costs and fees.

Dissenting (Gray, C.J.). The defendant complains about all of his fees and the trial court's failure to conduct a hearing. The court deletes some of his fees on account of the trial court not conducting a hearing. The court should order a new hearing, and if the defendant's indigence persists, all of his fees should be deleted.

11th District Eastland

***Polvon v. State*, No. 11-22-00010-CR (Tex. App.—Eastland, Jan. 1, 2024)**

Attorneys. Mary Stillinger (appellate), Joe Spencer, Jr. (trial), Felix Valenzuela (trial)

Issue & Answer. A trial court may order a defendant who raises an insanity defense to submit to an examination from a State's expert. The examination must be limited to rebuttal issues. When the trial court fails to implement measures to ensure the rebuttal examination is limited in nature, does the examination violate the defendant's Fifth Amendment right against self-incrimination. **No (although it appears court answered a different question: "the trial court did not err or violate Appellant's Fifth Amendment privilege . . . by ordering him to submit to [examination])."**

Facts. The State convicted the defendant of capital murder and the trial court assessed punishment at life without the possibility of parole. Before trial the defendant gave notice of his intent to claim insanity at the time of the murder. The defendant obtained the services of an expert who interviewed him four times for a total of ten hours. The State obtained a trial court order directing the defendant to submit to an evaluation from a state's expert for purposes of rebuttal evidence. The defendant was somewhat uncooperative during his four hours of this state-expert evaluation. At trial the dueling experts disagreed as to the defendant's diagnoses and sanity at the time of the offense.

Analysis. When a defendant gives notice of his intent to present an insanity defense, under *Soria v. State*, 933 S.W.2d 46 (Tex. Crim. App. 1996) and *Lagrone v. State*, 942 S.W.2d 602 (Tex. Crim. App. 1997) he waives his Fifth Amendment privilege against self-incrimination for the purpose of rebutting his asserted insanity defense. The defendant claims without support that the State's expert acted as a state agent for a freewheeling, investigative, and custodial interrogation. The trial court did not err by ordering the defendant to submit to an examination conducted by the State's expert.

Comment. This provokes the same thoughts I have about handwriting and voice exemplars. What if the defendant just says "no." Or what if he mockingly writes in wingdings and speaks like Gilbert Gottfried?

12th District Tyler

***Johnson v. State*, No. 12-22-00270-CR (Tex. App.—Tyler, Jan. 10, 2024)**

Attorneys. Sten Langsjoen (appellate), Allison Biggs (trial)

Issue & Answer. Do the following facts justify the issuance of a warrant to discover and track a person's cell site location information? **Yes.**

Facts. A jury convicted the defendant of Aggravated Robbery. The evidence showed that, among other things, the defendant stole the victim's cell phone. The victim described the suspect as a black man in a ski mask who fled in a white car. The victim used his Google account to track his phone's last known location. A detective went

to that location and discovered a black man loading a large amount of clothing into a white Lexus parked in the driveway of a home. Officers eventually spoke with the occupants of the home, none of whom could give an alibi for the defendant. A detective tried to call the defendant's phone and discovered that it had been changed or disconnected. Citing these facts and others, the detective obtained a warrant for the defendant's CSLI. The data revealed that the defendant was at the scene of the offense when it occurred. The defendant moved to suppress the CSLI, arguing: (1) the warrant affidavit contained no evidence that a phone was associated with or used during the robbery, (2) the warrant affidavit made no reference to a cell phone in the probable cause affidavit, (3) the warrant affidavit's inclusion of boilerplate recitations such as "everyone has a cell phone and carries it," and (4) the warrant affidavit's conclusory remark that the phone is believed to have evidence on it.

Analysis. Generally, the State must obtain a warrant supported by probable cause before acquiring a phone's CSLI. "A mere desire to learn the movements or location of a suspect is not probable cause to obtain CSLI from his cell phone service provider." Articulable facts must support a conclusion that police will find inculpatory location information about the suspect. The defendant contends that the warrant application failed to establish a nexus between his cell phone and the offense.

> [B]ut, because we live in a society in which our phones go wherever we go, facts establishing a nexus between a phone's owner and the offense may suffice in some instances. See Carpenter, 138 S.Ct. at 2217-18 ("A cell phone—almost a feature of human anatomy—tracks nearly exactly the movements of its owner . . . . [People] compulsively carry cell phones with them all the time.").

