TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

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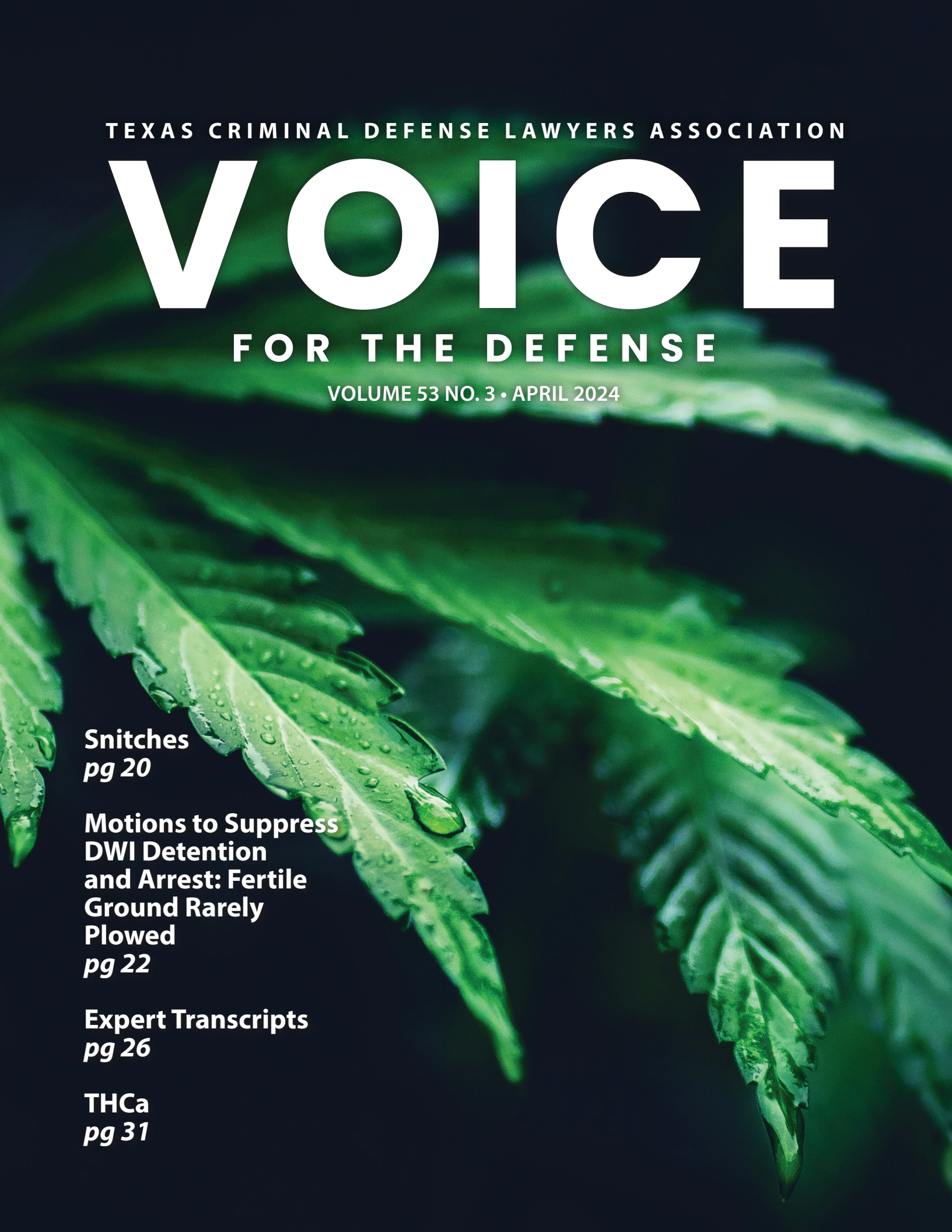

Texas Criminal Defense Lawyers Association

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MAY 3
2024
ALOFT DALLAS DOWNTOWN

FRIDAY

SCAN TO REGISTER

OPENING STATEMENT	CARL CEDER
THE CANNABIS MOLECULE: DIFFERENT FORMS OF THC, DELTA 8, 9, & 10	DANIEL MEHLER
MOTIONS TO SUPPRESS AND CHALLENGES IN DWI DEFENSE	JEMILA LEA
THE FOURTH AMENDMENT AND OTHER LEGAL CHALLENGES IN CANNABIS DEFENSE	DON FLANARY
WHAT THE HECK IS A DELTA 8 PEN?	AMANDA HERNANDEZ
PRESCRIPTION DRUGS	MATT PEACOCK
DISCOVERING AND CHALLENGING THC LAB RESULTS	JOSEPH HOELSCHER
UNDERSTANDING TOXICOLOGY IN THC DWI CASES	ADAM TISDELL
VOIR DIRE	DAVID BURROWS

COURSE DIRECTORS:
DAVID BURROWS, CARL CEDER, NNAMDI EKEH, & DON FLANARY




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VOICE
FOR THE DEFENSE
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Features

Columns

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

May

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

May 10
TCDLA | Financial Friday - Secure 2.0
Webinar

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 11
CDLP | Public Defense Leaders Training
San Antonio, TX

June 12
CDLP | Capital Litigation
San Antonio, TX

June 12
CDLP | Indigent Defense
San Antonio, TX

June 12
CDLP | Mental Health
San Antonio, TX

June 13
CDLP | Women Defenders
San Antonio, TX

June 13-15
TCDLA | 37th Annual Rusty Duncan Advanced Criminal Law 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 Continued

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 7-9
CDLP | Mitigation Bootcamp
Austin, TX

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

August 9
CDLP | Against All Odds *w/ SACDLA*
San Antonio, TX

August 9
TCDLA | Financial Friday - Debt Module
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 29
TCDLEI Board Meeting
Zoom

September

September 5-6
TCDLA | Criminal Law Master Class
Dallas, TX

September 6
TCDLA Executive & Legislative Committee Meetings
Dallas, TX

September 7
TCDLA Board & CDLP Committee Meetings
Dallas, TX

September 13
TCDLA | Financial Friday - Asset Protection
Webinar

September 16
CDLP | Mindful Monday
Webinar

September 17
TCDLA | Constitution Day

September 18
TCDLA | New Lawyer - Mental Health
Webinar

September 25-28
TCDLA | Round Top XII - Advanced Trial Academy
Roundtop, TX

October

October 3-5
TCDLA | FIDL 4.0 Returner *w/ TIDC and HCPD*
Austin, TX

October 5-7
TCDLA | Blast & Cast
Rockport, TX

October 6-19
TCDLA | FIDL 5.0 Returner *w/ TIDC and HCPD*
Austin, TX

October 11
CDLP | Nuts & Bolts *w/ SACDLA*
San Antonio, TX

October 16
TCDLA | New Lawyer - Evidence
Webinar

October 16
CDLP | Innocence for Students *w/ IPOT*
San Antonio, TX

October 17-18
CDLP | 21st Annual Forensics
San Antonio, TX

October 24
CDLP | Mental
South Padre Island, TX

October 25
CDLP | Capital
South Padre Island, TX

October 25
CDLP | Crimmigration *w/ SBOT*
Edinburg, TX

November

November 7-8
TCDLA | 20th Annual Stuart Kinard Memorial Advanced DWI
San Antonio, TX

November 8
TCDLA | Financial Friday - Academics of Investing
Webinar

November 8
CDLP | Mindful Monday
Webinar

December

December 6
CDLP | 17th Annual Hal Jackson Memorial Jolly Roger Criminal Law
Denton, TX

December 12-13
TCDLA | Defending Those Accused of Sexual Offenses
Round Rock, TX

December 16
CDLP | Mindful Monday
Webinar

Scholarship Information:

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

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

President's Message

JOHN HUNTER SMITH

Spring Is All About New Beginnings and Transformations

Spring is a season that symbolizes starting fresh and starting over. Spring serves as a metaphor for personal renewal. I always knew that spring was around the corner when I was preparing to attend the Tim Evans Trial College (TETC). This is my favorite seminar that TCDLA puts on each year. However, I was not enthusiastic about taking the trip from McKinney to Huntsville to teach and lecture this year. I had just finished a three-week federal trial and I was tired and stressed about work at the office and missed opportunities to make new money. Also, I was concerned that I would not be mentally/physically present to do a good job as a small group instructor.

Kerri Anderson Donica and Lance Evans did an exceptional job putting on a first-class seminar this year. Also, the faculty, the lecturers, and the TCDLA staff did an outstanding job. Lastly, this seminar would not be possible without eager students willing to put themselves out there and take a risk to receive both positive and negative feedback. I left there with some observations that resonated with me as a human, as a lawyer, and as a member of the faculty.

First, something that I had not considered were lawyers who had been practicing law for 3 to 6 years and had not had an opportunity to try a criminal case because of COVID. They referred to themselves as COVID LAWYERS. COVID was an obstacle for all of us. However, I cannot imagine what it was like for a young, solo practicing lawyer starting their career. This made me think of a quote, "Success is to be measured not so much by the position that one has reached in life as by the obstacles which he has overcome." I can assure you what I observed from the COVID LAWYERS collectively as a group, were tenacious, passionate, and hungry-to-learn lawyers.

Second, I learned from the students as they completed the exercises. I was curious as to why a teacher learns from the student. When I returned home, I decided to research this issue, and turned to Google for the answer. I learned this is called the protégé effect. The protégé effect is a psychological phenomenon where teaching, pretending to teach, or preparing to teach information to others helps a person learn that information. I know that each of the faculty members became a better lawyer by giving back and teaching the same trial skills we've honed for years.

Third, I was reminded by a student why I chose this profession. During the closing argument exercise, I had a student who was struggling with their performance on the exercise. I was getting frustrated as a teacher because I could not help this student. I tried every technique that I had seen used in the past at TETC. I was ready for her to give up and quit so that I would not feel like a failure. But, to her credit, she refused to give up. Finally, I asked her, "Why did you want to be a criminal defense lawyer?" The student started to tell me, and I said don't tell me, give us a closing argument to that question. For the next 10 minutes, this student took me and their fellow students on a journey to answer the question. The student's story emotionally moved me. I was so proud of this student's fortitude. As I looked around the room, I observed fellow students being lost in the story. When the student finished the story, I said you just gave a moving closing argument. This student's story was my spring renewal to remind myself why I chose this profession.

To the TETC 2024 students, remember that success is neither magical nor mysterious. Success is the natural consequence of consistently applying the basic fundamentals. Remember the basic fundamentals as you take your professional journey.

CEO's Perspective

MELISSA J. SCHANK

"Success is not final, failure is not fatal: It is the courage to continue that counts."
-Winston Churchill

Second Quarter Achievements: Progress Report on 3-Year Strategic Plan Initiatives (October - December 2023)

We have completed our second-quarter (October - December, 2023) goals from our 3-Year Strategic Plan Initiatives. See below for our accomplishments.

REVITALIZING THE ORGANIZATION

Committee Members: Molly Bagshaw, Amanda Hernandez, Kameron Johnson, Rocky Ramirez, Sarah Roland, Ted Wenske | Staff: Mari Flores (Lead), Cristina Abascal, Jayla Davis

Mission Statement Awareness — The committee came up with as many ideas as possible to raise awareness of our mission statement among TCDLA members. In the second quarter, the Mission Statement was published in the following: agendas and minutes for 38 committees and two Boards, Voice (quarterly), weekly email blast (4 times a year), all electronic seminar materials and books, seminar commercial slides, ordered pop-up banners to display at seminars and events, and orientation electronic materials.

Website Badges — The goal was to educate members on website badges to display their status as TCDLA members and TCDLEI donors at the Fellows, Associate Fellow, and Super Fellow levels. All badges are available on the website for easy download, and a blast email with links to download the website badges is available. The badges can be displayed on members' business cards, website, email signatures, etc. Staff are available to assist as needed.

Board Report Card — First quarter board report cards were distributed; in the second quarter, they were modified to add additional information. The items on the board report card outline the annual duties of board members, which are reviewed by each board member at quarterly board meetings to be updated to meet their yearly responsibilities. These cards are vital resources for the nominations committee in evaluating board renewals.

Baseline of Data (Dashboard) – Update the dashboard to include data for the committee to review and board on accomplishments throughout the year.

ENHANCING COMMUNICATION & REORGANIZING RESOURCES

Committee Members: Nicole DeBorde Hochglaube, Aaron Diaz, John Gilmore, Dustin Nimz, Paul Tu | Staff: Sonny Martinez and Alicia Thomas (Leads), Lucas Seiferman, Jessica Steen, Ashley Ybarra

Members' Resource Guide — The committee developed a Members' Resource Guide, compiling all members' resources and services in one location divided into 11 major categories, including volunteer guide from another initiative team. An interactive E-Book will be distributed, included in new and renewal emails, and printed copies in new member kits.

Staff Technology Refresh — In response to member feedback from a technology survey, the committee initiated comprehensive training for TCDLA staff. The program covered essential skills including Zoom link management and review for webinars and phones, website navigation, phone settings, accessing seminar materials, app usage, Listserv posting, and AI software.

EMPOWERING & SUPPORTING MEMBERS & VOLUNTEERS

Committee Members: Jeep Darnell, Lance Evans, Lisa Greenberg, Thuy Le | Staff: Miriam Duarte (Lead), Keri Steen, Rick Wardroup, Dajon White, Anastasia Chapa

Intentional Board Recruitment to Represent

All of Our Members — The subcommittee has some suggestions to the entire Strategic Planning Committee for prerequisites for the board. In addition, the following verbiage, "Who have you recruited to a committee?" is added to the board report card.

Intentional Volunteer Recruitment — This quarter, we finalized and completed the Volunteer Resource Guide, which will be included in the Members' Resource Guide. This is being distributed to new members in print copy and then electronically on the renewal of the monthly benefits email and weekly news blast.

UNDERSTANDING MEMBER RESOURCES TO INCREASE EDUCATION ACCESS

Committee Members: Paul Harrell, Mario Olivarez, Rick Russwurm, Monique Sparks, Clay Steadman, and Judson Woodley | Staff: Grace Works (Lead), Meredith Pelt, Kierra Preston, Miriam Duarte, Alicia Thomas, Cristina Abascal, and Lucas Seiferman

Educate Law Schools on Partnering with TCDLA — To enhance collaboration between law schools and TCDLA, law school staff were consulted, and a plan was created focusing on alumni outreach within TCDLA for connections and compiling contact information for dissemination. Plans were made to integrate student socials with TCDLA events and organize interactive sessions to foster a stronger connection between law schools and TCDLA. An action plan will be created in the next quarter.

Financial Barriers—Hotel Rates—The Committee analyzed financial barriers from the TCDLA survey and found that while 98% agreed on the association's value, one response stated dues were high. Other financial barriers cited were high hotel costs and participation in seminars. 71% preferred hotel room costs to fall within the $129 - $175 range; this is being utilized when booking hotels and also to continue offering all seminars as webinars.

