TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

VOICE FOR THE DEFENSE

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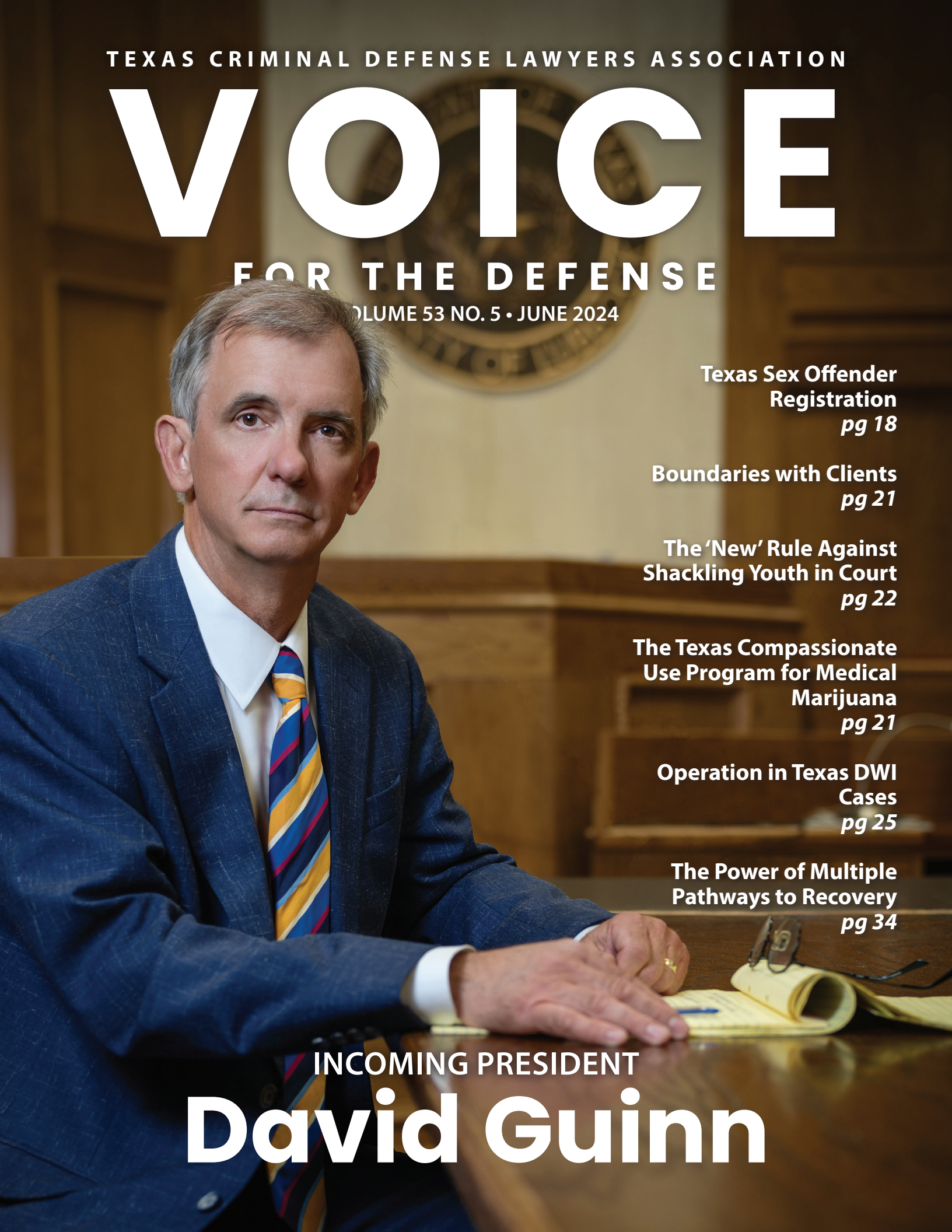

INCOMING PRESIDENT

David Guinn

Texas Criminal Defense Lawyers Association

22ND ANNUAL TOP GUN DWI

Register today at tcdla.com, give us a call at 512-478-2514, or scan the QR code below!
Available In Person, Livestream and On-Demand At Your Own Pace

COURSE DIRECTORS:
DOUG MURPHY & MARK THIESSEN

AUGUST 16, 2024 • THE WHITEHALL • HOUSTON, TX

SCAN TO REGISTER

FRIDAY

TECHNOLOGY AT TRIAL: LEVERAGING TECH IN DWI DEFENSE ..... CHRIS MCKINNEY

BEHIND THE NUMBERS: GAS CHROMATOGRAPHY AND BLOOD TESTING DEMYSTIFIED ..... LEE POLITE

TEACHING BLOOD TESTING TO THE JURY: EFFECTIVE COMMUNICATION STRATEGIES ..... MARK THIESSEN

STRATEGIC ADVOCACY: WEAVING YOUR THEORY FROM VOIR DIRE TO CLOSING ARGUMENTS ..... DOUG MURPHY

UNRAVELING THE FORENSIC PUZZLE: FIGHTING THE BATTLE IN DWI TRIALS ..... ANGELICA COGLIANO

ETHICAL ADVOCACY: MARKETING STRATEGIES IN DWI DEFENSE ..... ED MCCLEES

OVER-THE-COUNTER INFLUENCE: DEFENDING AGAINST DWI CHARGES INVOLVING THC ..... NICHOLAS HUGHES

UNDERSTANDING THE MIND OF THE JURY: HOW JURORS THINK IN DWI CASES ..... DAVID GONZALEZ

FIELD TO COURTROOM: UNDERSTANDING SFST AND POLICE INVESTIGATIONS IN DWI DEFENSE ..... DON EGDORF

DRUGS, TESTING, AND HOW THEY AFFECT THE HUMAN BODY ..... AMANDA CULBERTSON

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VOICE
FOR THE DEFENSE

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Features

Columns

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Volume 53 No. 5 | June 2024

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

June

June 11
CDLP | Public Defense Leaders Training
San Antonio, TX

June 12
CDLP | Capital Litigation
San Antonio, TX

June 12
CDLP | Indigent Defense
San Antonio, TX

June 12
CDLP | Mental Health
San Antonio, TX

June 13
CDLP | Women Defenders
San Antonio, TX

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

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

June 15
TCDLA Annual Members' Meeting
San Antonio, TX

July

July 3
TCDLA | Declaration Reading

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

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

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

July 13
CDLP | Orientation
South Padre Island, TX

July 19
TCDLA | Financial Friday - Divorce
Webinar

July 22
CDLP | Mindful Monday - Addictions with Cooccurring Mental Health issues
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 Lawyer - 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 | 22nd Annual Top Gun DWI
Houston, TX

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

August 29
TCDLEI Board Meeting
Zoom

August 29-30
CDLP | 2nd Annual Floyd Jennings Mental Health Symposium
Fort Worth, TX

September

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

September 6
TCDLA Executive & Legislative Committee Meetings
Dallas, TX

September 7
TCDLA Board & CDLP Committee Meetings
Dallas, TX

September 13
CDLP | The Way of the Warrior
Witchita Falls

September 13
TCDLA | Financial Friday - Asset Protection
Webinar

September 13
CDLP | Crimmigration *w/ SBOT*
Edinburg, TX

September 16
CDLP | Mindful Monday - Reproductive Laws
Webinar

September 17
TCDLA | Constitution Day

September 18
TCDLA | New Lawyer - Mental Health
Webinar

September 20
CDLP | The Way of the Warrior
Midland

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

October

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

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

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

October 16
TCDLA | New Lawyer - Evidence
Webinar

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

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

October 24
CDLP | Mental
South Padre Island, TX

October 25
CDLP | Capital Defense
South Padre Island, TX

November

November 7
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
Webinar

December

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

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

December 16
CDLP | Mindful Monday
Webinar

Scholarship Information:

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

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

President's Message

DAVID GUINN

"For the loser now
Will be later to win
For the times they are a-changin'"
- Bob Dylan, 1964

Times are a Changin'

Every member of TCDLA matters. All of us. That won't and shouldn't change.

While fashion, politics, weather, and technology spiral constantly without much warning, some things are unalterable. We need each other — for instruction, advice, encouragement, and friendship — that won't ever change, ever. While it can seem that the more differences we carve to distinguish ourselves from one another, whatever those differences are, each of us matters and makes a difference as defense counsel. What comes out of your mouth in court or fingertips on the keyboard on behalf of your client is ultimately all that's important. Our combined backgrounds, perspectives, and thoughts are precious resources that must be protected and revered. It's fair to say many of us have personalities that might fall under the "doesn't play well with others" category. Nonetheless, it is our interdependence and cooperation that achieve the most, not only for the common good, but for each of us individually.

When we share what we see in each of our relative necks of the woods, we give the others a "heads up" on what might be coming. When we brainstorm, things get better. Our jobs are hard—they are supposed to be—and that won't change. When we see friends from other places and are glad to enjoy the moment, we are encouraged. But nothing good comes easily. Not everyone can or will do what we do or strive to do it particularly well. "Counsel" is right there in the 6th Amendment to the U.S. Constitution, so change won't be a crime bill that resembles "90's Texas Tort Reform", legalizing a lot of behavior and putting us out of work. No, "counsel" is right there in the U.S. Constitution.

Not only by making a living and supporting those we love but to each and every client, you matter serving as a critical check and balance between the government and its people. It may not feel like it at the time, but it's true. That's how erosion and compounding work, be it soil, money, or ideas—every little bit affects the whole over time—it's just the direction that's different. And you never know when the opportunity will arise, so we must always be ready and committed to each other.

While receiving stellar legal instruction and lobbying the Texas Legislature are incredible benefits of membership, it is our sharing and edifying of relationships that are the greatest and best benefits. No other specialty group is as welcoming, fun, and sharing as TCLDA. You can get more than you give, but giving is mighty fine. Being connected to one another is critical, not just because of our role in the criminal justice system, but because of the very fact that the times are changing. We hold onto each other as we pass through the currents in criminal law and continue forward. But here's the thing non-lawyers and a lot of law students don't' know: if you really want to work on the ground floor of a case that improves American Constitutional Law, it's most likely to happen on a court appointment. It's just the numbers. That's where the facts of a given case arise. A lot more poor people get arrested. So, most often, the person representing the poor who makes the objection or motion that preserves the error in the record is the person that gets to the Supreme Court. So many of the most significant cases in our constitutional fabric started with some "regular" lawyer nobody knew about whose client was assigned to them.

Gerry Goldstein taught us that our clients—especially the poor—are the canaries in the coal mine of constitutional criminal law. We are their only voices and champions. Those two things will not change. Moses wrote in Deuteronomy 15:11 that the poor would never cease to be in the land; Mark 14.7 and Matthew 26:11 say that the poor will always be with us. Both of those statements were made over 2,000 years ago and have proven to be true. While the times are a changin', the fact that some people are poor and find themselves in the sights of various forms of government will not. Our job is inscribed in the Constitution forever. It is our everyday experience and connection in a symbiotic relationship that is inextricably intertwined. Neither the poor nor us are going away anytime soon.

And that is how it should be between our fellow members, toiling in the jails and courthouses of Texas. Public Defender, general practitioner, notable high-profile lawyer, or steady soldier who just shows up and does a super job that goes without much fanfare—we're in this together. We have each other's backs, and we share the load. Nobody is leaving anyone alone on the battlefield.

You and our mission matters—that's the TCDLA way.

"And the first one now
Will later be last
For the times the are a-changin'"

CEO's Perspective

MELISSA J. SCHANK

To command is to serve, nothing more and nothing less.

- Andre Malraux Read

Be All You Can Be

Attention, TCDLA troops! Prepare for the 37th Annual Rusty Duncan Advanced Criminal Law Course, scheduled for June 13-15, 2024, in San Antonio. Named in honor of the late Honorable M. P. "Rusty" Duncan III of the Texas Court of Criminal Appeals, this course will arm you with the latest insights on state law, scholarly topics, and key cases from the past year to bolster your legal arsenal.