Here the warrant affidavit contained sufficient facts from which the magistrate could have reasonably determined there was a fair probability that CSLI evidence would implicate the defendant. These facts included a theft of the victim's cell phone, the defendant's presence at the last known location of that cell phone, the defendant having features matching a description of the suspect, the defendant driving a vehicle matching a description of the suspect vehicle, and the inability of the defendant's family/friends to account for his whereabouts at the time of the robbery.

Comment. I'm not sure if the court is being disingenuous or creative. Regardless, the citation and quotation to *Carpenter* is concerning. The court essentially says that it is okay to always assume that a person will have their cell phone on them when they commit crimes. According to the Twelfth Court, then, there is no need to articulate facts leading to a conclusion that the bad guy had his phone on him—he just does (this one did, all the future ones will, and those falsely accused will too). In support of this the court quotes selectively from *Carpenter*—a phone is "almost a feature of human anatomy" that "tracks nearly exactly the movements of its owner." But the United States Supreme Court did not point this fact out in an effort to sanction conclusory assumptions in CSLI warrant affidavits. The Supreme Court pointed this out to illustrate the profound invasion of privacy that occurs when the government obtains your CSLI data. Prest-o-change-o, I guess.

13th District Corpus Christi/ Edinburg

Ghanem v. State, No.

13-22-00447-CR (Tex. App.—Corpus Christi, Jan. 11, 2024)

Attorneys. Angelica Cogliano (appellate)(trial), E.G. Morris (trial)

Issue & Answer. Some pain management clinics require special certification. Texas Occupations Code sets forth such requirements and excludes "[clinics] owned or operated by a physician who treats patients within the physician's area of specialty and who personally uses other forms of treatment, including surgery, with the issuance of a prescription for a majority of the patients." Is the phrase "personally uses other forms of treatment" unconstitutionally vague?

Facts. The defendant is a family physician who has been in private practice for more than two decades. The State convicted him of operating a pain management clinic without certification. The defendant's office manager testified at trial. She asserted that the defendant treated people for a variety of ailments but that "around 80 percent" of patients were prescribed controlled pain medications (per statutory definition). The defendant's office manager became concerned about the high volume of pain management prescriptions being written by the defendant and his purported lack of attention to and use of tools designed to prevent over-prescribing controlled substances. Despite this concern, she conceded that the defendant did not have any patients who came to the clinic solely for pain medication, that the defendant had discharged multiple patients for not complying with the clinic's rules on controlled substances, and that the defendant integrated into his practice holistic or natural medicine. The State combined this testimony with that of the undercover officer who was able to quickly obtain pain medications from the defendant's clinic, and testimony from an expert in the operation of a pain management clinic.

The State argued that the defendant did not meet the threshold percentage of patients receiving "other forms of treatment" to qualify for the certification exemption. The State attempted to explain "other forms of treatment" through the testimony of an attorney who worked for the Texas Medical Board (TMB) and the Medical Director of the TMB. According to the TMB attorney,

> [T]he intent of the statute based on the legislative history and, you know, other things is that this statutory exemption from pain management clinic registration was intended to apply to practices where a physician is really doing a lot of other things besides just issuing prescriptions. They are doing injections, they are performing surgery, they are performing other sorts of procedures that address chronic pain, not just issuing a prescription drug to the patient on a monthly basis . . . . And it has to be for a majority of the patients during the time period that we're looking at.

Notwithstanding her firm belief regarding legislative intent, the TMB attorney acknowledged TMB does not provide any guidance or promulgate any rules or formal interpretations consistent with the TMB attorney's beliefs. TMB's Medical Director further narrowed the concept of

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"other forms of treatment." According to him, "other forms of treatment" meant non-prescription treatment. When the defendant showed the Medical Director a transcript from a proceeding in which he testified inconsistently, the Medical Director challenged the accuracy of the transcription.

Analysis. When a defendant challenges a statute's facial validity on non-First-Amendment grounds, he must show the statute "operates unconstitutionally in all potential applications." When a defendant makes an as-applied challenge to the constitutionality of a statute he must show the statute is unconstitutional as applied to his particular facts and circumstances. A statute is void for vagueness if it fails to define words and phrases sufficient to give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited.