Seminar Topics — The Committee reviewed survey data on the majority of topics. Members are eager to attend seminars on over 40 topics, with the highest-ranked being capital, sexual assault, family violence, and evidence. Insights also revealed preferences for the most sought-after cities, Austin and San Antonio, with Fort Worth, Dallas, and Houston as secondary options. The Nexus committee and staff will use all the data to better meet members' needs.

Wellness Warriors Walk!

To fulfill another one of our Strategic Plan goals with our Wellness Committee, we had a Wellness event at our quarterly events. Annie Scott planned and led our first organized wellness walk in March around the beautiful lake in Sugarland.

Annie Scott, Isela Anaya, Lara Davila Bracamonte, Mari Flores, Lisa Lazarte, Sonny Martinez, Dustin Nimz, Meredith Pelt, Melissa Schank, Patty Tress

Charlie Butts Scholarship

Winner: Kiara Vaughters

Kiara Vaughters, a third-year law student at the University of Texas School of Law, is passionate about criminal defense law and aims to become a public defender upon graduation. Recognizing the importance of safeguarding the rights of the accused, she is dedicated to defending marginalized communities and advocating for indigent individuals. Through internships, community outreach, and further education, Kiara is committed to challenging biases and addressing systemic inequalities within the criminal justice system.

TCDLA

Editor's Comment

JEEP DARNELL

Ask any of the 3,500 to 4,000 members of TCDLA what being a part of this Organization means to them, and you'll likely receive a myriad of responses. Each member holds a unique perspective, yet amidst this diversity, there are common threads that bind us together.

Recently, I've heard sentiment among some members of being on the outskirts, excluded from the inner circle, or not truly embraced as part of the TCDLA family. To those who harbor such feelings, I extend a challenge: immerse yourselves more deeply in TCDLA and volunteer. We have what seems like a million different committees to work on, we have a board Directors, we have an Executive Committee, and we have our Officer Chain. Engage with the numerous committees and seek out to be included in one of them, contribute to the board of directors (the meetings are open), and get to know members of the the Executive Committee and our Officers.

The best place to start getting more involved in TCDLA is through one of the hundreds of millions of committees that we have. Each committee offers ample opportunities for involvement and to make a difference in the Organization and criminal justice in Texas. Rather than seeking recognition solely through getting elected to the Board, provide your unique energy and perspective into meaningful work that advances our shared mission.

The people who I know love this Organization, are people who may not always think or act like me, or even be people that I necessarily consider my friends; but they are all people who work hard to make this Organization, criminal defense, and the State of Texas a better place every day.

Occasionally, a disgruntled member who in a moment of discontent tells everybody she or he is resigning or quitting their position and the rest of us can go to hell. Well, I say that's their loss because we, the members of TCDLA and the Organization itself will continue to strive.

Let us, as members of TCDLA, remain steadfast in our dedication to our cause. Together, we will continue to champion the principles of justice and fortify the fabric of criminal defense in the State of Texas.

Be safe,

Jeep Darnell

The Federal Corner

JOEL PAGE

Fifth Circuit Vacates Guideline Enhancement for Failure to Consider Affirmative Defense

Any federal criminal practitioner with sufficient time in the field will recall their first difficult client conversation about sentencing beyond the offense of conviction. "So," we tell them, "uh, I'm afraid it doesn't quite work like that," by which we mean that the elements of the offense don't limit the facts that the judge can use to boost the Guideline range. Then we tell them:

"Yeah, if you plead guilty to 5 kilograms, that's just the minimum. The prosecutor -- or, more likely, the Probation Officer relying on an Agent relying on a terrified drug dealer trying to reduce their prison sentence -- can still say you actually dealt 1,000 kilos."

Or, "yes, you're charged with stealing one credit card, but if you plead guilty, they can use the credit limits of 700 credit cards against you at sentencing."

Or, "yes, you're charged with possessing the gun, but the judge can give you more time because he thinks you killed someone with it."

These conversations often tend toward the unpleasant.

The last of these scenarios (basically) came to pass in *United States v. Santiago*, --- F.4th ----2024 WL 1205473 (5th Cir. March 21, 2024). However, the opinion also reminds us not to give up hope. According to the opinion, Santiago and associates sold marijuana from a hotel room. Again, according to the opinion, a rival "crew" (the case arose in New Orleans, but we may assume from the opinion's spelling choices -- "crew" rather than "krewe" – that it involved drug trafficking rather than parade floats) ambush-robbed Santiago and his associates. A firefight ensued, and one rival crew member suffered a gunshot wound. No one died.

Santiago pleaded guilty to a variety of federal offenses. These included 18 U.S.C. §924(o), (conspiracy to possess a gun in connection with some drug trafficking), but certainly did not include attempted murder. Nonetheless, the Presentence Report cross-referenced Guideline 2K2.1 – used for §924(o), or more frequently 18 U.S.C. §922(g) – to the attempted murder Guideline 2A1.2. It did so because Probation believed that Santiago, or someone in his crew, tried to kill someone in the firefight.

For those unfamiliar, "cross-referencing" is when the judge leaps from the offense Guideline governing the defendant's less-serious statute of conviction to the Guideline governing a more serious offense. Judges do this upon a finding that the defendant actually committed the more serious offense, notwithstanding the lack of a charge for it. Some Guidelines have provisions encouraging this kind of jaunty Guideline hopping if the judge thinks the defendant was undercharged (or under-convicted). These "cross-reference" provisions include USSG §2B1.1(c) (fraud and such), USSG §2D1.1(d)(drug trafficking), and USSG §2K2.1(c) (firearms).

Back to *Santiago* – a Fifth Circuit panel of Smith, Higginson, and Higginbotham vacated the sentence, concluding that the district court wrongly applied the cross-reference to attempted murder. The panel did not dispute that someone could have been killed by all the shooting going on, nor even that someone in Santiago's crew might have intended as much. But it nonetheless found error. In its view, the government failed to rebut Santiago's claim of self-defense to the attempted murder he wasn't charged with. A video of the events showed an armed robbery against Santiago and his associates, and hence put the question of self-defense at issue. And the panel could see no evidence of the firearm's use in anything but self-defense. The panel noted that a defendant, or a federal defendant at least, cannot claim self-defense if he "recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct." But Fifth Circuit precedent has long held that mere criminal conduct – as opposed to active provocation – doesn't trigger this disqualification. As such, the court thought that a finding of self-defense to attempted murder was compelled by the universe of evidence before the district court, and it accordingly found the cross-reference erroneous.

The case may be of some use to the federal criminal defense bar in this Circuit. Specifically, it can be cited for the proposition that defendants may leverage affirmative defenses against sentence adjustments that depend on the commission of another offense. Cross-references do not occur in most cases, though they certainly aren't infrequent. The Sentencing Commission Sourcebook shows that about a thousand people get cross-referenced to the drug Guideline each year, and another few hundred get cross-referenced to various assaultive Guidelines. *See* US Sentencing Commission, *2023 Sourcebook of Federal Sentencing Statistics*, Table 20 (2023), available at https://www.ussc.gov/research/sourcebook-2023.

Still, many Guidelines provide enhancements when the defendant commits another criminal offense with sufficient connection to the offense of conviction, including USSG §§2B1.1(b)(8)(12), 2D1.1(b)(3), and 2K2.1(b)(6). And even more significantly, there is a background requirement in USSG §1B1.3 that ***every*** Guideline enhancement be premised on criminal conduct. *United States v. Anderson*, 174 F.3d 515, 526 (5th Cir. 1999) ("However, for the acts to constitute relevant conduct, the conduct must be criminal."). If the defendant can use affirmative defenses to defeat a cross-reference, there is no logical or textual reason that they could not also use them to defeat other kinds of Guideline enhancements.

Without doubt, relevant conduct is a potent weapon available to the government at sentencing, capturing large swaths of conduct outside the four corners of the indictment or the elements of the offense. And while clients must be warned about the possibility of enhanced Guidelines on the basis of relevant conduct, defense attorneys have to fight the sense of learned helplessness about it. A close reading of USSG §1B1.3 will often provide means to defend against Guideline enhancements not based on the offense of conviction. *Santiago* highlights another possible shield to such enhancements: ask yourself, "if the client were charged with the conduct that gives rise to this Guideline enhancement as a criminal offense, how would I defend them?"

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

Beyond the City Limits

JESSICA CANTER
& TIP HARGROVE

Interlock and the Rural Non-Lawyer Judge

Have you lost count of how many times you've tried to explain vehicle interlock requirements to a rural County Judge who is not a lawyer? It can be a frustrating experience despite the fact that many rural County Judges are retired law enforcement officers. In an attempt to help, we offer this guide on explaining vehicle interlock requirements to non-lawyer rural county judges in misdemeanor cases. This guide does *not* address felonies because it has been our experience that the vast majority of district judges impose interlock requirements "at random," whether or not the law makes it mandatory.

A couple of points to make before we begin:

A. The "interlock lobby" is a strong one, so interlock, or similar technology, is here to stay.

B. Rural judges have access to what is commonly referred to as a "Bench Book" which provides incomplete guidance on interlock devices.

C. Hon. Mark Hocker, County Court at Law #1, from Lubbock, teaches at "new judge school." At this seminar, Judge Hocker hands out a simplified chart on interlock device requirements. Many Judges refer to it. Judge Hocker has allowed us to attach his chart as a part of this article. See Chart.

D. All the above resources, while helpful, are lacking when it comes to explaining discretion and innovative use of the interlock device.

E. Unless noted otherwise, for the sake of simplicity, we use the term "DWI" throughout the article; boating, flying, and amusement park ride alcohol cases have the same requirements for interlock devices.

F. To be clear, "TC" stands for Transportation Code, "PC" stands for Penal Code, "CCP" stands for Code of Criminal Procedure, and "ODL" stands for Occupational Driver's License.

We will address the interlock in two categories: prior to first court appearance and disposition of the case.

PRIOR TO FIRST COURT APPEARANCE

While a DWI case is pending, many judges require the installation of an interlock device as a bond condition, pursuant to CCP Section 17.441. It states that an interlock device is **REQUIRED** to be installed within **30 days of release from jail** on DWI offenses. This requirement can be waived, however, if a judge makes a finding that an interlock "would not be in the best interest of justice." See CCP 17.441(b). Please note, 17.40 of the CCP states that conditions of bail for "public safety" are just peachy, and many judges campaign on some sort of public safety platform, so expect this section to be frequently thrown in your face.

Judges are also no longer required to include hours, days, and counties of permitted travel with an interlock device. In the old days, a judge had the discretion to either list the hours, days, and counties of permitted travel without an interlock, or permit wide open driving with one. Now the code, under TC 521.248(d), states that these restrictions cannot be imposed if an interlock device is installed. (A cynic would say that is the interlock lobby working in its own self-interest…).

Speaking of listing out the hours, days, and counties of permitted trial - this brings up the important issue of an Occupational Drivers License (ODL). There appears to be no direct requirement for an interlock in the Occupational License statute - TC 521.221. However, DPS for "good cause" can impose special restrictions including, under TC 521.221(a)(2), a special mechanical control device. An interlock device certainly sounds like a special mechanical control device. By the way, TC 521.221(a)(4) & (5) say days/hours/counties restrictions can also be imposed by DPS for "good cause." How the heck they go about showing "good cause" and to whom they would show it is a mystery to us. Also, please remember that our clients frequently need to drive a company vehicle and we know the company is highly unlikely to allow an interlock in that company owned vehicle. A waiver is

possible under TC 521.246(e) provided the company is cooperative and states that cooperation in writing.

DISPOSITION

The completion of a case comes by way of disposition: an acquittal, an outright dismissal, a plea to something other than a DWI, or a DWI conviction (straight probation, deferred adjudication, or jail time).

One would think that an acquittal/outright dismissal or a plea to something other than a DWI would have no interlock requirements, and they generally do not. However, an agreement to have an interlock device where none is required can be an incredibly useful negotiation tool. For example: negotiate with the prosecutor by telling them that your client will agree to have an interlock device as a condition of probation for the entire length of said probation if the charge is changed to something like obstruction of a highway. While an interlock device is an expensive pain, it can be far less of an expensive pain as compared to a DWI conviction. As for deferred adjudication, an interlock is required under CCP 42A.408(e-1). Judges always have the power to modify the terms of probation (see 42A.051 of the CCP) unless there is a specific prohibition. "Wiggle room" is found in two places. The first is CCP 42A.408(f). That provision starts by saying the interlock must stay on for at least 50% of the probationary term, but it allows for a deviation in "…the interest of justice…".

The second is CCP 42A.408(e-2), which states that a judge can waive interlock requirements after an evaluation and a finding that the device is not necessary for community safety. That evaluation is critical. As you know, probation officers routinely perform all sorts of evaluations on our unfortunate clients. The evaluation under CCP 42A.408(e-2) can give us a real opportunity to be creative. All we need to do is cite the statute, ask

that the evaluation results to go to the judge, and make our pitch for a waiver. No doubt "community safety" will be the key to getting the interlock removed earlier rather than later. Unless the judge feels comfortable that the probationer has demonstrated sobriety, we are probably out of luck for getting an early removal of the interlock. (By the way, another opportunity to use all this to our advantage are the positive results of an interlock imposed as a bond condition.) As to a conviction with a probated sentence, an interlock is *not* required on probated sentences for DWI 1st, DWI with an open container, or DWI with an alcohol concentration below .15.

Interlock devices are required by CCP 42A.408 (c)(1) for BAC .15 and above, if it's a second offense within 10 years (CCP 42A.408(c)(3)), or if the person is under 21 years of age (CCP 42A.408(e-1) regardless of the type of probation. Please note that CCP 42.408(c)(3)(d) says that a DWI more than 10 years old cannot be used to impose an interlock.

