

The background of the entire page is a dense, colorful collage of stylized human silhouettes. The colors range from dark blues and greens to bright oranges and yellows. The silhouettes are layered and overlapping, creating a sense of a large, diverse crowd. The overall style is graphic and modern.

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

# VOICE

FOR THE DEFENSE

VOLUME 53 NO. 4 • MAY 2024

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Texas Criminal Defense Lawyers Association

22<sup>ND</sup> ANNUAL

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# VOICE

FOR THE DEFENSE  
Volume 53 No. 4 | May 2024

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**June 12**  
CDLP | Capital Litigation  
San Antonio, TX

**June 12**  
CDLP | Indigent Defense  
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**June 12**  
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**June 13**  
CDLP | Women Defenders  
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**June 13-15**  
TCDLA | 37<sup>th</sup> Annual Rusty Duncan  
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San Antonio, TX

**June 14**  
TCDLEI Board, TCDLA Executive, CDLP,  
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**June 15**  
TCDLA Annual Members Meeting  
San Antonio, TX

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**July 3**  
TCDLA | Declaration Reading

**July 10-14**  
TCDLA | Members' Trip  
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**July 10**  
CDLP | Trainer for Trainers  
South Padre Island, TX

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

**July 13**  
TCDLA, CDLP, TCDLEI | Orientation  
South Padre Island, TX

**July 19**  
TCDLA | Financial Friday - Divorce  
Webinar

**July 22**  
CDLP | Mindful Monday  
Webinar

**July 24**  
TCDLA | New Lawyer - Rural Smuggling  
Webinar

**August**

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

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

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

**August Continued**

**August 7-9**  
CDLP | Mitigation Bootcamp  
Austin, TX

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

**August 9**  
TCDLA | Financial Friday - Debt Module  
Webinar

**August 16**  
TCDLA | 22<sup>nd</sup> Annual Top Gun DWI  
Houston, TX

**August 19**  
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Criminal Law  
Webinar

**August 29**  
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Zoom

**August 29-30**  
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**September**

**September 3**  
CDLP | The Way of the Warrior  
Witchita Falls

**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  
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Webinar

**September 16**  
CDLP | Mindful Monday - Reproductive  
Laws  
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**September 17**  
TCDLA | Constitution Day

**September 18**  
TCDLA | New Lawyers - Mental Health  
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**September 19**  
CDLP | The Way of the Warrior  
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CDLP | Round Top XII - Advanced Trial  
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**October**

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

**October Continued**

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

**October 16**  
TCDLA | New Lawyers - Evidence  
Webinar

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

**October 17-18**  
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San Antonio, TX

**October 24**  
CDLP | Mental Health Interactive  
South Padre Island, TX

**October 25**  
CDLP | Capital Defense  
South Padre Island, TX

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**November 4**  
CDLP | The Way of the Warrior  
New Braunfels, TX

**November 7-8**  
TCDLA | 21st Annual Stuart Kinard  
Memorial Advanced DWI  
San Antonio, TX

**November 8**  
TCDLA | Financial Friday - Academics of  
Investing  
Webinar

**November 8**  
CDLP | Mindful Monday - Criminal  
Attorneys During the Holiday Season  
Webinar

**December**

**December 6**  
CDLP | 17th Annual Hal Jackson  
Memorial Jolly Roger w/ DCCLA  
Denton, TX

**December 12-13**  
TCDLA | Defending Those Accused of  
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**December 16**  
CDLP | Mindful Monday - Blues:  
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Webinar

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# President's Message

JOHN HUNTER SMITH



## Parting Words

My fellow TCDLA members in this my last President's column I wanted to share some of my reflections as your President.

I am profoundly grateful to TCDLA for giving me the opportunity to serve as your President over the past year. I am grateful to my Executive Committee, our Board of Directors, the Criminal Defense Lawyers Project Committee, the Texas Criminal Defense Lawyer Educational Institute Board, each and every seminar course director, each speaker, and you, the TCDLA members. Additionally, I am extremely thankful for our Chief Executive Officer Melissa Schank and the TCDLA staff for guiding me with wisdom and knowledge over the past year.

In all my work as your President, it was my goal to be true to our TCDLA mission statement. More importantly, it was my goal that every decision benefited the TCDLA membership.

Over this past year, I have been in situations where I thought, "it is really special that I am getting to experience this." You might say that those situations represented what I appreciated most about being your President. This past year, I had the opportunity to attend numerous TCDLA CLE seminars. At these seminars, I had the opportunity to meet many lawyers from across the State of Texas. What I learned was these lawyers were doing some very interesting and fascinating work, and I never would have encountered most of them had I not had this opportunity. I truly enjoyed talking to our members about how they handle certain cases, and I have often been inspired by the creativity that they bring to their work.

The second aspect I greatly appreciated as your President was working with the many committees that drive TCDLA. I would like to recognize the several hours of hard work, time away from their law practice, and true dedication to our TCDLA Mission Statement, and our Membership from the following committees: Strike Force, Criminal Defense Lawyers Project, and Amicus. I cannot thank you enough for the work you do behind the scenes to benefit our membership.

Although there are many achievements that we have made as an organization over the past year, there are certainly matters that we can approve on in the future. I think one of our biggest challenges looking forward is to remain relevant and connected to our younger members. This is not a phenomenon that is specific to just TCDLA, but is a challenge for other statewide organizations as well. I want to commend our Strategic Planning Committee for its vision to remain relevant with our membership and our future members.

In closing, I want to express my deepest gratitude for giving me the opportunity to lead this remarkable organization. Throughout the year, it has been my focus to let our membership know that I recognize and understand the stress of our profession. I recognize that sometimes our work is not appreciated. Sometimes, our role as a defender of the citizen accused is subject to negative comments. I want to leave you with the words of Maya Angelou, "You may encounter many defeats, but you must not be defeated. In fact, it may be necessary to encounter the defeats, so you can know who you are, what you can rise from, and how you still come out of it."



# CEO's Perspective

MELISSA J. SCHANK

*ROSES ARE RED; VIOLETS ARE BLUE, AND TCDLA STANDS STRONG WITH YOU.*

## Stop and Smell the Flowers

Sometimes we're compelled to pause in the frenzy of life's demands. Such a moment recently found me, courtesy of a consistently thoughtful member sent me an e-card. Rushing through my day, as usual, I clicked it open without much thought. Yet, the card's animation and music seized my attention. The animation of the blooming flowers and the tranquil music transported me outdoors and gave me a sense of calm and serenity. It was a "stop and smell the roses" moment. I felt like I was outside and could smell the flowers; I was thankful for the breather and appreciated the kindness behind the gesture. I had another e-card that was sent to me as a thank you for a contract I signed; the card was the person's face singing me a song that they took the time to personalize the words. The card had a catchy tune, and the customized lyrics that were meant for me only made me laugh, and this, too, brightened my day. I am in the process of learning how to make these e-cards so I can send them to people and hopefully put a smile on someone's face! Taking the time to make someone smile or smell the flowers is a wonderful gift.

A gift I have given myself is some dedicated "me" time. For the past year, I've had this desire to learn how to play pickleball. However, my gym's requirement for beginner open play is to take 2-3 introductory sessions to learn the rules and how to play. These sessions have been booked continuously for a year. Then, the day after Thanksgiving, there was an open spot, and I finally got my opportunity. Since then, I've been consumed by a passion for pickleball, carving out and protecting time each week to play. I have been meeting and making connections with newfound friends. These friends keep me motivated and help me improve my skills. Pickleball has turned into a cherished refuge from life's demands and provides a mental break while getting some healthy exercise in! I have also been receiving some interesting remarks when I sport my TCDLA swag, stay tuned for these future stories.

As time goes by, I find myself focusing more on staying healthy, nurturing relationships, and providing exceptional service. It can be frustrating when I work with other people or services and don't see the same level of

dedication. It seems like good customer service is becoming rare these days. However, during a recent seminar in Longview, I was pleasantly surprised by the exceptional service provided by the hotel staff, grocery store attendant, and others I encountered. Their commitment to go above and beyond reminded me that there are still people who care. I had a great time in Longview attending the TCDLA/CDLP Riding for the Defense hosted by course directors David Moore and Bobby Mims. David and Pam Moore opened their house and served a delicious home-cooked meal for speakers and staff and everyone raved on how delicious everything was. The attendees were full of praise for the speakers and appreciated the high quality of our continuing legal education seminar; the speakers had the audience engaged and captivated and the room was packed until the end.



In the hustle and bustle of our daily lives, it's easy to overlook the small moments that bring joy and peace. Whether it's a heartfelt gesture from a friend or discovering a new passion like pickleball, these moments remind us to slow down and appreciate the simple pleasures. As we navigate through the challenges of work and relationships, let's remember to prioritize our well-being and nurture the connections that bring us happiness. Amidst the chaos, may we always strive to provide exceptional service and kindness to others, just like the wonderful individuals I encountered in my life. Let's keep spreading smiles and spreading joy – because in the end, it's these little acts of kindness that make life truly meaningful.

# Editor's Comment

JEEP DARNELL



**Here Comes the Sun**

Here we are in May and on our way to June, and with that comes the pervasive heat of summer. I'm just as guilty as the next guy (or gal) who thinks, "man I don't want to deal with the triple-digit summer heat." However, I have to remind myself that with the summer heat comes the time to enjoy my family. For all the complaints I, and others, have about the heat, getting to see my kids more without having to drop them off at school first thing in the morning, going on trips, going to baseball tournaments, the fireworks on the 4th of July, and getting to attend Rusty Duncan and the President's Trip to South Padre Island are always highlights that only come with the sunny part of the year.

Now I know that not every one of y'all has little kids like I do. I'm also fully aware that every year feels like it's hotter than the last and the heat feels like it stays longer and longer. Regardless of whether you have kids or not, or their age, I challenge you to make the most of the upcoming summer months. Every one of us can enjoy the celebration of being an American; every one of us can enjoy taking some time off and going on a vacation or two; and all of us who can attend Rusty and South Padre can enjoy spending time with our brothers and sisters who fight the same daily fights we do. If you do have kids, enjoy them enjoying their summer, and if your kids are in college, enjoy the time you can spend with the adults they are becoming.

I am positive that if each and every one of us makes the effort, we can find happiness in the coming heat. Instead of concentrating on how hot it is, we can each enjoy the fact that the dreariness of winter is gone, and the world is alive. I know it sounds corny, but there is something to enjoy about the trees full of leaves (even in El Paso), hummingbirds dancing around, and, at least in my part of the world, the late summer rains that make even the desert turn green. I'm sure I'll forget my own words and cuss the heat before too long, but we all need to remember to enjoy what comes with the sun.

Be safe,

Jeep Darnell

# The Federal Corner

JOEL PAGE



## Fifth Circuit Tinkers with the Standard to Get a Suppression Hearing

For the federal defense attorney, deciding how much to write in a motion to suppress can be a matter of some strategy. When the facts are set in concrete – for example, when a body cam has captured the events leading up to a search, or when the motion pertains only to the facial adequacy of a warrant affidavit –we might as well describe those facts in detail. While we’re at it, we might as well pre-empt the government’s most likely legal defenses of the search; at least the ones we’re sure the government will think of anyway.

But sometimes we might not want to be quite so chatty. If the best evidence available to us is a police report, we might be concerned that telegraphing our views of the facts or law will affect the content of an officer’s testimony. That is, we might fear that the officer will shape or shade his or her testimony to defeat the factual or legal theories in our motion. This is especially so if the police report is ambiguous, terse, or subject to elaboration. And even if the report is perfectly clear, police witnesses have been known to remember the facts differently on the stand than they do in their reports. Further, judges have been known to credit an officer’s live testimony over a contemporaneous report, concluding that the officer’s memory of an event has improved over time. Likely, this is a testament to the growing availability of jelly-fish-derived memory supplements.

So, some good defense lawyers think that the less they say before the police officer testifies, the better. That’s not the only reasonable choice. Some lawyers prefer to have the government’s respond to a fuller explication of their view of the facts and law. They hope, not unreasonably, that the government’s response will make additional factual disclosures that may be used at the suppression hearing, or even at trial.<sup>1</sup>

<sup>1</sup> As a young lawyer, I heard a second-hand story about storied Texas defense lawyer Gerry Goldstein: that he would bait the prosecution into contesting Fourth Amendment standing, then use the government’s pre-trial filing to that effect as substantive evidence at trial to weaken the government’s

But let’s suppose we are inclined to play your cards close to the vest. How do we make sure we get an evidentiary hearing while saying as little possible? A straightforward reading of Fifth Circuit precedent used to suggest that the initial motion might need only be very limited indeed. For decades, the Fifth Circuit had given us a clear rule, in suppression and other contexts:

“...a hearing is required ‘when the defendant alleges sufficient facts which, if proven, would justify relief.’”

*United States v. Powell*, 354 F.3d 362, 370 (5th Cir. 2003)(quoting *United States v. Mergist*, 738 F.2d 645, 648 (5th Cir.1984) (further citation omitted); accord *United States v. Garza*, 429 F.3d 165, 172-173 (5th Cir. 2005); *United States v. Harrellson*, 705 F.2d 733 (5th Cir. 1983); *United States v. Smith*, 546 F.2d 1275 (5th Cir.1977); *United States v. Poe*, 462 F.2d 195 (5th Cir.1972).

Equally well-settled was the allocation of the burdens of proof: once the defendant had shown that some piece of evidence came from a warrantless search, the government bore the burden to show that the search fell into an exception to the warrant requirement. *United States v. Chavis*, 48 F.3d 871, 872 (5th Cir. 1995); *United States v. Roch*, 5 F.3d 894, 897 (5th Cir.1993) (quoting *United States v. De La Fuente*, 548 F.2d 528, 533 (5th Cir 1977)).

So, putting that together, there was a good case to be made that we didn’t have to do much to get a hearing. We could simply allege that our client had been searched without a warrant, that evidence resulted, and that the client had sufficient connection to the searched area to assert standing. Because warrantless searches are presumed unreasonable, that would seem to allege a *prima facie* case for relief. Of course, the government

---

evidence of constructive possession. If, after all, the client has too little connection to a residence to contest a search, doesn’t that raise doubt that he had dominion over everything within it? At the time, I assumed the story to be apocryphal, but Mr. Goldstein and Cynthia Orr were generous enough with their time to confirm it for me in preparation for this column.

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could come back and invoke one or more of the exceptions that now riddle the warrant requirement. But if all we wanted was to get in the court and cross-examine the searching officer, the gate seemed to be open.

A recent Fifth Circuit decision might call for a little more care. In *United States v. Garcia*, No. 22-40570, \_\_F.4th\_\_, 2024 WL 1725018 (5th Cir. Apr. 23, 2024), the defendant sought a suppression hearing to contest the recovery of currency from a search of his suitcase. In support, he filed an affidavit alleging that: 1) officers detained him in a hotel lobby, 2) they seized and searched his suitcase during this detention, and 3) he did not consent. *Garcia*, 2024 WL 1725018, at \*8. The Fifth Circuit held this inadequate to require a hearing. *See id.* at \*8-9.

Several rationales can be sussed out of the Fifth

Circuit’s opinion.<sup>2</sup> First, the court observed that “[defendant’s] affidavit did not even establish that the search occurred without a warrant.” *Id.* \*9. That much seems basically consistent with prior precedent – while warrantless searches are presumptively invalid, searches in general are not. So, if the defendant never alleged a warrantless search, he never alleged a presumptively invalid one.

But this was not all the court had to say. The court also opined that the duty to “allege[] sufficient facts which, if proven, would justify relief,” was also the duty to *prove* those facts, not merely to state them in a motion. It said:

Although the motion to suppress alleged a warrantless search, “counsel’s statements in [a] motion

<sup>2</sup> For conceptual reasons, these will not necessarily be taken in the order presented in the opinion.

and subsequent briefs are not evidence.” It was first [defendant]’s burden to “produce[] evidence” that the search violated his Fourth Amendment rights.

*Id.* (quoting *INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984), and *Roch*, 5 F.3d at 897)(internal citations omitted) (emphasis added by *Garcia* court).

This might get a little thorny for us if we want a hearing without fully reciting the facts of our case. The procedure used in *Garcia* – a client affidavit – doesn’t seem well designed to make the required showing. Although a client can usually swear that he or she underwent a search or detention, he or she probably lacks first-hand knowledge of the warrant’s non-existence. Of course, there is no bar on hearsay at a pre-trial hearing, and even under *Garcia*, the evidence of a warrantless search need not be conclusive. So, it would probably suffice to submit an affidavit from a lawyer or investigator saying that review of the discovery, and a request for production of the warrant, had turned up no evidence that it existed. Counsel might also just attach a police report to the motion. However, that would create the potential problem of supplying evidence that invokes an exception to the warrant requirement. Still, while this is a trap for the unwary, it’s probably not an insurmountable obstacle.

Of greater concern is *Garcia*’s suggestion that we must fully describe the circumstances of the search and must do so in a way that shows it was unreasonable. The *Garcia* court held the defendant’s affidavit insufficient because it “d[id] not establish what was happening directly before the search,” a requirement that goes well beyond mere warrantlessness. *Id.* at \*8. It continued:

The proponent of a motion to suppress has the burden of proving, by a preponderance of evidence, that the evidence in question was obtained in violation of his Fourth Amendment rights. ... This may require the movant to present evidence of the circumstances surrounding the search, for instance to establish that he had a reasonable expectation of privacy in the object of the search.

*Id.* at \*9 (quoting *United States v. Smith*, 978 F.2d 171, 176 (5th Cir. 1992)) (internal citations and quotation marks omitted).