In the trial court, the defendant raised a facial and as-applied challenge to Occupations Code Section 168.007 (the provision exempting clinics based on performing "other forms of treatment"). He did not challenge Section 168.001 (the provision defining pain management clinic by the percentages of treatments using specifically identified controlled substances). The only issue properly before the court is the phrasing of the exemption provision and whether it adequately delineates legal and illegal conduct.

Here the statute is sufficiently clear. The statutory exemption from pain clinic certification requires the doctor to provide other forms of treatment and, when read in context, the phrase "other forms" necessarily means other forms than "the issuance of a prescription." It also requires that the "other form of treatment" be a treatment the owning doctor "personally uses." This is also unambiguous. "The physician himself or herself—not an associate, employee, or patient—must perform the treatment." To the extent that the defendant interprets "other forms of treatment" to mean treatment modalities distinct from prescribing one of the statutory listed types of controlled substance medications, the court disagrees [without analysis].

Comment. Fun fact. Angelica is sitting behind me at TCDLA's Federal Law Gumbo Seminar while I write this summary. I had to have her explain the statute to me because I didn't understand it (or because I was on Bourbon Street the night before). Doctors are smarter than lawyers, so I guess it's okay that it's confusing to me.

14th District Houston

State v. Hatter, No. 14-20-00496-CR (Tex. App.—Houston [14th Dist], Dec. 14, 2023)

Attorneys. Tonya Rolland (appellate), Natalie Schultz (trial)

Issue & Answer 1. Does promise of dismissal constitute an enforceable plea bargain offer?

Issue & Answer 2. Can a trial court order specific performance on a breached plea bargain under the facts of this case? **Yes.**

Facts. This case is on remand from the Court of Criminal Appeals. In January 2020 the trial court granted a state motion to dismiss a felony charge against the defendant. There was an initial understanding between the State and the attorney representing the defendant that the defendant would enter a guilty plea in a pending DWI case. When it became apparent that misdemeanor trial counsel would not play ball, the attorney representing the State nonetheless promised a dismissal regardless of the outcome of the misdemeanor DWI. Fast-forward three months, the State dismissed the defendant's misdemeanor DWI charge after discovery of faulty blood vials. Seemingly in response to having their hand forced in the misdemeanor case, the State re-filed the felony charge notwithstanding the State's handshake agreement. Felony trial counsel for the defendant articulated the series of events as follows:

> The offer from the State to my client in our felony case was that in exchange for a plea of guilty in her Driving While Intoxicated case(s), her Assault of a Public Servant case would be dismissed. Another attorney represented [Appellee] on both of her misdemeanor cases. That attorney did not want to plea [Appellee] to her Driving While Intoxicated charges so that she could get a dismissal on her felony case. Because [Appellee's] felony disposition was contingent on her misdemeanor dispositions and her misdemeanor attorney's unwillingness to negotiate a plea with that agreement, I felt [Appellee] was being treated unfairly. I spoke on many occasions to the chief prosecutor on the felony case, Mr. James O'Donnell. Mr. O'Donnell understood

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> the problem and unfairness surrounding the misdemeanor disposition affecting [Appellee's] felony disposition. After speaking to him on many occasions (of which I do not remember the dates), we were able to come to an agreement. Mr. O'Donnell agreed that regardless of the disposition of the misdemeanor Driving While Intoxicated cases, he would dismiss the felony Assault of a Peace Officer. He made multiple promises to me that he would not only dismiss the felony case regardless of the misdemeanor dispositions, but that he would promise to never re-file the felony case. He made this guarantee to me multiple times while in the 230th courtroom at 201 Caroline. . . Mr. O'Donnell told me that he would give the reason of "other" on the dismissal and would write "subject to re-file" although he again promised that he would not do so and no one else would either.

According to the attorneys involved in the case, supervising prosecutors made the decision to refile after the felony complaining witness brought it to the attention of the DA's office that the defendant was getting off with two dismissals.