Lastly, we must consider a conviction without community supervision (jail time or time served). This disposition does not require an interlock, unless it's a second offense within five (5) years of the current conviction. If it is the second offense within five (5) years, the interlock device is required for a year under PC 49.09(h). Interestingly, PC 49.09(h) applies to motor

MISDEMEANOR D.W.I. SENTENCING SUMMARY

		DWI 1st Offense	DWI w/ Open Container	DWI w/ ≥ 0.15 BAC	DWI 2nd Offense
	Punishment (Def. Adj.?)	[MB] **72 hrs. - 180 d. Jail; Optional Fine ≤ $2,000** [1] (Yes, *unless*...)[5*]	[MB] **6 - 180 d. Jail; Optional Fine ≤ $2,000** [2] (Yes, *unless* ...)[5*]	[MA] **0 - 365 days Jail; Optional Fine ≤ $4,000** [3] (No)[6]	[MA] **30 - 365 days Jail; Optional Fine ≤ $4,000** [4] (No)[7]
JAIL / Final Conviction	**DL Suspension**	**90 d. - 1 yr.,**[8*] ***except*** **:** < 21 at offense = **1 yr.**[9]	**90 d. - 1 yr.,**[8*] ***except*** **:** < 21 at offense = **1 yr.**[9]	**90 d. - 1 yr.,**[8*] ***except*** **:** < 21 at offense = **1 yr.**[9]	**180 d. - 2 yrs.,**[10] ***unless*** **:** prior w/in 5 yrs. = **1 - 2 yrs.**[11]
	Credit ALR ?	**Shall Credit,**[12] ***unless*** **:** < 21[13] *or* prior § 49 Conv.[14]	**Shall Credit,**[12] ***unless*** **:** < 21[13] *or* prior § 49 Conv.[14]	**Shall Credit,**[12] ***unless*** **:** < 21[13] *or* prior § 49 Conv.[14]	**NO**[14]
	Ignition Interlock	**Not Required**	**Not Required**	**Not Required**	**REQUIRED *if*** prior conviction is w/in 5 yrs.[15*]
	Traffic Fine Offenses > 9/1/19 (Not if Indigent)[16]	**$3,000** (1st w/in 36 mo.)[17] **$4,500** (2nd+ w/in 36 mo.)[18]	**$3,000** (1st w/in 36 mo.)[17] **$4,500** (2nd+ w/in 36 mo.)[18]	**$6,000**[19]	**$3,000** (1st w/in 36 mo.)[17] **$4,500** (2nd+ w/in 36 mo.)[18]
Community Supervision	**DL Suspension**	**90 d. - 1 yr., *but*** waived if Alcohol Program ordered;[20*] ***except*** **:** < 21 = **90 d.**[21*]	**90 d. - 1 yr., *but*** waived if Alcohol Program ordered;[20*] ***except*** **:** < 21 = **90 d.**[21*]	**90 d. - 1 yr., *but*** waived if Alcohol Program ordered;[20*] ***except*** **:** < 21 = **90 d.**[21*]	**180 d. - 2 yrs,**[22] ***unless*** **:** prior w/in 5 yrs. = **1 - 2 yrs.**[23]
	Credit ALR ?	**Shall Credit,**[12] ***unless*** **:** < 21[13] *or* prior § 49 Conv.[14]	**Shall Credit,**[12] ***unless*** **:** < 21[13] *or* prior § 49 Conv.[14]	**Shall Credit,**[12] ***unless*** **:** < 21[13] *or* prior § 49 Conv.[14]	**NO**[14]
	Ignition Interlock (50% of supv.)[24]	**Not Required, *unless*** **:** Def. Adj.;[25] < 21;[26*] or Prior w/in 10 yrs.[27*]	**Not Required, *unless*** **:** Def. Adj.;[25] < 21;[26*] or Prior w/in 10 yrs.[27*]	**REQUIRED**[28]	**REQUIRED *if*** BAC ≥ 0.15[28] ***or*** prior w/in 10 yrs.[27]
	Shock Time[29]	**0 - 30 d.**[30]	**0 - 30 d.**[30]	**0 - 30 d.**[30]	**72 hr. - 30 d.,**[31] ***unless*** **:** prior w/in 5 yrs. = **5 - 30 d.**[32]

Footnotes to Citations on reverse — Last updated 10/04/2023

Misdemeanor DWI Sentencing Summary
Footnotes to Citations

1. P.C. § 49.04(b)
2. P.C. § 49.04(c)
3. P.C. § 49.04(d)
4. P.C. § 49.09(a)
5. C.C.P. Art. 42A.102(b)(1)(B)
   * No Def. Adj. for Flying W.I., if Δ is a CDL/CDL learner, or for offenses > 09/01/2019.
6. C.C.P. Art 42A.102(b)(1)(B)(ii)
7. C.C.P. Art. 42A.102(b)(1)(C)

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8. T.R.C. § 521.344(a)(2)(A);
   * Suspension must begin w/in 30 days of conviction.
9. T.R.C. § 521.342(b)
10. T.R.C. § 521.344(a)(2)(B)
11. T.R.C. § 521.344(a)(2)(C)

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12. T.R.C. § 521.344(c)
13. T.R.C. § 521.344(c)(2)
    * < 21 at time of offense
14. T.R.C. § 521.344(c)(1)

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15. P.C. § 49.09(h)
    * "5 yrs." is offense date to offense date. I.I.D. order ends 1 yr. after DL Susp. ends.

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16. T.R.C. § 709.001(c)
    Only for Offenses > 9/1/19
17. T.R.C. § 709.001(b)(1)
18. T.R.C. § 709.001(b)(2)
19. T.R.C. § 709.001(b)(3)

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20. T.R.C. §521.344(a)
    * (d) Waiver of Susp.
    * Jury may rec. no DL susp. [C.C.P. Art. 42A.407(a)]
21. T.R.C. § 521.342
    * For Δ's < 21, Alcohol Education Program does not waive suspension. However, if Ignition Interlock Device is ordered as condition of community supervision, then do not have to suspend DL.
22. T.R.C. § 521.344(a)(2)(B)
23. T.R.C. § 521.344(a)(2)(C)

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24. C.C.P. Art. 42A.408(f)
25. C.C.P. Art. 42A.408(e-1)
26. C.C.P. Art. 42A.408(e)
    * < 21 at time of offense
27. C.C.P. Art. 42A.408(c)(3),(d)
    * Includes a waived prior (e.g. 2nd plead down to 1st)
28. C.C.P. Art. 42A.408(c)(1)

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29. C.C.P. Art. 42A.401(b)
    * May not credit SHOCK time served if later revoked
30. C.C.P. Art. 42A.302(a)(1)
31. C.C.P. Art. 42A.401(a)(1)
32. C.C.P. Art. 42A.401(a)(2)

For corrections, or comments:

Mark Hocker, Judge
Lubbock County Court at Law #1
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vehicles only, not boats, planes, or amusement rides. How is that enforced? By contempt under PC 49.04(h). Article PC 49.04(h) states that the convicting court retains jurisdiction for contempt purposes. DPS can also continue to mess with our clients under the TC 521.221, which allows DPS to impose "special restriction" on an ODL.

So how long must interlock devices stay on? That is an open question as far as we can tell. As we said above under deferred adjudication, CCP 42A.408(f) says an interlock must remain on at least 50% of the term of community supervision. Remember, though, the very same statute states if the court finds that the "interest of justice" is not being served by the imposition of an interlock, you may be able to get the interlock waived completely or reduce the time a client must have it further.

While this guide is relatively short, we hope it is helpful and that the information provided arms you with what you need when attempting to educate our enrobed friends who don't hold a law license.

Jessica Canter *began her career as a public defender with the Bee County Regional Public Defender's Office in 2015, a division of Texas RioGrande Legal Aid. In 2018, she established the Lavaca County PDO's office. In February 2022, she became the Director of Professional Development and Holistic Defense for the Bexar County Managed Assigned Counsel office in San Antonio, TX. After a year of wonderful work with the Bexar County MAC, Jessica realized she missed working with clients and joined the Concho Valley Public Defender's Office in San Angelo, TX. Jessica has been a board member of the Texas Criminal Defense Lawyers Association (TCDLA) since 2018 She speaks for TCDLA at CLEs on storytelling, openings and closings, and voir dire, and has been the course director for several TCDLA sponsored CLEs. She has also served as chair of the State Bar Legal Services to the Poor in Criminal Matters Committee.*

Tip Hargrove *graduated from The Citadel (Military College of South Carolina) in 1971 and from Univ of North Carolina Chapel Hill Law School 1974. Went on active duty USAF in 1974. Began solo practice in San Angelo in 1978 handling criminal and family cases. Served on the TCDLA Board of Directors for 9 years and also served on the SBOT Family Law Council.*

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Ethics and the Law

SUZANNE SPENCER

An Ethics Case Study: The Lawyer Did What? And the Client Ended Up in the Hands of the Northeast Cartel?

I. INTRODUCTION

My indigent defense practice involves representing numerous non-citizen clients with U.S. Immigration and Customs Enforcement (ICE) holds. An ICE hold is also referred to as an immigration hold or immigration detainer. It is a request from ICE to the local jails to hold a non-citizen inmate for an additional 48 hours after release from custody. The purpose for this hold is so ICE can take custody of the non-citizen and place them in detention for possible deportation. When retained or appointed to represent an incarcerated non-citizen with an ICE hold, best practices dictate leaving the client in custody. If bond is sought and granted, the vulturous ICE agents will often circumvent the client's release on bond, swarm in and take immediate custody of your non-citizen client.

Leaving your non-citizen client with an ICE hold in jail accomplishes three things: **(1)** it allows the client's family time to retain an immigration attorney, if feasible; **(2)** it allows the court assigned attorney time to seek immigration advice per *Padilla*[1] regarding a resolution for the pending case(s) that subjects the client to the least negative immigration consequences; and **(3)** it allows for time to set the case(s) for trial or work out a plea disposition or dismissal.

II. CASE STUDY FACTS: MYSTERY LAWYER POSTS BOND / ICE DETAINS CLIENT / CARTEL KIDNAPS CLIENT

My non-citizen client will be referred to as Mr. Pablo Garcia. He was sitting "comfortably" in the correctional complex while my defense team worked on fighting the criminal cases and coordinating with the client's family in the U.S. and in the foreign home country.

Early on a Wednesday morning we received frantic telephone calls from the client's family informing us that Mr. Garcia had been swept up and detained by ICE. We were confused as we had neither submitted bonds, nor were his cases resolved. Armed with the Managed Assigned Counsel immigration lawyer, I made my way to the ICE "clearinghouse" in search of Mr. Garcia and an explanation for his ICE detention. Much to my chagrin, I learned Mr. Garcia had just been taken in a van toward the Texas border in Nuevo Laredo, Mexico.

It did not take long to glean that a personal bond had been posted. I was the assigned attorney of record and Mr. Garcia had not retained other counsel. Unbeknownst to Mr. Garcia, a distant relative of his family retained a lawyer for him. This lawyer never visited, interviewed, video called, or phone called Mr. Garcia at the jail. Nor did the lawyer bother to contact me as the official attorney of record. What the retained lawyer did, however, was to immediately post a personal bond for my client. It did not take long thereafter for ICE to swarm in and the take my client.

Mr. Garcia was transported forthwith to the Nuevo Laredo border wherein he was captured by the Northeast Cartel. It was at this particular moment that the Mexican Marines appeared, and a battle ensued. Fortunately, Pablo came out alive, albeit in the custody of the cartel. He spent 35 long tortuous days in their custody wherein he was beaten and pummeled every day. We were apprised of these details by Mr. Garcia's family. The cartel allowed Pablo to make contact with his family in the United States, and then commandeered the communication with my client's loved ones to demand a ransom in exchange for Pablo's release.

III. The Texas Disciplinary Rules of Professional Conduct (TDRPC)

Did the Retained Lawyer Violate any of the TDRPC? Yes, he did violate several rules in §I. entitled, "CLIENT – LAWYER RELATIONSHIP"

1 *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 1483, 176 L.Ed.2d 284 (2010)

of the TDRPC:

Rule 1.01 - Competent and Diligent Representation:

1.01 §(b)(2): In representing a client, a lawyer shall not: frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.

Comment re: Competent and Diligent Representation:

Comment 6. - If a lawyer has accepted employment, he/she should act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf.[1]

The alleged retained lawyer never interviewed or contacted Mr. Garcia, by any means, to ascertain what obligations were owed to the client thereby failing to act with competence, commitment and dedication to the interests of the client. Mr. Garcia would not have agreed to the posting of a personal bond. This lawyer never contacted me as the attorney of record. Nor did this lawyer file or execute a motion to substitute counsel.

Rule 1.02 - Scope and Objectives of Representation:

1.02 §(a) Subject to paragraphs **(b), (c), (d), (e)** and **(f)**, a lawyer shall abide by a client's decisions:

(1) concerning the objectives and general methods of representations;

(2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law; and

(3) In a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

§(b) A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation.

§(c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.

§(d) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.

§(e) When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.

§(f) When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Comments re: Scope of Representation:

Comment 1. – The client has ultimate authority to determine the objectives to be served by legal representation, within the limits imposed by law, the lawyer's professional obligations and the agreed scope of representation.

Comment 2. – The lawyer is obligated to communicate proposed settlements and plea bargain offers to the client.

Comment 3. – The lawyer should consult the client re: any proposal.

Comments re: Limited Scope of Representation:

Comment 4. – The scope of representation provided by the lawyer may be limited by agreement with the client.

Comment 5. – The scope of representation must accord with the Disciplinary Rules of Professional Conduct and other laws.

Comment 6. – Unless representation is terminated, a lawyer should carry through to conclusion all matters undertaken for the client.[1]

Again, the alleged retained lawyer failed to interview or contact Mr. Garcia. Therefore, my client's objectives and the general methods of representation were never discussed. Mr. Garcia was deprived of the decision he was entitled to make regarding the posting of a personal bond. In addition, had the lawyer intended to limit the scope of representation in any way, he could only do so by agreement with the client. The lawyer failed to get any agreement from Mr. Garcia.

Rule 1.03 – Communication:

1.03 §(b): A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment 1. – Communication - The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued to the extent the client is willing and able to do so.[1]

The alleged retained lawyer failed to communicate with the client either in person or by jail video/telephonic means. The lawyer failed to contact me as the attorney of record. The lawyer's lack of communication denied the client the information he needed to participate in decision-making, and led to that lawyer's ill-informed decision to post a personal bond when the client had an ICE hold.

Rule 1.04 – Fees:

1.04 §(c) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

Comment 2. - Basis or Rate of Fee - In a new client-lawyer relationship, an understanding as to the fee should be promptly established. When the lawyer has not regularly represented the client, it is preferable for the basis or rate of the fee to be communicated to the client in writing.[1]

The alleged retained lawyer had not previously represented Mr. Garcia in any civil, criminal or any matter

at all. Nor did he have an acquaintanceship of any type with Mr. Garcia. This lawyer failed to communicate with the client by any means. Therefore, the basis or rate of the lawyer's fee was not communicated to Mr. Garcia at all, much less promptly.

Rule 1.08 - Conflict of Interest: Prohibited Transactions:

1.08 §(e): A lawyer shall not accept compensation for representing a client from one other than the client unless:

1. The client consents;
2. There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
3. Information relating to representation of a client is protected as required by Rule 1.05 "Confidentiality of Information."