Respectfully, the reasoning here – that defendants have long had to allege standing, and therefore may have to allege “the circumstances surrounding the search” – is questionable. Standing is an affirmative element of a Fourth Amendment claim, not an exception to the general rule requiring the police to get search warrants. To give the defendant an affirmative burden of proof regarding standing is merely to require a *prima facie* case of a Fourth Amendment claim. But to give the defendant a burden -- an evidentiary burden at that, and one that attaches before any hearing has commenced – to defeat all exceptions to the warrant requirement is effectively to invert the presumption that warrantless searches are unreasonable.

Nonetheless, here we are. There may be cases where we so value the element of surprise -- or so distrust that an officer’s testimony will remain unaffected by a more fulsome motion to suppress -- that it’s worth taking the risk that the judge will deny the hearing. In some cases, moreover, a judge may be amenable to an amended motion, if the first one is deemed insufficient. Indeed, some judges will probably grant a hearing even on a bare-bones motion. In other courts, however, we need to recognize that the game may have changed.

---

**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 from the Supreme Court in *Davis v. United States*, 140 S. Ct. 1060 (2020), and quite a lot more unfavorable opinions from the Fifth Circuit over the years.

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# Beyond the City Limits

TODD DALTON GREENWOOD

## My Next Conversation with A Rural County Attorney About Why They Keep Charging My Clients with Possession of Marihuana That They Cannot Prove

*Disclaimer: Subject matter experts in this area include the alumnae for last week's highly informative continuing legal education event in Dallas. This CLE provided some of the inspiration for the topics contained in this article. My hope is that the following will assist you in your next conversation or correspondence with any prosecutor still willing to prosecute your client with a marijuana offense. Tip of the hat to Don Flanary, Daniel Mehler, Adam Tisdell, Amanda Hernandez, Joseph Hoelscher, Carl Ceder, Jemila Lea, Matt Peacock, and (the) David Burrows.<sup>1</sup>*

**Me:** Wayne! How you?! [firm handshake, eye contact] How's that cutter you're takin' to the Futurity in the Fall?

**County Attorney:** We'll get there. What we doin' with Ricky Lee? You know he's known 'round here. He's a [insert last name].

**Me:** I know. 'Apple don' ...

**CA:** "Apple don't fall far from the tree."

**Me:** Wayne, we're west of the 100th meridian. Not too many apple trees this side of Lubbock.

**CA:** [strategic silence, blank stare] Your client was legitimately pulled over for failure to signal and a busted tail lamp. The weed was sitting in a sandwich baggie on

the passenger seat in plain sight. The car reeked of skunk.

**Me:** Nobody even says any of those words, anymore.

**CA:** Might be. But your guy there is guilty as sin.

**Me:** Remind me which commandment touches on smokin' a plant? What would Willie do?

**CA:** [looking at watch, trying not to grin and, yes, he wears a wristwatch, not an Apple watch] We're not getting' us anywhere. I got other cases.

**Me:** I hope they're not marihuana cases [clearing throat when pronouncing silly legislature spelling decisions] because you can't prove any of them.

**CA:** [crossing arms, settling back in his chair] My DPS lab analyst says we can. Seen your 39.14?

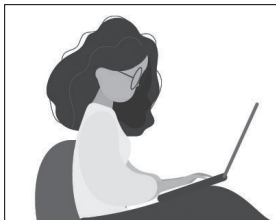
**Me:** Sure have. So has my consulting forensic toxicologist. The lab results indicate a finding of 'marijuana' using gas chromatography mass spectrometry. That is not a scientifically reliable means to test to demonstrate the presence of any cannabinoid proscribed by statute at a level that is unlawful to possess. In fact, there is no testing methodology which satisfies the rigor of Texas Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>2</sup> My forensic toxicologist, who is a great deal more qualified than your DPS analyst, will so testify.

**CA:** Ricky Lee can't afford a toxicologist.

**Me:** He sure can't. I guess the citizens of Cactus

<sup>1</sup> The association hosts these several times a year. This was the 17th Annual DWI Defense: Defending Freedom: Cases with DWI, Prescription Drugs, & Marijuana. Go to [https://www.tcdla.com/TCDLA/Events/Event\\_Display.aspx?EventKey=W050324](https://www.tcdla.com/TCDLA/Events/Event_Display.aspx?EventKey=W050324).

<sup>2</sup> Tex. R. Crim. Evid. 702. 509 U.S. 579, 598 (1993). See also *Kelly v. State*, 824 S.W.2d 568, 573-74 (1992).



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County can, though. I mean, I guess they can because prosecuting marijuana cases since hemp was legalized in 2019 means just that. For whatever reason, it's one of only three counties out here in the Big Ole Empty in which we're still seeing marijuana and vape pens. So, I guess that implies a willingness to fund what most of the rest of the Great State of Texas has decided is scientifically impossible or else a money-losing proposition.

**CA:** You think Judge Bean in there is going to pay for your expert?

**Me:** I think we're going to have at least a hearing or two over it. That means pleadings. That means I'll move for the litigation packet from DPS, which they haven't given you yet, so you haven't gotten me even though I filed the 39.14 demand six weeks ago. That means my toxicologist provides telephonic testimony over just how scientifically unsound the DPS results are. Then we try it. I discussed it with Ricky Lee. We don't want an offer. Your DPS analyst spends at least an hour on the stand in cross examination making my record for appeal. After that time and trouble, if you can put together a jury that doesn't hang, we spend the next 18 to 24 months just getting the appeal through the intermediate court because this case is just exactly how high a priority, do you think? Then, fair chance of a do-over because your judge didn't want to pay for my expert. Hell, I might as well move over here.

**CA:** The offer is \$500 fine plus costs and a time-served.

**Me:** That's more reasonable than those probation offers you were making the pro se guys last docket. Even if your deputy was a K9, he couldn't establish plain sniff via the smell of what he guesses was marijuana. So, you also have an *Arizona v. Gant* problem.<sup>3</sup> Add a motion to suppress and a 38.23 instruction if we reach trial to the litigation that's going to keep you off the ranch.

<sup>3</sup> 556 U.S. 332 (2009).

**CA:** Nobody smokes hemp flower.

**Me:** My expert who runs a dispensary less than 40 minutes from here will contradict you on that with sales receipts. The only people who think that are you and some justices on an appellate court in Dallas.<sup>4</sup> Next time you're driving around with that solo cup in your console full of cola, ask yourself whether some deputy gets to guesstimate it's got TX in it.<sup>5</sup> Might, might not, right? Just like the 'odor of marijuana' might be the odor of a legal cannabinoid or an illegal one? Willie weed or hemp flower? Probable cause is not a coin toss, Wayne. We define that standard, remember?<sup>6</sup> I believe we have preemptive federal constitutional authority.

**CA:** [yawning] You have your offer, counselor. You are obligated to take it to Ricky Lee. You know he dove head first off a windmill into a horse trough about ten years ago?

**Me:** He already turned down time-served. He turned down a one-day pretrial diversion.

**CA:** I haven't offered a one-day pretrial diversion in 17 years doing this job!

**Me:** I know. You told me that last time when I asked for one. I just don't like getting up and walking back and forth like a government puppet. He's not pleading. Try it or dismiss it. Neither are the next dozen of these. He's related to half the county. He's a [last name], right?

<sup>4</sup> *State v. Gonzales*, 676 S.W.3d 261, 269 (Tex. App. – Dallas 2023) (holding 'odor of marijuana' sufficient to establish probable cause to support a warrantless search of a vehicle).

<sup>5</sup> <https://txwhiskey.com/>

<sup>6</sup> "[F]acts and circumstances within [officers'] knowledge and of which they had reasonably trustworthy information sufficient to warrant a prudent (wise in practical affairs) man in believing that the person had committed or was committing an offense. *Beck v. State of Ohio*, 379 U.S. 89 (1964).

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

# Ethics and the Law

LAURA POPPS



## When is it Acceptable for a Texas Lawyer to Charge a Non-refundable Fee?

The ethical rules around charging, collecting, and managing attorney fees are commonly misunderstood, leading to inadvertent violations. One particular area of confusion is the notion of a “non-refundable” fee. Some attorneys believe that contractually designating fees as “earned upon receipt” and “non-refundable” makes them so, but this is rarely the case. In Texas, there are very few instances where it is appropriate to charge a “non-refundable” legal fee. To understand when a non-refundable fee is acceptable, it is important to look at what it actually represents and the rationale for treating it as non-refundable or earned upon receipt. This requires a closer examination of how fees are categorized and the terminology that contributes to the confusion in this area.

### Advanced Fees

Advanced fees are any legal fees paid in advance for legal work to be performed in the future. “When a client pays an advance to a lawyer, the lawyer takes possession-but not ownership-of the funds to secure payment for the services the lawyer will render to the client in the future.”<sup>1</sup> Advanced fees are frequently called “deposits” or “retainers.” But, this has led to tremendous uncertainty because a true “retainer” is not an advanced fee, nor is it intended to compensate the lawyer for work to be performed on the case. The proper terminology for advanced fees is therefore “advanced fee” or “deposit.”

### Retainers

The term “retainer” has engendered enormous confusion when it comes to classifying legal fees. Authorities have noted that over time, “the word ‘retainer’ has been used so inconsistently that it has practically lost all definable meaning.”<sup>2</sup>

The primary issue seems to be that the term “retainer” has been used to describe two entirely different types of fees - one which is properly classified as non-refundable and one which is not.

### The True Non-Refundable Retainer

A true non-refundable retainer, also referred to as a “general retainer,”<sup>3</sup> is not an advanced legal fee and in no way is intended to compensate the lawyer for future legal services. A true non-refundable retainer is a fee that is paid solely “to secure the availability of a lawyer’s future services and compensate the lawyer for the preclusion of other employment that results from the acceptance of

employment for the client.”<sup>4</sup> If a fee meets this criteria, it is appropriate to deposit it directly into the attorney’s operating account and consider it earned upon receipt.

When will a fee meet this criteria?

- The non-refundable retainer must constitute a “reasonable” fee for securing the lawyer’s availability and compensating the lawyer for lost employment opportunities. What is reasonable depends on the case and the circumstances, but any fee that is large enough to appear to be actual compensation for legal services will raise red flags.
- The lawyer must be able to substantiate that other employment will probably be lost by obliging himself to represent the client.<sup>5</sup>

When will a fee NOT be considered a true non-refundable retainer?

- When the fee is too large to be considered reasonable compensation just to secure the lawyer’s services or compensate for lost opportunities.
- When there are not likely to be any lost employment opportunities.
- When the lawyer intends the fee to compensate him or her for work to be done on the case. This could be evidenced in several ways, such as when the lawyer bills hourly against the retainer or asks for more than one retainer. A dead give-away is when the “retainer” constitutes the fee for the entire case. A true non-refundable retainer would be collected separately and in addition to any payment for legal services, because it is not intended to pay the lawyer for performing legal services.

Any legal fee that does not meet the strict criteria of a true non-refundable retainer must be placed in a lawyer’s trust or IOLTA account until earned. “It is a disciplinary violation for a lawyer to agree with a client that a fee is non-refundable upon receipt, whether or not it is designated a ‘non-refundable retainer,’ if that fee is not in its entirety a reasonable fee solely for the lawyer’s agreement to accept employment in the matter.”<sup>6</sup>

Lawyers frequently attempt to disguise “advanced fees” as “non-refundable retainers” in order to allow immediate access to the funds and to provide assurance that the fees won’t have to be returned if the representation is cut short. The more savvy lawyers even know to put certain buzzwords in their fee agreements when describing non-refundable fees. But such language won’t protect a lawyer from a disciplinary sanction if the fee itself is not a true

non-refundable retainer. Regardless of the language used in the contract, or what the client is willing to agree to, a fee intended to pay for future legal services can never be transformed into a non-refundable fee

### All Other Fees Labeled as “Retainers”

The term “retainer” is often used loosely to describe “any sum of money paid to the lawyer at or near the commencement of representation.”<sup>7</sup> This generic designation is meaningless in terms of whether a fee is “non-refundable” or “earned upon receipt.” Again, any fee designated as a “retainer” that does not constitute a true non-refundable retainer, is not earned upon receipt and is refundable unless and until it is earned through the rendition of legal services. It must go into the lawyer’s IOLTA account until earned. Ultimately, **a fee is determined by its purpose—what it is intended to purchase—and not by its label.**<sup>8</sup>

### Flat or Fixed Fees

A flat or fixed fee (hereinafter “flat fee”) is a fee “that embraces all work to be done, whether it be relatively simple and of short duration, or complex and protracted.”<sup>9</sup> Flat fees are often paid at the beginning of the representation, prior to any legal work being done. When this occurs, the fee is both an “advanced fee” and a “flat fee.”

Certain areas of practice lend themselves to flat fees, such as the practice of criminal law or family law. There is nothing wrong with charging flat fees for a representation, and there is nothing wrong with collecting the fee up front. However, in Texas it is never the case that a flat fee is “earned upon receipt” or “non-refundable.” It doesn’t matter what the fee agreement says or what the client is willing to agree to. In Texas, flat fees must remain in trust until earned.<sup>10</sup>

Depending on how the fee agreement is structured, this may be once the legal matter concludes, or once certain milestones within the representation are completed. It is perfectly acceptable to designate these milestones within the fee agreement and to transfer the apportioned funds from trust once they are earned. However, because the disciplinary rules require that fees be reasonable, any “extreme ‘front-loading’ of payment milestones in the context of the anticipated length and complexity of the representation” may run afoul of the rules.<sup>11</sup>

### Conclusion

In Texas there is almost no such thing as a “non-refundable fee.” A true non-refundable retainer is permissible, but it is a rarity, and is highly scrutinized. Any fee designated to cover future legal services cannot be classified as “non-refundable” or “earned upon receipt,” irrespective of a client’s consent. The determining factor for when a fee is considered earned and how it must be managed by the attorney lies in the fee’s purpose—what it is intended to compensate for.

### Endnotes

- 1 ABA Formal Op. 505 (2023).
- 2 *Id.* (citations omitted).
- 3 Ronald D. Rotunda, *Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility* 175 (2023–2024 ed.).
- 4 *See* Tex. Comm. on Prof’l Ethics, Op. 611 (Sept. 2011).
- 5 *Cluck v. Commission for Lawyer Discipline*, 214 S.W.3d 736, 740 (Tex. App.--Austin 2007, no pet.).
- 6 *See* Tex. Comm. on Prof’l Ethics, Op. 611 (Sept. 2011) (emphasis added).
- 7 ABA Formal Op. 505 (2023).
- 8 *See id.* at n.18 (citations omitted).
- 9 ABA Formal Op. 505 (2023).
- 10 *See* Tex. Comm. on Prof’l Ethics, Op. 611 (Sept. 2011). Some jurisdictions authorize lawyers to treat advances as the lawyer’s property upon payment if the client agrees to such in the fee agreement. ABA Formal Op. 505 (2023). Texas is not one of those jurisdictions.
- 11 ABA Formal Op. 505 (2023); *see* Tex. Disciplinary Rule Prof’l Conduct 1.04.

**Laura Popp** practices in Austin, Texas in the areas of attorney license defense, attorney ethics consulting, and criminal appeals. She has been board certified in criminal law since 1999. Laura is Co-Chair of the TCDLA Ethics Committee. She served for 10 years as Regional Counsel at the Office of Chief Disciplinary Counsel, where she directed litigation, investigations, and grievance administration for the Austin region and served as lead counsel in some of the Bar’s more complex litigation. She can be reached at [laura@poppslaw.com](mailto:laura@poppslaw.com) or (512) 865-5185.

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# Declaration Readings

July 3, 2024 - Statewide

If you're interested in organizing a declaration reading in your community, please contact Robb Fickman at [rfickman@gmail.com](mailto:rfickman@gmail.com), Chuck Lanehart at [chucklanehart@hotmail.com](mailto:chucklanehart@hotmail.com), or Phil Ricker at [philip@rickerlaw.com](mailto:philip@rickerlaw.com)

## Despite its Shortcomings, the Great Document Deserves to be Read: 2024 TCDLA Declaration of Independence Readings

CHUCK LANEHART

Each year, Texas criminal defense lawyers celebrate the true meaning of Independence Day by reading the Declaration of Independence at courthouses throughout the state. This is your opportunity to get involved in this wonderful tradition.

The Declaration of Independence is our nation's most revered symbol of a nation's stand against the illegal and immoral depredations of the crown against our citizens. It is only fitting that in Texas, which leads the country in the exoneration of those wrongfully accused and imprisoned, criminal defense attorneys serve at the forefront of the battle against the encroachment on our rights today. These readings are a reminder to all in the criminal justice system that abuses of power will be exposed and fought by members of the criminal defense bar.

It is true the Declaration is an imperfect document. Despite its lofty promise that "all men are created equal," the Declaration freed not one slave, gave not one woman the right to vote, and its text graphically insults every Native American. Yet the Declaration is, as was elegantly described by Dr. Martin Luther King Jr., a "promissory note" for America, a starting point that led to the Constitution, the Bill of Rights and the American rule of law that eventually began to address these shortcomings.

Organizers should reach out to our criminal defense lawyer brothers and sisters whose ancestors were slighted by the Founders—African Americans, women, Native

Americans—and specially invite them to participate. It is entirely appropriate in opening remarks to Declaration readings that organizers mention the shortcomings of the document and how we should all strive to overcome those shortcomings.

Aside from patriotic ideals, those who have participated in these events will tell you the readings are great fun, and everyone seems to come away with a feeling of goodwill, a chance to share fellowship with colleagues, and perhaps an opportunity to show off for friends, family and community.

The founder of this wonderful 15-year-old tradition—Robert Fickman of Houston—will join Chuck Lanehart of Lubbock and Phil Ricker of Levelland in coordinating statewide readings again this year. Those of you who have been involved in the past—you know who you are—will soon be contacted with information about the 2024 readings.