Analysis. In the court's initial opinion, it reasoned that the "handshake agreement" not to refile constituted an enforceable immunity agreement. The Court of Criminal Appeals reversed with instructions to evaluate the promises made by the prosecutor in the nature of a plea agreement. In this context—plea bargains are enforceable once approved by the trial court. "If the agreement can be enforced the defendant is entitled to seek specific performance of its terms . . . ." To discern the parties' obligations, the court refers to general contract principles. Here there was an offer, acceptance, a meeting of the minds, etc. Here the trial court found that a promise was made by the felony prosecutor to dismiss the case and not refile (no matter what) with the understanding that the defendant would plea to a misdemeanor DWI charge. The trial court found that the State breached its promise when it refiled the felony charge. The trial court's conclusions show that the trial court found the elements necessary to form a plea agreement approved by the trial court. The State's contention that specific performance is only available to a party who holds up his or her end of the contract is unpersuasive. "[The defendant's] failure to fulfill her contractual obligations does not rest with her—rather, it stems from the misdemeanor prosecutor's unilateral decision to dismiss [the Defendant's] DWI cases. . . . Accordingly, [the defendant] was prevented from holding up her end of the bargained-for agreement because the State made that performance impossible."

Dissenting (Jewel, J.). The majority grossly overstates what the record supports. The essential contractual elements of acceptance of an offer and mutual consent is missing. There is no evidence the defendant accepted the State's offer to dismiss a felony in exchange for a misdemeanor plea. It does not appear the defendant ever promised to plead guilty to misdemeanor DWI, and indeed never did. The defendant's contention that a plea bargain existed is also inconsistent with her initial brief before the court in which she argued "this case did not involve a promise of a plea bargain." The majority then erroneously finds an implied approval of the plea bargain by the trial court when the trial court did no such thing.

Comment. I hate this because I know everyone expects me to root for the defense, but Justice Jewell is correct. The State got nothing of value from the defendant here. No consideration, not even detrimental reliance.

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

- 2nd District Fort Worth
- 5th District Dallas
- 6th District Texarkana
- 9th District Beaumont

ABBREVIATIONS

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

FACTOR TESTS

***Barker* (Speedy Trial Factors)**
(1) length of delay, (2) reason for delay, (3) assertion of right, (4) prejudice

***Almanza* (unobjected-to jury charge factors)**
(1) the entire jury charge, (2) the state of the evidence, (3) the final arguments, (4) other relevant information

***Gigliobianco* (403 Factors)**
(1) probative force, (2) proponent's need, (3) decision on an improper basis, (4) confusion or distraction, (5) undue weight, (6) consumption of time

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Child Sex Assault ..... Heather Barbieri
Juvenile Law ..... Kameron Johnson
Homicide ..... Eric Davis
AI (Ethics) ..... Sean Hightower

Federal Boot Camp

Federal Rules of Evidence ..... Rene Valladares
Sentencing Guidelines ..... Roberto Balli
Federal Tial Nuances ..... Robert Jones

State Boot Camp

Case Law Update ..... Judge David Newell
Cross Exam ..... Michael Gross

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Current Issues with Immigration Law & Crimes in Texas ..... Jordan Pollock
Practical Punishment Procedures ..... Jeep Darnell

FRIDAY, JUNE 14

Jury Charge ..... Reagan Wynn

Trial Boot Camp

Rules of Evidence ..... Jason Parrish
Post Conviction Litigation ..... Allison Clayton
Voir Dire ..... Chris Downey
Search & Seizure ..... Laurie Key

Family Violence Boot Camp

Procedures & Rules (Ethics) ..... Paul Tu
Family Violence - Categories & Types ..... Monique Sparks
Collateral Consequences ..... Betty Blackwell
AFV – Dealing with the Procedures, Rules & Protective Orders ..... Nicole DeBorde Hochglaube & Clay Steadman

Trial Boot Camp

Plea Negotiation (Ethics) ..... Jeremy Rosenthal
Mental Health ..... Joe Stephens
Experts ..... Huma Yasin
Forensics Update ..... Mark Daniel

Technology & Forensics Boot Camp

DNA ..... Nick Hughes
Challenging Experts ..... Angelica Cogliano
Hemp & Marijuana ..... Amanda Hernandez

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Supreme Court Update ..... Gerry Goldstein
Trial by Media ..... Amanda Knox & Anna Vasquez
Victory on Two Fronts: Combating Multiple Complainants & Theories of Defense in Sex Cases ..... Missy Owen
The Great Debate - Case of the Century ..... Dan Cogdell & Rusty Hardin

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