Comment re: Person Paying for Lawyer's Services:

Comment 5. - §(e) requires disclosure to the client that the lawyer's services are being paid for by a third party.[1]

Again, the client, Pablo Garcia, was in custody. The alleged retained lawyer neglected to visit or interview the client at the jail either in person, by the jail ViaPath video or telephonic means. The lawyer, thereby, failed to inform Mr. Garcia that he was retained and paid by a third party.

IV. CONCLUSION

Pablo Garcia's family received several threatening telephone calls from the Northeast Cartel demanding a $5,000.00 ransom in exchange for Pablo Garcia's release. The family was given one week to raise the money. The immigrant family barely made enough money to get by. After a week of trying to raise the money, the family was only able to scrape up $1,000.00. When the cartel called that day, my client's sister, the matriarch of the family, managed to convince the cartel member on the phone to agree to release Pablo upon the payment of $1,000.00. The payment was made via a wire transfer. Pablo was indeed released that day.

Fortunately, despite the lawyer's shocking disciplinary rule violations, this story did not have a sad ending. Lucky to be alive, Pablo Garcia made his way back to the Central Texas area a few weeks later. Ultimately, his harrowing ordeal was considered in his favor during negotiations, and his high breath test driving while intoxicated case was dismissed. However, the lawyer's conduct could so easily have ended in tragedy. The clear take-away is that lawyers must familiarize themselves with the TDRPC because failure to follow the rules could leave a client in peril, or worse.

[1]SCOTX/Texas Court Rules/Texas Disciplinary Rules of Professional Conduct/Sec.1.01 – 9.01/Effective January 31, 2022.

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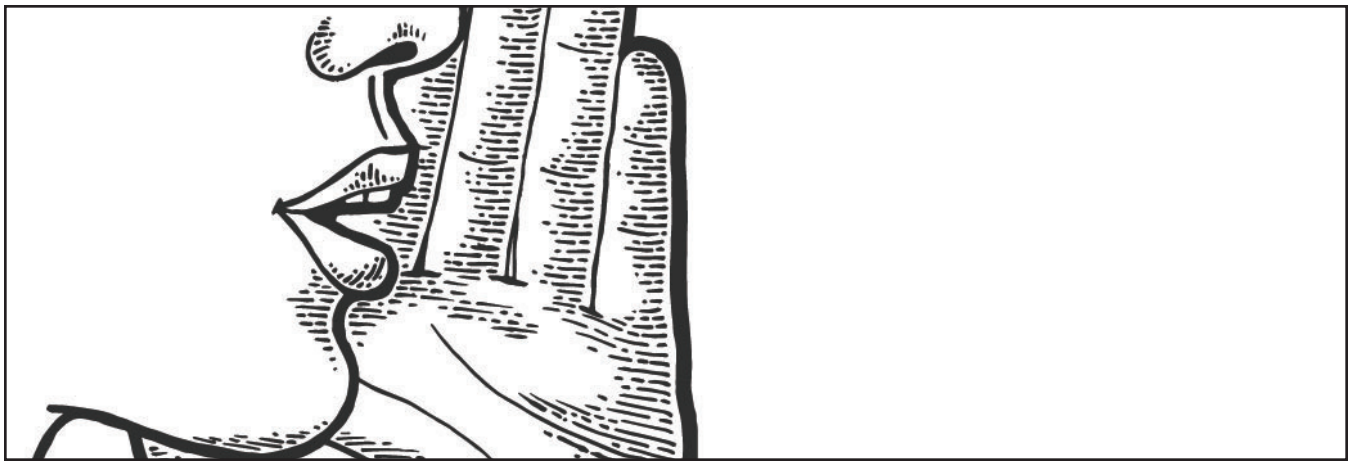

Snitches

CLIFFORD DUKE

Article 3 of 3 in Series

Issues with healthcare are not the usual place that you would look to analyze issues with witnesses. However, in today's world - with costs rising and levels of care dropping - it needs to be noted that snitches in most circumstances will no longer get stitches. They will be placed directly in ditches.

Joking aside, what do we do when we don't get our client to the prosecutor to offer "help" first? How bad is it when a co-defendant is listed on the witness list for trial, or your client's cell mate listed in the 404(b) disclosure? Special rules apply to accomplice, jail house, and confidential informant testimony and it's important to be prepared to keep them in their lane.

A. Accomplice "Snitch" Testimony

Accomplice testimony is inherently unreliable. "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense." Tex. Code. Crim. Proc. §38.14. "An accomplice is a *discredited witness*." *Wincott v. State*, 59 S.W.3d 691,698 (Tex.App – Austin 2001*) citing Walker v. State,* 615 S.W.2d 728, 731 (Tex.Crim.App. 1981) (emphasis supplied). "No matter how complete a case may be established by an accomplice witness, a conviction is not permitted unless the accomplice's testimony is corroborated." *Id.*

An accomplice is a person who participates in the offense before, during, or after its commission with the requisite mental state. *Smith v. State*, 332 S.W.3d 425, 440 (Tex.Crim.App. 2011). A witness that is indicted for the same offense as the accused is an accomplice as a matter of law, and will continue to be so even after a dismissal of the charge if the dismissal is in exchange for testimony. *Id.* If the evidence is conflicting on the status of a witness, the trial judge may instruct the jury to determine a witnesses' status as a fact issue. *Druery v. State*, 225 S.W.3d 491, 498 (Tex.Crim.App. 2007). If there is a factual question about the status of a witness as an accomplice, the burden is on the State to prove that a witness is not an accomplice. *Haney v. State*, 951 S.W.2d 551 (Tex.App.-Waco 1997).

Accomplice testimony is not limited to an accomplice testifying in open court. "[T]he plain meaning of "testimony" does broadly include at least some out-of-court statements not made under oath." *Bingham v. State*, 915 S.W.2d 9, 10 (Tex. Crim. App. 1994), *on reh'g*, 913 S.W.2d 208 (Tex. Crim. App. 1995). In *Bingham* the State attempted to back-door Bingham's wife's statements through an investigator about their plan to burn down their trailer as a statement against interest, but without the accomplice witness instruction to the jury. The appellate court remanded, requiring the accomplice witness testimony instruction because "to hold otherwise, would permit the State 'to do that which it cannot do directly.' " *Id.*

To evaluate the sufficiency of corroborative testimony, an appellate court will first eliminate from consideration the evidence of the accomplice witness. *Wincott* at 898, *citing Edward v. State*, 427 S.W.2d 629, 623 -33 (Tex. Crim.App. 1968). "If the State fails to produce any non-accomplice evidence tending to connect the defendant to the offense, then the defendant is entitled to an acquittal." *Id.* Evidence that only shows guilt by association is insufficient. *Weatherred v. State*, 100 Tex.Crim. App. 199 (1925). Examples of such corroborating circumstances include subsequent flight, possession of the fruits of the

crime, and presence at or near the scene of the crime at an unreasonable hour. *Cherb v. State*, 472 S.W.2d 273, 280 (Tex.Crim.App. 1971) *citing Cawley v. State*, 166 Tex. Crim. 37 (1957). Conduct on the part of a person accused of a crime after its commission may indicate a consciousness of guilty for that crime. *Brown v. State*, 657 S.W.2e 117, 119 (Tex.Crim.App. 1983). Evidence providing "even a strong suspicion is insufficient to corroborate the testimony of the accomplice witness." *Wincott* at 700.

If the State fails to provide the required corroborating evidence "the court shall instruct the jury to render a verdict of acquittal, and they are bound by the instruction." Tex.Code.Crim.Proc. §38.17.

B. Jailhouse Snitch Testimony

Testimony from a witness that comes from a fellow inmate is treated in the same manner as accomplice testimony. It was designed to operate 'similarly' to Article 38.14, the statute "enacted to address how to handle accomplice-witness testimony." *Phillips v. State*, 463 S.W.3d 59, 67 (Tex. Crim. App. 2015); *see also id.* at 69 (Keller, P.J., concurring) ("[T]he jailhouse-witness statute was designed to operate like the accomplice-witness statute.").

An interesting note for both accomplice testimony and jailhouse testimony is that it applies only to the guilt/innocence phase of the trial. Both 38.14, as well as 38.075, address necessary corroboration for a conviction, not for the evidence to be admissible in punishment. *See Ex. Parte White*, 506 S.W.3d 39 (Tex.Crim.App. 2016).

C. Confidential Informant Testimony

The final 'tainted witness' that requires corroboration is a non-police officer that is used covertly on behalf of the police to gather evidence. Tex. Code. Crim. Proc. 38.141. This corroboration requirement only applies to narcotics investigations, Chapter 481 of the Health and Safety Code. *Id.* "This rule is a 'statutorily imposed review and is not derived from federal or state constitutional principles that define the legal and factual sufficiency standards.'" *Malone v. State*, 253 S.W.3d 253, 257 Tex.Crim.App. 2008) *citing Druery v. State*, 225 S.W.3d 491, 498 (Tex.Crim.App. 2007).

Like accomplice-witness and jailhouse snitch testimony, a defendant may not be convicted based solely on the testimony of the confidential informant. Tex.Code. Crim.Proc. 38.141. The same standards for evaluating the sufficiency of the evidence for corroboration for accomplice-witnesses applies to confidential informant corroboration. *Malone*, at 258. "There is no set amount of non-accomplice evidence that is require for sufficiency purposes; '[e]ach case must be judged on its own facts.' " *Id. citing Gill v. State*, 873 S.W.2d 45, 48 (Tex.Crim.App. 1994).

The co-defendant who provides the State testimony can be a daunting turn of events for your client's defense. It is a good start to be prepared with the deadly cross examination to show how the co-defendant is lying just to save their own skin; but using the law to limit how much damage they can do can get you just as far. It is probably best to remember, from the get-go, that even fish wouldn't get caught if they'd just keep their mouth shut.

Read Article 1 of 3 of the series in the January/February 2024 issue of the Voice! Article 2 of 3 in the March 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.*

Motions to Suppress DWI Detention and Arrest: Fertile Ground Rarely Plowed

HAROLD J. DANFORD

Member of DWI Committee

Following too closely, not signaling for at least 100 feet, and weaving within a lane are all too familiar reasons why our clients are pulled over. These are also the common subjects of our motions to suppress in DWI cases. The overwhelming majority of DWI motions to suppress relate to whether the officer had reasonable suspicion to stop our clients in the first place. Motions to suppress the detention for a DWI investigation or the arrest are less common, but they do not have to be.

In many cases, the client is driving relatively fine, but pulled over for some inconspicuous reason such as a defective headlamp or expired registration. The National Highway Traffic Safety Administration (NHTSA) does not recognize these traffic offenses as signs of intoxication, and hopefully your officer will admit the same. Even if he's the argumentative type, I bet the officer will acknowledge that most of the speeders he has stopped were sober. If you have a case where your client is driving relatively normally, then you are off to a great start.

Next, watch for cases where the client exhibited little to no sign of intoxication while speaking to the officer. Perhaps the client allegedly smelled of alcohol, or admitted to drinking a couple of drinks (as is allowed), or even had red, glassy eyes, but did not exhibit any true loss of their mental or physical faculties.[1] An officer may admit, for example, that your client did not slur his words, that he could understand him, and that the client followed instructions, answered questions, and provided the information for which he was asked. The officer may additionally acknowledge the fact (and the relevance) of it being late at night, allergy season, or the possibility that your client was simply tired.[2] If the officer tries to get away with an observation like "slightly slurred speech," don't let him. Ask the officer what on earth that means, and make the judge decide what he or she thinks of your client's speech. When watching the video, the judge is in the same position as the officer, and they are allowed to Monday morning quarterback every day of the week. Remember, the officer needs reasonable suspicion of DWI before he can prolong the detention and subject your client to roadside acrobatics.[3] If there are no true indicators of intoxication, there is no reasonable suspicion of DWI, and your client should not become the subject of such a roadside investigation.

When dealing with probable cause to arrest, the SFSTs will of course be important, assuming your client completed them. But I have had several cases where the SFSTs began and ended with the HGN for one reason or another, and where the officer performed that test improperly. The HGN test is an easy one for officers to mess up. Two such cases were *State v. Evans* and *State v. Nielsen*,[4] and I have had the opportunity to cite

1 *See State v. Mosely,* 348 S.W.3d 435, 441 (Tex. App – Austin 2011, pet. ref'd.) (finding that being involved in an accident, odor of alcohol, admission of drinking, and bloodshot eyes do not establish the loss of normal use of mental or physical faculties or probable cause to arrest for DWI).

2 *See Davis v. State,* 947 S.W.2d 240, 245 (Tex. Crim. App. 1997) (finding reasonable suspicion of DWI dispelled with no odor of alcohol or admission of drinking and driver's explanation that he was tired).

3 *See Rodriguez v. United States*, 575 U.S. 348, 354-55, 135 S. Ct. 1609, 1614-15, 191 L.Ed.2d 492 (2015); *see also Davis v. State*, 947 S.W.2d at 244.

4 *State v. Evans*, 500 S.W.3d 528 (Tex. App. – San Antonio 2016, no pet.); *State v. Nielsen*, 594 S.W.3d 356 (Tex. App. – San Antonio 2018, no pet.).

them several times since.

In those cases, and others alike, there was nothing particularly "drunk" about the driving, little to no signs of intoxication during the initial interaction, an invalid HGN test (facing traffic, starting on the wrong eye, etc.), and no other SFSTs, either because they were not offered or because the client could not perform them due to injury or disability. Prosecutors love to use a refusal to participate in SFSTS against our clients. However, it is important that we do not confuse a client's inability to perform the tests as a refusal.[5] Even if the client refused, that should not get the State very far if there are no other signs of intoxication. Finally, the officer can still lack probable cause even if your client completed the tests. The officer will no doubt find something to complain about, but if it looks like your client walked a straight line and stood on one leg for a decent amount of time, this can be just as good, if not better, than when he had a genuine excuse as to why he could not perform the tests.

Do not fear the "totality of the circumstances" and take the opportunity to argue that they weigh in your client's favor. Recall that NHTSA outlines three distinct phases of DWI detection: Vehicle in Motion, Personal Contact, and Pre-arrest Screening, with a final arrest decision based on "the collective evidence."[6] At the conclusion of the hearing, you may be able to argue that the officer detected no indicators of intoxication before pulling your client over, at least more good than bad during the initial interaction, and few to no valid clues at all during the SFSTs. In the end, the judge will do whatever he or she wants. But on facts like these, you can feel just as confident about a motion to suppress detention or arrest as any motion to suppress the stop. Even if you lose, you will at least get some good testimony, and the prosecutor may realize just how much of an uphill battle they have in store when beyond a reasonable doubt is the standard.

Harold J. Danford *is the lead attorney at Danford Law Firm in Kerrville. He has proudly represented the accused across the Texas Hill Country for more than 25 years. He is a former prosecutor, municipal judge, and Director of the Texas Department of Public Safety's DWI/ALR Program. He was previously on the board of TCDLA and currently serves as President of the Kerr County Bar Association. He can be reached at (830) 257-4045 or harold@danfordlaw.com.*

5 *See Evans*, 500 S.W.3d at 538.