If you have not been involved in a Declaration reading in years past but want to become involved this year, please contact us: Robert Fickman, (713) 655-7400 ([rfickman@gmail.com](mailto:rfickman@gmail.com)), Chuck Lanehart, (806) 535-2689 ([chuck@lubbockcriminaldefense.com](http://chuck@lubbockcriminaldefense.com)) or Phil Ricker (806) 891-0136 ([phil@rickerlaw.com](mailto:phil@rickerlaw.com)).

Please join us in honoring our nation's most sacred document in the spirit of independence.



# Overlooked and Overcharged: Representing Black Immigrant Clients

JORDAN POLLOCK

*Member of Crimmigration Committee*

For criminal defense attorneys, advising non-citizen clients of the immigration consequences of charges and pleas is a crucial part of their ethical and constitutional obligations. For defense attorneys in Texas, it can be easy to forget that immigrants come from every nation in the world given the large, shared border with Mexico. This is why it is essential for defense attorneys to ask every single client, regardless of appearance, accent, language, or name, where they were born. If the client answers they were born abroad, attorneys must follow up with questions about immigration status and naturalization. Making assumptions about a client's immigration status can gravely prejudice the client and have serious professional repercussions for the defense attorney. Non-citizen criminal defendants already have an uphill battle having their unique needs recognized in the criminal justice system, before even attempting to protect their ability to remain in the U.S. in the immigration system. But one group of immigrants has been at greater risk of being overlooked by defense attorneys: Black immigrants.

Black immigrants are often overlooked based on stereotypes about what an immigrant looks like, and assumptions about language and surnames. Black immigrants from English-speaking countries often have names that may not jump out to a defense attorney as the name of a foreign-born person. Clients who have lived in this country many years may not have any accent and may not (without questioning) identify themselves as an immigrant. Additionally, because Black immigrants are less likely than other immigrants

to be in the country without authorization, they may not have an ICE detainer (until they are convicted of a deportable offense). See Pew Research Center, January 2022, "One-in-Ten Black People Living in the U.S. Are Immigrants" at p. 14 (hereinafter "Pew Report").<sup>1</sup> Given the fact that Black immigrants may present differently than other immigrant clients, it is essential for defense counsel to question every client about their country of birth (and follow up on that inquiry with questions about immigration history and naturalization).

The failure of defense counsel to recognize Black immigrants' need for Padilla advice is a far-reaching problem given the growth of this population. According to the Pew Research Center, one-in-ten Black people in the U.S. are immigrants. See Pew Report at p.17. Texas itself has seen over 250% growth in its Black immigrant population since 2000. See *Id.* at p.23. Given the well-documented existence of systemic racism in the criminal justice system, and corresponding systemic racism in the immigration system, it is imperative that criminal defense attorneys do not compound this harm by overlooking Black immigrants' unique needs. The changes in the immigration laws in the late 1990s created an immigration system which has particularly harmed Black immigrants, who are overpoliced. See Black Alliance for Just Immigration/NYU Immigrant Rights Clinic, *The State of Black Immigrants, Part II: Black Immigrants*

<sup>1</sup> The Pew Research Center's full report is available for download at: <https://www.pewresearch.org/race-ethnicity/2022/01/20/one-in-ten-black-people-living-in-the-u-s-are-immigrants/>

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in the Mass Criminalization System (hereinafter “BAJI Report”). Just as Black people are more likely than white people to be targeted by police, research suggests that Black immigrants are also disproportionately vulnerable to immigration enforcement. See BAJI Report at pg. 20. For example, more than 20% of immigrants facing removal on criminal grounds are Black, despite Black immigrants only making up 7.2% of the immigrant population. See BAJI Report at pg. 19. Additionally Black immigrants are more likely to receive a formal removal order in immigration court as opposed to Voluntary Departure, a fact which sets up often unconquerable bars to lawful return. See BAJI Report at p.22. Finally, as mentioned above, many Black immigrants have been in the U.S. lawfully for many years and the only reason they will be removed is because of contact with the state criminal justice system. For more information on the unique challenges Black immigrants face, and the way that the prejudices that pervade the criminal legal system extends to the immigration system, read the full report from the Black Alliance for Just Immigration and NYU Immigrants’ Rights Clinic, available at: <https://baji.org/wp-content/uploads/2020/03/sobi-fullreport-jan22.pdf>.

Asking one simple question about immigration status

and avoiding making assumptions about nationality based on a client’s name, accent, or appearance, can save a client from serious adverse immigration consequences and defense counsel from professional reprimand.



**Jordan Pollock** has been the Immigration Specialist at the Dallas County Public Defender’s Office since 2014. Ms. Pollock also serves as an adjunct professor at Texas A&M Law School, where she teaches a course in “crimmigration,” and is the vice-chair of the Texas Criminal Defense Lawyer’s immigration committee. Previously, Ms. Pollock was an Equal Justice Works Fellow at Public Counsel in Los Angeles, where she instituted a Legal Orientation Program at two Orange County detention centers and represented detained immigrants in removal proceedings. She received her J.D. with honors from the University of Texas School of Law and her B.A. with honors from Duke University. Before law school, Ms. Pollock was an accredited representative at the New York Legal Assistance Group, where she represented clients in affirmative immigration matters.



# Shout-Outs!

**Kudos to Ted Wenske and Brent Ratekin!** They got a not guilty on all counts verdict in the 340th of Tom Green County. Client had a four count indictment, Continuous Sexual Assault of Child, Sexual Assault X2 and Indecency with Child. Ted was able to show that the accusations all came from a vindictive mother and now 18 year old complaining witness as our client left the relationship after a 10 year relationship and the police “investigation” was terrible. Jury deliberated a little over 7 hours before coming back with the correct verdict. The DA had to proceed with no outcry statements as she admitted that her outcry notices were incorrect. They did not bring that up until right before trial so she could not correct her mistake! **Way to go!**

**Great work by Mitch Adams** of Tyler, Texas! He represented a citizen accused of POCS, a 2nd Degree Felony amount, enhanced to a 1st with a prior pen trip, in Van Zandt County. Mitch submitted his written request for discovery over two years prior to trial on April 9th, 2024, and he never received a lab report. Even after the certificate of lab analysis was filed, no lab report was attached by the DA’s Office. Mitch knew they did not provide him this report as required, and thus could not prove an essential element at trial. Mitch’s client rejected the State’s offer of 10 years TDC and Mitch picked a jury on April 9th. On April 10th, 2024, after the jury was seated and jeopardy attached, when the State attempted to introduce the lab report, Mitch timely objected under Michael Morton and the 294th District Court’s standing orders of disclosing lab reports at least five days before trial. The State’s Counsel mistakenly thought he provided the report via online discovery, and Mitch clarified it was never provided to the Defense, online or otherwise. The ADA took a recess, after which he offered an apology to Mitch and had the integrity to dismiss the case in front of the jury. Mitch walked a client facing life in prison, by keeping his cards close to his chest and playing them only at the opportune moment. **Congratulations, Mitch!**

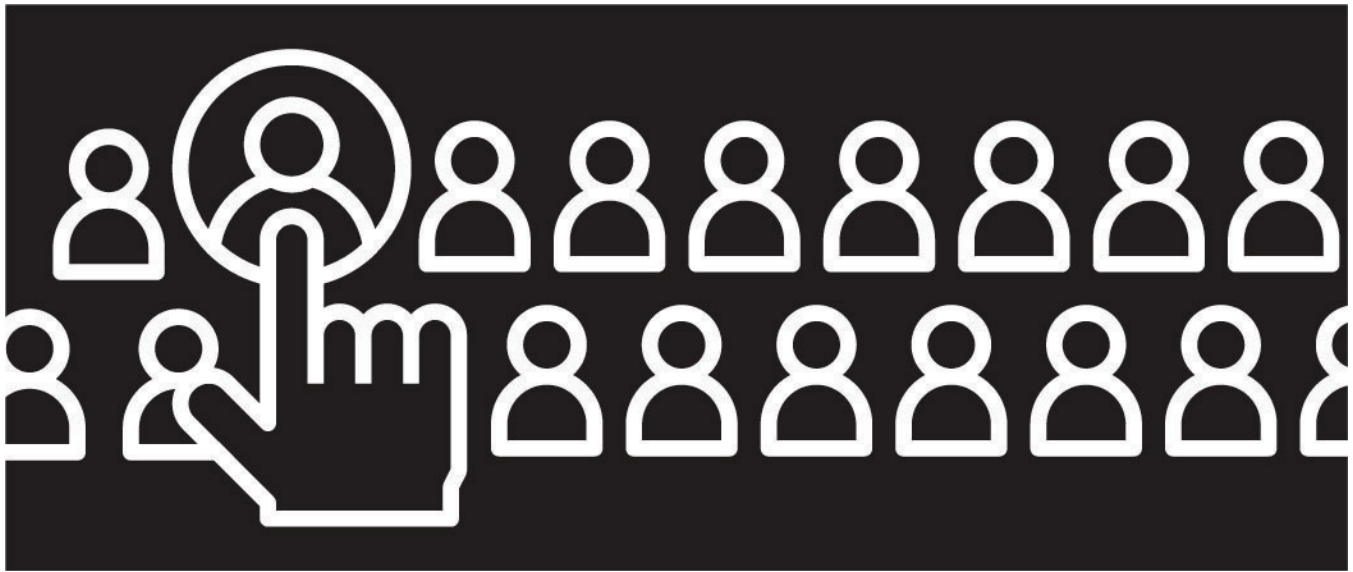
**Shout out to Mishae Boren and T.W. Davidson!** They worked on a two-and-a-half-year case with one of the most difficult prosecutors and clients they’ve ever encountered. The case, initially concerning indecency with a child by contact indictment, was radically rewritten to indictment for injury to a mentally ill person by bodily contact. The original indictment was dismissed in November ‘23. A few weeks later, the State indicted the D again, same charge, but via the grand jury assigned to a different district court, as well as a new bond. A few days before the court heard my “Expedited Evidentiary Hearing,” they became aware the juvenile-age victim and her mother were both changing their story about what the client allegedly did to the juvenile. They talked with the prosecutor to discuss a deal. The court accepted the deal, accepted the plea, and ordered the deferred. The client walked out of the courthouse a few minutes later, not convicted, not in shackles, crying, sobbing but not from tear gas and taser jolts, and not wearing an orange jump suit either. **Amazing work!**

**Kudos to W. Clyde Lemon!** He coordinated having clemency granted for 110 African American soldiers of Camp Logan incident of 1917. He was awarded the President’s Award by the NAACP Houston Branch for the project. **Congratulations!**

**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.

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. **Well done!**



## Voir Dire

ED STAPLETON, SARA STAPLETON-BARRERA, &  
MUHAMMAD JALAL HUSSAIN

### 1. How I first learned to pick a jury and why I decided this didn't work and what we do now.

In 1936, Clarence Darrow wrote his article on jury selection in which he considered the race, religion, and occupation of jurors. When I began trying cases in 1976, every lawyer I knew who picked juries followed this pattern. Strike the bankers, keep the laborers, strike the Presbyterians, keep the Catholics, strike the rich, keep the poor. With some variation, this is what everyone did. For fifty years, I have heard these and other even less scientific theories of jury selection: “What do their shoes look like?” “Ectomorph, endomorph, mesomorph?” “Eeny meeny miny moe, all the gringos gotta go.”

Even though this approach was standard and accepted, I began to doubt it worked in the 1980s and 90s when I inadvertently tested the theory. In those days, Brownsville Texas was viewed as a great venue with both plaintiff favorable judges and jurors. Lawyers with big cases from around the country would file their asbestos cases and product liability cases here, without regard to where the injury occurred. Our small firm was often hired as local counsel for a tiny slice of the pie. These venue rules have now changed, and out-of-towners rarely come here anymore, but it was fun while it lasted.

On those cases, back in the day, when we got to trial, I was sometimes concerned that the lawyers sent to try the case were not adequately prepared because they didn't know the facts of the case well enough. It was frustrating to sit beside an unprepared lawyer and suffer the pains of awkward direct and cross-examinations. So, I concocted a subterfuge to force the lawyers to prepare ahead of time.

I told them that a service we performed as local counsel was providing a practice jury so we could discover the weaknesses of the case with people from our community. We would hire twelve jury-eligible folks from Manpower and use them as practice jurors so I could force the lawyers to practice their case at least once before trial.

Then we had a consequence I did not expect. To practice voir dire on the practice jury, the lawyers would ask their questions, read the juror cards, and strike six jurors. We then split the two juries up and each was asked to deliberate the case. **In every single case, the stricken jurors awarded a better verdict than the ones the lawyers wanted. Differently put, in every case, the lawyers struck the wrong jurors.**

It began to occur to me that maybe everyone was doing a bad job of selecting jurors. Random selection would have been better. Doing the opposite of what they thought they should do would have been better.

I read books and attended many seminars on jury selection and got some ideas and began to try to figure out how to make strikes that helped. Talking to jurors and asking them if they would help us or hurt us seemed to be a reliable method. However, as we discuss below, even this produces mistakes among jurors who want to be socially acceptable. For example, people who think they oppose the death penalty will kill and people who think they favor the death penalty discover they don't have a stomach for the killing. We surprise even ourselves--most of us do not know ourselves as well as we think.

The Capital Jury Project provided some insight. This is a series of university research studies supported by the

National Science Foundation founded in 1991. In general, the findings indicate that jurors don't trust experts, that the race of the defendant matters, and jurors don't understand jury instructions. Many articles based on the CJP data have been published explaining this data.

In 2006, a book was published that gave some guidance: *Scientific Jury Selection (Law and Public Policy: Psychology and the Social Sciences)* 1st Edition by Joel D. Lieberman (Author), Bruce D. Sales (Author).

Since then, social scientists have continued to research and publish and give us some ideas on what will make a good juror.

I have developed my own opinions from this research and decades of jury trials that I will share in this article. Some of these methods reflect the psychodrama training and the Trial Lawyers College voir dire with Gerry Spence. Also, defending death penalty cases and training in the Colorado Method of Capital Voir Dire has helped develop this method.

The threshold question: **Can we ever predict what people will do in the future?**

## **2. Can the future behavior of people be predicted? Or more specifically, can a juror's vote on the verdict be predicted?**

Well, yes to an extent. If the answer were a flat, "No," we would never have needed peremptory challenges at all. But let us assume for a moment that the Common Law possesses some measure of wisdom. As Justice White wrote in *Swain v. Alabama*, 380 U.S. 202 (1965), "The peremptory challenge has very old credentials." *Id.* at 213. Citing an English Common Law source from 1305, we are told defendants got 35 challenges in felonies and the prosecutor had limitless challenges. "The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury. See *Lewis v. United States*, 146 U. S. 376." *Swain* at 219. As Justice White further wrote: "It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty." *Id.* at 220. This was still in the bad old days before *Batson v. Kentucky* and allowed "in the quest for an impartial and qualified jury" the striking of "Negro and white, Protestant and Catholic..."

What then, if these matters do not predict whether a juror will be "impartial and qualified," or more frankly, hurt the cause of the one making the challenge? This must be considered. Moreover, what if future behavior of human beings can never be predicted at all? I will argue that it can be, but only in a qualified manner.

To consider this question, we go to the Scottish American philosopher Alasdair MacIntyre. In *After Virtue: A Study in Moral Theory* Chapter 8, "The Character of Generalizations in Social Science and their Lack of Predictive Power." As the title suggests, MacIntyre urges social science cannot produce "law-like generalizations." Every "law" to predict jury behavior, like other "laws" of social science, "...coexist in their disciplines with recognized counter examples." *Id.* At Loc 5640. Even in natural science, MacIntyre tells us, there are probabilistic generalizations in which the quantification is over sets and

not over individuals. As lawyers picking juries, we make our peremptory challenges of individuals, so we will always have a measure of unpredictability. MacIntyre tells us that Machiavelli in his concept of *Fortuna* shows that no matter how well we formulate generalizations about human life, "...the factor of Fortuna was ineliminable from human life." *Id.* at loc 2032. "We can by improvements in our knowledge limit the sovereignty of Fortuna, the bitch-goddess of unpredictability; we cannot dethrone her." *Id.* at 2036.

But of course, we rely on predictability of human affairs all the time. For hiring security in a football stadium, we can safely predict a football stadium will be empty at 4 am and full at 4 pm on a Sunday afternoon. We know we all tend to catch more colds in winter and the suicide rate rises sharply around Christmas and that a wife or husband is more likely to murder you than a criminal stranger. *Id.* at 2225

And then some predictions seem uncanny, but merely reflect that we know other people better than we may realize. For example, we can predict the hour and place in Manhattan where strangers will meet if they only know that other strangers have been given the same instructions. Nuclear Strategist Thomas C. Schelling asked a hundred subjects and eighty of them selected the spot under the large clock in the Concourse of Grand Central Station at twelve noon. *Id.* at 2218.

For purposes of jury selection, it does not matter for us if there exists a causal relationship, only that the correlation is reliable. If 80% of the jurors wearing brown shoes always voted to acquit, we would use this fact whether the shoe color and acquittal had anything to do with each other.

However, we must accept that "...the pervasive unpredictability in human life also renders all our plans and projects permanently vulnerable and fragile." *Id.* at 2242.

MacIntyre also tells us: "The generalizations and maxims of the best social science share certain characteristics of their predecessors—the proverbs of folk societies, the generalizations of jurists, the maxims of Machiavelli." 2271.

On a broader view, we are trying to understand human nature. The "predecessors" MacIntyre names are particularly rich in interpreting human nature. I believe Bible stories, Shakespeare references, fairy tales, folk sayings and "dichos" in Spanish all provide guidance. I believe we can learn about a person by thinking about which of the seven deadly sins most tempts him.

So how if we test the factors lawyers use for strikes do they hold up?