Honorable Maurice Palmer "Rusty" Duncan III led a distinguished life from 1945 to 1990, culminating his career as a Texas Court of Criminal Appeals judge from 1987 to 1990. Before donning his judicial robes, Rusty was a formidable force in criminal defense, earning Board Certification in Criminal Law and practicing out of Denton, Texas. His volunteer service was exemplary, including roles such as Chair of the State Bar's Committee on the Study of the Insanity Defense in Texas (1982-1983), Co-Chair of the State Bar's Penal Code and Criminal Procedure Committee (1982-1984), and Member of the Senate Committee on the Development of a Criminal Code of Evidence (1983-1984). He also served as editor of "Voice for the Defense" from 1984 to 1987. For a more in-depth mission debrief on Rusty, visit the TCDLA website and check out the June 2019 article in the archives.

As we march forward to the end of Rusty Duncan, our current commanding officer of TCDLA, General John Hunter Smith, will hand over the reins to the incoming President, David Guinn. It's been an honor serving under John this year; his leadership has been exemplary, leading the troops and ensuring every member of our ranks is recognized for their contributions. I have enjoyed working with him, and I thank him for listening, as well as his guidance, and support, which have been invaluable to me and the entire TCDLA staff, steering our association to victory in many battles.

At the 52nd Annual Members Meeting, we will swear in the new TCDLA officers, including nine renewing board members and nine new board members. We will convene at Rosario's after the ceremony for our traditional celebratory lunch. Together, we will continue strengthening our ranks, supporting and defending each other as a unified force.

Under John Hunter Smith's leadership, the Executive Committee, TCDLA Board, and various committees have diligently advanced our mission. It's been a privilege to work with such a dedicated team. Stay tuned for next month's article to see the highlights of our committees' efforts. If you want to take a more active role in TCDLA, we are accepting Committee Interest forms for the 2024-2025 term. We have over 35 committees to choose from! The form is available on our website, or you can email me.

Special thanks to TCDLEI Chair Kyle Therrian and the TCDLEI Board Members for distributing over $45,000 in scholarships to attorneys facing hardships, travel stipends, and a 3L scholarship. We will hold a silent auction at Rusty Duncan to raise funds for next year. Remember, it's YOU who makes this possible!

Third quarter Strategic Plan glory report.

ENHANCING COMMUNICATION & REORGANIZING RESOURCES

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

- General Public Relations Messages - Our committee will enhance public relations by engaging with external publications, using social media, and partnering with criminal defense associations to amplify our messages and increase visibility.
- Communicate Strategic Plan Updates - The committee developed a strategy to keep TCDLA members informed of changes and strategic plans through podcasts, website announcements, targeted emails, and Listserv updates.

REVITALIZING THE ORGANIZATION

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

- Each One Reach One Drive – The drive starts September 1, 2024. See the attached plan. To boost

auto-renewal, we'll improve advertising and offer a free cheat sheet on Cannabis or Juvenile law.

- Ribbon Titles – The committee created a list of ribbon titles for members to choose from on their profiles once the software is ready. Members can select up to 5 titles. See the attached options.
- Board Report Card –The items on the board report card outline the annual duties of board members. The members review them at quarterly board meetings, and the nominations committee uses them.
- Baseline of Data (Dashboard) –The dashboard will capture beginning data and progress data through the year, such as current membership number, member satisfaction, awareness of the mission statement, and board report card status.

EMPOWERING & SUPPORTING MEMBERS & VOLUNTEERS

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

- Develop and Implement New Member Programs - Office Hours, interactive Zoom for members to brainstorm issues in their cases with Board Members and past presidents.
- Membership Resources Guide—This is an outline of membership benefits, including website resources, available in print and electronic form with interactive links.

UNDERSTANDING MEMBER RESOURCES TO INCREASE EDUCATION ACCESS

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

- Track Repeat CLE Attendance - We analyzed attendee data from TCDLA seminars over the past three years and calculated the percentage of repeat attendees for each seminar. This information will aid in planning future seminars by providing insights into preferred locations, topics, and speakers. Within the last three years, 27% of attendees returned to attend the same seminar more than once.
- Project Management - TCDLA uses project management software, to support the success of our over 40 committees. Each committee uses a template for each with up to 20 tasks reviewed biweekly to ensure members meet deadlines.

Finally, I look forward to working with David Guinn this year as he assumes presidential responsibilities in June. Under his leadership, we will launch our "Each One – Reach One" drive to grow our membership, continue developing and maintaining member resources, support Texas criminal defense attorneys, and, most importantly, stay strong and united! Always remember: the TCDLA staff is here to assist. If you need information or a service we can provide, don't hesitate to contact us. Stay strong, TCDLA! Forward march!

Congratulations! Future Indigent Defense Leaders 3.0 Graduating Class

Daniel Albert, Fernanda Benavides, Faith Castillo, Billy Chapa, Ashley De La Garza, Maisie Edwards, Randy Farrar, Hannah Frank, Barry Gormley, Amanda Gunn, Victoria Knott, Sarah May, Lauren McCollum, Cecelia Morin, Xanthe Munoz, Julio Nieto. Sean Rogers, Michael Roman, Zayne Saadi, Laura Shamsie, Tatum Simpson, Tyler Steeb, Alan Streetman, Maythe Tellez, Alexandra Tijerina, Derek Whitmire, Jason Yancey, Larissa Zavarelli

Editor's Comment

JEEP DARNELL

Thank You

I have mentioned before (I solicited members to attend) that I have served over the past year as Chair of the Criminal Defense Lawyers Project (CDLP) Committee. Despite the time away from the office and home, this past year has been an honor. I want to thank our outgoing President, John Hunter Smith for selecting me to serve in that role during his presidency. I have always taken the role of education in the practice of law very seriously. Very early in my TCDLA journey, I found the CDLP Committee and I was immediately hooked by the mission of the grant funded project. If you aren't aware, TCDLA, through the CDLP Committee, runs a grant provided by the Texas Court of Criminal Appeals to provide high-quality, legal education in the rural areas of Texas, mental health training, and legislative updates, among other ventures. Over my 6+ years of serving as a CDLP speaker, I have spoken in Longview, Edinburg, Texarkana, Lajitas, El Paso, Denton, and South Padre Island and served as a course director or co-course director in El Paso, Denton, Corpus Christi, Amarillo, San Angelo, Lajitas, Marfa, Longview, and McKinney. Now, El Paso is my home, so I won't count that one, and there is some overlap between places I've presented and places I've only served in a course director capacity, but that's still a big chunk of the State of Texas about which I have been privileged to travel and meet criminal defense practitioners. I wish I could remember the name of every person who has come up to me and picked my brain or thanked me for coming to their small corner of the world. However, each of those brothers and sisters has personified the goal of CDLP and made every trip worthwhile. Frankly, there are a lot of thankless jobs around TCDLA, but serving as a committee member and speaker of CDLP isn't one of them. If you are interested in speaking or assisting, please let Melissa Schank know. This brings me to another incredible fringe benefit of being involved in CDLP: getting to know so many members of our TCDLA staff. I have enjoyed so many meals with a great number of TCDLA staff members over the years at various TCDLA events, and that time has given me the privilege of getting to know many of them on a much more personal level. From Melissa Schank, to Mari Flores, to Grace Works, to Sonny Martinez, to Christine Abascal, to Rick Wardroup, to Kierra Preston, to Keri Steen, to Miriam Duarte,to Alicia Thomas, to Meredith Pelt, to Jessica Steen, to Jayla Davis, to Ashley Ybarra, to Lucas Seiferman, to Dajon White, to Mary Crosby, to Anastasia Chapa, they are wonderful people who help each and every one of us every day but do not get enough recognition or personal interaction from the general membership. If you get the chance to meet and speak to any of the TCDLA staff members, please do so; they are wonderful folks. Finally, the last group I would like to acknowledge from my years of serving are the prior Chairs and Vice-Chairs, Course Directors, and co-speakers. I have so many stories that I have accumulated over the years of just getting to know other people who have had the same opportunity to serve the criminal defense bar across the State. I have spent many a night up way too late enjoying adult beverages, many a meal laughing my backside off, and many a night "enjoying" the same dingy hotel as other presenters only to wear those experiences like a badge of honor coming up through the ranks. So many of the lawyers I have served with throughout the years are now preeminent lawyers across the State. Many serve in public defender offices, others work as solo practitioners, still others work as associates working their way into the practice. However, most importantly, I have become close friends with lawyers from Longview to Marfa, Corpus to Amarillo, Texarkana to Fort Stockton, and, most recently, in San Angelo. To each of you who have taught me to be a better speaker and lawyer, and to any of you who have had to endure me teaching you, thank you. I have had the time of my life and I hope to continue serving whenever someone needs an aged pinch-hitter to come off the bench. I look forward to the success that my good friends Paul Tu and Patty Tress will have over the next two years as they each get their deserved turn at the CDLP Chair position.

2024–2025 Membership Directory
Order Form/Information Update

In a continuing effort to "go green," the TCDLA board voted to to send everyone a link with the electronic version in the form of a PDF. If you need a USB, a complimentary one will be sent to you by request.

- Remember, you can access the directory online in the "Members Only" section. This is updated daily and is the most current and accurate version. You can search by city, county, and specialty category
- **Market yourself online:**
  - Add your photo to the online directory (email photo to jsteen@tcdla.com);
  - List yourself in Lawyer Locator, which is visible to the public seeking attorneys;
  - Add a bio;
  - Add partner/spouse;
  - Add website.
- Update your information online anytime by sigining into www.tcdla.com, click "Profile" or email this form to mduarte@tcdla.com, fax to 512-469-9107, or mail to 6808 Hill Meadow Drive | Austin, TX 78736 by August 31.

2024–2025 Membership Directory
Order Form/Information Update

Contact Information

Name _____ **Bar #** _____ **Cell #** _____

Firm _____

Office Address _____

City, State, Zip _____ **Email** _____

Office Phone _____ **Office Fax** _____

Spouse's/Partner's Name _____

Lawyer Locator Fields _____ _____ _____

Payment for printed directory—$10.83 (includes tax) ❑ **Check** ❑ **Credit Card**

_____

Credit Card Number **Expiration Date** **CVC**

For statistical purposes only:

Member of a local criminal defense bar association _____

Date of Birth* _____ **Sex** ____ **Ethnicity** _____ **Law School** _____

***to get a birthday coupon**

TCDLA Amicus *Strickland v. State*

Overview

Larry Gene Strickland, II pled guilty to possession of a controlled substance in exchange for six years deferred adjudication. A year later, the trial court adjudicated Mr. Strickland's guilt and sentenced him to 10 years imprisonment. The trial court also sought to cumulate Mr. Strickland's sentence with a prior case, but the Seventh Court of Appeals reversed the trial court because the cumulation order did not specifically connect Mr. Strickland to the prior case. The Court of Criminal Appeals granted the State Prosecuting Attorney's PDR on four issues concerning cumulation orders, but the State's argument mainly focused on asking the Court to overturn a century of precedent requiring that cumulation orders be specific. TCDLA filed an Amicus Brief in support of Mr. Strickland, arguing that the doctrine of stare decisis should guide the Court's decision not to overturn its precedent because doing so would have unforeseen consequences—including delaying an inmate's release date.

Scan QR to Read More!

How to Scan a QR Code:

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

Drafter: Aaron Diaz

Aaron Diaz Bio

Aaron M. Diaz is an associate attorney with the Goldstein & Orr law firm in San Antonio, Texas. Before attending law school, Aaron spent over a decade as a paralegal and received his Bachelor of Science degree in Criminal Justice from the University of Texas Pan-American, and a Master of Arts degree in Legal Studies from Texas State University. Aaron graduated from St. Mary's University School of Law, cum laude, in May of 2020.