6 NHTSA, U.S. Department of Transportation, DWI Detection and Standardized Field Sobriety Testing, Participant Manual, Session 4, p. 3-4 (2023).

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The Need for Expert Transcripts
We need your help!

MATT SMID

I. Attorneys Need Expert Transcripts.

The State has identified its expert witness. That expert's testimony had been deemed unhelpful by a judge in a prior case because of both – its uncertainty and its equivocating nature. Moreover, that same judge stated that the expert's testimony was unreliable because he had used – selective blindness and – had cherry pick[ed] the data. Or perhaps the judge deemed that expert unqualified due to his lack of relevant experience. Obviously, such a prior ruling (and commentary) with respect to the expert is potentially very damaging – but how would one find that possibly-damaging information? By looking at the expert's previous testimony of course.

On the other hand, laying the foundation for the admissibility of expert witness testimony requires careful preparation. The required showing will vary depending on the subject matter of the expert's testimony, the extent to which the expert's field of expertise is novel, whether it involves hard or soft science and the connection between the expert's qualification and the opinion being offered. That is why we need expert transcripts.

II. Case Study.

The setting is the 2022 World Series. Alex Bohm, a 6-foot-5 baseball player, is incredibly soft-spoken. Standing in the dugout after his first-pitch blast in the second inning, with the bedlam it inspired at Citizens Bank Park still echoing around him, he smiled and shrugged sheepishly. Who does Bohm have to thank for this life changing moment? The crowd? Phillies mascot, the Philie Phanatic? Astros pitcher Lance McCullers Jr. for throwing a meatball?

Philadelphia Phillies fans had waited 4,747 days to watch a World Series game at home. So Bryce Harper

didn't make them wait too much longer. With one on and two out in the bottom of the first, he swung at a first-pitch curveball from Astros pitcher McCullers Jr. and sent it soaring into a sea of swirling red rally towels.

Just like that, the Phillies, were up 2-0. While Nick Castellanos batted, Harper called Bohm, who was on deck, back over to the dugout and emphatically said … well, something. Bohm didn't get to bat that inning, but he led off the second by homering on a first-pitch sinker. Whatever Harper had noticed and relayed to him — a tip, a tell, something from the scouting report that seemed relevant — it worked. This moment of greatness was inspired by teamwork.

III. Expert Testimony Transcripts Are Our Scouting Reports.

An expert's words, as expressed during the course of cases (which can be found in a variety of formats, including transcripts, reports, affidavits and declarations), can be used in a variety of ways to discredit an expert.

a. Transcripts of Testimony

As one attorney recently noted:

> "–What you do when you have an expert who's testified a thousand times is you have to obtain those transcripts, . . . The more transcripts you have, the more ammo, and – the more likely you're going to find something in those transcripts that will be inconsistent with something that's testified [to] in your case[.]"

Thus, use transcripts to find inconsistencies amongst what the expert is prepared to say in the pending case and what that same expert has said previously. Finding such an inconsistency can be extremely damaging. For instance, principles of forensic sciences are constantly changing. You may have a well renown expert who previously used a now flawed technique or analysis (which was deemed valid at the time of his testimony) in coming to his conclusion which led to past convictions and sentences. Fast forward to your trial. Scientific principles have changed, as they always do. The very same expert now uses a different technique or analysis due to the old method being deemed unreliable. Should the jury really believe an expert who relied on a flawed technique in the past? How do we know his current technique won't become unreliable one day, like the old technique? Obtain the expert's old transcripts and don't let them get away with his previous use of a flawed technique! This is undeniably a credibility issue.

Transcripts, however, can be used in other, creative, ways as well. For instance, just as you can compare an expert's current CV to older versions; transcripts can be used in a similar vein. Specifically, compare what the expert has testified to as being his/her qualifications and consider whether that testimony matches up to the credentials listed in that expert's CVs (whether present or past).

b. Expert Testimony Transcript Databases.

Free, centralized databases of expert witness transcripts do not seem to exist, but several for pay options are available. For example, expert witness transcripts are available for a fee to civil defense attorneys who are members of the Defense Research Institute (aka DRI). On the plaintiff's side, the AAJ Exchange makes available to its members on a database (developed by submissions from its members) of tens of thousands of transcripts. The commercial TrialSmith document database purports to have approximately 600,000 transcripts and is jointly sponsored by more than sixty trial lawyer associations and litigation groups (each group encourages its members to contribute depositions and other documents to TrialSmith). Wow! Wouldn't it be nice to have such a database like this that is FREE for Texas criminal defense attorneys?

IV. Call For Expert Transcripts.

This is a call for your expert transcripts. The Texas Criminal Defense Attorneys Association Transcript Committee is compiling a database of expert testimony transcripts, and we need your help to make the database useful and effective for Texas criminal defense attorneys. Melissa Schank and Keri Steen are taking time out of their busy schedules to help get this database up and running. Please consider sending your expert transcripts to our compilation of transcripts so that we can use them to help each other be more effective trial attorneys. Whoever submits the best transcript will be receiving a free annual membership to TCDLA. The winner will be announced at Rusty Duncan so please submit those transcripts ASAP! Please send them to Keri at Ksteen@tcdla.com.

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

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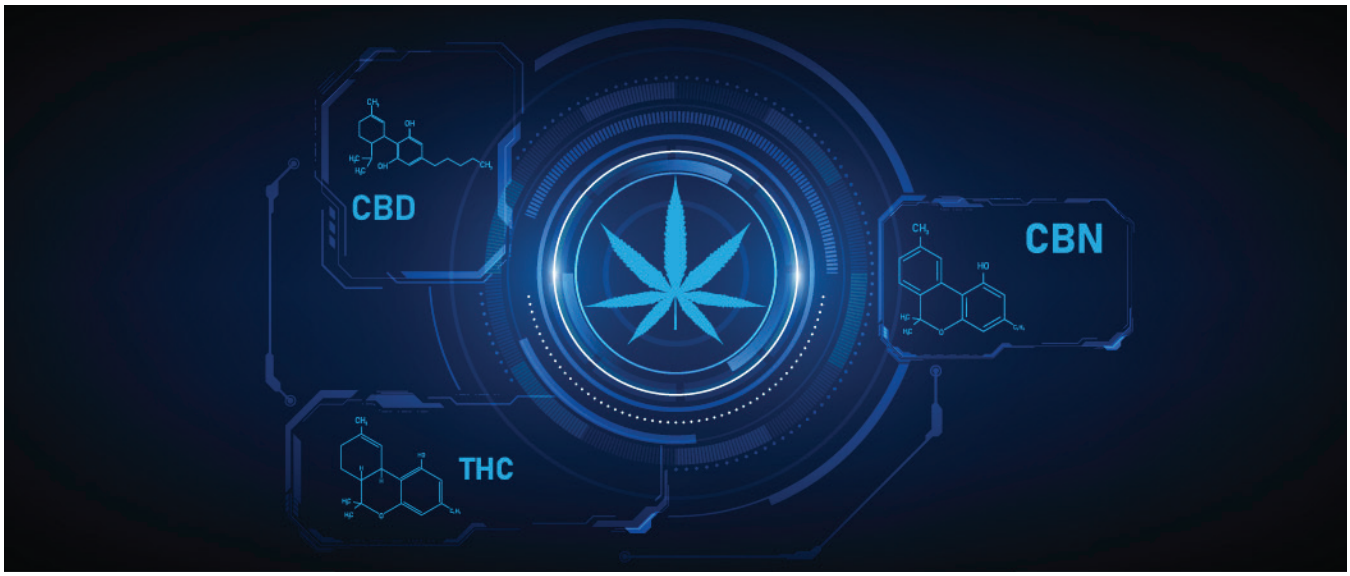

THCa

DANIEL MEHLER

Tetrahydrocannabinolic Acid (THCa):

Since the legalization of hemp in Texas in 2019, it seems like a million hemp retailers have popped up in our state selling hemp products. One of the fastest selling products in the market is Tetrahydrocannabinolic acid (THCa). This article will hopefully provide some clarity on what THCa is and why it matters to our practice.

What is a cannabinoid?

Cannabinoids are a group of chemicals found in the plant cannabis sativa L.[1] To date, there have been 113 cannabinoids discovered in the cannabis plant.[2] Delta-9 Tetrahydrocannabinol (hereinafter, "Delta-9 THC") is the primary psychoactive compound derived from the cannabis plant.[3] Tetrahydrocannabinols, as a group, are also the chemicals referenced repeatedly in the statutes of Texas. Another cannabinoid many people are familiar is Cannabinol (hereinafter, "CBD").[4]

Ok, so what is THCa?

Tetrahydrocannabinolic acid (THCa) is the non-psychoactive acidic precursor of Delta-9 Tetrahydrocannabinol.[5] It actually accounts for as much as 90% of the total quantity of Delta-9 THC that can be derived from cannabis, as very little Delta-9 THC is found in the raw flowers of the plant.[6] THCa is found in variable quantities in cannabis and through a chemical process known as decarboxylation, it is converted into Delta-9 THC when exposed to heat[7]. The easy way to think about this chemistry is:

THCa + Heat --> THC + carbon dioxide

The process of decarboxylation releases a carbon dioxide molecule, which is harmless when inhaled, and a psychoactive Delta-9 THC molecule remains.

So is it legal?

That depends on who you ask. THCa is not listed anywhere in the Texas statutes. The only place decarboxylation is mentioned is in the Agriculture Code, Chapter 12, explaining the requirements of pre harvest

1 Cannabis (Marijuana) and Cannabinoids: What you Need to Know, National Center for Complementary and Integrative Health, https://www.nccih.nih.gov/health/cannabis-marijuana-and-cannabinoids-what-you-need-to-know (last visited Jan. 2, 2024).

2 Id.

3 Tetrahydrocannabinol (THC), Statpearls, National Library of Medicine, https://www.ncbi.nlm.nih.gov/books/NBK563174/ (last visited Jan. 2, 2024).

4 Alline Cristina Campos et al., *Multiple Mechanisms Involved in the Large-spectrum Therapeutic Potential of Cannabidiol in Psychiatric Disorders*, 367 Philosophical Transactions of the Royal Society B: Biological Sciences (2012).

5 Guillermo Moreno-Sanz, *Can You Pass the Acid Test? Critical Review and Novel Therapeutic Perspectives of Δ9-tetrahydrocannabinolic acid A*, 1 Cannabis and Cannabinoid Research (2016).

6 Id.

7 Id.

testing of hemp grown in Texas.[8] As a basic principle of criminal law, that which isn't expressly prohibited is not prohibited. Thus, one can conclude that THCa, as a substance, is legal in Texas.

We must also consider the analogue statute in the Health and Safety Code (HSC 481.002). An analogue is defined as having either a substantially similar chemical structure **OR** substantially similar pharmacological effect. THCa has neither. As a molecule, it is larger than Delta-9 THC with an additional carbon and two additional oxygen atoms. Due to the differing shape of the molecules, THCa does not bind at the CB1 receptor, which is what causes the psychoactive effects of Delta-9 THC.[9] Thus, THCa is a wholly different and distinct molecule from Delta-9 THC that does not produce similar effect. One can conclude that it is not an analogue as defined in state law.

The bottom line

THCa has rapidly emerged as a viable hemp product that is very much in demand across Texas. Its legality has yet to be determined one way or another, but as laid out in this article, it is a separate and distinct substance from Delta-9 Tetrahydrocannabinol.

Daniel Mehler *is an attorney and expert witness based in San Antonio, Texas. In addition to his legal education, he has a masters degree in medical cannabis science and therapeutics from the University of Maryland School of Pharmacy. He practices and testifies in both state and federal court.*

8 Agriculture Code, Chapter 122. Cultivation of Hemp, https://statutes.capitol.texas.gov/Docs/AG/htm/AG.122.htm (last visited Jan. 2, 2024).

9 Guillermo Moreno-Sanz, *Can you pass the acid test? Critical Review and Novel Therapeutic Perspectives of Δ9-tetrahydrocannabinolic acid A*, 1 Cannabis and Cannabinoid Research (2016).

Shout out to Kyra Leal! She was referred a Bell County case by TCDLA member Patty Tress. The client, a French resident, was temporarily living in California when she was picked up on an Aggravated Assault with a Deadly Weapon warrant. Her ex boyfriend was facing assault on a pregnant person charges where she is the victim, and decided to respond with allegations against the client that she assaulted and stabbed him. After she was extradited to Texas Leal spoke with the ADA several times. The ADA was not willing to drop the case, but we did present a grand jury packet. Leal was informed last week that the case was no-billed by the grand jury and the client is able to return home to France to be with her son and her parents. **Way to go!**

Kudos to John A. Peralta! He walked his client on a five-count felony indictment in Cherokee County. The defendant was charged with one count of Assault on a Pregnant Person and four counts of Injury to a Child. One Count was resolved after a motion for directed verdict was granted; the jury returned not guilty verdicts on the remaining four counts. **Amazing work!**

Great work by Jemila Lea! Jemila stands as an exemplary advocate for justice, particularly in the realm of DWI cases. Her profound understanding of the intricacies surrounding DWI, from blood, warrant, and chain of custody is a testament to the years she has devoted to mastering this legal domain. A stalwart supporter in the trials she undertakes, Jemila is adept at formulating messages and ideas that contribute to concise and impactful two-word verdicts. Within the Dallas County Courthouse, she embodies a legendary status, generously extending her wealth of knowledge and assistance to those in need. Jemila's professional prowess makes her an invaluable asset, leaving an enduring impression on the pursuit of legal fairness. **Fantastic!**

Job well done by Joseph Esparza! He won a hard fought general court martial at Randolph AFB for a USAF Officer client accused of multiple assaults on his family, specifically on his wife, 9 year old son, and toddler daughter. Joseph prepped the case hard with his trial partner, Major Alex Biltz, and they successfully litigated many 404b issues into one triable case. Esparza cross examined the wife at trial for a long time and exposed her in numerous lies and when Esparza was about to enter evidence that she knew was going to hurt her case further, she tried to plead the 5th to stop it! (Judge had to explain to her how the 5th didn't apply to her in this instance). He proved her bias and motive to lie and even found her ex-husband from out of state that no one could previously find and had him testify as to her "less than poor" character for truthfulness. The child complainant ended up hurting the government's case on a gentle cross in the end and they showed how his claims and his mother's claims both could not be true. Their expert psych testimony as to suggestibility and parental alienation and our client testifying in his own defense sealed the deal. Final verdict: NOT GUILTY on all three charges. **Excellent!**

Congrats to AFPD Amr Ahmed and FPD Margy Meyers. The FBI Director told Congress their client was a would-be terrorist. The government charged the client with being an alien in possession of a firearm while he was unlawfully in the United States. AFPD Amr Ahmed and FPD Margy Meyers demonstrated that no one could understand that an asylum applicant is not lawfully here. Twelve jurors returned five not guilty verdicts. **Great job!**

Way to go Sam Bassett and Charlie Baird ! (with assistance for jury selection by Reagan Wynn) They received a NOT GUILTY verdict from a Williamson County Jury in February. The client was charged in two indictments (two alleged victims) with the offense of Aggravated Sexual Assault of a Child. One of the indictments carried a mandatory minimum of 25 years with no parole. The client was in custody for over 2 years prior to trial and maintained his innocence throughout the process. **Amazing!**

Major kudos to Mark Daniel, a former TCDLA President and member of it Hall of Fame has been selected the recipient of the prestigious Blackstone Award which is the highest honor that can be bestowed by the Tarrant County Bar Association. The award, named after Sir William Blackstone-a British legal scholar in the 18th century-has been awarded annually for over 60 years to an attorney who shows consistent ability, integrity, and courage. Mark is one of only four criminal defense attorneys to have received this award. The award is a testament to his legal prowess, accomplishments, professionalism and his willingness to give back selflessly to our profession. **Well deserved!**

A huge shoutout to Sophie Bossart with the appellate division with Harris County Public Defender's Office. In her first case with the office, she wrote a great brief, had her first oral argument, and just won with her client's conviction for aggravated assault reversed.