## **3. Demographics rarely give useful information for predicting a juror's verdict.**

Based on social science studies and my own experience, I have come to the opinion that selecting a jury based on demographics does not help predict if the jury selected will convict or acquit. Research conducted on race, gender, age, occupation, social status, religion, shows that none of these helps predict a juror's behavior. Striking all the cops or all the Presbyterians or all Anglos is often counterproductive.

We asked a summer intern, Jalal Hussain, a classics student at NYU who aspires to law school to research these theories and the theories from the psychological testing which may be more predictive than demographic information. These

findings are largely consistent with the opinions we have formed from trial and error. Many of these opinions were formed by reading *Scientific Jury Selection* which I cited above. Neither Jalal nor Sara nor I are social science scholars, so I invite you all to help us improve on both our research and our conclusions. In the meantime, I continue to watch the shadows on the back of the cave to try to figure out what the jurors are doing at the front of the cave. These are some of the findings Jalal, Sara, and I believe will hold up. I suggest we begin with the following principles:

**Do not strike based on the race of the juror.**

The race of a prospective juror does not predict the likelihood to acquit. One example of a study that confirms this was conducted by Arizona State University criminologist John R. Hepburn in an article published in 1980. Hepburn interviewed 305 people from a random sample of registered voters in St. Louis County, Mo. Hepburn presented a hypothetical case based on a murder trial involving the murder of a police officer by a young, black male. He found the perception of the strength of the evidence impacted the juror's verdict, but not race.

The county we live in is almost all Hispanics with few others on the panel. However, I've picked juries in plenty of other jurisdictions and believe striking based on race in those places, like here, doesn't provide any advantage. Of course, we would like a hundred studies to be sure, but this finding is consistent with my experience.

**Do not strike based on religion.**

The religion of a prospective juror does not predict the likelihood to acquit. Hepburn's mock trials found no correlation between the religion of the juror and acquittal, just as they found no correlation between the race of the juror and acquittal. In addition to Hepburn, Jalal found a study from 1961 by a criminologist named Reed that makes the same finding.

Religious beliefs may correlate with some of the psychological factors I do believe help, but we have no studies on this. I have a hunch that Catholics, Jews, Muslims, and Hindus are more fatalistic than mainstream Protestants, but I won't strike on that basis, because our hunches are often wrong.

**Do not strike based on gender.**

Gender does not predict likelihood to acquit. Like other demographic factors, research concerning the connection between gender and verdicts has either been inconclusive or contradictory. For example, some legal scholars found that women were more likely to convict than men. This was found in a study by Cutler, Moran, and Narby. They interviewed 150 individuals, presenting to them a case where a young man beat his girlfriend to death and was now being prosecuted for first degree murder and whose defense was that he was not guilty because he was insane. Expert testimonials from psychologists, both for the prosecution and defense, were also provided. Results from the surveys showed that women were more likely to convict, along with Hispanics and conservatives.

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This tendency to convict was also found in child abuse, drug trafficking, and rape cases. Other research has found no relationship between gender and jury decision making. For example, the study by Bridgeman and Marlowe found that gender had no effect on verdicts. Another study discussed above, by Moran and Comfort, did not find a connection between juror gender and the final verdict. They do claim that gender does have a relationship with other demographic factors that do, according to them, influence juror verdict. Some of the scholars argued that having more children made people more prone to convict. Also, that the verdicts of female jurors were linked to them scoring high on the Boehm Legal Authoritarianism Scale and the Just World Scale, both of which appear to indicate the juror is prone to convict.

My response is if women are more likely to vote to convict on certain crimes than men based on their scores correlating with authoritarianism and whether we live in a just world, than we should simply ask these questions rather than determine if it is a man or a woman answering them.

#### **Do not strike based on education.**

One study in 1980 entitled *Juror Characteristics—to What Extent are they Related to Jury Verdicts*, makes several claims based on that small sample, among them, "...males of higher education levels became more likely to acquit." Again, the studies contradict each other on this issue. A study of ninety-six venirepersons in St. Louis in 1996 also found higher educated people more likely to acquit.

See what you think, but I don't buy it and recommend you ignore education levels when you make your strikes.

#### **Do not strike based on age.**

The studies contradict each other on this issue. That same St. Louis study found older people more likely to acquit. But then, we have a 1978 survey by a guy named Feild for whom 896 individuals answered a questionnaire and found just the opposite. Some of the other studies mentioned earlier such as Simon and Comfort found no correlation. For years, I have spoken to jurors after the verdict and have never seen age as a factor. I have recently had older jurors who voted to acquit tell me they thought the best innocent jurors were the younger ones. I appreciate their thoughts, but I am still not willing to make age a deciding factor,

#### **Do not strike based on wealth or socioeconomic status.**

Adler says high "prestige" jurors convict and Moran and Comfort say they acquit. Wiener and Stolle say they convict. Feild says they acquit. Reed says they convict. Bridgeman and Marlow say it has no effect.

In my experience people perceive themselves to be of high status or having pulled themselves up by their own bootstraps, without any relationship to the world around him. I have found that the poor housekeeper who did better than her siblings may view herself in much the same way as an entitled, rich person, while someone born to wealth may well recognize the advantages he has had and want to give someone else a break. Differently put, to the extent these factors are reflected in a worldview we will describe below, they may show how someone might vote on a jury, but it is the worldview and not

the status that is important.

#### **Do not strike based on occupation.**

I have from the beginning been told by other lawyers that cops, teachers, nurses and jailers would convict. I believe that this is all hogwash. Sara's first not guilty included a cop who showed up with a big iron on his hip until the judge made him leave it at home. Of course, a cop may be a judgmental, authoritarian, person who believes life is always fair and you will want to strike him for these reasons, but not just because he's a cop. Many people seem to end up in a profession regardless of their personal worldviews.

The opinions from the surveys mentioned above are sometimes contradictory and other times make no findings.

We are alert to potential jurors who, based on the education may have special knowledge on an issue in the case such as medical or engineering questions so we know to whom we are addressing the evidence.

**Ignore other factors such as juror's birth order, political party, place of birth, and physical condition, until we get some good research that correlates some of that with an acquittal.**

I confess I am curious about all these things because I want to know the audience. But I would not strike based on any of these factors.

At the recent Rusty Duncan Seminar in San Antonio, Lawyer, and Jury Consultant Guru Robert Hirschorn recounted the selection of jurors who believed the 2020 election was stolen in the successful defense of an accused person from Boeing. Hirschorn does his own research, so at some point, I may yet be persuaded that this issue has value in other cases.

### **4. Striking based on the jurors' answers to psychological questions does correlate with a juror giving a not-guilty verdict.**

#### **Ask the juror how he feels about the case.**

Once we decide that demographics don't work, the way is cleared to find out what does. First, and always most important for me, is still what the juror tells us. If a juror tells us he does or does not like us or our facts, I think it is a safe bet that he will feel the same way after hearing the evidence. The social scientists test this using a concept they call "pre-deliberation." We lawyers and our clients sometimes worry that a juror will give a false answer on purpose to try to get on a jury. If this happens, I've never spotted it. The bigger risk is that the juror did not listen to the question or did not understand the question and gave a false answer accidentally. For this reason, we ask similar questions in different ways to make sure we understand each other. If a prospective juror tells me he will hurt my case, I listen.

Next, is how the juror answers certain psychological questions. Once you have practiced this method for a while, you will see that the worst jurors talk their way off the jury anyway. These are the same ones we would ordinarily strike because they show up with the least desirable answers to psychologically scaled questions. Our worst jurors by scaled questions will self-select on four or five questions. These will

often also be the ones stricken for cause. To the extent they are not, we then use our strikes based on their answers to psychological questions.

**Ask the juror psychological questions to determine whether the answers have been found in the studies among jurors who acquit.**

Many good lawyers over a couple of decades have told me they are skeptical of this method. I have come to the point where I would not do it any other way. Below I'll give some scaled questions we ask to try to get a basis for the peremptory challenges. We only ask about the "bad" end of the scale so we can identify who to strike. We do not ask about the good end of the scale, because we do not want to identify the jurors the prosecution should strike. We count the "bad" answers and strike those with five, first, then those with four, and so on until we've used up our strikes.

We ask a question to identify extraverts as a tie breaker, because extraverts have been found more likely to acquit. I'm not sure why that would be, but it seems to be true.

**Do not ask for written juror questionnaires.**

My opinion (contrary to most voir dire experts I know.): Written juror questionnaires give the prosecution more good information than they give us. In death penalty cases, they identify the life-givers so they may be challenged for cause. They are time-consuming, expensive, and counter-productive.

The one exception is if a federal judge refuses any voir dire questions by the lawyers at all, I'll ask that either my questions be asked or submitted as written questions. But then, I only ask the "bad" end of the question, so I can decide on my strikes. If a judge does not allow any psychological questions, I will sometimes decide not to use any peremptory challenges and announce on the record that the client has been deprived of the ability to intelligently exercise peremptory challenges—a point of error I hope someday to develop for the Fifth Circuit.

I recognize this advice is opposed to that of all the voir dire seminar speakers I have heard, and I hate to disagree with my betters, but I suggest that defending a different type of case requires a different approach. Two luminaries of the voir dire practice, Lisa Blue and Robert Hirschorn are advocates of using written questionnaires. Yes, they wrote the book. I have had the privilege of trying cases with both and for what they do, I defer to them. Lisa was trying civil asbestos cases. Robert was selecting the jury for birth injury cases. I have heard Robert speak about defending millionaires accused of murder or rich people accused of fraud. In all the cases, the resources and political influence allowing a huge voir dire panel available to them. In that type of case, sure, follow their lead and get a good written jury questionnaire.

In most of our cases, however, we lack the resources for a big panel, plenty of time, or a psychologist to help us analyze the answers. In these cases, I believe, the questionnaire helps the prosecution to identify and strike the jurors more likely to find not guilty. On most of the indigent or middle-class clients I have represented, the best strategy is to get at least one good strong defense juror on the jury. A questionnaire is likely to reveal that person so the prosecution is helped to make its strikes.

**Do not ask for a shuffle of the panel.**

A juror's appearance is not going to allow a prediction of how he or she will vote. A shuffle before the jurors are questioned is not going to allow us to improve the panel. Nearly fifty years ago my criminal law professor in law school Albert W. Alschuler told us that the defense would be better off taking the first twelve in hopes that one acquitter or life-giver was in that group. It took me decades to come around to his opinion, but I think he was right.

**Do not ask for a long period of voir dire.**

Fifteen or twenty minutes is enough to ask the scaled questions. My recommendations below will require more time than twenty minutes, but a long voir dire just gives the State more time to drone on and on with platitudes and they may accidentally stumble upon one of your good jurors and strike him or her. We ask the scaled questions first, so we'll know how to exercise our strikes if we run out of time.

**Strike the jurors with a strong belief people are governed by an internal locus of control.**

We trust these questions most and weigh them more heavily than other factors. Certain personality profiles do show a correlation with a tendency to find the accused person not guilty. The worldview I trust the most is whether the person believes that people are mostly the products of our heredity or environment or whether people make decisions that determine our status in life. More bluntly put, did the person accused of the crime commit the crime because of "fate" or because of his "choice?" Believers that fate governs our actions acquit; believers that we make a choice to commit a crime convict. One psychological concept that helps determine this is the external/internal locus of control. This is the question of how much control an individual has over his or her life. Those who believe that the outcomes in their lives are a result of outside factors such as the state of the economy and disease or, more broadly, fate and bad luck, have an external locus of control. On the other hand, those who place the source of their outcomes on their own actions and behavior have an internal locus of control. Research suggests there's a relationship between a juror's locus of control and the verdict he or she reaches.

For example, in a study by Phares and Wilson in cases related to automobile accidents, it was found that those who had an internal locus of control supported guilty verdicts for the accused more so than externals.

These findings are especially strong when the complaining witness has been badly injured. When the evidence against the accused was ambiguous but the suffering of the victim was great, those with an internal locus of control were more prone to deem the accused guilty than their external peers. When the evidence against the accused was strong, both those with an internal and external locus of control backed guilty verdicts. Again, when the suffering of the victim was not severe (the injuries were minor) and when the evidence against the accused was ambiguous, both groups generally shared the same verdict. Similar are questions that determine whether the juror believes in a fair world in which we get what we deserve in life and people will like us if we try hard enough.

I'm persuaded that these opinions about fate or free will, luck or choice, external or internal control, and fairness of life are the most important things I can know about a juror (or a prosecutor, cop, teacher, doctor, nurse, or judge).

### **Strike the authoritarian jurors.**

The authoritarian personality trait is another psychological concept that influences jury decision-making. Individuals who are highly authoritarian place traditional values above all else and believe in unwavering obedience to authority. The more control and the more conformity, the better. Traditional societal norms provide authoritarians with a sense of safety. Therefore, anyone who deviates from the norms and values espoused by authoritarian individuals is seen as a threat. This is the idea of “us” and “them” prevalent among authoritarians. Those who conform are part of the “us” whereas those who deviate, according to authoritarians, are the “them”. How might this manifest in jury bias?

Authoritarians are found to support the prosecution and favor punishment. For example, a study by Bray and Noble discovered that juries made up entirely of authoritarian individuals supported prison sentences that were twice as long as those who were less authoritarian (“equalitarians”).

An exception to this rule is if our client is a person in authority. Authoritarian individuals are less punitive when the defendant is an authoritative figure, such as a police officer, or when the defendant was following the orders of his superior. Research by Garcia and Griffitt, for example, showed that authoritarians tended to recall more facts/evidence from the prosecution than the defense, presumably because the prosecuting attorney is seen as an embodiment of authority whose evidence is therefore more valuable. An experiment by Hamilton was conducted where participants viewed a presentation of a modified military trial based on an actual one related to the Korean War. The defendant, a corporal, killed unarmed prisoners but claimed that he was ordered to by his superior officer. Different versions of the case, one where the superior officer was a sergeant and the other a captain were presented. Results showed that observers who were identified as authoritarians supported an acquittal of the defendant when the superior officer was a captain and attributed more responsibility to the latter, supporting the idea of obedience not being a crime.

### **If you must choose between two jurors with several bad answers, keep the extravert.**

Of all the five-factor personality tests, the only factor that appears to correlate with acquittals is being an extravert. Extraverts also seem to have a larger impact on the other jurors. Clark et al. conducted a study in which 764 venirepersons completed the Big Five Inventory personality test before voir dire (juror selection, however, was not based on personality traits). These individuals were then sent to participate in a set of criminal and civil trials. Afterwards, jurors who self-reported as having greater influence over their peers were identified as extraverted based on the previously gathered data. It was also discovered that extraverted individuals were most likely to be selected as forepersons and were responsible for longer deliberation times.

A related personality trait is how much the juror talks. In a study performed by Diamond and Casper in which they analyzed 60 jury deliberations in mock trials and asked the participants to rate each other's influence, it was found that there was a correlation between the loquaciousness of certain jurors and their rated influence by their peers. The number of words spoken by these jurors represented a 14% variation in the average influence of a juror. More talkative jurors are the most influential in jury deliberations.

### **Some more tidbits about jurors from the social studies you may find interesting or useful.**

1. People who believe the purpose of punishment is rehabilitation rather than retribution are more likely to acquit and give a lower sentence. We use this belief as a scaled question and I think it is true, but I could not find a social study that supports it. I think this was a conclusion I reached from the articles written reviewing the Capital Jury Project.
2. Jurors influence each other on a dyadic level—between two jurors.
3. More serious cases require less evidence, because jurors will err on the side of public safety if the crime involves serious wrong doing.
4. In giving life rather than death, jurors asked about it later refer to particular vignettes in the life of the client to defend their position. (I believe this also to be true in deciding guilt or innocence in other cases as well).
5. Death qualified jurors favor guilty verdicts more than life-giving jurors.
6. Prior convictions cause jurors to lean toward conviction regardless of instructions not to do so.
7. Jurors with a legal background are more likely to acquit. (I believe this is true even if the juror has worked as a prosecutor).
8. Jurors will say they can be fair even when other testing suggests they cannot.
9. Inaccurate answers will be given more often by jurors who have a strong desire to be socially acceptable.
10. Authoritarian individuals are more volatile when it comes to decision making.

### **5. So how do we apply all of this during Voir Dire?**

#### **What is our goal in this case?**

“Not guilty” is a nice goal, but not always possible. Sometimes a finding of guilty to a lesser included offense or a jury award of probation is something to celebrate. Life without parole can also be a cause for celebration, though a muted one. Certainly, we will take the acquittal if the prosecution fumbles the case, but our strategy will include knowing what seems possible. Sometimes we just must walk the plank: the client is old, any plea deal sees him dying in custody, he doesn't want to go to prison as an admitted sex offender, his gang or the mobsters won't let him defend himself without risking the lives of his family—there are many reasons why a case must be tried even if a loss is likely. Deciding on the goals helps us decide whether the client will testify, how much his criminal history will hurt us, or whether we can call character witnesses.

**It takes two to do a voir dire.**

Usually, we work as a team of two. If I talk to the jury, Sara keeps the tally and makes the strikes. If Sara talks to the jury, I keep a tally and make the strikes. If one of us speaks during voir dire, the other will usually give the opening statement. This is so the jurors will be familiar with both of us when we begin cross-examinations.

**Steps in voir dire.**

1. Chasing the skunk out of the jury box.
2. Objecting to prosecutors’ improper questions.
3. PowerPoint slides and scaled questions.
4. What scares me about this case and how do I answer questions raised by the prosecution voir dire?
5. PowerPoint slides and legal issues.
6. Challenges—cause and peremptory.
7. Who are these people on the jury?