Aaron's current practice focuses solely on juvenile and adult criminal defense, representing clients charged with misdemeanor and felony offenses. He also handles state and federal appeals and post-conviction writs of habeas corpus cases. Aaron is a current TCDLA Board member and serves on several TCDLA committees. He is also the producer of TCDLA's podcast–Sidebar with TCDLA.

TCDLA
TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

Mission Statement

TCDLA's purpose is to protect and ensure by rule of law and protect those individual rights guaranteed by the Texas and federal Constitutions in criminal cases; to resist the constant efforts which are now being made to curtail such rights; to encourage cooperation between lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education, and assistance, to promote justice and the common good.

The Federal Corner

KRISTIN KIMMELMAN

Back to Basics: Government Promises, Appeal Consultation, and One Court at a Time

Bad facts make bad law. So, do good facts make good law? Not always, but here are a few examples of extreme facts from recent Fifth Circuit cases reiterating basic principles:

1. Prosecutors should not breach plea agreements,
2. Defense attorneys should consult with clients about whether to appeal, and
3. District courts generally lose jurisdiction after a notice of appeal is filed.

Government Breach: A Promise—Made *After* Knowing About the Defendant's Bad Acts—is A Promise

A typical plea agreement involves the defendant agreeing to plead guilty and waiving a litany of rights in exchange for some benefit from the government. (Of course, if there is no benefit, consider whether pleading guilty without an agreement and keeping the right to appeal is better.) Then the agreement details various ways the defendant could breach the agreement.

But sometimes it is the government who breaches the agreement. Our job is to not let them unjustly take away the benefit of the bargain. That is best done by objecting to the breaching behavior when it occurs. In rare circumstances, the government will have to answer for a breach even absent an objection. That was the case in *United States v. Malmquist*, 92 F.4th 555 (5th Cir. 2024).

Shawn Malmquist had a drug problem. He was also facing the serious federal charge of possessing with intent to distribute 50 grams or more of methamphetamine. *After* violating several conditions of his pretrial release, and while a petition to revoke bond was pending, Malmquist entered into a plea agreement with the government in which the government promised to "recommend that [Malmquist] receive a three-level downward adjustment for acceptance of responsibility."[1]

The presentence report, though, did not recommend acceptance of responsibility, citing Malmquist's "noncompliance issues" and bond revocation. Malmquist objected to the lack of acceptance, noting that he pled guilty promptly and never contested his guilt.

At sentencing, the government argued *against* acceptance—even though it had agreed otherwise in the plea agreement. The prosecutor said the PSR "got this right." He emphasized that Malmquist failed out of his drug rehabilitation program, tested positive for meth twice, and was caught with a distributable amount of meth. All the cited behavior occurred *before* the government entered into the plea agreement promising to recommend the three levels off for acceptance.

The district court noted that "[d]efendants usually get acceptance of responsibility."[2] But the court agreed with the government that Malmquist was "not entitled to acceptance of responsibility," because after he told the magistrate judge that he would behave while on pretrial release, "he went back to at least the use of drugs."[3] The court continued to refer to the lack of acceptance before sentencing Malmquist to 151 months' imprisonment.

On appeal, the government conceded that it had clearly breached the plea agreement. But it argued that it did not aggressively argue against acceptance, so the breach did not influence the district court's decision. The Fifth Circuit disagreed. The Court found it reasonably likely that the district court would have imposed a lesser sentence but for the breach. Because the government did not rebut the presumption that the breach affected the fairness, integrity, and public reputation of the judicial proceedings, the Court vacated Malmquist's sentence and remanded for resentencing.

Now, rarely will you have a clear breach and the district court obviously being influenced by the government's argument for the opposite of what was promised. That is why an objection to the breach is so important. When

1 *Malmquist*, 92 F.4th at 559 (quoting plea agreement).

2 *Id.* at 560 (quoting sentencing transcript).

3 *Id.* (quoting sentencing transcript).

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the breach is preserved, "[t]he defendant is entitled to relief even if the Government's breach did not ultimately influence the defendant's sentence."[4] The defendant can then choose either withdrawal of his guilty plea or specific performance with resentencing before a different judge.[5]

So, read those plea agreements carefully before advising your client about whether to sign them, and then reread them again before sentencing. And if the government is making an argument contrary to what it promised, object. A promise is a promise.

Duty to Consult with Client About Appealing

Another basic, routine aspect of criminal defense comes after sentencing: consulting with the client about the right to appeal and then filing that notice of appeal. That appeal deadline is set in stone, or really in Federal Rule of Appellate Procedure 4(b): 14 days after the judgment is entered. That deadline can only be extended "[u]pon a finding of excusable neglect or good cause" for an additional 30 days.[6] And, depending on the court, that finding is not assured.[7]

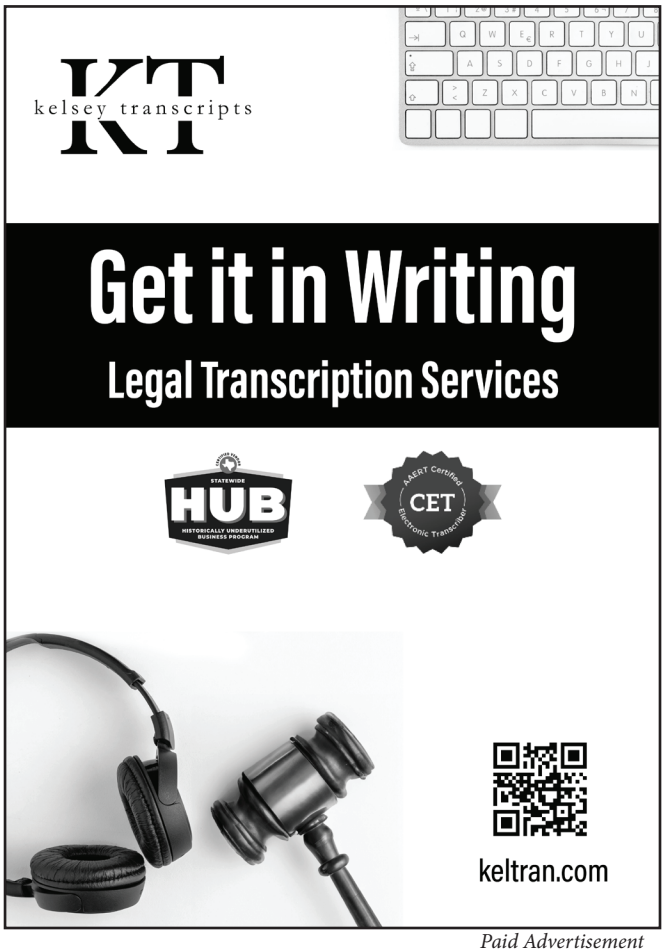
Once those 14 or 44 days expire, the only way for a defendant to get a direct appeal is through a 28 U.S.C. § 2255 petition alleging ineffective assistance of counsel for failing to file a notice of appeal. Ineffective assistance in this context includes not filing a notice of appeal when the client has asked for one and also *failing to consult* with

4 *United States v. Harper*, 643 F.3d 135, 139 (5th Cir. 2011).

5 *Id.*

6 Fed. R. App. P. 4(b)(4).

7 *See, e.g.*, *United States v. Wiley*, No. 23-60068, 2024 WL 400194, at *3 (5th Cir. Feb. 2, 2024) (per curiam) (affirming denial of motion for excusable neglect).



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the client about an appeal.[8] Counsel has a constitutionally imposed duty to consult with a client about an appeal when there is reason to think either that (1) a rational defendant would want to appeal (because there is a nonfrivolous issue), or (2) this particular defendant reasonably demonstrated that he was interested in appealing.[9]

Which brings us to *United States v. Tighe*, 91 F.4th 771 (5th Cir. 2024).

In *Tighe*, the Fifth Circuit held that trial counsel was ineffective because she failed to consult with Tighe about his appeal.[10] After sentencing, the attorney did not ask Tighe if he wanted to appeal. She relied on Tighe to contact her within 14 days if he wanted to appeal. She explained that she would have advised him about the advantages and disadvantages of an appeal but only if he had contacted her.

That was deficient performance because a rational defendant in Tighe's situation would have wanted to appeal, and he had expressed shock at the sentence imposed. There was a reasonable probability that but for counsel's failure to consult with him about an appeal, he would have timely appealed. A defendant need not demonstrate that his appeal has merit to show prejudice.

So, just a reminder to *consult* with your client about whether to appeal. Making sure he or she knows about the 14-day deadline is not enough.

One Court At A Time

Once that notice of appeal is filed, the general rule is that only the court of appeals has jurisdiction and the district court is divested of its control over those aspects of the case involved in the appeal.[11] This translates to the rule that, usually, only one court can be working on the case at a time. Again, a case with extreme facts, *Willis*, demonstrates this basic principle.

Vinson Lee Willis was sentenced in April to 120 months' imprisonment on three counts to run consecutively but "[o]nly to the extent it produces a total aggregate of 188 months."[12] Willis filed a timely notice of appeal. Then the Bureau of Prisons notified the district court that the sentence could not be executed as intended. So, the court set a July resentencing hearing, with consent of the parties, to "'reimpos[e]' the original April sentence—but 'with a little tweak.'"[13] The court then sentenced Willis to a total 180 months: 120 months on two counts running concurrently and 60 months on a third count running consecutively to the others.[14]

Before reaching the sentencing challenges, the first question for the Fifth Circuit was which sentence to review. The answer: the first sentence, because the district court did not have jurisdiction to resentence Willis after the first notice of appeal.

How can a district court correct or change a sentence after the judgment is entered? There are limited options.

Federal Rule of Criminal Procedure 35(a) allows the district court to "correct a sentence that resulted from arithmetical, technical, or other clear error" within 14 days after sentencing. Even if the court does not correct the error, this could be a way to preserve an error for appeal.[15] That worked in another extreme case, *Perkins*, where the district court did not explain its 137-*year* upward variance. The failure to explain such a variance was "egregious and clear," so "Rule 35 was an appropriate vehicle to preserve error[.]"[16]

Additionally, Federal Rule of Criminal Procedure 36 allows the court to "correct a clerical error in a judgment, order, or other part of the record" at any time. Certain

8 *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).

9 *Id. Flores-Ortega*

10 *See Strickland v. Washington*, 466 U.S. 668 (1984).

11 *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).

12 *United States v. Willis*, 76 F.4th 467, 470 (5th Cir. 2023) (quoting sentencing transcript).

13 *Id.* (quoting sentencing transcript).

14 *Id.* at 471.

15 *United States v. Perkins*, 99 F.4th 804, 810 (5th Cir. 2024), No. 22-50987, 2024 WL 1794350, at *10 (5th Cir. Apr. 25, 2024).

16 *Id.*

sentence reduction mechanisms under 18 U.S.C. § 3582 may also be available.

But while Rule 35(a), Rule 36, and § 3582 may "give the district court the *authority* to re-sentence" a defendant, they do "not give the court the *jurisdiction* to do so after" a notice of appeal is filed.[17] And the parties cannot create subject-matter jurisdiction by waiver and consent.[18] At most, the district court could provide an indicative ruling under Federal Rule of Criminal Procedure 37 of how it would rule if it had jurisdiction, and then a party can notify the appellate court under Federal Rule of Appellate Procedure 12.1.

One last note about this "one court at a time rule": the Fifth Circuit keeps jurisdiction until the mandate is issued.[19] Usually, the mandate is issued 21 days after the Court enters its opinion.[20] But sometimes the mandate does not appear… for a long time.[21] That is a signal that the Court is considering whether to take the case *en banc*, which seems to happen most when the panel decision is defense-favorable, even when the government has not moved for rehearing.[22] At least now, thanks to a recent change in the Fifth Circuit's internal operating procedure, the docket is supposed to reflect an order withholding the mandate.[23]

So, just be aware that once that notice of appeal is filed, the district court no longer has jurisdiction over the aspects of the case on appeal. The ball is in the Fifth Circuit's court until it decides to send it back to the district court.