The facts were that in January 2023, Judge Ramona Franklin insisted on masking for everyone – not just during voir dire, but also the witnesses and attorneys during the entire trial. Maverick Ray and Brian Lavine tried the case and made constitutional objections. During oral argument, Sophie argued about Governor Abbott's opposition to mask mandates and the General Orders had expired. The Court of Appeals held: The State's initial point—the constitutional deprivation was merely partial and not complete—cannot carry the day. As Supreme Court jurisprudence makes clear, any deviation from traditional face-to-face confrontation must be supported by case-specific evidence. *Craig*, 497 U.S. at 850; *Coy*, 487 U.S. at 1021; *see also Romero*, 173 S.W.3d at 506. No evidence was presented here. The record does not reveal that any person in the courtroom was diagnosed as COVID-19 positive or was otherwise ill, showing COVID-19 symptoms, immunocompromised, or unvaccinated. **Excellent work!**

Significant Decisions Report

KYLE THERRIAN

I like to think of myself as the Casey Kasem of case law. Maybe I can call myself Caselaw Kasem. This month, on account of the limited number of sig-worthy intermediate court cases, I think I may be more of a Carson Daly. Genuflecting to a diverse range of multi-generational pop culture traditions is a flex I like to do. IFYKYK. But for those who don't, here's your summary. Carson Daly is a television host—he hosted a program on MTV where he played music videos by request. Music videos are like TikToks but longer. And Casey Kasem is someone you should pretend to be familiar with among other living generations (I assume it's okay to condescend Gen Z in a magazine because they probably don't have magazines).

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.

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

***Lewis v. State*, No. PD-0564-23 (Tex. Crim. App. Jan. 29, 2024)**

Attorneys. Mark Hochglaube (appellate), Emily Shelton (trial)

Issue & Answer 1. Is a defendant who wins an appeal in the intermediate court entitled to bail pending the State's petition for discretionary review (PDR) in the CCA? **Yes.**

Issue & Answer 2. When an intermediate court of appeals sets bail for a prevailing defendant can the CCA find the amount set by the intermediate court insufficient? **Yes.**

Facts. The defendant threatened to kill his mother because the State listed her as a prospective witness. An intermediate court reversed his conviction for a fatal variance—the state charged the defendant with retaliation against a "witness" rather than a "prospective witness." The intermediate court set bail pending the State's petition for discretionary review. Once the State filed for discretionary review the State asked the CCA to increase the amount set by the intermediate court.

Analysis 1. Yes. Article 44.04(h) provides:

> [i]f a conviction is reversed by a decision of a Court of Appeals, the defendant, if in custody, is entitled to release on reasonable bail, regardless of the length of the term of imprisonment, pending final determination of an appeal by the state or the defendant on a motion for discretionary review.

Analysis 2. In *Murdock v. State*, 870 S.W.2d 41 (Tex.

Crim. App. 1993) the CCA held that once an intermediate court sets bail, the defendant may not again apply for bail in the CCA. However, Murdock does not address whether the CCA can evaluate the sufficiency of the bond set by the intermediate court. Article 17.09 gives judges the authority to determine the sufficiency of bond amounts. The language of Article 17.09 does not limit its application to trial courts. Moreover, once PDR has been filed the appellate court loses jurisdiction, giving yet further authority for the CCA to review sufficiency of bail.

> And it appears to be rather obvious that the amount of bail here is insufficient. That amount did not prevent Appellant from repeatedly violating his conditions when he was first granted bail on appeal. Moreover, a $120,000 cash bond supplied by the victim does not seem like a particularly strong incentive for Appellant to abide by his conditions. If he violates a bond condition, the victim, not Appellant, is the one who suffers the financial hit. And the offense for which Appellant was convicted was retaliation against the victim. Causing the victim to lose $120,000 could actually be a substantial way to retaliate against her. But part of the point of the bond is to protect the victim. It would be ironic for the victim to lose her $120,000 because Appellant violated the condition of his bond that prohibits him from contacting her. And because Appellant is prohibited from having contact with the victim—which even his appellate attorney recognizes has to happen—the victim is in no position to exert any influence over him to abide by his bond conditions.
>
> Increasing Appellant's bond would likely require him to resort to a bail bondsman to make bail. That would inject a third party who would have an incentive to ensure that Appellant behaves, and it would impose some financial liability on Appellant that might serve as an incentive for him.

Comment. This is a strange opinion. Not because I think it's a result in search of a rationale (you can judge that yourself). I think the opinion cuts against the bright lines that traditionally delineate the workloads and roles of higher and lower courts. What is particularly problematic with this new role assumed by the CCA are the rules that accompany judicial determinations that could result in the revocation of a person's liberty. Rule 101(e) states that the rules of evidence apply to a hearing to "deny, revoke, or increase bail." Due process also requires notice, hearing, and an opportunity to be heard. Given that appellate courts pride themselves on not being places of witness testimony, I don't see how the CCA can increase a person's bail while still paying deference to these rules.

***Becerra v. State*, No. PD-0280-22 (Tex. Crim. App. Feb.**

7, 2024)

Attorneys. Lane D. Thibodeaux (appellate), David Barron (trial)

Issue & Answer 1. Is the Texas constitutional right to a 12-person jury violated when an alternate juror retires to the jury room with the 12 regular members of the jury, participates in deliberations, and casts a vote? **No.**

Issue & Answer 2. Does the presence and participation of an alternate juror with the regular 12-person jury constitute an impermissible outside influence on jury deliberation? **Yes.**

Facts. The bailiff discovered that the alternate juror had entered the jury deliberation room and participated in jury deliberations. Further hearing showed that the alternate also cast a vote that contributed to the jury's initial verdict, as well. The trial court acted by removing the juror, admonishing the remaining jurors to disregard the alternate's participation, and instructing the jury to continue deliberations. The defendant moved for a mistrial and for a new trial. He argued the alternate's presence and participation violated Article V Section 13 of the Texas Constitution and Articles 33.01, 33.011, and 36.22 of the Code of Criminal Procedure. The trial court denied the defendant's motion for a new trial and cited the defendant's failure to object at the moment the alternate entered the jury room. A somewhat turbulent appellate history ensued. In 2021, after the Tenth Court of Appeals affirmed the trial court's ruling holding defense counsel to a standard of clairvoyance, the CCA reversed and held that preserving the error at the moment an outsider enters the jury room holds the defendant to an impossible standard. On remand, the Tenth Court of Appeals again upheld the trial court's ruling as a non-abuse of discretion. This opinion is the PDR from the Tenth Court's non-abuse-of-discretion holding.

Analysis 1. Alternate jurors are not part of the composition of the jury. The relevant provisions of the Texas Constitution and Code of Criminal Procedure use the word "composed" when describing the 12-person requirement. This refers to the formation of the jury. These provisions do not indicate that an alternate juror's participation in deliberation converts a 12-person jury into a 13-person jury. "Suggesting that an alternate juror becomes a member of the petit jury through participation and deliberation is akin to saying that this Court consists of more than nine judges because staff attorneys assist in drafting opinions."

Analysis 2. Article 36.22 prohibits a non-juror from being with the jury during deliberations and from conversing with the jury about a case on trial.

Our holding that the alternate juror's participation in deliberations does not rise to the level of a constitutional violation should not be taken as a suggestion that the alternate juror's presence with the jury during deliberations and participation in those deliberations was permissible. It was not.

The primary purpose of Article 36.22 is to insulate jurors from outside influences. An alternate juror is an outside influence when that alternate is present for or participates in deliberations. When it is shown that an alternate juror was present for or participated in deliberations, the ensuing harm analysis "focuses on whether the alternate juror's intrusion into jury deliberations affected those deliberations and thereby the verdict." This is a question the court of appeals must answer on remand.

Dissenting (Yeary, J.). The majority inexplicably eliminates the presumption of harm that the CCA has historically applied to cases of outside influence.

Dissenting (Keel, J.). There wasn't even an error here.

Comment. This is a long opinion. My even shorter (more cynical) summary is this: if a judge doesn't formally impanel a jury greater than 12, there is no constitutional violation. An extra juror sneaking into the jury room is a mere outside influence—a kind of error that can be ignored most of the time through the artful combination of nonconstitutional error rules and the complicated rules of post-verdict juror interrogation.

Daniel v. State, No. PD-0037-22 (Tex. Crim. App. Feb. 14, 2024)

Attorneys. Erika Copeland (appellate), Steve Walden (trial)

Issue & Answer. In 2022, the CCA held that failing to maintain a single lane constitutes a traffic offense only when it is unsafe. Before this, the appellate jurisdictions were split into unsafe-lane-infraction jurisdictions and lane-infraction-only jurisdictions. The instant traffic stop occurred prior to the 2022 CCA opinion in an unsafe-lane-infraction jurisdiction. Under these circumstances is the officer's failure to articulate how the defendant's lane infraction was unsafe excusable as a reasonable mistake of law? **Yes.**

Facts. The defendant failed to maintain a single lane of travel. There were no other cars near the defendant when this occurred, and no other aspect of his driving was unsafe. An officer conducted a traffic stop and subsequently arrested the defendant for Driving While Intoxicated 3rd or More. The Third Court of Appeals held that the officer did not have sufficient justification to conduct a traffic stop, given the absence of evidence showing the defendant's lane violation was also unsafe.

Analysis. In *Hardin v. State*, 664 S.W.3d 867 (Tex. Crim. App. 2022), the CCA determined that the infraction of Failure to Maintain a Single Lane required proof of:

(1) a lane infraction and (2) an unsafe movement. The instant traffic stop took place prior to the CCA's opinion in *Hardin*. Prior to *Hardin* the courts of appeal were split on the issue of whether an officer could conduct a traffic stop on a lane infraction standing alone. The law in the land of the Third District (at the time of the traffic stop) was that an officer could not—the officer must also articulate how the maneuver was unsafe. Notwithstanding the binding precedent in the Third District, the question remained a "very hard" and "difficult" question of statutory construction among the courts of appeal. When the officer acted, the law regarding Failure to Maintain a Single Lane was unsettled statewide. Thus, applying the doctrine of reasonable mistake of law—a doctrine that excuses constitutional violations based on an officer's no-fault misinterpretation of law—suppression under the Fourth Amendment was improper in this case.

Concurring (Yeary, J.). *Hardin* was incorrectly decided. The officer did nothing wrong.

Dissenting (Walker, J.). The officer did not follow the law of the Third District. The State cannot invoke the *Hein* mistake-of-fact rule by virtue of irrelevant jurisdictions interpreting the law differently.

Comment. The defendant raised the concern that officers could forum shop for preferred interpretations of law anytime our intermediate courts create a split interpretation of statutory law. The CCA seems to have missed the point when it rejected this argument by assuring the defendant that an officer has no ability to shop the judicial evaluation of his arrest in a favorable forum. The defendant's forum shopping argument is a suggestion that officers in an appellate district with unfavorable binding precedent may simply choose their favorite interpretation from another district and proceed accordingly. This opinion hamstrings courts of appeal from interpreting the law in a manner that informs police how to conduct their activities (how society expects them to conduct their activities).

State v. McGuire, No. PD-0984-19 (Tex. Crim. App. Feb. 21, 2024)(plurality)

Attorneys. Kristen Jernigan (appellate), Michael Elliot (trial)

Issue & Answer. Are exigent circumstances a necessary showing for officers conducting an arrest they did not observe but falling under Article 14's authorization to arrest upon probable cause and discovery of the defendant in a suspicious place? Issue avoided. Exigent circumstances exist here regardless.

Facts. The defendant struck and killed a person while operating his vehicle. Nobody saw the defendant driving, but he parked nearby and called friends and family. Law enforcement eventually contacted the defendant, conducted a DWI and Failure to Stop and Render Aid investigation, and arrested him. Blood was later drawn without a warrant or consent. The DWI became a

prosecution for felony murder that resulted in a conviction then reversal on appeal. The instant case involves the defendant's conviction for Failure to Stop and Render Aid and the evidence that was acquired after officers arrested the defendant without a warrant.

Analysis. Article 14 sets rules for warrantless arrest that exist in addition to those required by the Fourth Amendment. Article 14.03(a)(1) provides:

Any peace officer may arrest, without warrant . . . persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony, violation of Title 9, Chapter 42, Penal Code, breach of the peace, or offense under Section 49.02, Penal Code, or are about to commit some offense against the laws; . . . .

Whether a place is a suspicious place is a highly fact specific determination. Usually, the time between the offense and the discovery of the defendant must be short, the place of arrest must be close to or linked to the crime scene, and facts must objectively point to the defendant's guilt in a felony offense or breach of the peace.

In *Swaim v. State*, 181 S.W.3d 359 (Tex. Crim. App. 2005), the CCA held that the State must also show exigent circumstances to conduct a warrantless suspicious place arrest. The courts below relied on the lack of exigent circumstances to suppress post-warrantless-arrest evidence. The State seeks a ruling to disavow *Swaim* and the requirement of exigency, but such a ruling is unnecessary here.

Regardless of whether exigent circumstances are absolutely required under Article 14.03(a)(1), we find that there were exigent circumstances in this case to justify a warrantless arrest. If ever there was a case to be made for exigency, this case defines it. As a result, there is no need to disavow *Swain* at this time.