**Chasing the skunk out of the jury box.**

1. Is the prosecutor wearing a purple ribbon to support victims of family violence? Has the D.A.’s office set up a shrine to victims in the courthouse lobby? Are there posters on the wall outside the elevator celebrating the victims of crime? Does the trial judge have a plaque from MADD behind his desk? Does the trial judge display a three-and-a-half by two-and-a-half-foot poster in his courtroom depicting a grave with a cross on it, and the words “You have the right to drink; You have the right to drive; You have the right to remain silent. Don’t drink and drive; don’t ride with anyone who does?” *State v. Edwards*, 591 So.2d 748 (La. Ct. App. 1991). If so, it is time to get some photographs and a motion ready asking to take the offending items down.
2. Is the client wearing jail clothes or shackles? *Deck v. Missouri*, 544 U.S. 622 (2005) Did I bring him some clothes and request the bailiff or judge to let him shave and take off the shackles?
3. Has his family been excluded from the courtroom? Make sure the bailiff has not excluded family members of our client or other members of the public from the courtroom during voir dire. The trial judge must also consider all reasonable alternatives to closure. *Presley v. Georgia*, 558 U.S. 209 (2010). Space and overcrowding concerns must not outweigh Sixth Amendment rights; a trial court should move to a bigger courtroom or split the panel in half. *Steadman v. State*, 360 S.W.3d 499, 509 (Tex.Crim. App. 2012).

**Objecting to prosecutors’ improper questions.**

This will be based on the law of your jurisdiction. Texas has largely eliminated any way to show harm in voir dire. *Easley v State*, 424 S.W.3d 535 (Tex. Crim. App. 2014) rejected the application of Article 1, Section 10 of the Texas Constitution to voir dire objections. However, the Sixth Amendment guarantees of the United States Constitution still grant the “right to a trial by an impartial jury in all criminal prosecutions.” The Texas Court of Criminal Appeals acknowledged this right in *Uranga v. State*, 330 S.W.3d 301 (Tex. Crim. App. 2010). Because State law now gives no mechanism to show harm arising from error

in the voir dire, federal constitutional harm becomes the only basis to complain of an illegal voir dire question.

In Texas, the two most common need for objections are questions that seek a commitment from the juror under *Standefer v. State*, 59 S.W.3d 177 (Tex. Crim. App. 2001) and the way the prospective juror is asked by the prosecutor if he can follow the one witness rule under *Lee v. State*, 206 S.W.3d 620 (Tex. Crim. App. 2006). Lee describes how, if carefully done, the prosecutor can still ask a form of this question. Even after Lee, a juror cannot be “challenged for cause simply because they need more than one witness to convict.” A juror may only be challenged for cause because he could not convict “based upon one witness whom they believed beyond a reasonable doubt, and whose testimony proved every element of the indictment beyond a reasonable doubt.” Lee at 263.

**PowerPoint slides and scaled questions.**

This is the meat of what we are advocating in this article and the way that may be a change from how you are now handling voir dire. The first few questions we ask are scaled questions from one to seven that show how jurors would rate themselves on the assumptions we make about reaching an acquittal, based on the findings in the psychological studies described above. We do this first because when we have done it the other way, we run out of time and don’t know whom to strike. If for some reason you can’t use the slides, the question is still quite simple: “Folks, we do not make our strikes based on demographics, race, religion, occupation, that sort of thing. We believe it is better to ask questions that ask about attitudes and those mostly come from psychological tests. These don’t disqualify anyone from sitting on a jury. Sara and I may give different answers to these questions, but they allow us to quickly make choices about jurors when we get to the selection process. Our first question is on a scale of 1 to 7. One would be, ‘I believe where we end up in the world is largely determined by the hand we have been dealt in life—our heredity or environment.’ Seven would be, ‘I believe where we end up in the world is determined by our own choices and effort.’ Some of you will be a mixture and say you are a three or a four. Based on these questions, who among you would say, “I am a seven?”

Listed below are some of the scaled questions we have used:

1	2	3	4	5	6	7
People’s misfortunes					People’s misfortunes	
result from the mistakes					are often thrust	
they make.					upon them.	

1	2	3	4	5	6	7
We become who					We become who	
we are because of					we are only	
genes and environmental					because of choices	
influences.					we make in life.	

1	2	3	4	5	6	7
Our destinies					We all have free	
are each					will, so each of	
determined					us makes his	

before we are  
born

own destiny

Listed below are some of the individual questions intended to learn the same information:

Who agrees with this statement?

*Police should be allowed to arrest and question suspicious persons to determine whether they have been up to something illegal.*

Who agrees with this statement?

*Police should be allowed to arrest and question suspicious persons to determine whether they have been up to something illegal.*

This question will help you identify the extraverts:

Who among you would answer, “yes” to all five of the following questions?

1. I see myself as someone who is talkative.
2. I see myself as someone who is full of energy.
3. I see myself as someone who generates a lot of enthusiasm.
4. I see myself as someone who has an assertive personality.
5. I see myself as someone who is outgoing and sociable.

#### **What scares me about this case and how do I answer questions raised by the prosecution voir dire?**

In dealing with facts that may cause the jurors to dislike us, our clients or our case—race, sexual orientation, heinous crime, insanity defense, prior criminal history, gang membership, facial tattoos, prostitution, drugs-- we use a version of the method taught by Gerry Spence at his Trial Lawyer College. That is, we identify the issue, reveal to the jurors a personal failing on that issue we have had in our own experience, ask the jurors to share as well, acknowledge and honor their own histories and ask other jurors to respond to what they have heard. On each of these, we try to get a symbolic picture from the internet for our multi-tasking younger jurors.

Next, we deal with the hard questions that may have arisen from the prosecution’s questioning. Some things need to be answered and the jurors have been thinking about it and will help you answer. For instance, prosecutors will sometimes give an example of reasonable doubt or circumstantial evidence that may need to be answered with another example. Some prosecutors like to show a picture of a pistol made in the form of a puzzle with a few pieces missing and argue that this is still enough for proof beyond a reasonable doubt. These may need a response: “How do we know this picture is not of a BB gun? Would we really be right in making a finding beyond a reasonable doubt?”

#### **PowerPoint slides and legal issues.**

In dealing with legal issues, we give a picture from the internet that helps illustrate the point. We show a slide that states the issue and then ask open-ended questions and allow the jurors to explore the reason behind the rule. Why should we have a presumption of innocence? In a drug case? In a murder? In a DWI? Why do we have twelve jurors? Why not pick one smart one? Why is there a privilege not to testify?

Why shouldn’t other convictions be the basis to assume someone is guilty this time? What is the difference between intentional and reckless? Why would anyone refuse a breath test? Why would anyone run from the police if he were innocent? Why would a child make a false report of sex abuse? Why does burglary require that you don’t own the house? Why does trespass require that you know the owner wants you to leave? Why does the law allow a defense of coercion or duress? Why does the law allow self-defense? Defense of a third person? Defense of property? Why does the law provide for governmental authority to commit a crime?

For every issue in the case, there is an open-ended question that will allow a jury discussion. It is not hostile toward jurors and does not offend. It is instructive to jurors about the principles behind the laws and why they are not just “technicalities.” It gives more information in addition to your scaled questions for exercising peremptory strikes. You may well run out of time during this process, so put the more important matters first and time it to end with something strong.

#### **Challenges—cause and peremptory and why we don’t try to bust the panel.**

Some jurors will talk themselves off the jury such as, “Yes, I know the son of a bitch because he tried to kill my son.” Finding the jurors who know witnesses and failure to identify them has been a fertile area for reversal. In *Williams v. Taylor*, 529 U.S. 420 (2000), when the deputy sheriff’s ex-wife failed to identify herself, the Supreme Court sent the case back to the Fourth Circuit to determine whether the trial was unfair and the prosecutor had committed misconduct. What we know is the perennial question of “Can you be fair?” is useless. But sometimes a juror admits he cannot be fair and is identified as a challenge for cause. Experienced lawyers on both sides will usually agree with the judge’s picks of people who have disqualified themselves.

Challenges for cause are beyond what we want to talk about in this paper. I will say that, especially on death penalty juries, we write the challenges down and read them off a card so we can preserve error. Also, it seems to me that the folks properly challenged for cause are usually the ones who score as judgmental and authoritarian on our psychological questions. By the time we reach challenges for cause, we often have a good idea who we want to keep based on their answers to the scaled questions. We do not fight to exclude a juror who believes the defendant should testify if he scores well otherwise on our profiles, especially if we plan on the defendant testifying.

Grading of the profiles can be done very quickly and looks like this:

Juror #	WILL	CONTROL	MISFORTUNE	RESPECT	LIKABLE	OUTGOING	RETRIBUTION	NOTES
	1s	1s	7s	1s	7s	Yes	7s	
1								
2								
3								
4								
5								
6								
7								
8								
9								
10								

Then we simply strike those who from our point of view have the most bad answers and are still left after the challenges for cause and within the number of jurors on the list.

We don't want to "bust the panel." Oddly, I have had colleagues brag to me that they were going to disqualify so many jurors, that a new panel would have to be brought in to get a jury. The purpose is not to strike as many people as possible. The judge will just bring a bigger one next time around. Or even right then. *Broussard v. State*, 910 S.W.2d 952 (Tex.Crim.App. 1995); *Williams v. State*, 631 S.W.2d 955 (Tex.Crim.App. 1982). The purpose is to find a jury who will give us the verdict that helps our client.

Who are these people on the jury?

If our strikes have served the purpose we think they will, the jury will be a group of non-judgmental people who recognize none of us deserve credit or blame for where we end up in life. If we were born on third base, we don't decide we hit a triple. If we are born into the underbelly of society, we don't go around heaping ashes on our heads, but recognize as the mobster famously said, "Life for me was not a multiple-choice test." Our selected jurors will have a healthy suspicion of authority especially when authority is cruel or causes human beings to suffer. They know that luck plays a big part in life, sometimes people just don't like you and we do not live in the best of all possible worlds. Our jurors are from all races, ages, religions, genders, socio-economic levels, educations, and occupations. These are our sisters and brothers, our co-religionists, like-minded philosophers to ourselves, and when we utter the truths of this worldview, to them, they will sometimes nod back to us knowingly. We (the jurors and the defense lawyers) believe in common:

*"There, but for the grace of God, go I."*

*"To understand all is to forgive all."*

*"Man can do what he wills but he cannot will what he wills."* — **Arthur Schopenhauer.**

*"Every instinct that is found in any man is in all men. The strength of the emotion may not be so overpowering, the barriers against possession not so insurmountable, the urge to accomplish the desire less keen. With some, inhibitions and urges may be neutralized by other tendencies. But with every being the primal emotions are there. All men have an emotion to kill; when they strongly dislike some one they involuntarily wish he was dead. I have never killed any one, but I have read some obituary notices with great satisfaction."* — **Clarence Darrow**

*"Life calls the tune, we dance."*

— **John Galsworthy**

*... I know, Your Honor, that every atom of life in all this universe is bound up together. I know that a pebble cannot be thrown into the ocean without disturbing every drop of water in the sea. I know that every life is inextricably mixed and woven with every other life. I know that every influence, conscious and unconscious, acts and reacts on every living organism, and that no one can fix the blame. I know that all life is a series of infinite chances, which sometimes result one way and sometimes another. I have not the infinite wisdom that can fathom it, neither has any other human brain"*

— **Clarence Darrow**

“There are but few important events in the affairs of men brought about by their own choice.”

— Ulysses S. Grant, *Memoirs and Selected Letters*

“Belief is not subject to the will. Men think as they must.”

And on and on.

Now—after the jurors are selected--we do want to know all about them. Their age and race and religion and occupations and gender and life experience because we want our vignettes and direct examinations and cross-examinations to include examples with which they can relate. But we have selected them for the way they view the world.

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# Rule 1009: The Ins And Outs

## PATTY TRESS

This article will address Texas Rules of Evidence Rule 1009,<sup>1</sup> which governs language translation.

1 Here is the rule for reference:

(a) **Submitting a Translation.** A translation of a foreign language document is admissible if, at least 45 days before trial, the proponent serves on all parties: (1) the translation and the underlying foreign language document; and (2) a qualified translator's affidavit or unsworn declaration that sets forth the translator's qualifications and certifies that the translation is accurate.

(b) **Objection.** When objecting to a translation's accuracy, a party should specifically indicate its inaccuracies and offer an accurate translation. A party must serve the objection on all parties at least 15 days before trial.

(c) **Effect of Failing to Object or Submit a Conflicting Translation.** If the underlying foreign language document is otherwise admissible, the court must admit-and may not allow a party to attack the accuracy of-a translation submitted under subdivision (a) unless the party has: (1) submitted a conflicting translation under subdivision (a); or (2) objected to the translation under subdivision (b).

(d) **Effect of Objecting or Submitting a Conflicting Translation.** If conflicting translations are submitted under subdivision (a) or an objection is made under subdivision (b), the court must determine whether there is a genuine issue about the accuracy of a material part of the translation. If so, the trier of fact must resolve the issue.

(e) **Qualified Translator May Testify.** Except for subdivision (c), this rule does not preclude a party from offering the testimony of a qualified translator to translate a foreign language document.

(f) **Time Limits.** On a party's motion and for good cause, the court

The primary focus is sub-section (e), however, we will look at the other sections as needed. The "leading" case regarding Rule 1009 appears to be *Castrejon v. State*, 428 S.W.3d 179 (Tex. App. Houston-1st Dist. 2014, no pet.), wherein the Court of Appeals resolved that Rule 1009(a) applies only to the written translation of a foreign document/video only needs to comply with the 45-day notice for a written document or translation, but not for the actual recording or video. Therefore, keep in mind that a written document translation must be provided 45 days prior to trial. When complaining about failure to comply with this requirement, an objection is necessary, as a motion in limine will not preserve error on this issue. However, if you miss this deadline, there is a failsafe imbedded into Rule 1009.

Rule 1009 (e) is where the failsafe can be found. This part of the rule allows the trial court to admit translation "at trial either by live testimony or by deposition of a **qualified** expert translator." Tex. R. Evid. 1009(e); see *Peralta v. State*, 338 S.W. 3d 598 (Tex. App.—El Paso 2009). If you have missed the 45 day deadline, in lieu of written documents, you can have the document/video translated live. Keep in mind there are pitfalls to having something translated live. Live translation can life to the words, for better or for worse. Thus, it is important to evaluate your case to determine

may alter this rule's time limits.

(g) **Court-Appointed Translator.** If necessary, the court may appoint a qualified translator. The reasonable value of the translator's services must be taxed as court costs.

what is best, and if you would like to have only a certified translation admitted.

If the proponent of the evidence chooses to admit a live translation, the Rule states the live translation must be done by a qualified translator. This is where your 702 hearing comes into play. Just because someone took the foreign language years ago does not make them a qualified expert for translation in a courtroom.

If you are objecting to a translator's qualifications, you must make a timely objection to the qualifications of the person being offered to perform the live translation. Objections must be made at the earliest possible opportunity to preserve error. See *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002). Rule 1009(b) provides some insight regarding how to adequately object. Keep in mind that if you object, you must point out specific inaccuracies of the translation by stating with specificity what the objecting party contends is a fair and accurate translation. Tex. R. Evid. 1009(b). In other words, make sure to have your own translation.

Texas Code of Criminal Procedure art. 38.30 is your source for getting an interpreter appointed to aid you in translation. In *Peralta*, the court determined that when "the interpreter is positively identified, qualified, officially sworn, and subjected to cross-examination, the requirements of Texas Code of Criminal Procedure 38.30 are met." Do not go into a case blind when dealing with a foreign language. Make sure you get your own interpreter. Further, when the other party (the State) is offering live translation, make sure to request your expert hearing. The court in *Castrejon* cited that neither Rule 1009 nor art. 38.30 require an interpreter to be licensed or certified in order to provide an admissible translation.

Further, courts have held that an individual called upon to interpret in criminal proceedings is not required to have specific qualifications or training; instead what is required is "sufficient skill in translating and familiarity with the use of slang." *Kan v. State*, 4 S.W.3d 38, 41 (Tex. App.—San Antonio 1999). The competency of an individual to act as an interpreter is a question for the trial court. *Id.* at 41.

This line of rulings removes the qualified expert standard from the rule and replaces it with a lower standard. As defense attorneys, we must continue to object to any lowered standard that is allowed for the State of Texas to prove their cases. This lower standard only hurts our clients and allows the State to call unqualified people to translate. Make sure you are objecting and requesting expert hearings with regard to translation so that if a verdict does not go in your favor, the issue can be preserved for appeal.



**Patty Tress** is the CEO of the Law Office of Patty A. Tress. She has been licensed to practice since 2005 and handles exclusively criminal cases. She is an advocate for those who are accused of high level crimes.

  
  
*Jason Parrish*

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*Length of Practice: 20 Years*

*Favorite TV Show: Mayor of Kingstown*

*Advice for people to get more involved: Step up and do it. It's a wonderful organization with rewarding benefits.*

*Primary Cases: Criminal*

*Free Time Activities: Spending time with my family*

*Favorite Food: Barbecue Bar-B-Q!!*

*Most Successful Case and Why: State v. Michael Gatewood. Not Guilty on all 3 Counts.*

*Way to Relax: Bora Bora*

*Place to Travel: Bora Bora*

*Dream Car: 1968 Mustang GT Fastback*

*Life Motto: "Don't Sweat the Small Stuff"*

*Advice you wish you knew starting out as a lawyer: Stay positive and don't ever let others bring you down! Take it one case at a time.*

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# The Exoneration of Rosa Jimenez

GARY A. UDASHEN

## Introduction

Sometimes children suffer serious injuries and nobody is responsible. Yet, as the tragic case of Rosa Jimenez illustrates, it is not at all uncommon that an adult who has a child in their care is blamed for something that they are not responsible for.