Kristin M. Kimmelman *is a Supervisory Assistant Federal Public Defender for the Office of the Federal Public Defender of the Western District of Texas. She lives in San Antonio and practices primarily before the Fifth Circuit Court of Appeals. She can be reached at Kristin_Kimmelman@fd.org or 210-472-6700.*

17 *Willis*, 76 F.4th at 473; *but see United States v. Martin*, 596 F.3d 284, 286 (5th Cir. 2010) (holding district court had jurisdiction to reduce sentence due to a retroactive Guidelines amendment despite the pending appeal).

18 *Willis*, 76 F.4th at 473.

19 *United States v. Cook*, 592 F.2d 877, 880 (5th Cir. 1979).

20 Fed. R. App. P. 40(a)(1), 41(b).

21 *See United States v. Ramirez*, 82 F.4th 384, 386 n.3 (5th Cir. 2023) (Smith, J., dissenting from the denial of rehearing en banc).

22 *See, e.g.*, *id.*; *United States v. Campos-Ayala* 81 F.4th 460, 461 (5th Cir. 2023) (granting rehearing *en banc, sua sponte*); *United States v. Aguilar-Alonzo*, 944 F.3d 544 (5th Cir. 2019) (withdrawing August 2019 opinion and substituting opinion in December 2019, with dissent bemoaning that the government had not moved for rehearing).

23 5th Cir. R. 41, I.O.P.

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Beyond the City Limits

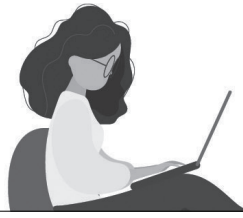
HARMONY M. SCHUERMAN

Small Town Practice: Blu Rays to 39.14

The words fsmall town practice can mean many things to many people, depending on how "small" one considers the town. Tarrant County, for example, had a population of 2.15 million in 2022. Parker County, 30 minutes west, had a population of 165,000. Wise County, 30 minutes in the other direction, had a population of 74,895 in the 2022 census. I would consider Wise and Parker small, although they may be large to you.

Like death and taxes, some things are the same regardless of the county size. Officers arrest, cases get filed, grand juries indict. The differences can be nuanced, but here are a few I've dealt with over the past 15 years.

1. JP Arraignments – *we don't need no stinking lawyers*
    a. Some smaller counties do arraignments in jail with a rotating list of non-attorney Justices of the Peace. This means the public (and you) can't participate, and oversight is non-existent. Bond amounts and conditions are often arbitrary and higher and more onerous than in larger towns. Clients who post large bonds may see themselves without a court-appointed attorney. (I've seen a judge refuse to appoint because the defendant had a pack of cigarettes in his pocket.)
2. Adult Incarceration
    a. County jails are typically smaller and may not have little things like Wi-Fi for attorneys, or big things like GED classes or rehabilitation programs for our clients. They may sell beds to other counties, or to the federal government. I've generally found they are easier to get in and out of, and if you make friends with the jail staff, they'll bend over backwards to help you.
3. Juvenile Clients
    a. Most small counties do not have separate juvenile detention facilities, so you may have to travel several counties over to meet with your younger clients. There may be only one prosecutor who handles all of these cases, and often detention hearings are held in JP Court.
4. CSCD *for you, and for you, and for you…*
    a. Community Supervision and Corrections Department ("CSCD") may be the only game in town. Need pretrial bond supervision, an interlock, an ankle monitor, or drug testing? Look no farther than your local CSCD. They also handle post-plea probation services. The benefits are often related to the relationships you can form with the officers in your probation department. On the flip side, if one of them dislikes you, or your client, it can create a hostile environment for future dealings. Watch for exclusive contracts with vendors such as those who provide interlocks, drug patches, or other monitoring devices.
5. Technology
    a. Not surprisingly, technological advances are often slow to reach rural areas, and the effect that can have on your practice may be unmanageable for those with large caseloads. Although written discovery may be delivered via email (or a portal for wealthier counties), plan to get dashcams, bodycams, and surveillance videos in less conventional ways. One county I practice in received a donation from a local bondsman



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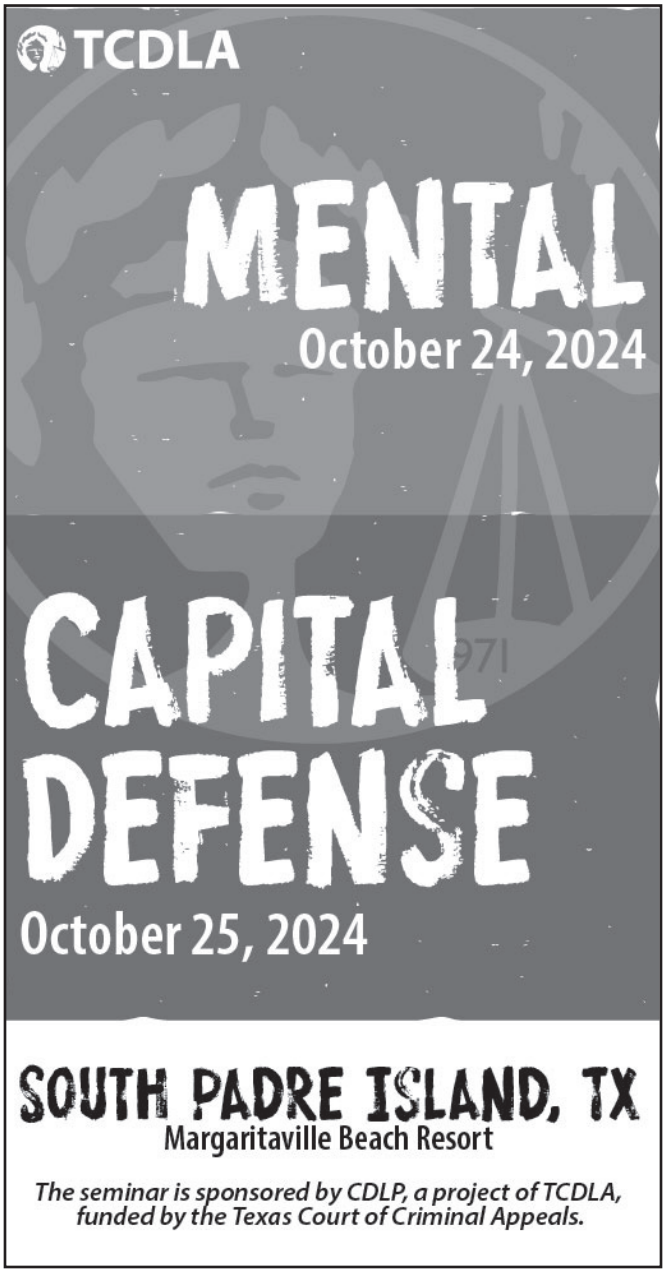
of Blu-Ray recording devices for all their squad cars. This precipitated my frantic search for not only a Blu-Ray player, but also the Blu-ray Discs we must provide the county attorney's office to replace the ones we take. Discovery is provided in that format to this day. You may also be required to login to sites like Evidence.com for discovery as well.

6. District and County Courts at Law
    a. District courts are often general jurisdiction courts, meaning they handle criminal, family and civil cases. In more sparsely populated counties, one court may serve several counties. There may be one jury week and two criminal dockets per month. As a result, expect slower resolution times for cases. Much of your negotiation may be done via email or on the phone, as there is simply no time to do so in docket. Or, you may have a prosecutor who won't negotiate until you are sitting in docket with a line behind you.
    b. Bond forfeitures are often up to the prosecutors in that court – if your client is late or you are court-appointed, expect the prosecutor to ask for a drug test. On that subject, small counties are sometimes testing grounds for new products. Companies like Intelligent Fingerprinting will provide free fingerprint drug testing devices for use in the courtroom. The upside for courts being they can test your client for drugs in the jury box. The downside for your clients is there is no mechanism for reviewing the validity of the test results and they can't be sent off for re-testing.
    c. Whereas larger district courts have district clerks in the courtroom, smaller counties do not. You may need to take your client to their office to sign sworn paperwork.
7. District and County Attorneys
    a. In addition to the technology issues mentioned above, you may find slower indictment times and the need for Tex. Code Crim. Proc. Art. 17.151 - 90-day writs. We automatically calendar 90 days out and file the writ on the 90th day. It's normal to have DA's refuse to provide discovery prior to indictment, as their understanding of Tex. Code Crim. Proc. Art. 39.14's "as soon as practicable" language is seen as discretionary. They will argue staffing issues prevent the dissemination of discovery in a timely manner. Be prepared to file Keith Hampton's writ for mandamus action with every case. Eventually it may work.
    b. Offers in smaller jurisdictions tend to be higher in my experience. I have a Possession of a Controlled Substance <1 gram (.094 grams) with an 18-year offer. Obviously, my client is enhanced, but the same case would likely resolve with a Tex. Code Crim. Proc. Art. 12.44(a) offer in another county. Unfortunately, juries in these counties often issue similarly long sentences, so there isn't much motivation for prosecutors to plea cases.
    c. Deferred Prosecution Programs may be slower to implement or may be non-existent.

Hopefully you found this interesting. I look to seeing you in our smaller counties soon!



Ethics and the Law

MITCH ADAMS

You Have the Right to Remain Silent: When Not to Ask for Discovery

This article is basic Lawyer 101 stuff, but I think it's still a worthwhile topic either as a refresher or as an introduction for new and new'ish criminal defense lawyers. The inspiration for this article came as the result of me getting a mid-trial dismissal in a possession of a controlled substance case by simply keeping my mouth shut.

The Michael Morton Act is a wonderful thing. It takes such a load off our shoulders where obtaining evidence through the discovery process is concerned. Nevertheless, we're oftentimes still filing additional discovery motions for discrete items of evidence, access to evidence, laboratory re-testing of evidence, and so on. Those of you who routinely file a discovery motion to obtain records documenting the proper maintenance of gas chromatographs in state crime labs for your DWI cases can relate. When we think that there's some item of evidence missing from what we initially get from the DA's office, we aren't shy about asking for it. Sometimes, though, when you know you're missing something, it can be in your client's best interests to keep quiet. But is that ethical?

Here's an example: you're three days out from trial in a driving while intoxicated case with a blood draw, and the assistant DA has not provided you with a copy of the lab test results (trust me, it can happen). You want to pick and get a jury seated and sworn in so that jeopardy attaches in the hope that your trial judge will exclude the lab report for not having been timely provided to you. But are you ethically required to point out the missing report to the prosecutor? The answer, obviously, is no.

Rule 4.01 of the Texas Disciplinary Rules of Professional Conduct requires that we be truthful in our statements to others. So, if the prosecutor were to ask you before trial whether you have a copy of the lab report, you'd be obliged to tell him that you do not. But the rule does not require you to volunteer the omission.

Similarly, Rule 3.03 requires us to be truthful with the tribunal, i.e., the court. Because we cannot make a false statement about a material fact to the trial judge, you would be compelled to inform the judge at a hypothetical pre-trial hearing about the missing lab report if she were to ask you whether you have received all the evidence from the DA's office and are ready to pick a jury. But, again, nothing in Rule 3.03 requires you to volunteer that you don't have something.

Prosecutors have a duty under Rule 3.09 to timely disclose *Brady* evidence to us. Article 39.14 requires them to timely provide to us whatever discovery materials they have in their possession upon receiving a request to do so. There are also additional notice obligations and deadlines that they must meet in certain cases in providing timely notice of their intent to offer outcry statements (Tex. Code Crim. Proc. Art. 38.072) and particular evidence of extraneous acts (Tex. Code Crim. Proc. Art. 38.37). These are their responsibilities, not ours, and their failure to provide proper notice could result in the exclusion of an outcry statement or evidence of an extraneous offense.

It's also worth keeping in mind that the DA's failure to timely disclose evidence no longer has to be because of a willful violation or bad faith in order for a judge to exclude it at trial. Now, the mere fact of not having timely disclosed evidence where there is a proper 39.14 request is enough to warrant its exclusion from evidence at trial, if your judge is inclined to impose that remedy, as opposed to granting a continuance. *See State v. Heath*, 642 S.W.3d 591 (Tex. App.—Waco 2022, pet. granted).