This case involved all of the following circumstances: the defendant was located a short distance away, there were motorcycle parts lodged in his vehicle, the victim was dead, the defendant's passenger said he hit the victim, the defendant told people he hit "something," officers found a cooler of beer in the defendant's truck bed, the defendant exhibited many signs of intoxication, police were investigating a roadway homicide, it was 1:00 AM, the intersection was poorly lit, there were only four DPS troopers in the county that night, the crime scene was 800 feet in length, officers were using flashlights to investigate. "Though Appellee was cooperative to this point, there was no guarantee that he would not leave the scene at his earliest opportunity. And if he left in his vehicle, Appellee could have presented a danger to others."

Concurring (Keel, J.) Joined by Judges Keller, Yeary, Slaughter (and McClure **concurring** separately without opinion). There is no exigency requirement.

Comment. This statement:

We agree with the State in that they were not given fair notice of the exigency question which is not specifically mentioned in the statute. This unfairly deprived them of an adequate opportunity to develop a complete factual record.

I would have liked to have taken the special bar exam for prosecutors where you could just write in the essay section "decline to answer, did not receive notice this question would be on the exam."

Ex parte Padron, WR-62-917-02 (Tex. Crim. App. Feb. 7, 2024)(not designated for publication)

Attorneys. Michael Ware (writ), Chase Baumgartner (writ)

Issue & Answer. When: (1) the parties agree the State obtained a conviction through unreliable jailhouse informant testimony, (2) the parties agree that habeas relief should be granted, and (3) the habeas applicant articulates new developments in the reliability of jailhouse informant testimony, is the record sufficient to adopt the trial court findings recommending habeas relief? **No.**

Facts. [Taken from the facts stated in the Innocence Project amicus brief written by Heidi Bloch and Nicole Cordoba] A jury convicted the defendant of capital murder in 2004. The State's principal evidence was testimony from an eyewitness who "conceded he only viewed the perpetrator's face for a matter of seconds, from a significant distance, with dim lighting conditions . . . ." The eyewitness did not initially identify the defendant, but the police tried again and again after a month-long investigation. "[T]he police showed the eyewitness several subsequent lineups that always included [the defendant's] picture, with an ever-rotating assortment of other 'filler' pictures. [The defendant] was the only one that was used in every photo array." Eventually the eyewitness identified the defendant. In the writ hearing before the district court the defendant presented expert testimony on "unconscious transference," a phenomenon that occurs "when a witness is not truly familiar with the perpetrator and is semi-familiar with the suspect, and as a result, the suspect pops out to the witness because there is some familiarity, but the witness cannot correctly place where the familiarity is derived from. Repeatedly exposing an eyewitness to a picture of a suspect increases the risk of unconscious transference.

By passing Article 11.073 the Texas Legislature adopted a statutory procedure for litigating post-conviction habeas applications based on new scientific knowledge. The CCA has yet to apply Article 11.073 to the science of faulty eyewitness testimony, but the defendant urges the CCA to do so here.

Analysis. "This Court requires additional factual development. The trial court is the appropriate forum for findings of fact. The trial court shall order the eyewitness who identified Applicant in a photospread and at trial to give testimony regarding the veracity and reliability of the witness's identifications of Applicant. To do so, the trial court may use any means set out in Article 11.07, § 3(d)."

Comment. The ever-shifting deference to local prosecuting attorneys on an issue-by-issue basis.

Comment. The CCA is following what seems to be a protocol set in the Lydell Grant case where they remanded DNA actual innocence case and insisted on having the testimony of "mistaken" eyewitnesses despite DNA evidence exonerating the defendant. Mike Ware represented Lydell Grant and he also represents Padron here. In 2021, the Texas Monthly ran an article on the Grant case with a Mike Ware quote as its title. Michael Hall, "It's the Most Outrageous Thing I've Ever Seen. It Makes No Sense." Texas Monthly, January 2021 (available at: https://www.texasmonthly.com/true-crime/dna-evidence-proved-lydell-grants-innocence/).

Here, the eyewitness picked the defendant out of a lineup despite having stated that the perpetrators wore ski masks. The eyewitness has been in and out of state and federal custody, had a significant criminal history at the time of trial and since, and was given incentives to give his identification in the first place. What could this guy have to say that would add to the fidelity of the criminal process? What do we do if he takes the stand and lies again (or persists in his mistake)?

2nd District Fort Worth

Karr v. State, No. 02-23-00220-CR (Tex. App.—Ft. Worth, Feb. 8, 2024)

Attorneys. Bryant Cabrera (Appellate)

Issue & Answer 1. Every year, DPS prepares a document determining what out-of-state offenses share same or substantially similar elements to Texas offenses requiring registration as a sex offender. This document is the only means that the State may use to prove that a defendant has a conviction from another jurisdiction requiring him to register as a sex offender in Texas. Does such a document fit within the public records exception to the rule against hearsay? **Yes.**

Issue & Answer 2. A defendant has three prior convictions: (1) possession of child pornography, (2) failure to register as a sex offender (same date as #3), (3) failure to register as a sex offender (same date as #2). Penal Code 12.42 permits the State to punish a person as a repeat offender by elevating the punishment range one level for a single prior offense. Article 62.102 permits the state to punish a failure to register offense one degree higher if it is shown that the defendant has a prior conviction for the same offense. Can the State combine these enhancements to: (1) prosecute the defendant as a 3rd degree elevated to a 2nd degree, and then upon a 2nd degree conviction (2) enhance the defendant's 2nd degree punishment to 1st degree punishment? **No.**

Facts. A military court convicted the defendant of possession of child pornography in 2007. When the defendant moved to Texas in 2015, DPS was required to determine whether the defendant's military conviction was a qualifying offense for state sex offender registration (using a same or substantially similar elements test). DPS determined that that Texas sex offender registration applied. Later, in 2018, the State convicted the defendant twice for two counts of failure to register as a sex offender. The instant conviction arises from a purported failure to register occurring in 2022 (after the defendant's child pornography conviction and after the defendant's two concurrent failure to register offenses). In this case the defendant called the police regarding a burglary and, instead of solving a burglary, they snagged the defendant as an unregistered sex offender. A jury convicted the defendant and the trial court assessed the punishment. The trial court used the defendant's two prior convictions for failure to register in the same manner used in the indictment: the court used one of the defendant's prior convictions to enhance his offense (3rd degree to 2nd degree) and the other prior conviction to enhance his punishment (2nd degree to 1st degree). The trial court then sentenced the defendant to 15 years in prison.

Analysis 1. The defendant's main contention is that members of DPS are considered law enforcement. The State may not avail itself to the public records exception to admit "a matter observed by law enforcement" in a criminal case. "Whether DPS employees are law-enforcement personnel is not dispositive; the nature of their work is." The resolution of this case is controlled by *Cole v. State*, 839 S.W.2d 798 (Tex. Crim. App. 1990). The defendant relies on *Cole's* determination that a document prepared in anticipation of trial is inherently untrustworthy. But this is not how the document in this case was prepared. Instead, this document falls within *Cole's* description of documents that are admissible under the public records exception—documents that are (1) prepared in a non-adversarial setting, (2) unrelated to specific litigation, and (3) record objective, neutral observations.

Analysis 2. The enhancements alleged by the State do not change the nature of the underlying offense. They only change the potential range of punishment upon obtaining a conviction.

- Penal Code § 12.42(a)-(c) permits the State to "enhance" a non-state-jail punishment one degree

upon proof of another non-state-jail felony conviction. This is known as a repeat offender enhancement. It enhances a defendant's punishment.

- Penal Code § 12.42(d) permits the State to "enhance" a non-state-jail punishment to a range of 25-life upon proof of two prior sequential convictions (a second offense occurring after the first conviction became final). This is known as a habitual offender enhancement. It enhances a defendant's punishment.
- Article 62.102 "increases" the punishment for failure to register as a sex offender from a third degree to a second degree felony upon proof that the defendant has one prior failure to register as a sex offender conviction. This is a punishment enhancement. It enhances a defendant's punishment.

Accordingly, the State tried the defendant for a 3rd degree felony and could avail itself of any applicable sentencing enhancements. It could avail itself to Article 62.102's singular punishment level enhancement or it could avail itself to Penal Code §12.42's singular punishment level enhancement. Not both.

Comment. Key & Peele have a skit where Barack Obama uses an anger translator named Luther. Luther converts a fake Obama's mild-mannered remarks into very aggressive smack talk. "I have a birth certificate! I have a hot-diggity-doggity-mamase-mamasa-mamakusa birth certificate . . ." Key & Peele, Obama's Anger Translator – Meet Luther (Comedy Central, October 3, 2012). Anyway, I think there should be a position of objection translator. "He means 6th Amendment, Crawford, counsel has a hot-diggity-doggity objection under the Confrontation Clause, your honor."

3rd District Austin

Koury v. State, No. 03-22-00641-CR (Tex. App.—Austin, Jan. 30, 2024)

Attorneys. Dal Ruggles (appellate)

Issue & Answer. Under Article 38.23 (statutory exclusionary rule) is the lapse in the licensure of a SANE nurse at the time of the SANE evaluation grounds to exclude the victim's SANE evaluation statements because the SANE nurse was "an illegal practitioner" under Section 301.251 of the Texas Occupation Code? **No.**

Facts. The State's SANE nurse performed a forensic examination on March 30, 2020. She testified at trial regarding statements made by the complainant. The SANE nurse testified that her nursing license had expired on February 28, 2020, but had learned of the lapse in July 2020.

Analysis. Article 38.23(a) provides:

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

"Obtained" refers to evidence acquired by "planned action or effort, or, more specifically, by seizure." The Court of Criminal Appeals requires a causal connection between the illegal conduct and the acquisition of evidence. "Thus, not every violation of law will invoke the rule." The purpose of the rule is to protect the rights of the accused from infringements by the state. But there are additional reasons why 38.23 does not operate in favor of suppression here. First, Article 38.23 does not give standing to raise a challenge to the violation of another person's rights. Second, the nursing license statutes are

"unrelated to the purposes of Article 38.23;" they pertain to medical competence and training.

Comment. Actually (pushes glasses closer to face), if we want to be historically correct and not perpetuate inaccuracies and errant quotes from old cases, the purpose behind Article 38.23 was to protect against unlawful vigilante justice. Remember we here in SDR land use the word Article to refer to an Article of the Texas Code of Criminal Procedure. Article 38.23 has been a rule of Texas criminal procedure since 1925, a time when vigilante justice was a real thing. Nathan L. Mechler, Texas's Statutory Exclusionary Rule: Analyzing the Inadequacies of the Current Application of Other Person(s) Pursuant to Article 38.23(a) of the Texas Code of Criminal Procedure., 36 ST. MARY'S L.J. (2004). Available at: https://commons.stmarytx.edu/thestmaryslawjournal/vol36/iss1/5.

4th District San Antonio

State v. Rodriguez-Gomez, No. 04-23-00157-CR (Tex. App.—San Antonio, Feb. 14, 2024)

Attorneys. Jamal Sadat Huhammad (writ) Aron Israelite (writ)

Issue & Answer. When a district court dismisses a prosecution pending in a county court pursuant to a writ of habeas corpus and the State does not appeal from the district court's order and then the county court subsequently enters a conforming order dismissing the case and the State appeals from the county court's order and on appeal the State complains about the district court order but fails to provide the appellate court with the record from the district court proceedings, does the State lose? **Yes** [assuming I recapped this convoluted scenario correctly].

Facts. The State filed a Criminal Trespass charge against the defendant in county court. The defendant filed a writ of habeas corpus in district court. On January 10, 2023, the district court ordered the defendant's case dismissed with prejudice. On February 10, 2023, the county court held a hearing during which the clerk and the attorney for the defendant informed the county court that the district court ordered the case dismissed. The county court judge asked whether the State had appealed, and the State responded that "regardless of whether the State had filed a notice of appeal, the county court still had to take action on the . . . advisory, I guess, dismissal [from a court without jurisdiction]." The same day the defendant filed a motion to dismiss in the county court and articulated that the district court had already granted a dismissal on equal protection grounds. The county court ordered the case dismissed on February 15, 2023. The state then filed its notice of appeal on February 24, 2023.

Analysis. Regardless of what the county court subsequently ordered; the district court order is the one ordering dismissal on equal protection grounds. That occurred on January 10, 2023. The State did not file its notice of appeal until February 24, 2023—45 days later. As to the district court order, the court of appeals is without jurisdiction to consider the State's appeal. If the district court's order was valid, the county court had no jurisdiction to dismiss an already dismissed case. Thus, to determine the jurisdiction (enforceability) of the county court's order the court of appeals must determine whether the district court order is valid. The court of appeals can make this determination despite the non-appeal from the district court order because a void judgment is a nullity and whether the judgment is void in this case impacts the jurisdiction of the county court order.

"As of January 10, 2023—the date on which the district court granted habeas relief to Rodriguez-Gomez—a local district court had jurisdiction to consider an application for writ of habeas corpus in a misdemeanor case." "A trial court . . . [has] authority to dismiss a criminal indictment or information, including with prejudice, if such dismissal is the appropriate means to neutralize the taint of a constitutional violation." Considering these principles, it is conceivable that the district court could have validly ordered the county court prosecution dismissed. But, because the State failed to furnish the court of appeals with a copy of the district court proceedings, the court of appeals is without the ability to evaluate the appropriateness of the district court action. The presumption of judgment regularity requires the court to uphold the order of dismissal.

Comment. Super geeky appellate lawyer stuff. I love it.

Becka v. State, No. 04-23-01078-CR (Tex. App.—San Antonio, Feb. 7, 2024)

Attorneys. Rick Cofer (appellate), Don Flanery III (appellate)

Issue & Answer. Is a jury's finding that a defendant is competent to stand trial and the trial court's associated order adjudging the defendant competent a final judgment, appealable notwithstanding the non-resolution of the underlying criminal cause? **No.**

Facts. The State indicted the defendant in January 2019 for Murder. In October 2020 the trial court determined the defendant incompetent to stand trial and committed the defendant to a competency restoration program. In November 2023 the trial court held a jury trial on the issue of competency. The jury found that the defendant's competency had been restored. The defendant now attempts to appeal the jury's finding of competency and the trial court's associated order.

Analysis. "A pretrial judgment of competency that

includes the trial court's order adjudging and decreeing a defendant competent to stand trial is neither a judgment of conviction nor an order made immediately appealable by statute." Accordingly, the appellate court has no jurisdiction under Article 44.2.

Comment. A judgment has a definition under the code of criminal procedure: "written declaration of the court signed by the trial judge and entered of record showing the conviction or acquittal of the defendant." I think it's significant that the Legislature says "a judgment" rather than "the judgment." The Fourth Court interprets the law as though there can only be one kind of judgment in a criminal case. I'm not sure that's right.