On January 30, 2003, Rosa Jimenez was babysitting a 21-month-old child, when a wad of paper towels lodged in the child's throat and obstructed his airway. Jimenez frantically ran to her neighbor with the boy in her arms and asked her neighbor to call 911. The wad was removed from the child's throat by paramedics using forceps, but the child suffered brain damage as a result of oxygen deprivation and died as a result.

Based on a conclusion by medical personnel that the child could not have accidentally choked on the paper towels and that they had been forced down his throat, Rosa Jimenez was arrested and charged with murder and injury to a child. Following a jury trial in Travis County, Jimenez was convicted and sentenced to 99 years in prison.

Jimenez remained in prison until 2021, when the Travis County District Attorney's Office agreed with a team of Innocence Project and pro bono attorneys that the child had, in fact, accidentally swallowed the paper towels, and that Jimenez was innocent of the claim that she had caused the child's death. This agreement was adopted by Judge Karen Sage of the 299th District Court in Travis County, leading to the granting of an Application for a Writ of Habeas Corpus by the Court of Criminal Appeals.

On August 7, 2023, the Travis County trial court granted the State's Motion to Dismiss the Indictment, where the District Attorney's Office stated that, ". . . the state asserts that it has determined no credible evidence exists that inculpates defendant Rosa Estela Olvera Jimenez and its belief that Rosa Estela Olvera Jimenez is actually innocent. . ." This dismissal ended Jimenez's 20-year ordeal of false conviction and imprisonment.<sup>1</sup>

## II.

### Trial Testimony

The evidence against Jimenez at her trial consisted entirely of opinion testimony from medical personnel that it would have been physically impossible for the child to choke accidentally on the wad of paper towels and, therefore, the paper towels must have been intentionally forced into his throat. This testimony was provided by paramedics, two medical doctors who treated the child, a forensic pathologist and a child-abuse pediatrician. Because the child was in Jimenez's care, the claim was that she must have forced the paper towels down the child's throat.

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<sup>1</sup> Jimenez was represented on this writ application and exoneration by Vanessa Potkin and Barry Scheck of the National Innocence Project, and current and former Foley & Lardner, LLP, trial lawyers, Rachel O'Neil, Sara Brown, Sadie Butler and Joanne Early, and Matthew Rowen, Sara Tatum and Jaywin Singh Malhi, formerly of Kirkland & Ellis, LLP.

There was no evidence that Jimenez had ever mistreated the child, no evidence of motive, substance abuse or any reason to believe Jimenez would have engaged in this violent conduct. Nevertheless, based strictly on the medical testimony, the jury found Jimenez guilty of murder and injury to a child and sentenced her to 99 years in prison.

### III.

#### Post-Conviction Challenges to Conviction

Jimenez's conviction was affirmed by the Third Court of Appeals in 2007 and her petition for discretionary review was denied. *Jimenez v. State*, 240 S.W.3d 384 (Tex. App. – Austin 2007, pet. ref'd). Jimenez then filed an initial Application for a Writ of Habeas Corpus under Art. 11.07, Tex. Code Crim. Proc. Travis County trial court Judge Charles Baird recommended relief be granted on this writ application on the basis that Jimenez was denied her due process rights to receive adequate funding to hire expert witnesses and that she received ineffective assistance of counsel at trial. However, the Court of Criminal Appeals rejected the recommendation of the trial court and denied writ relief. *Ex parte Jimenez*, 364 S.W.3d 866 (Tex. Crim. App. 2012).

Two additional writ applications filed by Jimenez were summarily denied.

On January 4, 2021, a fourth state writ application was filed that ultimately led to Jimenez's conviction being vacated. *Ex parte Jimenez*, No. WR-75,266-04 (Tex. Crim. App., May 27, 2023).

Prior to the granting of the fourth writ application, several significant events occurred. First, a documentary entitled, *Mi Vida Dentro* (My Life Inside), produced by a Mexico City filmmaker, was released. This documentary led the Mexican government to advocate on behalf of Jimenez. This advocacy included obtaining legal representation for Jimenez.

Additionally, Judge Jon Wisser, who presided over Jimenez's trial in 2003, wrote a letter to the Travis County District Attorney stating that, "I believe now, as I did at the time of trial, that there is a substantial likelihood that the defendant was not guilty."

Also, in 2019, a federal district court in the Western District of Texas ordered that Jimenez be retried or released. *Jimenez v. Davis*, 2019 WL 13274919 (W.D. Tex. Oct. 28, 2019), adopting Magistrate's Report, see *Jimenez v. Davis*, 2018 WL 4344481 (W.D. Tex. Sept. 10, 2018).<sup>2</sup> The

<sup>2</sup> Jimenez was represented on her Federal Writ Application, and first state writ application, by Bryce Benjet, formerly of the National Innocence Project, and current Conviction Integrity Unit Director for the Queens County, New York, District Attorney's Office.

order of the federal court became moot when the Court of Criminal Appeals granted this writ application. *Jimenez v. Lumpkin*, 2023 WL 4499874 (5th Cir. July 10, 2023).

The advocacy from various quarters, including state and federal judges, resulted in the Travis County District Attorney's Office reopening its investigation of this case. The District Attorney's Office worked collaboratively with Jimenez's legal team to re-investigate the case, resulting in the discovery of the new evidence that ultimately led to this exoneration.

The new evidence included a newly available Consensus Statement of four leading pediatric otolaryngologists<sup>3</sup> concluding that the child's death was likely the result of a tragic accident. This re-investigation also led to a newly submitted affidavit by Dr. Elizabeth Peacock, one of the medical professionals who testified against Jimenez at trial.

At trial, Dr. Peacock, an Assistant Medical Examiner for Travis County, testified that the child's death could not have been accidental. However, her new affidavit stated that, contrary to her trial testimony, she now "believes it is possible that (B.G.'s) death was accidental."

The Consensus Statement also addressed the question of whether it is possible that the child's death was accidental. The authors of the Consensus Statement were recognized as the nation's leading experts in the mechanics of children's airways, including the introduction and removal of foreign bodies into a child's airway. The authors of the Consensus Statement were:

- Dr. Michael J. Rutter, Professor of Otolaryngology at the University of Cincinnati College of Medicine.
- Dr. Douglas Sidell, Assistant Professor of Otolaryngology at the Stanford University Medical Center.
- Dr. Ron Mitchell, Professor and Vice Chairman of the Department of Otolaryngology at the University of Texas Southwestern Medical Center.
- Dr. Karen Zur, Interim Chief of Otolaryngology at Children's Hospital of Philadelphia.

The authors of the Consensus Statement also testified at the hearing on the writ of habeas corpus, and their statements and testimony established the following:

The Consensus Statement itself contained four relevant conclusions:<sup>4</sup>

- First, the Consensus Statement "reject[s] as erroneous" the testimony at Applicant's trial that "accidental

<sup>3</sup> Otolaryngology is a medical specialty which is focused on the ear, nose and throat.

<sup>4</sup> This summary of the conclusions of the Consensus Statement comes from the Agreed Findings of Fact, Conclusions of Law and Recommendation on Application for Writ of Habeas Corpus signed by the trial court on January 27, 2021.

ingestion of the paper towels [by B.G.] was ‘impossible.’” The Consensus Statement concludes that “B.G. could have readily inserted the paper towels in his mouth, either as a string or as a wad,” and could have begun “to have trouble swallowing them completely or getting them out of his mouth” within “a matters of seconds.”

- Second, the Consensus Statement rejects the assertion that a single person could have intentionally forced the paper towels in B.G.’s mouth without great effort and without leaving behind physical evidence of a struggle. The Consensus Statement states: “Inserting a string or wad of paper towels would be exceedingly difficult even with additional adults restraining the child. A single individual attempting this on a 21-month-old boy would find this task nearly impossible.” The Consensus Statement provides an analogy by explaining that even doctors find it “almost impossible” to use a tongue depressor to view an uncooperative child’s tonsils “without the assistance of a second adult (usually a parent) who has been shown how to hold the child still” – and viewing an uncooperative child’s tonsils is considerably easier than forcing a foreign object into a child’s throat.
- Third, the Consensus Statement rejects the conclusion that B.G.’s “gag reflex” would have prevented the wad of paper towels from becoming stuck in his throat. Specifically, the Consensus Statement explains how the mechanics of a child’s airway and the expected physical reaction to a foreign object can result in paper towels being pulled into a child’s throat rather than expelled.
- Fourth, all four authors of the Consensus statement independently and affirmatively conclude that “the medical evidence makes it far more likely than not [that the choking] was an accident.”

At the hearing, these physicians testified that:<sup>5</sup>

- Any reasonable pediatric otolaryngologist with specialized training and experience in pediatric airway management would agree with the conclusion in the Consensus Statement that it was possible for the paper towel wad accidentally to become lodged in B.G.’s throat.
- The conclusion that B.G.’s death was likely the result of a tragic accident, rather than an intentional act by someone other than B.G., is not a “close call.” It would be near to impossible for a single individual to force a wad of paper towels into an uncooperative child’s throat. Dr. Sidell specifically testified that he would not be physically capable of doing so, and that he did not

believe that Applicant would be able to do so either.

- The gag reflex would not prevent the wad of paper towels from becoming lodged in B.G.’s throat. Rather, the reflexive mechanics of a child’s airway would result in the paper towels being drawn further into the throat and tightly compressed as the child attempted to swallow the foreign body.
- The amount of blood contained on the wad of paper towels removed from B.G.’s throat was entirely consistent with an accidental choking, particularly in light of the efforts to resuscitate B.G. and remove the wad of paper towels. Dr. Mitchell testified that the amount of blood was “minimal,” while Dr. Sidell produced a photograph of a patient’s airway containing blood and testified that the blood was a result of intubation.
- There is nothing unique about paper towels, contrary to the testimony of the state’s witnesses at trial, that would cause a child not to put paper towels in his mouth. Dr. Sidell specifically testified that he had previously treated a patient who had ingested a paper towel, as well as a patient who ingested a piece of notebook paper. The doctors testified that they had personally treated patients who had ingested all manner of truly bizarre objects. For example, Dr. Mitchell testified that he had treated a child who had ingested a cockroach.

Following the writ hearing, the Travis County trial court entered the agreed findings and recommendation. In the findings, the court found “that the state had elicited false and misleading testimony at Applicant’s trial in violation of Applicant’s due process rights.” Among the false testimony cited by the court was the state medical expert’s trial testimony that it would have been impossible for the child to accidentally choke on the wad of paper towels. The court also found testimony by state’s medical experts that there was no way the child could have put the paper towels in his mouth by himself to be false. Testimony by the state’s medical experts that the child’s gag reflex would have prevented him from choking accidentally on the wad of paper towels was also found to be false. The court also found testimony from the state’s medical experts that a young child would not put paper towels into his mouth to be false.

In *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009), the court held that the presentation of false testimony by a state’s witness is violative of due process, even if the prosecutor is unaware of the falsity.<sup>6</sup> The trial court relied on *Chabot* in its findings.

On May 31, 2023, the Court of Criminal Appeals

<sup>5</sup> This summary of the testimony from the writ hearing also comes from the trial court’s findings signed on January 27, 2021.

<sup>6</sup> The court also found the false testimony to be material because there is a reasonable likelihood that it affected the jury’s decision to convict Jimenez. See *Ex parte Weinstein*, 421 S.W.3d 656 (Tex. Crim. App. 2014); *Ex parte Chaney*, 563 S.W.3d 239 (Tex. Crim. App. 2018).

granted relief to Jimenez based on presentation of false testimony and vacated her conviction.<sup>7</sup> *Ex parte Jimenez*, No. WR-75,266-04, 2023 WL 3733662 (Tex. Crim. App. May 31, 2023).

#### IV.

#### Dismissal of Indictment

Following the granting of the writ application, the case was returned to the Travis County trial court for either a retrial or dismissal. On July 24, 2023, the District Attorney’s Office filed a “Motion to Dismiss Indictment” on the basis that Jimenez is actually innocent and that there was no credible evidence of her guilt. The trial court thereafter entered an order of dismissal, exonerating Rosa Jimenez and ending her 20-year ordeal.

#### V.

#### Lessons Learned

The lesson of the Jimenez case for trial lawyers is to always fully investigate claims made by medical personnel that are used in support of criminal charges.

This investigation should involve having defense experts, with expertise in the particular area at issue, examine the evidence.<sup>8</sup> A trial attorney should never accept

<sup>7</sup> The trial court also made a finding that Jimenez was actually innocent. The Court of Criminal Appeals did not adopt the actual innocence finding.

<sup>8</sup> Although Jimenez’s trial attorney had an expert witness testify at trial, the witness did not have sufficient expertise in the medical field at issue. The authors of the Consensus Statement introduced in the writ proceedings

the claims of medical witnesses without a full inquiry into the accuracy of those conclusions. See *Ex parte Briggs*, 187 S.W.3d 458 (Tex. Crim. App. 2005) (attorney ineffective for failure to thoroughly investigate medical evidence before advising client to plead guilty to injury to a child).

The primary lesson of the Jimenez case for post-conviction purposes is that inaccurate scientific and expert testimony can, and often does, result in wrongful convictions. Fortunately, Texas has taken important steps to enable courts to correct erroneous convictions that are a result of this type of testimony.

First, as mentioned previously, in *Ex parte Chabot*, the Court of Criminal Appeals recognized that false testimony presented without the prosecutor knowing of its falsity is a violation of due process. Prior to *Chabot* being issued in 2009, it was necessary to show the prosecutor knew of the falsity of the testimony to obtain writ relief. *Chabot* allows correction of convictions based on false testimony by experts, even when the experts believe the testimony being presented was truthful. The *Chabot* case, and the cases following it, enabled the correction of the wrongful conviction in the *Jimenez* case.

The second major legal basis to deal with incorrect scientific testimony is Art. 11.073, Tex. Code Crim. Proc. This provision provides for writ relief when there is new scientific evidence that was not available to be offered by a convicted person at the person’s trial or that contradicts scientific evidence relied on by the state at trial. Although, Art. 11.073 was not directly involved in the *Jimenez* case, it is an important provision for dealing with changes in

possessed the necessary qualifications to rebut the false testimony of the state’s experts.

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scientific knowledge and standards. *See Ex parte Robbins*, 478 S.W.3d 678 (Tex. Crim. App. 2014) (medical examiner’s reconsideration of her opinion on cause of death was new scientific evidence); *Ex parte Mayhugh*, 512 S.W.3d 285 (Tex. Crim. App. 2016) (new science regarding physical signs of sexual assault of children).

## VI.

### Closing Comments

Commenting on Rosa Jimenez’s exoneration, Vanessa Potkin, Director of Special Litigation at the National Innocence Project, and Jimenez’s lead attorney, stated:

I wish we could say that what happened to Rosa was an isolated occurrence, but we have a real, pervasive problem in our country when it comes to how the criminal legal system treats the caregivers of children who are hurt or die.

The *Jimenez* case is one of many cases from around the country where courts are taking a second look at criminal prosecutions of caregivers when young children suffer serious injuries. *See Ex parte Henderson*, 384 S.W.3d 833 (Tex. Crim. App.

2012) (recognizing new science regarding head injuries in infants from short distance falls); *Ex parte Overton*, 444 S.W.3d 632 (Tex. Crim. App. 2014) (ineffective assistance found based on failure of defense counsel to present expert medical testimony concerning salt intoxication); *Wisconsin v. Edmunds*, 746 N.W.2d 590 (Court of Appeals – Wis. 2008) (shift in mainstream medical opinion regarding shaken baby syndrome established reasonable probability that a different result would be reached in a new trial); *State v. Nieves*, 302 A.3d 595 (N.J., 2023) (finding expert testimony that shaking alone can cause the injuries associated with Shaken Baby Syndrome to be scientifically unreliable); *Kaiser v. State*, \_ N.W.3d \_, 2024 WL 1080968

(Minn. 2024) (state expert witnesses in prosecution for death of a child presented false testimony). Convictions based on disputed and discredited medical theories are particularly troublesome, as demonstrated by the tragedy of the Rosa Jimenez case,<sup>9</sup> as well as these other wrongful convictions.<sup>10</sup>



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

<sup>9</sup> For more information on this case, see website for “The National Registry of Exonerations.”

<sup>10</sup> This story of Rosa Jimenez’s exoneration is the fourth of what will be a recurring feature in the Voice. Mike Ware, Executive Director of the Innocence Project of Texas, Allison Clayton, IPTX Deputy Executive Director, Jessi Freud, IPTX Senior Staff Attorney, and Gary Udashen, IPTX board member and former board president, will write periodic articles concerning particularly interesting exonerations from around the State of Texas. For purposes of these stories, the term “actual innocence” will follow the use of that term in the Texas statute providing compensation for the wrongfully imprisoned. (§103.001, Civil Practice & Remedies Code). Under that statute, wrongfully imprisoned persons are entitled to receive state compensation if they have received a pardon based on innocence, they have been granted writ relief by the Court of Criminal Appeals based on actual innocence, or they have been granted writ relief by the Court of Criminal Appeals on some other basis and the State’s Attorney dismisses the charge on the basis that no credible evidence exists that inculcates the defendant and that the State’s Attorney believes the defendant to be actually innocent.

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# Scope and Effect of Judge’s Denial of a Prosecutor’s Petition for Waiver of Jurisdiction and Discretionary Transfer to Criminal Court in a Juvenile Case

ABNER BURNETT

*Member of Juvenile Committee*

This short piece derives from a question that I received during the preceding year.

More than once someone has asked me whether a presiding judge in juvenile court may deny a Petition for Discretionary Transfer under Tex. Fam. Code Ann. §54.02 and whether the State could appeal that decision. One might think that the title of the statute answers the first question, “Waiver of Jurisdiction and Discretionary Transfer to Criminal Court”. [emphasis added]. Nevertheless, I have witnessed otherwise.