My takeaway is this: if you've filed a timely request for evidence per 39.14 (and you should do so in every case after an indictment is returned or a complaint and information is filed), and you realize that the prosecutor has not given you something that he will need to prove his case, keep it to yourself. You have the right to remain silent.

Mitch Adams *is a criminal defense lawyer in Tyler, Texas. He graduated from the University of Texas in 1994 with a B.A. in English, and from the Texas Tech School of Law in 1998. While in Lubbock, he clerked for Chappell, Lanehart & Stangl, P.C., where he caught the bug to practice criminal defense law. He is the lucky husband of Kerry, and the proud father of Sarah and Charlie.*

Operation in Texas DWI Cases

DOUGLAS HUFF & KEVIN SHENEBERGER

Member of DWI Committee

Introduction

Driving While Intoxicated[1]: the seeming simplicity of this three-word phrase in the Texas Penal Code belies a linguistic labyrinth in which prosecutors and defense attorneys clash for control. While the "intoxicated" element is aided by the statutory proofs available to the State (i.e., blood alcohol concentration of 0.08 or higher, loss of normal use of mental faculties, loss of normal use of physical faculties), no similarly succinct assistance has emerged to clarify the element of "driving". In the code, "driving" is further defined as "operating a motor vehicle in a public place", with no clarification of what "operating" entails. In 1995, the Texas Court of Criminal Appeals weighed in with its assertion in *Denton v. State*[2] that to find operation "the totality of the circumstances must demonstrate that the defendant took action to affect the functioning of his vehicle in a manner that would enable the vehicle's use";[3] however, in *Kirsch v. State*,[4] the court subsequently held that the inclusion of the same definition in a jury instruction would constitute an impermissible comment on the weight of the evidence.[5] In *Kirsch*, the court held that while the *Denton* definition was appropriate for appellate courts examining the sufficiency of the evidence, jurors should be "free to assign [the 'operate' element] any meaning which is acceptable in common parlance[6]". Thus, while courts reviewing for error as a matter of law (such a probable cause determination on a motion to suppress) are guided by the precise language of *Denton*, defining the "operating" element remains a fact-intensive battle of persuasion when placed in the hands of jurors. Further, the inquiry involves two key findings: first, a temporal connection between the alleged operation and the time of intoxication, and second, specific facts related to the alleged act of operating. Both of these findings require a case-by-case analysis of relevant facts, including witness statements, circumstantial evidence, and the actions and statements of defendants.

Temporal Connection Between Alleged Operation and Intoxication

The necessity of proving a temporal link between a defendant's driving and their intoxication is well-established in caselaw, and this proof may be established through both direct and circumstantial evidence.[7] In cases involving accidents, courts have found that specific circumstances of the accident may be sufficient to establish this connection. For example, in *Kuciemba v. State*[8] the Texas Court of Criminal Appeals found that the absence of skid marks on the roadway (indicating that the defendant did not apply his brakes before a rollover accident occurred) was sufficient evidence that the defendant was intoxicated at the time of driving, and the officer's discovery of the defendant still bleeding behind the wheel of the vehicle indicated that the accident had recently occurred.[9] Guided by *Kuciemba* and a Nebraska Supreme Court case cited in that decision,[10] the Fourteenth Court of Appeals found a sufficient temporal link based on an officer's testimony that the defendant was involved in a single-vehicle accident, the defendant admitted to driving, and no skid

1 Tex. Penal Code § 49.04.

2 911 S.W.3d 388 (Tex. Crim. App. 1995).

3 *Denton*, 911 S.W.3d at 390.

4 357 S.W.3d 645 (Tex. Crim. App. 2012).

5 *Kirsch*, 357 S.W.3d at 652 .

6 *Id.*

7 *See, e.g.*; *Kuciemba v. State*, 310 S.W.3d 460, 462 (Tex. Crim. App. 2010).

8 *Id.*

9 *Id.* at 463.

10 *State v. Blackman*, 254 Neb. 941 (1998).

marks were discovered on the road.[11] In *Robbins v. Texas*,[12] the Second Court of Appeals found the temporal link satisfied based in part on a 911 caller's description of a defendant leaving the scene of a single car accident.[13] In *Robbins*, a witness to a single-car accident called 911 and gave the dispatcher a description of a suspect who she had seen exiting the vehicle before walking down the highway's frontage road; an officer responding identified the defendant based on the description, and the defendant admitted he was the driver of the wrecked vehicle. In addition to the inference of intoxication presented by a single-vehicle accident discussed by the courts in *Scillitani* and *Kuciemba*, the court in *Robbins* further held that circumstantial evidence may support a temporal link between intoxication and driving even when the State is unable to establish "the precise time of an accident or of the defendant's driving."[14] More recently, in *Rodriguez-Portillo v. State*,[15] the First Court of Appeals found a temporal link between driving and intoxication when an officer, assisted by a canine unit, tracked and discovered a suspect in a field near a single vehicle accident over an hour after a 911 caller reported the accident and described the suspect. The court found that, in addition to facts discovered by responding officers that corroborated the 911 caller's statements, the officers did not find anyone else in the vicinity, the barefoot defendant's shoes were discovered in the vehicle, and the keys to the vehicle were in the defendant's pocket.

11 *Scillitani v. State*, 343 S.W.3d 914, 924 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

12 No. 02-20-00043-CR, 2021 Tex. App. LEXIS 8221 (Tex. App.—Fort Worth Oct. 7, 2021, pet. ref'd).

13 No. 02-20-00043-CR, 2021 Tex. App. LEXIS 8221 (Tex. App.—Fort Worth Oct. 7, 2021, pet. ref'd).

14 *Id.* at *9.

15 No. 01-22-00447-CR, 2023 Tex. App. LEXIS 6845 (Tex. App.—Houston [1st Dist.] Aug. 31, 2023, pet. ref'd).

Facts relevant to operation

In non-accident cases, the determination of the "operating" element is similarly supported by a similar combination of direct and circumstantial evidence. In *Freeman v. State*,[16] a defendant was discovered asleep at the wheel. The court found the evidence that the engine was running, the lights were on, the vehicle was in drive, and the motion of the vehicle was only halted because its wheels were resting against a curb accumulatively supported reasonable inferences that the defendant was operating her vehicle while intoxicated. In *Dornbusch v. State*,[17] the Second Court of Appeals cited nearly identical facts to determine the evidence sufficient to prove the defendant was operating his vehicle (defendant was found asleep or passed out in the back of a parking lot with the engine running, radio playing loudly, headlights on, and transmission engaged such that the vehicles movement was only prevented by its wheels touching the curb).

In *Texas Dept. of Public Safety v. Allocca*,[18] however, the Third Court of Appeals found evidence insufficient to support a probable cause finding that a defendant was operating a vehicle while intoxicated, affirming the lower court's reversal of an administrative law hearing. In *Allocca*, though the defendant was discovered sleeping in his vehicle with the engine running, the court cited several facts distinguishing it cases previously discussed: the vehicle was legally parked in a public parking space, it showed no signs of being in an accident, it was not parked in a manner indicating the driver had been intoxicated, the headlights were not activated, the driver's seat was reclined, the defendant did not have his foot on the brake, and the officer was dispatched to the scene on a "suspicious vehicle" call rather than a report of a potentially intoxicated driver. Although the facts in *Allocca* suggest that there *are* circumstances under which the "operating" element can be successfully challenged, in the more recent *State v.*

16 69 S.W.3d 374 (Tex. App.—Dallas 2002, no pet.).

17 262 S.W.3d 432 (Tex. App.—Fort Worth 2008, no pet.).

18 301 S.W.3d 364 (Tex. App.—Austin 2009, pet. filed).

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Espinosa,[19] the Texas Court of Criminal Appeals explicitly held that *Alloca* is not controlling and that the Court has not adopted its reasoning. In *Espinosa*, the defendant was discovered asleep behind the wheel of her vehicle in the middle of a moving, bumper-to-bumper, recently formed school pickup line. While declining to adopt *Alloca*'s reasoning, the Court distinguished the case from *Alloca* on several grounds: in *Alloca*, the defendant was parked in a legal parking spot, sleeping in a reclined seat, and testified that he had the car running solely for the air-conditioning; in *Espinosa*, the defendant was in a moving lane of traffic, sleeping upright, and had no explanation for why she was sleeping there. The *Alloca* decision is further distinguished as an apparent anomaly considered against *Murray v. State*,[20] in which the Texas Court of Criminal Appeals reversed a defendant's acquittal by the lower appellate court, which had found the evidence insufficient to prove that he was operating the vehicle. The defendant had been sleeping in his vehicle (parked partially on a driveway and partially on an improved shoulder) with the seat reclined, engine running, and radio on. While the lower court determined that there was no evidence as to when or whether the defendant was intoxicated at the time of driving, the Court of Criminal Appeals focused on other facts: the defendant was alone in the vehicle, no one else was in the vicinity, and no alcoholic beverages or containers were discovered in the area. Based on the officer's observations that the defendant was "very intoxicated", the defendant's admission that he'd been drinking, and the fact that no alcohol bottles or alcoholic beverages were discovered in the vicinity, the court determined that a factfinder could reasonably infer that he had operated the vehicle while intoxicated.

Practical Arguments for the Defense

We refer back to *Denton* as our guidepost, however, with recent cases such as *Alloca* and the distinguishable elements of *Espinosa*, we see that operation is becoming a topic that can and should be challenged. Long have been the days when operation was thought to include the keys in the ignition with the car is running. We don't have to have our foot on the clutch of a vehicle to prevent it from stalling, and most cars are now push button starts. Remote starting a vehicle while standing in your living room with a drink in hand is unlikely to be considered Driving While Intoxicated, whereas a sitting asleep behind the wheel of a vehicle in drive with a foot on the brake would be. As stated in *Denton*, "the totality of the circumstances must demonstrate that the defendant took action to affect the functioning of his vehicle in a manner that would enable the vehicle's use."[21] A vehicle's use is for transportation. It can be argued that,according to *Denton*, *Alloca*, and *Espinosa*, not only should the temporal connection be examined but also what, if any, actions were taken for the vehicle's *use*.

19 666 S.W.3d 659, 669 (Tex. Crim. App. 2023).

20 457 S.W.3d 446 (Tex. Crim. App. 2015).

21 *Denton v. State*, 911 S.W.2d at 390.

Conclusion

The reluctance of the Texas legislature and Courts to provide jurors with a clear and direct definition of the "operating" element of a DWI charge can frustrate defense counsel in a manner akin to another notoriously undefined standard in Texas law; the burden of proof of "Beyond a Reasonable Doubt". Contending with that burden often leads to voir dires in which the defense pontificates on the near unattainability of such a significant proof, while the State does everything it can to reduce the same to mere "common sense." In the case of the "operating" element, however, an odd realignment of argumentation occurs. When it comes to "operation," the State advocates that the slightest action—such as rolling down a vehicle's window—is sufficient to satisfy "operation," just as a defense attorney might advocate in favor of the slightest reasonable doubt; meanwhile, defense counsel emphatically counters with the State's old chestnut of "common sense." Despite the lopsided caselaw in favor of broad and circumstantial satisfaction of "operation" as a matter of law, the prescribed "common parlance" standard for the jury's determination of operation can lead to success for the defense at trial. The operating element—untethered to legalistic language—can present an opportunity to engage with the jury in a realistic and down-to-earth manner; a welcome reprieve from the technical legalese they are charged to endure. The opportunity to abandon precision, unobjected, in favor of an appeal to life experience (i.e. "We all know what "driving" means, and this ain't it!") is rare in criminal law; under the right set of facts, an otherwise unwinnable trial may be rescued by this overt ambiguity.