5th District Dallas

Hernandez v. State, No. 05-23-00058-CR (Tex. App.—Dallas, Jan 30, 2024)

Attorneys. Pamela Boggess (appellate), Cody Cofer (appellate), Daniel Collins (appellate), James Luster (appellate)

Issue & Answer. When nothing but the judgment indicates that the defendant waived the right to a jury trial, is there sufficient proof that the defendant knowingly and voluntarily waived his right? **No.**

Facts. The State prosecuted the defendant for continuous sexual abuse of a child in a trial before the court. The record reflects that the trial court admonished the defendant on the range of punishment and inquired about plea negotiations. The State read its indictments and then a trial before the court ensued. The record does not reflect that the trial court admonished the defendant about his right to a jury trial.

The trial court's docket entries in these cases do not indicate appellant waived his right to a jury on the record and that any waiver was knowing and intelligent. There was no word or action by appellant suggesting he knowingly and voluntarily waived his right to a jury trial. There is no indication in the record that appellant's trial counsel discussed with him the right to a jury or that appellant knew the implications of waiving his right to a jury.

The record also fails to reveal anything about the defendant's ability to speak English, his educational background, sophistication, and ability to comprehend the significance of waiving the right to a jury trial.

Analysis. The State carries the burden to show an express, knowing, and intelligent waiver of the defendant's right to a jury.

A defendant need not understand every nuance of the right to a jury before waiving that right (and we decline to adopt any definitive statement), but a waiver cannot be knowing and intelligent unless the record shows that the defendant at least had sufficient awareness of the relevant circumstances and likely consequences of waiving his right to a jury.

Comment. The judgment indicates that the defendant waived the right to a jury. There was a day not long ago the Fifth Court of Appeals used to cite the presumption of judgment regularity to overcome issues like this. It's good to see that they don't do that anymore. See Rios v. State, 665 S.W.3d 467 (Tex. Crim. App. 2022)(presumption of judgment regularity not sufficient to overcome a transcript indicating the defendant could not speak or understand English admonishments).

6th District Texarkana

Torres v. State, No. 06-22-00135-CR (Tex. App.—Texarkana, Feb. 7, 2024)

Attorneys. Frank Hughes (appellate)

Issue & Answer. When a defendant enters a guilty plea, the trial court must admonish the defendant both orally and in writing regarding the possibility of immigration consequences. When the record is replete with references to current and past immigration problems afflicting the defendant, is the trial court's failure to orally admonish the defendant excusable? **Yes.**

Facts. The trial court did not orally admonish the defendant regarding the immigration consequences of his guilty plea. Despite the non-admonishment, the record revealed several factors indicating the defendant's awareness of possible immigration consequences:

- A written admonishment signed by the Defendant indicating possible immigration consequences.
- The defendant's admission that he was born in Mexico.
- The defendant's admission that he had been convicted federally for "illegal re-entry."
- The existence of an "ICE hold" on the defendant while incarcerated in Hopkins County.
- The defendant's articulation to the trial court that he hoped the United States would grant him asylum after the disposition of the instant case.

Analysis. When the trial court fails to give immigration admonishments both orally and in writing, the reviewing court must consider the record as a whole to determine whether "we have a fair assurance that the defendant's decision to plead guilty would not have changed had the court admonished him." "On the record before us, we can infer that [the defendant] was actually aware of the immigration consequences of his plea." The defendant's immigration problems are not only replete throughout the record, the State's evidence was strong, and nothing in the record reflected that the defendant was a citizen or resident of this country.

Comment. I don't know. Does this conviction ruin

the defendant's chances of asylum? I'd have to at least call a buddy to verify. I doubt any judge who has presided over the defendant's fate knows the answer or has even called a buddy. Seems like an important question to answer.

10th District Waco

Jones v. State, No. 10-23-00146-CR (Tex. App.—Waco, Feb. 1, 2024)

Attorneys. Jack Hurley (appellate)

Issue & Answer 1. When the defendant puts identity at issue may he avail himself to Rules 404(b) (rule against conduct-conformity evidence) and 403 (rule against unfairly prejudicial evidence) to exclude evidence of a jail call made by the defendant threatening to kill a third party in the same manner the victim was killed? **No.**

Issue & Answer 2. The trial court determined the defendant to be indigent and ordered funding of an investigator on an indigent basis. Upon conviction the trial court assessed $3,000 for reimbursement of court-appointed investigator fees in the defendant's bill of costs and judgment. Was the trial court's assessment of court-appointed investigator fees in error? Issue avoided.

Facts. A jury convicted the defendant of murder. The defendant claimed that a different person murdered the decedent. To rebut this defense the State called the defendant's baby's mother who received a threat made by the defendant over a recorded jail phone call. According to the witness the defendant told her that the same thing would happen to her as happened to the victim.

Analysis 1. The State cannot present evidence of other bad acts to prove conduct conformity, however extraneous-offense evidence is admissible to rebut a theory of mistaken identity. Here the defendant put identity at issue by blaming a third party for the killing. Thus, the admission of the jail-call testimony did not violate Rule 404(b). Nor did the admission of jail-call testimony violate rule 403 under the Gigliobianco factors for unfair prejudice. The State needed the evidence to rebut the defendant's theory, it was probative on the issue of identity, and little time was spent developing the evidence for the jury's consideration.

Analysis 2. The judgment and bill of costs shows an assessment of $3,000 for a court-appointed investigator, but the bill of costs shows that the $3,000 fee had been paid, leaving a $0 balance. "Because the complaint in this case is purely monetary, the voluntary payment of the investigator's fees rendered the issue moot."

Concurring (Gray, C.J.). There is no evidence that the investigator fee was assessed or paid. If there was an erroneously assessed cost paid by the defendant, it was made under protest; and that payment should be refunded.

Comment. I think the jail call is admissible as the defendant's purported admission to committing the offense. "The same thing will happen to you" implies I'll do to you what I did to the victim. Sure, it could be interpreted in other ways, but this is a reasonable interpretation.

11th District Eastland

Starks v. State, No. 11-22-00236-CR (Tex. App.—Eastland, Feb. 8, 2024)

Attorneys. Leigh Davis (appellate), Jeremy Shipp (trial)

Issue & Answer. Health & Safety Code § 481.102(6) prohibits the possession of "[m]ethamphetamine, including its salts, optical isomers, and salts of optical isomers." Does the legislature's listing of specific forms of methamphetamine create a burden on the State to prove specific forms of methamphetamine? **No.**

Facts. The State convicted the defendant for Possession of Methamphetamine. Officers field tested the substance in question and received a positive for "methamphetamine." At trial, a DPS analyst testified that he conducted preliminary testing that showed the substance contained methamphetamine. It does not appear any the State presented any further evidence regarding the chemical analysis of the substance.

Analysis. Section 481.102(6) does not textually exclude any form of methamphetamine. The use of the

term "including" does not create limitation. Instead, it creates clarification and an intent to broaden not limit the definition.

14th District Houston

Laws v. State, No. 14-22-00356-CR (Tex. App. Houston [14th Dist.] Feb. 13, 2024)

Attorneys. Stan Schneider (appellate), Steven Greenlee (trial)

Issue & Answer 1. Does the failure to provide the defendant with a reporter's record during the 30-day motion for new trial period violate due process? **No.**

Issue & Answer 2. May an appellate court abate an appeal and expand the time for litigating a motion for new trial when the court reporter failed to provide a defendant with the reporter's record within the 30-day motion for new trial period? **No.**

Facts. The defendant shot and killed a man during a "tussle." The defendant claimed to have acted in self-defense and argued that the victim was wielding a knife. The jury rejected the defendant's theory of self-defense and convicted him. Post-conviction the defendant requested preparation of the reporter's record. The reporter did not provide the defendant with the record until after the 30-day period for filing and alleging grounds for new trial had expired. The defendant contends that the transcript reveals the following deficiencies of counsel:

- Trial counsel did not present any evidence in support of an oral motion to suppress appellant's video and audio statement to police.
- Trial counsel did not present an expert to examine the victim's toxicology report and explain the impact phencyclidine ("PCP") might have had on the victim's behavior.
- Trial counsel failed to present evidence that could have explained the effect of anesthesia or pain medication given to the defendant during and after surgery, which may have affected his cognition when interviewed by police.
- Trial counsel raised no objection to the admission of appellant's statement to law enforcement.
- Trial counsel failed to request a jury instruction on voluntariness.
- Trial counsel failed to request a jury instruction regarding Texas Penal Code Section 9.04.
- Trial counsel failed to cross-examine Precious about the victim's known propensity to carry or not carry a weapon.

Analysis 1. The [editorial note: system-wide] inability of court reporters to prepare records necessary to litigate motions for new trial does not deny a defendant due process because the defendant can always use the record [editorial note: many many years] later to file and litigate a writ of habeas corpus [editorial note: if he can afford a lawyer].

Analysis 2. Texas Rule of Appellate Procedure 2 permits an appellate court to "suspend a rule's operation . . . [in order to expedite a decision or for other good cause]." The rule does not permit an appellate court to suspend or enlarge time limits that "regulate the orderly and timely process of moving a case from trial to finality of conviction." The Court of Criminal Appeals prohibits the use of Rule 2 to permit out of time appeals. When addressing an identical issue, the Austin Court of Appeals held that the untimely preparation of a reporter's record does not constitute "good cause" to enlarge the time for litigating a motion for new trial.

Comment. See bracketed editorial notes.

Debottis v. State, No. 14-22-00884-CR (Tex. App. Houston [14th Dist.] Feb. 15, 2024)

Attorneys. Craig Hughes (appellate), Clay Caldwell (trial)

Issue & Answer 1. Is the erroneous admission of post-Miranda silence as evidence showing lack of remorse excusable so long as the State presents a lot of other evidence at trial making the defendant look bad in non-objectionable ways? **Yes.**

Issue & Answer 2. When the State fails to produce lab analysts to testify to the analytical aspects of a blood test and the defendant briefs the issue on appeal as follows:

Appellant's medical records include a lab report which constitutes hearsay within hearsay, and for which the witness could not lay a proper foundation, as she: i) could not testify that the lab was properly accredited at the time the testing was conducted; ii) lacked the training and professional credentials to understand or interpret the test results; and iii) was not involved in the testing process at the lab.

Can the court of appeals ignore the clear Confrontation Clause issue because the defendant did not say "Confrontation Clause." **Yes.**

Facts. The State prosecuted the defendant for Intoxication Manslaughter after she consumed several alcoholic beverages and crashed her car into another vehicle killing the two occupants. The arresting officer read the defendant her Miranda rights at the scene of the accident and the defendant invoked her right to remain silent. Nonetheless, she became not-so-silent at the hospital in front of the officers' body cam. She purportedly flirted with the arresting officer, expressed concern about her bond amount and her missing underwear. The State presented this evidence to the jury through the testimony of the arresting officer who was one of 15 State witnesses at trial.

Analysis 1. "Generally, a comment on a defendant's lack of remorse is an impermissible reference to the defendant's failure to testify (or otherwise remain silent) because only the defendant can testify as to her own remorse." Assuming the defendant's statements or silence were made in response to custodial interrogation, the evidence was only a small part of the State's presentation at trial and State placed no emphasis on this in their argument to the jury. Moreover, the egregiousness of the defendant's post-arrest demeanor pales in comparison to the egregiousness of her driving (caught on video).

Analysis 2. The defendant's argument "implicates the Confrontation Clause" but she cites "no law regarding the Confrontation Clause, nor does she substantively explain that the admission of the toxicology report violated her constitutional rights." The issue is inadequately briefed, and the court will ignore it.

Comment. I hate harm **analysis.** It is the court of appeals sitting as a 13th juror. I hate it more when the merits of the legal argument are clear and should have been addressed and resolved against the defendant.

It's not clear from the opinion and briefs whether trial counsel objected on confrontation clause grounds. It very well could be appellate counsel venting about a problem not properly preserved. But assuming there was a confrontation clause objection at trial, I think the court has all it needs to address the issue. It's not that complicated. Did people perform analytical functions in creating the lab report? If yes, did they testify? If no, then there is a Confrontation Clause violation.

***Roque v. State*, No. 14-22-00106-CR (Tex. App. Houston [14th Dist.] Feb. 27, 2024)**

Attorneys. Jani Maselli Wood (appellate), Rudy Duarte (trial)

Issue & Answer 1. Given four years of delay with numerous pro se demands for speedy trial that were never adopted by trial counsel and numerous resets by trial counsel never adopted by the defendant, should the case be dismissed on speedy trial grounds? **No.**

Facts. The State arrested the defendant for Murder in 2016. The defendant could not post bail. The defendant filed numerous pro se motions for speedy trial and speedy trial dismissal. The trial court never ruled on these motions. In 2021, weeks before trial, trial counsel moved to dismiss on speedy trial grounds. The State contended that the defendant waived speedy trial by acts of his counsel. Specifically, trial counsel reset the case numerous times and never did anything to adopt the pro se motions filed with the court. The trial court denied the motion to dismiss, and cited complications caused by Hurricane Harvey and the COVID-19 Pandemic.

Analysis 1. Speedy trial claims are evaluated under the Barker v. Wingo factors (see legend). Here the length of delay was significant—more than four years. Most, but not all, delay is attributable to defense counsel's requests to reset the case. The defendant theoretically asserted his right by pro se filings, but these invocations were ineffective because trial counsel did not adopt them, and a defendant is not entitled to hybrid representation. The trial court was "free to determine that [the defendant] acquiesced in the delay and was not truly interested in a speedy trial." The record fails to reflect any harm attributable to the delay

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and the court may not presume harm merely because the delay was significant.

Comment. If it is okay to delay for four years the trial of a defendant begging to go to trial, then I don't want to hear about laches in post-conviction writs.

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

- 1st District Houston
- 7th District Amarillo
- 8th District El Paso
- 9th District Beaumont
- 12th District Tyler
- 13th District Corpus Christi/Edinburg

About Kyle Therrian

Kyle Therrian *is an appellate lawyer practicing at the McKinney criminal law firm Rosenthal, Kalabus & Therrian. Kyle's appellate practice is statewide, he handles cases in our fourteen courts of appeal, the Texas Court of Criminal Appeals, and the Texas Supreme Court. In addition to authoring the Significant Decisions Report, Kyle is the chair of TCDLA's Amicus Committee and the Chair of Texas Criminal Defense Lawyers Education Institute.*

Abbreviations used in this publication include

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

Factor tests cited without recitation include:

***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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THURSDAY, JUNE 13

DWI Update ..... Doug Murphy

State Boot Camp

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

Federal Boot Camp

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
Junk Science ..... Angelica Cogliano
Hemp & Marijuana ..... Amanda Hernandez

SATURDAY, JUNE 15

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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