In more than one county in which I have practiced, the prosecutors routinely filed petitions to transfer under §54.02 where the offense alleged was a felony, Tex. Fam. Code Ann. §54.02(a)(1) and the juvenile Respondent’s age was adequate: 14 if the alleged offense was capital or 1st degree; 15 if the alleged offense was for 2d, 3rd, or state jail felony, Tex. Fam. Code Ann. §54.02(a)(2) A & B. The Respondent’s attorneys didn’t challenge the petition and the hearings were perfunctory. When I inquired about the disturbing efficiency of such an operation, judges, prosecutors, and defense attorneys acted surprised the petition could be challenged. In one case where I opposed transfer, the presiding judge insisted I provide a script for how the hearing should proceed. No one had ever challenged a petition to transfer before.

The authority and reasoning offered below supports

the conclusion that the judge’s decision to transfer or not is discretionary as that term is commonly applied in case opinions. A Respondent may appeal the Court’s decision to transfer but the State may not appeal the decision to retain the case in juvenile court.

The “abuse of discretion” standard applicable in these cases is comparable to the “abuse of discretion” standard in other applications . That standard is whether the juvenile court acted without reference to guiding rules or principles, *Matter of A.J.F.*, 588 S.W.3d 322 (Tex. App. – Houston [14th Dist] 2019).

The A.J.F. case cites *Moon v. State*, 451 S.W.3d 28, 36 (Tex. Crim. App., 2014), upon which it relies regarding what the judge must deliver as justification for a decision to transfer jurisdiction. *Moon* requires the trial court to list in detail the reasons for transfer thereby tying them to the provisions set out in the statute:

(1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;

(2) the sophistication and maturity of the child;

(3) the record and previous history of the child; and

(4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court, § 54.02(f)

*Ex parte Thomas*, 623 S.W.3d 370 (Tex. Crim. App. 2021) overturned *Moon* regarding the lengths to which a judge must go in specifically setting out reasoning for the decision to transfer jurisdiction. The *Thomas* opinion said, “None of the provisions quoted above require the juvenile court to recite the underlying facts upon which its reason for transfer is based. Rather, the statutory scheme merely directs the juvenile court to state the reasons for the waiver set out in the statute. The additional language ‘including the written order and findings of the court’ in § 54.02(h) allows for “findings,” but it does not require case-specific fact-finding beyond a statement of the reasons for transfer”, *supra*, at 379. The *Thomas* court posed the rhetorical question, “So What is Left of *Moon*?” Their answer: “Nothing”, *supra* at 381. The Court then held “A juvenile transfer order entered after the required transfer hearing and complying with the statutory requirements constitutes a valid waiver of jurisdiction even if the transfer order does not contain factually-supported, case-specific findings.” *supra*, at 383.

But *Thomas* also held, “Detailed findings are certainly preferable and helpful to keep the appellate court from having ‘to rummage through the record for facts that the juvenile court might have found, given the evidence developed at the transfer hearing, but did not include in its written transfer order.’” *supra*, at 381, quoting *Moon*, at 50.

Regarding the effect of the Court’s discretionary ruling, after lots of looking one sees all appellate opinions on the matter apparently spring from appeals where the Court granted the State’s petition and transferred jurisdiction to the district court. This is probably because Texas courts have repeatedly ruled that the State does not have a right to appeal rulings adverse to it in juvenile proceedings, *C. L. B. v. State*, 567 S.W.2d 795 (Tex. – 1978); *In re S.N.*, 95 S.W.3d 535 (Tex. App. Houston [1st Dist] 2002).

So, the judge’s decision to not transfer jurisdiction appears to be discretionary and not appealable by the State.



**Abner Burnett** *Juris Doctor degree, South Texas College of Law, Houston, Texas 1987. Private Practice, plaintiff personal injury and criminal defense, Odessa, Texas 1987-2002. Director, South Texas Civil Rights Project [Oficina Legal del Pueblo Unido], San Juan, Texas 2004-2008. Public Defender, Texas RioGrande Legal Aid 2008-2022; Served for several years as Director of the TRLA Public Defender Division. Currently Living in McAllen, Texas, somewhat retired, somewhat self-employed*

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# Significant Decisions Report

KYLE THERRIAN

“Don’t take counsel from your fears.” This is what I thought when reading a case I buried a little bit further below. It’s a quote I once attributed to Jeremy Rosenthal. But now that people read what I think, I Google my thoughts to make sure I’m not being ridiculous (not that it helps). A little typey-typey, clicky-clicky, and it looks like this is probably an Andrew Jackson quote. Wonderful. Since he was a bit of a jerk and proper attribution is ultimately unimportant to my meandering point, we’ll still say it’s a Rosenthal quote.

Well, to Jeremy’s dismay, I often take counsel from my fears when I represent someone in a federal criminal prosecution. If you practice federal defense, you know the institution is marked with a palpable undertone of risks associated with zealous advocacy. Be afraid of what the Government hasn’t disclosed. Be afraid of what the snitch might say. Be afraid of what is buried in the 5-terabyte hard drive. Be afraid of the vagaries of relevant conduct. Most importantly, be afraid of losing those three USSG acceptance of responsibility points. That some traffic in this fear so that those tasked with standing in their way might yield to institutional momentum is shameful. And that we, the defenders of freedom, do so knowingly is ironic. Adversarial advocacy is consummately American, and if you believe whoever created the \$20 bill, I suppose Andrew Jackson is too. So, if we all know these things are true, shouldn’t we do what Jeremy says just a little bit more?

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](mailto:kyle@texasdefensefirm.com) (972) 369-0577.

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## United States Supreme Court

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

## Fifth Circuit

### *United States v. Gentile*, 93 F.4th 855 (5th Cir. 2024)

**Issue & Answer.** The defendant can object to a district court's consideration of sentencing facts contained in a presentence investigation report. When the defendant objects but then withdraws his objection after the district court indicates that maintaining an objection risks the loss of a three-point reduction for acceptance of responsibility (risks greater sentencing) is the withdrawal of the objection "judicially coerced?" Maybe, the court did not answer.

**Facts.** The defendant pled guilty to a conspiracy to possess with intent to distribute 500 grams or more of methamphetamine. During the plea colloquy, the government read a summary of a factual basis into the record, including statements by the defendant and his co-conspirator (supplier). Those statements purport to show that the two conspired to purchase 1.5 kilograms of methamphetamine and that the defendant purchased up to 3.5 kilograms of methamphetamine from his co-conspirator. The defendant agreed to this factual basis but complained about the amount of methamphetamine attributed to his conduct. The magistrate taking the defendant's plea indicated that the defendant would reserve the right to object to a drug quantity in sentencing. In advance of sentencing, the presentence report writer recommended a three-point sentencing reduction for acceptance of responsibility. The defendant also filed his objections per the colloquy that took place during his plea. The defendant argued that he was responsible for only 7 grams of methamphetamine (as opposed to the 500 grams reflected in his guilty plea and the 3.5 kilograms contained in his factual basis). At sentencing, the trial court took issue with the defendant's objection and his insistence that the government put on evidence of total drug quantity. The trial court indicated that, if the defendant wished to maintain his objection, the trial court would remove acceptance of responsibility points.

... But if you are going to force the government to prove his involvement in what I'm going to call the entire charge that he's pleading guilty to, then he's not accepting responsibility for it

\* \* \*

... if he wants to move forward and have you

force the government to put the witness on and prove this, he does it at the risk of losing the three points.

Unsurprisingly, after this colloquy, the defendant withdrew his objection.

**Analysis.** The defendant contends he was judicially coerced into abandoning his objection and that the sufficiency of the evidence supporting the defendant's sentence should be reviewed for plain error. But "Gentile has failed to allege any remotely plausible effect on his sentence." He contends that his offense level would have been 34 if he received his three-point reduction. The record reflects that the defendant did receive his three-point reduction and that his guideline calculation accounts for acceptance of responsibility. [Editorial note: I think the court and defendant are talking over each other's heads, it appears the defendant contends he should have acceptance of responsibility and a lower drug quantity].

**Comment.** What a screwed-up system that punishes you for requiring the government to prove things. At least the government doesn't take advantage of their ability to launder gossip. We should all take solace in the fact that attorneys representing the government would never convert weak evidence into proven fact by juicing the presentence report behind the defendant's back. There isn't any useful law in this case, but it's nonetheless important. First, rarely do I see defendants objecting factually to the presentence investigation report. Some case law in the Fifth Circuit seems to impose a duty on the defendant to prove a negative (that the defendant is innocent of the allegations contained in the PSI). But other circuits clearly state that the government must prove contested sentencing facts by a preponderance of evidence. See *United States v. Harrison*, 743 F.3d 760, 763 (10th Cir. 2014); *United States v. Martinez*, F.3d 1022, 1027 (11th Cir. 2009); *United States v. Pelletier*, 469 F.3d 194, 202 (1st Cir. 2006); *United States v. Sorrells*, 432 F.3d 836, 838 (8th Cir. 2005); *United States v. Nallie*, No. 94-3429, 1995 U.S. App. LEXIS 9772, at \*6 (6th Cir. 1995). Second, this case highlights a common dilemma that federal criminal defense attorneys face: stand your ground in sentencing or lose acceptance of responsibility. I think the solution is to start fighting this issue on the edges. This wasn't the right case (500 grams versus 7 grams of meth), but potentially a dispute about a fact that counsel knows is derived only from the statement of one or two co-conspirators—one that counsel truly believes is bogus.

## Texas Court of Criminal Appeals

*Lall v. State*, No. PD-0700-22 (Tex. Crim. App. Mar. 27, 2024)

**Attorneys.** Brian Wice (appellate), Joshua Weber (trial), Kyle Steele (trial)

**Issue & Answer.** Can a court consider a defendant's refusal to consent to a search as some evidence supporting reasonable suspicion? **No.**

**Facts.** A police officer wanted to search the defendant's car. The defendant did not want the police officer to search his car, and he refused to consent to the search. The police officer, without other suspicion, detained the defendant for a period of time necessary to obtain a drug dog and conduct a drug dog sniff. The police officer then found methamphetamine.

**Analysis.** The court of appeals erroneously relied on the defendant's refusal to consent as a factor giving rise to reasonable suspicion. Justice Pedersen was correct that the majority should not have considered the Appellant's lawful refusal to consent as any indication of criminal activity for purposes of making a reasonable suspicion determination. In *Wade v. State*, 422 S.W.3d 661 (Tex. Crim. App. 2013), the CCA held that neither nervousness nor refusal to cooperate were sufficient factors constituting reasonable suspicion. Specifically, the court explained, "nor could the action of standing on one's rights be the tipping point in the reasonable suspicion calculus." The State read too much into this statement and assumed the CCA meant that standing on one's rights nonetheless serves as some proof. The dissent below is correct again: "The people ratified the Bill of Rights to prevent government abuse. When the assertion of a Fourth Amendment right gives rise to reasonable suspicion of criminal activity on the part of the people, it is not a right."

**Comment.** Occasionally, you get an amicus brief from Douglas Norman of the Nueces County District Attorney's Office. It's very strange. They're not bad briefs,

they're just not very amicus-ey. They don't comment on policy or the broad implications of a defense-favorable ruling. They're basically briefs that say, "Hey, that dude should lose." It makes me think that maybe I should file some amicus briefs—not on behalf of TCDLA – k but ones that are more to the tune of "now that you've heard from Doug, here's what Kyle thinks."

### 3rd District Austin

#### *Charles v. State*, No. 03-23-00241-CR (Tex. App.—Austin, Feb. 29, 2024)

**Attorneys.** Charles Soechting (appellate)(trial).

**Issue & Answer.** An officer cited three instances of lane infractions as the basis for conducting a traffic stop but a trial court did not find the officer credible. Are trial court findings insulated by an abuse of discretion standard even when video evidence would support the lawfulness of police conduct? **No.**

**Facts.** A police officer purportedly saw the following before conducting a traffic stop: (1) swerving within a single lane, (2) movement to the far left lane and back to the original lane without signaling, (3) driving in two lanes at once. The arresting officer was not able to consistently articulate where he witnessed these lane infractions. The video did not depict what the officer stated as the basis of his stop. However, the video did depict "the Defendant driving from the left turn lane into the far left lane after going through the green light. Defendant's right front tire briefly crossed into the center lane." The trial court did not find the officer's testimony credible and granted the defendant's motion to suppress.

**Analysis.** An appellate court reviews a trial court's findings of fact for an abuse of discretion. Ordinarily this means a trial court's findings are given a high level



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of deference. However, high levels of deference do not insulate a factual finding that is directly contradicted by video evidence. *Carmouche v. State*, 10 S.W.3d 323 (Tex. Crim. App. 2000). Here, the video shows the defendant moving between lanes without signaling. Although it is possible that the defendant was yielding to the officer approaching “the mere possibility that an act is justified will not negate reasonable suspicion.”

**Comment.** Two comments. First, I love the Carmouche case. I’ve cited it in appellate briefs (unsuccessfully) in various ways:

- This Court can and should reject invitations to disregard what it can see and establish conclusively with its own eyes.
- Standards of almost total deference cannot be implemented to contravene what is otherwise indisputable in the record.
- Appellate court presumptions and standards of review do not require a court to engage in a charade and sustain an outcome supported by conclusory testimony that is objectively contradicted.

It’s nice to see the argument worked for someone. For me, let’s hope the fourth time’s a charm.

Second, don’t forget the new standard for lane drifting: you can drift out of your lane if you can do it safely, but the State can rely on the reasonable mistake of law doctrine to support traffic stops made prior to the CCA case deciding this issue in 2022. *State v. Hardin*, 664 S.W.3d 867 (Tex. Crim. App. 2022).

## 7th District Amarillo

### *Brewer v. State*, No. 07-23-00191-CR (Tex. App.—Amarillo, Mar. 19, 2024)

**Attorneys.** John Bennett (appellate), T.D. Hammons (trial).

**Issue & Answer.** The doctrine of *idem sonans* forgives the misspelling of a name in legal documents if the listener would find it difficult to distinguish the misspelling from the proper spelling when the two names are pronounced. When the State transposes a complainant’s first and last name, should a court forgive the error under *idem sonans*? **No.** Is the conviction still sound? **Yes.**

**Facts.** The State charged the defendant with theft of a python from a pet store. In their indictment and jury charge, the State named the complainant-python-owner “Jimenez Javier.” But Jimenez Javier, as one might expect, was actually Javier Jimenez. At trial, Javier Jimenez denied using the name Jimenez Javier as an alias.

**Analysis.** The State clearly transposed the complainant’s first and last name. This mistake must be characterized as either an immaterial variance, a material variance, or simply an unimportant *idem sonans*

(misspelled but sounds the same pronounced). Because the transposing of first and last names does not result in the same sounding name, the error cannot be characterized as *idem sonans*. The correct classification of variance depends on the proof at trial. Because the State established that Javier Jimenez was the pet store owner from whom the defendant stole a python, the variance was not such that the State proved an entirely different offense. Thus, the variance cannot be characterized as material (affecting the defendant’s substantial rights). Because the misspelling is neither *idem sonans* nor a material variance, it must be characterized as an immaterial variance. Accordingly, the court of appeals must affirm the conviction.

**Comment.** It’s like an episode of Scooby Doo where they pull the mask off Jimenez to reveal that it was Javier all along. Some SigHead insider knowledge on this case . . . the State actually had a witness to help out with the whole Jimenez Javier Javier Jimenez debacle, but they couldn’t find a certified Parseltongue translator (it’s not a dad joke if you laugh).

## 8th District El Paso

### *Marquez v. State*, No. 08-22-00177-CR (Tex. App.—El Paso, Feb. 29, 2024)

**Attorneys.** Octavio Dominguez (appellate)(trial), Todd Morten (appellate), A. Marcelo Rivera (trial), Linda Perez (trial), Chad Bernaeyge (trial).

**Issue & Answer 1.** In the case of a missing person, can the State prove the *actus reus* of murder by showing a significant number of suspicious behaviors and incriminating circumstances? **Yes.**

**Issue & Answer 2.** In the case of a missing person, can the State prove the *mens rea* of murder by showing a significant number of suspicious behaviors and incriminating circumstances? **Yes.**

**Issue & Answer 3.** [is sauce for the goose sauce for the gander?] If the State can rely on a significant number of suspicious behaviors and incriminating circumstances to prove an intentional killing, is the defendant necessarily entitled to rely on the same behaviors and circumstances to claim a sudden passion instruction in the punishment phase of the trial? Not necessarily and not here.

**Facts.** The State convicted the defendant of murder based on his conduct around the time of the victim’s disappearance. The State did not present evidence of a dead body or an act causing the death of the victim. Instead, the State proved its case by combining the unusual conduct of the defendant during his brief relationship with the victim and the victim’s status as a missing person. Specifically, the State relied on the following, all occurring shortly before the victim disappeared:

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- The defendant watched the victim obsessively while the two were at the bar.
- The defendant fought with a man who wanted to dance with the victim.
- The defendant admitted to being in three arguments with the victim on the night of her disappearance.
- The defendant admitted to being the last person to see the victim alive.
- The victim's cell phone data showed her last coordinates in the vicinity of the defendant's home.
- The defendant's cell phone data showed significant location activity that ended at 3:10 AM the night of the victim's disappearance.
- The defendant's cell location data ended two minutes after he called his brother and less than an hour after the location services on the victim's phone ended.
- Hours after the victim's disappearance, the defendant texted his brother asking to use his jeep. Five minutes after this, the Defendant texted his brother-in-law to borrow a shovel.
- Shortly after these texts, video evidence depicted the defendant driving to his brother's house, then to his brother-in-law's house, then to the desert.
- Video evidence depicted the defendant returning from the desert an hour later.
- The victim's DNA was detected in the cargo area of the Jeep.
- The victim had never met the defendant's brother and had never been in his Jeep.