Douglas Huff *is a Partner and Senior Trial Attorney with Deandra Grant Law based in Dallas, Texas. He received his Juris Doctor from Saint Mary's School of Law. He currently represents individuals charged with various misdemeanors and felonies ranging from DWI, theft, assault, sexual assault, murder, and others. He can be reached at Douglas@ DefenseIsReady.com or 972-943-8500.*

Kevin Sheneberger *is an associate attorney with Deandra Grant Law. He received his Juris Doctorate from SMU Dedman School of Law. He graduated as a member of the Pro-Bono Honor Roll for his work with Legal Aid of Northwest Texas, and was also inducted into the Order of the Barristers for his excellence in oral advocacy. He currently represents individuals charged with DWI and intoxication related crimes, possession, burglary, sexual assault, and other crimes. He can be reached at kevin@defenseisready.com or (972)943-8500.*

Boundaries with Clients

STEPHANIE CANERO

Member of Mental Health Committee

Picture this: you are trying to review discovery or meet with clients and your phone rings, stops, then starts again. You already know who it is, you've spoken to this client almost every day and nothing seems to help and you're at your wits end. This is an all-too-common scenario where many of us will feel the immediate anxiety at the sound of our phones. Attorneys, both newly licensed and with decades of experience, can find themselves in these predicaments. These seemingly small day-to-day moments can have a long-lasting impact on an attorney's business as well as their mental health if they are not addressed. So, what can you do? Difficult clients will always exist, but there are a few ways to help keep them – and you – in check.

1. Clear Communication

Simple enough, right? For those in private practice, there's often a section in your retainer that outlines attorney-client expectations. In addition to the existing caveats, make sure to cover office hours, work hours and preferred communication (i.e. email, text, office phone, cell phone). This allows you to outline clearly and concisely what clients can expect when trying to reach you. It should also include a reasonable timeline in which they can expect to hear back from you. Giving a timeline often goes a long way in calming an anxious client. Work hours should address if they can reach you after office hours and provide a cut-off time for communication. For those who are in indigent defense – public defenders or private defenders – who don't choose their clients nor enter into a contract with clients, the same can be relayed at the first client meeting.

2. Get Comfortable Saying "NO"

It can be tempting to make an exception for a client, but keep in mind that the phrase, "Give an inch. Take a mile," is well-known for a reason. Consistency with the boundaries you set at the beginning of representation helps in the long run because it sets expectations. "No" is a full sentence. A client that expects updates every day or for an answer to every call regardless as to the time of day is impossible. If a client starts to cross boundaries, you are always entitled to point it out in a professional manner. Client work is how we make a living, but there must be a cost-benefit analysis. For example, is working this client's case going to impact your day-to-day mental health so adversely that the benefit of withdrawing from the case will far outweigh staying on? Sometimes you need to walk away, and that's okay.

3. Take Time for Your Mental Health

Sometimes taking time for yourself looks like picking up a hobby or going to the gym. If it diversifies your time in a helpful and healthy way, it's worth a try. Finding something you enjoy outside of work can take some trial and error, but the key is finding something that improves your well-being. Make sure you are not bottling up any frustrations or worries. Whether it's counseling, a friend, or colleague, find a person you can trust to vent to when needed. In our profession our baseline tends to lean towards stressed. What does your body do when it's stressed? It releases cortisol. That's the chemical that helps your body prep for fight-or-flight. It's useful for dangerous situations or the occasional stressful moment, but when your body stays in fight-or-flight over long periods of time you can develop anxiety or, worst case scenario, heart disease. Take advantage of the resources made available to you by the State Bar or your local mental health authority. If you prefer more anonymity, there are various online platforms with licensed professionals that can help.

The 'New' Rule Against Shackling Youth in Court

LAUREN MCCOLLUM

Member of Juvenile Justice Committee

On June 1, 2023, Texas Rule of Judicial Administration 17 (hereinafter referred to as "Rule 17") became effective. Rule 17 requires:

(a) Restraints, such as handcuffs, chains, irons, and other similar items, must not be used on a child during a juvenile court proceeding unless the court determines that the use of restraints is necessary because:

(1) the child presents a substantial risk of:

(A) inflicting physical harm on the child or another person;

or

(B) flight from the courtroom; or

(2) of any other factor relevant to assessing risk in the court proceeding.

(b) A party may request an opportunity to be heard on the necessity of restraints. The requesting party must provide reasonable notice to all parties. The court may hold a hearing to determine whether the use of restraints is necessary and must, when reasonable, make that determination before the child enters the courtroom and appears before the court.

(c) If the court determines that the use of restraints is necessary, the court must:

(1) order the least restrictive type of restraint necessary to prevent physical harm or flight; and

(2) make findings of fact in support of the determination on the record or in a written order.

(d) This rule does not apply to the use of restraints when transporting the child to or from the courtroom.

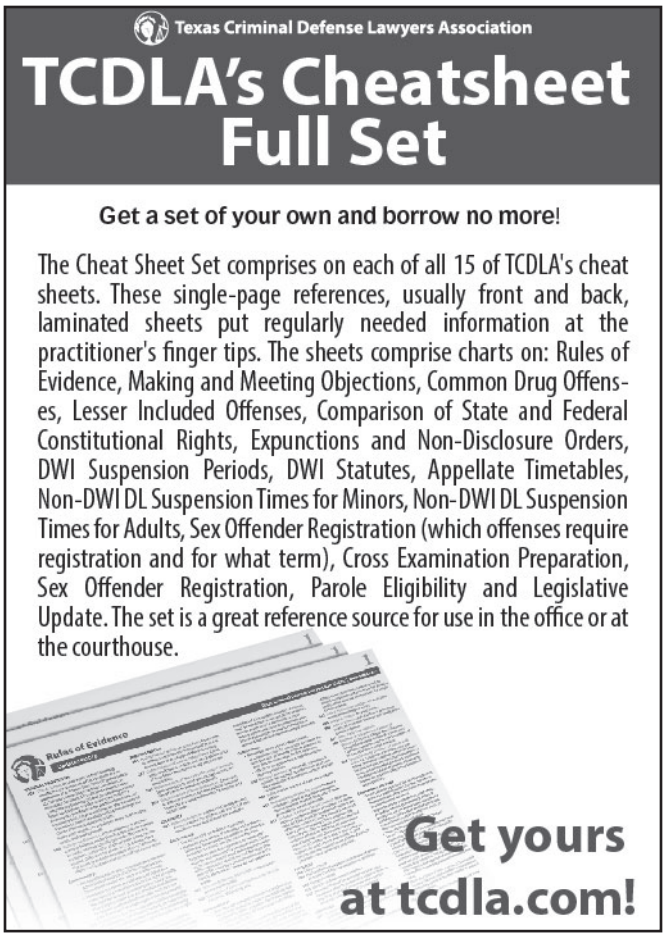
Tex. R. Jud. Admin. 17

Rule 17 provides juvenile respondents the opportunity to appear in court without restraints. It also provides the potential for a preliminary hearing on the issue of restraints prior to a juvenile entering the courtroom. Understanding the legislative history behind the rule, and ways to rebut the State's assertions, can be helpful when objecting to a client being shackled in the courtroom. This becomes especially important when you keep in mind that your client could potentially be as young as ten years old.

Rule 17 comes in response to Texas Government Code Section 22.0135, enacted in 2019, asking the Texas Supreme Court for guidance and uniformity. State Representative Gene Wu introduced House Bill 2737 (what ultimately became Tex. Gov't Code Section 22.0135) with one of the goals being to seek guidance from the Court on how to handle several issues, including the restraint of juveniles in court. Rep. Wu testified that the goal of the bill was "…so there's no widespread disparity

based on where you live."[1] Prior to the enactment of Rule 17, there was no uniform approach to how juvenile respondents appeared in Texas courts. Some counties had written policies that applied a presumption that any form of physical restraint was against courtroom policy, while others indiscriminately shackled all respondents. From conversations recorded in a 2020 document entitled "Restraints in Juvenile Court Discussion"– one thing was clear: nothing was clear when it came to the issue of how counties were dealing with balancing the interests of court security, safety, Constitutional rights, and the growing number of studies about restraining children.[2] However, even with the enactment of Rule 17, there is still disparity. News of this rule has been slow to spread and even slower to be implemented in rural areas. The implementation of the rule seems to garnish more pushback from the State and the bench in areas where resources for bailiffs and other security measures are unavailable. Furthermore, the rule and its application are hindered by the wide array of approaches to where juvenile court proceedings are held. In larger counties where there are dedicated juvenile courthouses with attached detention centers, security would arguably present less of a challenge to the movement away from juvenile restraints in court. In rural jurisdictions where juveniles are in modified courtrooms, temporary county buildings, or smaller juvenile courtrooms with potential gaps in security – there is arguably more potential for the Judge to find (and as counsel for the juvenile to anticipate and argue against) security considerations outweigh the juvenile's interest in appearing in court unshackled.

In arguing for a client to be unshackled during a hearing it can be helpful to point out the goal of the juvenile justice system. Dicta from seminal cases and policy statements on shackling youth offer insight into these stated goals and the potential harm that accompanies the practice. "The objectives are to provide measures of *guidance and rehabilitation* for the child and protection for society, not to fix criminal responsibility, guilt and punishment." *Kent v. United States*, 383 U.S. 541, 554 (1966) (emphasis added); *see also* Tex. Fam. Code Sec. 51.01. Therefore, it can be argued that it is counterintuitive to the goals of the juvenile justice system to shackle a child. "The nature of shackling necessarily signals that child is dangerous, thereby increasing the likelihood that the child will be treated as dangerous by others."[3]



In the National Center for Mental Health and Juvenile Justice ("NCMHJJ") Policy statement on Indiscriminate Shackling of Juveniles in Court released in 2015, the NCMHJJ cites studies indicating that the indiscriminate shackling of youth in the system could generate further negative feelings that the youth then might seek to deal with via substance abuse or other harmful behaviors, again countervailing the goals of the juvenile system. The Association of Prosecuting Attorneys released a statement of principles regarding the restraint of juveniles in court stating that children are impressionable and that the indiscriminate restraint of them could cause "…negative perception of the criminal justice system, including decreasing their level of cooperation and engagement with courtroom stakeholders."[4] They further go on to encourage a presumption against courtroom shackling.

Current studies show that shackling youth in hearings can aggravate problems related to trauma and self-image

1 Judicial Guidance Related to Child Protective Services Cases and Juvenile Cases Hearing Before the Judiciary and Civil Jurisprudence Committee, 86th Leg. H.B. 2737 (R) (2019) (Testimony of Rep. Wu).

2 Texas Children's Commission (Mar. 2021) "Restraints in Juvenile Court Discussion," https://www.texaschildrenscommission.gov/media/1gqkx4wm/restraints-in-juvenile-court-discussion-final-online.pdf.

3 American Bar Association, Criminal Justice Section, (2015) Report to the House of Delegates, http://njdc.info/wp-content/uploads/2014/09/ABA-Report-Resolution2015-107A-Revised-Approved.pdf.

4 Association of Prosecuting Attorneys, (2015) "Statement of Principles," https://www.defendyouthrights.org/wp-content/uploads/2015/12/Association-of-Prosecuting-Attorneys_Policy-Statement-on-Juvenile-Shackling.pdf.

that further contribute to criminogenic thinking and adverse childhood experiences. Children who appear in juvenile court are vulnerable and often have experience with trauma prior to their entrance into the juvenile justice system.[5] The objection to the indiscriminate shackling of youth is also rooted in Constitutional rights such as due process, the presumption of innocence and even the ability to be able to assist counsel. See *Deck v. Missouri*, 544 U.S. 622, 624 (2005). Protecting a juvenile's rights can begin as early as before the initial detention hearing and can start with a simple request that they are able to appear in court without restraints. The rule creates a presumption against shackling unless there is a specific finding based on proof provided to the contrary. Keep in mind that the rule also mandates that if restraints are deemed necessary, then findings of fact based on the determination are required on the record or in a written order. Further, even if restraints are determined to be necessary, the court must only order the least restrictive type to prevent harm or flight. As a practitioner, be ready to have information that supports your position, but also know what information the State might rely upon in arguing for their stance. Object to pre-mature considerations of detention matters and clarify that standards for a juvenile appearing in court unrestrained and that those for detention are different. *See Tex. Fam. Code §54.01.*

I encourage all defenders involved in the juvenile justice system to familiarize themselves with Rule 17 and be ready to object to the indiscriminate restraint of juvenile respondents.