**Analysis 1.** The evidence strongly connects the defendant to the death of the victim. The CCA has provided guidance in murder cases where the victim's body and the

murder weapon are not found: the State need not show how the victim died, evidence need not directly prove the defendant's guilt, and the State can combine motive and opportunity with other evidence. Here, the State did everything the CCA suggested as sufficient to prove a murder or a missing person—and more.

**Analysis 2.** A jury can infer a culpable mental state from the circumstances. The defendant's reliance on *Stobaugh v. State*, 421 S.W.3d 787 (Tex. App.—Ft. Worth 2014) is misplaced. In *Stobaugh*, the State did not prove that the defendant engaged in any conduct directed at the victim. The *Stobaugh* jury was necessarily left to speculate about the defendant's mens rea based on his fishy statements to police surrounding his wife's death. Here there is ample evidence (actual facts) supporting the inference of mens rea, including the multiple fights the defendant had with the victim and her rejection of him before she went missing.

**Analysis 3.** The defendant complains about the trial court's rejection of a sudden passion issue in the punishment phase of the trial. He essentially contends that if a jury was allowed to deduce an intentional killing from circumstances and behavior, then the trial court (as punishment factfinder) should be equally allowed to deduce that the defendant snapped uncontrollably and by provocation.

[W]e cannot find that [defendant's] emotional response to [the victim's] rejection constitutes an "adequate cause" giving rise to a sudden passion. The sudden passion claim is reserved for those circumstances in which the cause would "commonly produce a degree of anger, rage, or

resentment . . . in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.”

The sudden passion instruction is not available for aberrant behavior in response to dating rejection. To hold otherwise would promote violence by the subjects of romantic rejection.

**Comment.** My initial thoughts were, “they convicted a dude without direct evidence that a death occurred!?” But then the location services were turned off, and the dude got a shovel, and he got a jeep, and he drove to the desert, and he drove back from the desert, and the victim’s DNA is in the trunk. This is a vigorous and well-fought case by the defense lawyers, but cell-phone-jeep-shovel-DNA evidence is going to get you every time.

### 10th District Waco

#### [Willingham v. State, No. 10-21-00158-CR \(Tex. App.—Waco, Feb. 29, 2024\)](#)

**Attorneys.** Alan Bennett (appellate) Stanley Sokolowski (trial)

**Issue & Answer 1.** In an evading case, does the State have to prove the defendant knew the officer’s attempted arrest or detention was lawful? **No.**

**Facts.** The State convicted the defendant of evading in a motor vehicle but did not prove that the defendant knew the attempted arrest or detention was lawful.

**Analysis 1.** During the pendency of this appeal, the CCA decided *Nicholson v. State*, 682 S.W.3d 238 (Tex. Crim. App. 2024). There the CCA held that the Penal Code does not require the mens rea to be applied to the lawfulness of the detention or arrest.

### 11th District Eastland

#### [Starks v. State, No. 11-22-00354-CR \(Tex. App.—Eastland, Mar. 7, 2024\)](#)

**Attorneys.** Leigh Davis (appellate), Jeremy Shipp (trial), Jeff Johnson (trial)

**Issue & Answer.** Mail Theft includes the following elements: (1) intentional, (2) appropriation, (3) mail, (4) from mailbox or premises, (5) lack of effective consent, and (6) intent to deprive. Mail is defined, in part, as something delivered by a “common carrier” or “delivery service.” Is US Mail something delivered by a “common carrier” or “delivery service?”

**Facts.** A USPS mail carrier saw the defendant take a package from another person’s porch. The mail carrier called the police and the police saw the package inside the defendant’s house.

**Analysis.** The United States Postal Service is a “delivery service” as that term is used under the Mail Theft

statute. To whatever extent this is not a logical conclusion of legislative intent, the Legislature included “mailbox” as a place from where mail can be stolen. Mailboxes may only contain mail sent through the United States Postal Service.

**Comment.** I think this is the same Starks from the you-didn’t-prove-the-isomer-of-my-meth in the Starks opinion from last month. If so, I love it. If these weren’t great arguments, the Eleventh Court wouldn’t be publishing them, right?

#### [Luna v. State, No. 11-22-00039-CR \(Tex. App.—Eastland, Mar. 21, 2024\)](#)

**Attorneys.** Mike Holmes (appellate), Jason Leach (trial), V. Latawn White (trial)

**Issue & Answer 1.** A person commits capital murder if that person kills a fertilized embryo. If the assaulted impregnated victim testifies that the defendant committed acts that were the likely cause of a miscarriage and that the defendant specifically expressed an intent to kill the unborn baby, is the evidence sufficient in the face of the defendant denying knowledge of the impregnated victim’s pregnancy? **Yes.**

**Issue & Answer 2.** Is domestic violence a topic that lends itself to reliable and probative expert testimony that is not substantially outweighed by unfair prejudice? Yes, it can be and is here.

**Issue & Answer 3.** A jury believed that the defendant beat a pregnant woman and had the intent to cause her miscarriage, but the defendant said she tried to attack him with scissors. Was the defendant entitled to a deadly force self-defense instruction? **Yes.**

**Facts.** The State charged the defendant with Aggravated Assault and Capital murder for beating his wife until she miscarried. Wife testified that the defendant was often violent during their 15-year marriage. On this occasion, the defendant was upset with Wife because Wife had become pregnant with another man during a period of separation from the defendant. This argument continued throughout an evening during which the defendant took Wife to a strip club and purchased a lap dance for himself. After the two returned home, Wife attempted to barricade herself inside the home to avoid the looming assault. She was unsuccessful. The defendant severely beat her, pushed his knee into her stomach, and said “I’m going to kill that f----g baby.” The defendant testified and admitted there was an altercation, but, in his version, the Wife was the aggressor who attacked him with scissors. He also testified that he did not know she was pregnant.

At trial, the jury heard evidence that Wife frequently apologized to the defendant after instances of violence and that she remained with him despite fifteen years of purported abuse. To respond, the State presented an

expert on domestic violence and relationship dynamics who explained how Wife's conduct fell within normal domestic violence victim behavior.

**Analysis 1.** The facts are rare, but the analysis is typical. The impregnated victim testified to an act of the defendant sufficient to establish the actus reus of capital murder and testified to the words and conduct of the defendant sufficient to establish the mens rea. A jury could have reasonably discredited the Defendant's claimed ignorance and credited the impregnated victim. The evidence is sufficient when viewed in the light most favorable to sustaining the conviction.

**Analysis 2.** "We are aligned with our sister courts in holding that domestic violence, as an area within a field of psychology, is a legitimate field of expertise." The expert sponsored by the State was a licensed professional counselor with years of experience as a therapist and with training in domestic violence. She was qualified to share her opinion. The Rule 403 Gigliobianco factors (see legend below) weighed in favor of admissibility. Without testimony on the dynamics of domestic violence, a jury may have doubted the pregnant victim. The pregnant victim's testimony regarding what occurred is what (fairly) prejudiced the defendant. The expert's testimony merely provided context for abusive relationships.

**Analysis 3.** A person may use deadly force in self-defense "when and to the degree the actor reasonably believes the deadly force is immediately necessary to protect the actor against the other's use or attempted use of unlawful deadly force." A defense instruction is required whenever any evidence (Strong, weak, unimpeached, or contradicted) supports the instruction. Here the defendant testified the pregnant victim attacked him with scissors. "While reasonable minds may differ, it was for the jury, not the trial court, to decide whether Appellant reasonably believed that his use of deadly force was [justified]."

**Comment.** I hate "fixer" experts. This isn't the right case to do it in, but I think the only way courts start to seriously consider the appropriateness of the State calling a "fixer" to testify is for defendants to start calling "fixer" witnesses. The jury that gets to hear about the characteristics of bad guys and honest victims should also hear about the characteristics of false accusations.

## 12th District Tyler

**[Lymbery v. State, No. 12-23-00191-CR \(Tex. App.—Tyler, Feb. 29, 2024\)](#)**

**Attorneys.** Gena Bunn (appellate), Sean Hightower, (trial), Tim James (trial)

**Issue & Answer.** A jury may not convict a defendant based solely on accomplice-witness testimony (accomplice

testimony must be corroborated). In a prosecution for violating the Texas Open Meetings Act where corroborating evidence merely established the existence of a meeting and not the topic of discussion, did the State sufficiently corroborate the testimony of an accomplice witness? **Yes.**

**Facts.** The State charged the defendant, the Angelina County Judge, with violating the Texas Open Meetings Act. At trial, the State presented testimony from the county attorney who learned of a meeting of three commissioners (the defendant, Rodney Paulette, and Steve Smith). The State showed video surveillance showing the three individuals meeting inside the defendant's office the day before a vote to hire Chuck Walker as county road engineer. The State presented testimony from the county administrator who was instructed to prepare a folder for one of the commissioners in the meeting and was asked whether Chuck Walker would be present for the next day's meeting. Finally, the State presented testimony from Commissioner Smith (co-conspirator) who testified regarding the subject of the meeting: the next day's agenda and the Chuck Walker vote. According to an article in the Lufkin Daily News, the defendant admitted the meeting was inappropriate.

**Analysis.** Accomplice-corroborating evidence is evidence that "Tends to connect" the defendant to the commission of the alleged offense. The State does not have to corroborate every element of the offense or every aspect of the accomplice's testimony. The jury heard from county employees who witnessed the offense and saw video evidence showing that the meeting occurred. One of the employees was able to share with the jury that she overheard the quorum of commissioners discussing the vote on Chuck Walker. This evidence was sufficient to corroborate the testimony of an accomplice.


**Comment.** Commissioner Smith was sworn in as a newly appointed commissioner on the morning of the illegal meeting. The State forced him to take a plea deal. They are very serious about their meetings in Lufkin.

## 14th District Houston

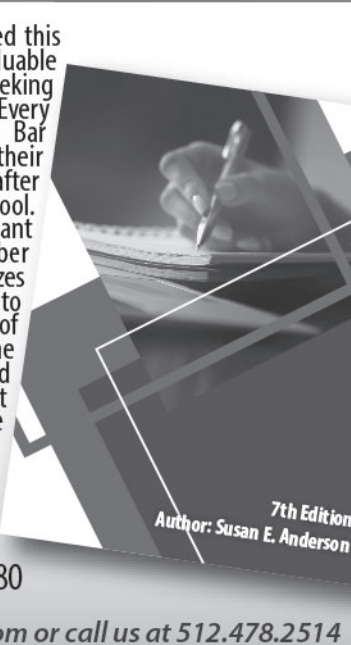
**[Jones v. State, No. 14-22-00495-CR \(Tex. App.—Houston \[14th Dist\] Feb. 29, 2024\)](#)**

**Attorneys.** Ted Wood (appellate), Joseph Vinas (trial)

**Issue & Answer 1.** Article 21.02 describes the requisites of an indictment and includes that it must appear to have been "presented in the district court of the county where the grand jury is in session." Where a defendant was prosecuted in the 337th but indicted by a grand jury impaneled by the 182nd, is the 337th without jurisdiction to revoke the defendant's probation? Issue avoided.

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**Issue & Answer 2.** A defendant's conditions of community supervision prohibited him from committing any offense "against the laws" of the State of Texas. The State alleged in a motion to adjudicate that he committed an offense "against the State of Texas." Was this a fatal error in the State's motion to adjudicate? Probably not; issue avoided.

**Issue & Answer 3.** A trial court must orally pronounce a defendant's sentence in his presence. Where an order of deferred adjudication requires payment of a \$1,000 fine, but the trial court later adjudicates and sentences the defendant, must the \$1,000 fine be re-pronounced? **Yes.**

**Facts.** In two separate cases, a trial court placed the defendant on deferred adjudication probation for eight years and assessed a \$1,000 fine. The State filed a motion to adjudicate the defendant's probation and the trial court conducted a hearing and found that the defendant violated his probation. The trial court sentenced the defendant to two concurrent 20-year sentences.

**Analysis 1.** The sufficiency of an indictment under Article 21.02 presents "a non-jurisdictional, procedural challenge that must be preserved by a proper and timely objection in the trial court." There being no objection, there is nothing to review.

**Analysis 2.** The State's motion to adjudicate or revoke probation does not need to be as precise as an indictment. It needs to give fair notice. If the defendant does not

believe he has been given fair notice, he is required to file a motion to quash. Here, the defendant did not raise this complaint in the trial court below. Thus, nothing is preserved for review.

**Analysis 3.** The trial court's adjudication of guilt sets aside the order granting deferred adjudication. At such time, the trial court must pronounce a new \$1,000 fine if it wishes to impose one. The trial court did not, and therefore, the trial court's silence controlled.

**Comment.** I didn't read the cases cited by the court in support of the contention that Article 21.02 complaints are non-jurisdictional. Pleadings are what vest courts with jurisdiction, so I'm curious what those cases say, just not curious enough to go read them.

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

- 1st District Houston
- 2nd District Fort Worth
- 4th District San Antonio
- 5th District Dallas
- 6th District Texarkana
- 9th District Beaumont
- 13th District Corpus Christi/Edinburg

### 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



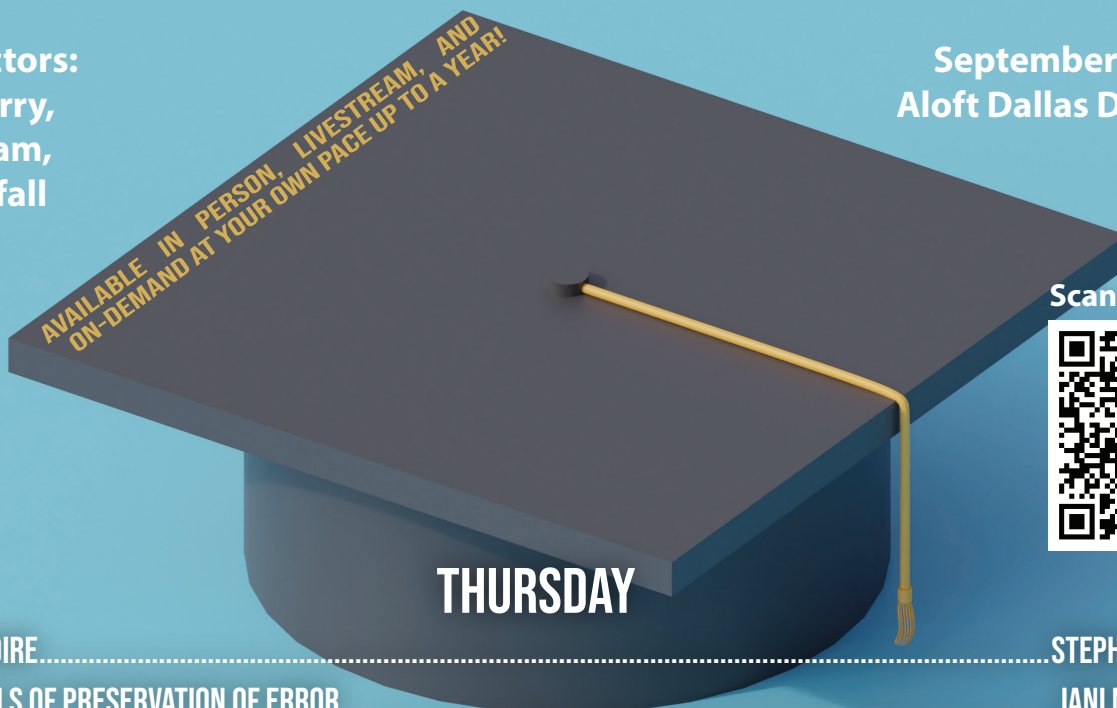
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THE LAW OF VOIR DIRE.....	STEPHANIE STEVENS
THE BROADER GOALS OF PRESERVATION OF ERROR .....	JANI MASELLI WOOD
NAVIGATING THE TRAPS OF EXTRANEEOUS OFFENSES.....	ANNE BURNHAM
BOND REDUCTION: USING YOUR CLIENT'S STORY.....	DAMON PARRISH
COMMUNITY SUPERVISION: ELIGIBILITY TO COMPLETION .....	MICHAEL GROSS
STATUTORY DEFENSES .....	FRANK SELLERS
ANALYZING THE CASE: CHARGING INSTRUMENTS & JURY CHARGE .....	MARK STEVENS & ELIZABETH BERRY

## FRIDAY

RULES OF EVIDENCE OVERVIEW, RELEVANCY AND ITS LIMITS.....	GREG WESTFALL
HOW TO GET THINGS IN/KEEP THINGS OUT OF EVIDENCE .....	WILLIAM BIGGS
HEARSAY & CONFRONTATION .....	LANCE EVANS
BRADY & MMA DISCOVERY.....	KRISTIN BROWN
IMPEACHMENT .....	ERIC DAVIS
EXPERTS .....	SARAH ROLAND
PUNISHMENT.....	MICHAEL HEISKELL

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### THURSDAY, JUNE 13

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<b>State Boot Camp</b>		
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Homicide .....	Eric Davis	
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<b>State Boot Camp</b>		
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Cross Exam .....	Michael Gross	
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		Rene Valladares
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		Roberto Balli
		Federal Trial Nuances .....
		Robert Jones
		Sean Hightower
		<b>Federal Boot Camp</b>
		Current Issues with Immigration Law & Crimes in Texas .....
		Jordan Pallock
		Practical Punishment Procedures .....
		Jeep Darnell

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Rules of Evidence .....	Jason Parrish	
Post Conviction Litigation .....	Allison Clayton	
Voir Dire .....	Chris Downey	
Search & Seizure .....	Laurie Key	
		<b>Family Violence Boot Camp</b>
		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
		<b>Technology &amp; Forensics Boot Camp</b>
		DNA .....
		Nick Hughes
		Junk Science .....
		Angelica Cogliano
		Hemp & Marijuana .....
		Amanda Hernandez
		Mark Daniel

### 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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