Lauren McCollum *is a public defender in San Angelo, Texas where she was born and raised. In San Angelo, she defends a variety of clients and cases, but her passion remains in juvenile law. Lauren attended St. Mary's University School of Law. She is a TCDLA board member serving on the Juvenile Law and Law Student Committees. She is also a Member of FIDL 3.0. She has an amazing fiancé named Bayley and two spoiled dogs. She enjoys traveling in her spare time. Lauren can be reached at Lmccollum@cvpdo.org.*

5 *See* Dierkhising, C. et al., Trauma histories among justice-involved youth: findings from the National Child Traumatic Stress Network, European Journal of Psychotraumatology. Vol. 4 (2013), http://www.ejpt.net/index.php/ejpt/article/view/20274 (concluding that up to 90% report exposure to at least one traumatic event in their young lives).

TCDLA MEMBERSHIP Spotlight

Amanda Hernandez

TCDLA Member Since: 2013

Favorite Seminar: South Padre

Law School: St. Mary's University School of Law in San Antonio

Length of Practice: 8 Years

Favorite TV Show: I have a lot of favorite TV shows, but my stepdaughter and I really enjoyed binge watching Stranger Things this year

Advice for people to get more involved: Feel free to seek help or advice, join committees of interest, attend the South Padre CLE, and discuss potential fits with TCDLA staff or board members if uncertain.

Primary Cases: all types of criminal defense matters but we concentrate on federal and sexual assault cases.

Free Time Activities: I spend time with family, visit friends, have dinners with girlfriends, enjoy the ranch, cuddle with dogs, play volleyball, travel, and appreciate life daily!

Favorite Food: Macaroni and cheese (don't hate).

Most Successful Case and Why: Despite challenges, in a recent indecency with a child case in Val Verde County, Don Flanary and I successfully defended a USBP agent accused by his stepdaughter. After thorough preparation, we effectively presented our client's story, especially through my cross of the CW, leading to a not guilty verdict and allowing him to regain his job and retirement.

Way to Relax: I enjoy family and friend time, walking or using my Peloton, watching thrillers, reading fiction, baking, and listening to audiobooks or podcasts.

Place to Travel: I have always wanted to see a beach with black sand or the Northern Lights.

Dream Car: One that I never have to fill with gas or charge

Life Motto: Philippians 4:13

Advice you wish you knew starting out as a lawyer: It's common to experience "imposter syndrome" moments where we doubt ourselves, but if you're putting in genuine effort and preparing your cases diligently, know that you are capable and supported by your TCDLA family.

The Texas Compassionate Use Program for Medical Marijuana

MARY BETH HARRELL

Texas' Compassionate Use Program ("CUP") allows for certain people with qualifying medical and mental health issues to carry a card and be permitted to use otherwise illegal amounts of THC products. But what happens when our clients get arrested prior for possession and possession related offenses before being enrolled?

This article will take you through the CUP and discuss how to assist your client in attaining the card they need – and how to persuade the prosecutor or the court your client needs to use THC going forward and why they deserve mercy after the fact.

Let's go through a common scenario:

Mr. Jones is stopped for speeding. Officer Smith approaches his vehicle and tells him that he smells weed and asks when Jones last smoked. During the ensuing conversation, Mr. Jones admits to smoking and hands a baggie of grass or a blunt to the officer. Mr. Jones is arrested for a misdemeanor marijuana possession. The subsequent search of Mr. Jones' vehicle yields a handgun. This is Texas and everyone has the right to carry the Glock of their choice unless they're otherwise engaged in a criminal offense. So now Mr. Jones is charged with unlawful carrying of a weapon (UCW) and let's further suppose Mr. Jones is already on probation and will likely face a revocation.

Jones is not a drug dealer, not a thug, and not a bad guy. He may be a veteran. Jones doesn't want to take a conviction because he's not a drug addict and doesn't want to lose his gun rights.

Many of us have clients who may be military veterans suffering from PTSD, anxiety or depression. They might be prescribed medication but hate the side effects. The medication may cause erectile dysfunction, fatigue, mental confusion, or impair the ability to focus. People might prefer using marijuana which eases their symptoms without the side effects.

But there is more to Mr. Jones' story and it's important to get the rest of it.

- Does Jones have a mental health diagnosis?
- Does he have a medical diagnosis?
- Does he have an active addiction or is he in recovery?
- What are his current relationships?
- Did he suffer past personal trauma?
- Did he actively serve in the military?

I find it is important to have this type of information so I can advise the client in building a mitigation packet that can lead to a dismissal, successful plea agreement, or to be used in open sentencing.

Applying the CUP to Jones' Case

We know that marijuana has proven benefits for treating certain medical conditions and symptoms. The

Program, passed in 2015, gives patients lawful access to low-THC edibles. When the Act first passed, epilepsy was the only eligible condition, but the Act expanded in 2019 and 2021 to add more. Conditions now eligible under the CUP include:

- Epilepsy
- Seizure disorders
- Multiple sclerosis
- Spasticity
- Amyotrophic lateral sclerosis
- Autism
- Cancer
- Post-traumatic stress disorder
- Incurable neurodegenerative diseases

What if the client does not suffer from any of those conditions? **Apply anyway**. I have clients with other conditions who still qualify for the compassionate use program.

The client is eligible if they are:

- A permanent resident of Texas
- Have been diagnosed with any of the above conditions
- The physician believes medical use of low-THC cannabis will provide benefits

If your client is under 18, they may require a legal guardian to participate in the Program. The majority of this process can be done online.

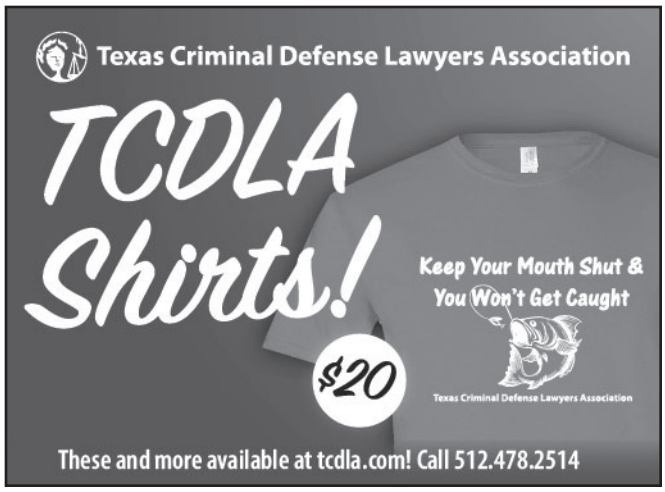
Going forward the card will excuse failed UAs for THC. If their bond conditions require random UAs then, again, a lab result positive for THC will not land them in trouble.

If the client does not have a diagnosis, I might make a lay decision that the client could benefit from the proper medical evaluation and advise them to obtain it. Most of us have developed skills to spot potential mental health issues though we're not professionals in that area. Be on the lookout with your clients in these instances.

Sometimes the client's insurance will pay for the evaluation. If they're military veterans, then they can apply to the Veterans Administration for mental health evaluation and treatment. If not, we refer them to a variety of sources such as MHMR or Bluebonnet Trails for the evaluation.

Applying to the program is easy and I have yet to have a client's application rejected or denied.

I will present the mitigation packet including the compassionate use card to the prosecutor and, if the client does not have much of a criminal history, I can usually negotiate a dismissal for the weed, and reduction to



Class C deferred for the UCW with a weapon forfeiture. Depending on the client and the prosecutor, I might get both dismissed, but the weapon will be forfeited. You must give a little quid for the quo.

Applying what we know to Jone's case, then we would apply for the card and present it to the prosecutor so that we can can argue probation should be reinstated and the violations excused.

Particulars about the CUP and Applying

Note: the Department of Defense prohibits the use of any marijuana-related substances, including CBD, hemp, and medical marijuana. As such, all active duty members of the U.S. Armed Forces are prohibited from participating in CUP, even if they are otherwise qualified. Veterans, however, can participate in the program.

Medical patients must utilize one of three dispensaries here in Texas. The client cannot grow his own or buy it from a friend:

- Fluent (formerly Cansortium Texas)
  info@fluenttx.com
  https://texas.getfluent.com/
- Compassionate Cultivation
  info@texasoriginal.com
  https://texasoriginal.com/
- Goodblend (Surterra Texas LLC, d/b/a goodblend)
  SupportTX@goodblend.com
  https://tx.goodblend.com/support/

These dispensaries can fill the prescription either in-person or online, and have the low-THC product delivered to your home. It's also important to note that CUP will not fill prescriptions from other states.

Smoking is excluded from medical use. Texas' low-THC products include edibles and drops. Texas does not recognize or accept medical marijuana cards from any other state. You can legally carry a handgun with a Texas medical marijuana card in Texas. Per the Texas Department of Public Safety:

A patient's participation in CUP does not, in itself, disqualify the individual from obtaining or maintaining a License to Carry (LTC). Notwithstanding that certain medical marijuana programs have been determined by the FBI to disqualify an individual from possessing firearms, the department does not believe this determination applies to Texas' CUP.

However, the individual's underlying condition that is the basis for participation in CUP may under certain circumstances be disqualifying. If the medical condition potentially affects the individual's ability to exercise sound judgment, the department may refer the matter to the Medical Advisory Board (DSHS) for their review and recommendation. Should the Board find the individual "incapable of exercising sound judgment with respect to the proper use and storage of a handgun," the Department would deny an application or revoke a current LTC.

When applying for the program, ensure you have a government-issued photo ID (like a driver's license), a passport-sized photo, proof of residency in Texas, and your signed Physician Certification Form.

The client must keep their registration card with them at all times and always carry their product in the labeled container it came in from the dispensary.

It's important to keep in mind that Texas's CUP is much more limited than medical marijuana programs in many other states. Patients should work closely with their healthcare providers to understand whether they qualify and whether low-THC cannabis products might be a suitable treatment option for their specific medical conditions.

Your client can start by applying online at:

Website: https://docmj.com/states/texas/

Hit the button "Book an Appointment"

It will then ask you to select an office location – select "Texas"

You will then select a payment option.

You will then select a provider.

You then select an available appointment date and time for a tele-visit that can be done from the comfort of your home with a smartphone, tablet or computer.

Mary Beth Harrell *has practiced as a criminal defense lawyer for 25 years. Her office is located in Killeen, Texas. She practices in Bell and Coryell County, Federal Court and US Magistrate Court on Ft. Cavazos.*

Email: Harrell@HarrellLawTexas.com
Phone: 254-680-4655
Website: https://marybethharrell.com/

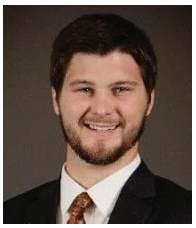
Texas Criminal Defense Lawyers Association

Board of Directors & Officers Nominees of 2024-2025

Swearing in June 15, 2024

Welcome, New Board Members!

Anne Burnham
Houston



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Kerrville

Aaron Diaz
San Antonio

Ryan Kreck
McKinney

Addy Miró
Austin

Oliver Neel
Fredericksburg

Annie Scott
Houston

Monique Sparks
Houston

Rebecca Spencer Tavitas
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Gatesville

Jolissa Jones
Houston

Rebekah Perlstein
Addison

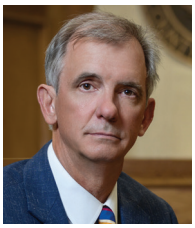
Sara Smitherman
Houston

Amanda Webb
Conroe

Theodore Wenske
Abilene

2024 - 2025

TCDLA Officers



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President | Lubbock

Nicole DeBorde Hochglaube
President Elect | Houston

Clay Steadman
1st Vice President | Kerrville

Sarah Roland
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Lance Evans
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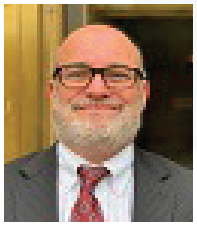

Adam Kobs
Secretary | San Antonio

Jeep Darnell
Voice for the Defense Editor | El Paso

Appointments CDLP

Paul Tu
CDLP Chair | Richmond

Patty Tress
**CDLP Vice Chair* | Denton

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April 16, 2024 - May 15, 2024

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Daniel Gordon - Cedar Park
Endorsed by Gene Anthes

Harper Haught - Abilene
Endorsed by Ted Wenske

Donald Wood - Denison
Endorsed by Bill Kennedy

Billy Morian - Houston
Endorsed by Matthew Morian

Holly Willis - El Campo
Endorsed by Ken D. Lipscombe

Crystal Adams - Pearland
Endorsed by Ricardo Gonzalez

Brian Durst - Rockwall

Zachary Miles - Victoria
Endorsed by Brent Dornburg

Antwone Cobbin - Lancaster
Endorsed by Daniel Barnes

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Christina Rodriguez - Houston
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Texas Sex Offender Registration

SEAN KEANE-DAWES

Member of the TCDLA Board

So, you finally worked your way up to take court appointments on the first degree wheel in your county. After a few high level drug offenses, you get a sex offense case in your email. You work the case and get a good offer. You now have to explain the requirements of sex offender registration, and possible deregistration under Chapter 62. The aim of this paper is to succinctly explain what you need to advise your client prior to him or her taking that plea.

WHEN IS SOMEONE REQUIRED TO REGISTER AS A SEX OFFENDER?

Anyone who has a reportable sex offense conviction, deferred adjudication, or juvenile adjudication, after September 1, 1970.

WHAT OFFENSES WOULD REQUIRE A DUTY TO REGISTER?

Offenses under penal codes:

20.02, 20.03, 20.04:
Unlawful Restraint, Kidnapping, or Aggravated Kidnapping, and the judge made an affirmative finding that the victim or intended victim was younger than 17 years of age;

20.04 (a) (4):
Aggravated Kidnapping with intent to violate or abuse the victim sexually;

20A.02 (3), (4), (7), or (8):
Trafficking of Persons for offenses committed on or after September 1, 2011;

20A.03:
Continuous Trafficking of Persons if based on conduct that constitutes an offense under TPC 20A.02 (3), (4), (7) or (8);

21.02:
Continuous Sexual Abuse of Young Child or 20.04(a)(4);

21.08:
Indecent Exposure (second violation, but only if the second violation did not result in deferred adjudications);

21.09:
Bestiality;

21.11:
Indecency with a Child;

22.011:
Sexual Assault;

22.021:
Aggravated Sexual Assault;

25.02:
Prohibited Sexual Conduct;

30.02 (d):
Burglary of a habitation with intent to commit a felony per TPC 20.04 (a)(4), 21.02, 21.09, 21.11, 22.011, 22.021, 25.02 and 33.021 (Online Solicitation of a Minor)..

33.021:

43.02(c-1)(2):
Prostitution, if solicitation of a person under 18years of age for offenses committed on or after September 1, 2019;

15.43.02 (c- 1)(3):
Prostitution, if solicitation of a person under 18 years of age;

43.021(b)(2):
Solicitation of Prostitution, if solicitation of a person under 18 years of age, for offenses committed on or

after September 1, 2021.

A reportable conviction also includes the following:

- An attempt, conspiracy or solicitation to commit an offense for any of the aforementioned offenses, except indecent exposure per TPC 21.08.
- A juvenile adjudication for delinquent conduct for the offenses named above is a reportable conviction.
- A conviction under the laws of another state, foreign country, federal law or military, is also a reportable conviction.

WHEN IS AN OFFENDER WITH A REPORTABLE CONVICTION REQUIRED TO REGISTER?

Once it is determined that an offender is statutorily required to register as a sex offender, the parole officer or designee must enter the statutorily mandated Special Condition "M" (sex offender registration) into the Offender Information Management System (OIMS). Once released from a jail or facility, the convicted person has to report to local law enforcement, and provide proof of identity and residence, within 7 days after release.

WHERE DOES THE OFFENDER NEED TO REGISTER?

If the convicted individual lives within the city limits, he is required to register with the local police department. If he resides outside of city limits, then registration is with the Sheriff's department. If another location is designated by local mandate, then it would be at that location.

WHAT IS THE FREQUENCY OF REGISTRATION?

This depends on the nature and the frequency of the convictions. If a convicted person has one or more sexually violent convictions, then he has to report once every 90 days. This includes single indictments with multiple counts.

Individuals with a single sex offense conviction or deferred adjudication are required to report annually to local law enforcement.

Individuals who have been civilly committed due to convictions for sexually violent offenses are required to register once a year if they are living at the commitment center. If these individuals are living outside of the civil commitment center, they are required to register once every 30 calendar days.

Individuals with juvenile adjudications, no matter how many, have to register every year for 10 years, after being discharged from the adjudication.

WHAT ARE SEXUALLY VIOLENT OFFENSES?

The following offenses identified by the Penal Code number are considered sexually violent offenses. These are:

- 20.04(a)(4), 21.02, 21.11(a)(1), 22.011, 22.021, 30.02 (d), 43.25, and;
- Convictions under the laws of other states, foreign countries or federal law that contains similar elements as those named above.

EXPIRATION OF SEX OFFENDER REGISTRATION

Individuals with convictions or deferred adjudications for the following offenses, have to register as a sex offender for life. These are:

- Sexually violent offenses, TPC;
- 20.02, 20.03, 20.04;
- 20A.02(a)(3), (4), (7), or (8);
- 20A.03;
- 21.11(a)(2);
- 25.02 ;
- 43.05;
  - (a)(2) for offenses committed on or before August 31, 2009, and the victim was under 17 years of age at the time of the offense, or;
  - (b) Offense committed on or after September 1, 2009, and the victim was under 18 years of age at the time of the offense.
- 43.26;
- An offense under the laws of another state if the offense contains substantially similar elements to the above offenses.

10 YEAR REGISTRATION POST DISCHARGE FROM AN ADJUDICATION OR CONVICTION IS REQUIRED FOR THE FOLLOWING OFFENSES:

20.02, 20.03, 20.04:
Unlawful Restraint, Kidnapping, or Aggravated Kidnapping, and the judge made an affirmative finding that the victim or intended victim was younger than 17 years of age;

21.08:
Indecent Exposure (second conviction or thereafter);

21.09:
Bestiality;

21.11 (a) (2):
Indecency with a Child by Exposure;

33.021:
Online Solicitation of a Minor;

43.02(c-1)(2):
Prostitution, if solicitation of a person under 18 years of age for offenses committed on or after September 1, 2019;

43.02(c-1)(3):
Prostitution, if solicitation of a person under 18 years of age;

43.021(b)(2):
Solicitation of Prostitution, if solicitation of a person under18 years of age, for offenses committed on or after September 1, 2021;

43.04:
Aggravated Promotion of Prostitution, for offenses committed on or after September 1, 2019;

43.05(a)(1):
Compelling Prostitution;

Adjudication of delinquent conduct or convicted when the offender was a juvenile;

Attempt, Conspiracy, or Solicitation, as defined by Chapter 15 of the Penal Code, to commit a reportable offense; and

An offense under the law of another state, a foreign country, federal law, or the Uniform Code of Military Justice if the offense contains elements that are substantially similar to the elements of one of the above offenses as determined by the DPS.

WHAT IS DEREGISTRATION?

The process of early termination of the duty to register as a sex offender is codified in Code of Criminal Procedure Chapter 62.402 and 62.403.

An individual with a single reportable adjudication or conviction may apply to the Council on Sex Offender Treatment for an individual risk assessment. That individual, after obtaining a risk assessment, can then file a motion for early termination of the duty to register as a sex offender in the convicting court of his sex offense.

VALUABLE RESOURCE:

Under 62.402, the department is required to compile a list of reportable convictions for which an individual must register, for a period that exceeds the minimum required registration period under federal law.

This list is kept on the Texas Sex Offender Deregistration website https://www.deregistertexas.com and titled: "TDPS Deregistration Eligibility Chart." A person seeking to deregister, should refer to this chart, to find out if the reportable conviction would qualify for deregistration. The department lists offenses in red, yellow, green, and orange. Offenses in red are not eligible for deregistration, while offenses in green are. Offenses in yellow are eligible for deregistration but only if registered more than five years while on deferred/parole/probation before discharge, and it is a single offense where the federal registration is less than the Texas registration requirement.

Offenses in orange are eligible for deregistration if they have been registered for more than 15 years while on deferred/parole/probation before discharge, single offense, and federal registration requirement is shorter than the Texas registration requirement.

Sean Keane-Dawes *is the Director of Attorney Development for Texas Riogrande Public Defender, and works primarily out of the Beeville, Texas office. Before this, Mr. Keane-Dawes was with Texas Riogrande Legal Aid, in the public defender division, and was the Chief of the Atascosa office before its closing in July 2023. He then moved to the TRLA Beeville office as a managing attorney until the separation of the public defender division of TRLA from the civil division. The new public defender office was renamed Texas Riogrande Public Defender and included the Operation Lonestar team. Mr. Keane-Dawes was then promoted to his current position.Prior to working with TRLA, Mr. Keane-Dawes was a solo practitioner for 18 years, practicing primarily criminal defense, and representing indigent clients.*

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Texas Criminal Defense Lawyers Association

The Power of Multiple Pathways to Recovery

LEE HOLLEY & MICHELLE SANDLIN

Americans with alcohol or other drug (AOD) problems make up a sizable amount of those who interface with the criminal justice system. While many will adjust their behavior in response to consequences, including, but not limited to legal consequences, those with addiction likely will not. For example, it is an unfortunate reality that many Americans drive after drinking alcohol regularly. Not everyone who acquires a DUI/DWI has a severe alcohol use disorder (a.k.a. "alcoholism"), but for those who do, the alcohol use disorder is likely to persist.

As of 2019, the American Society of Addiction Medicine, Inc. (ASAM), describes addiction as "a treatable, chronic medical disease involving complex interactions among brain circuits, genetics, the environment, and an individual's life experiences." ASAM goes on to state that "people with addiction use substances or engage in behaviors that become compulsive and often continue despite harmful consequences." Legal consequences are often insufficient, in and of themselves, to prompt individuals with addiction to find recovery, but may serve as opportunities in which they can receive treatment or be linked to mutual aid organizations.

While attorneys are uniquely qualified to have considerable influence and leverage with defendants, the most likely recovery pathway to be successful for an individual is the one they are most willing to engage in. For many individuals, successful recovery includes participation in a mutual aid program such as Alcoholics Anonymous (AA) or Narcotics Anonymous (NA). However, for individuals who have not found success with 12-step programs or are not willing to consider this as an option, a growing number of recovery pathways are available.

While 12-step programs can be incredibly beneficial for some, individuals unable or unwilling to explore the 12-step approach are presented with few treatment options that do not include a fair amount of 12-step programming. Not everyone who chooses to forgo the 12-step recovery route is simply "in denial" or "not in enough pain yet." Suppose we follow the idea that an individual's "bottom" is when they "stop digging," as opposed to believing that people are required to have severe legal, health, or relational consequences to be ready for help. In that case, we may save countless individuals and their families tremendous amounts of unnecessary pain and misery.

Offering people multiple pathways, as opposed to *only* 12-step programs, is one concrete way that we can increase the odds by which defendants with addiction may find recovery. The most viable pathway is the one that individuals are willing to pursue. By offering more options we can help defendants experience a degree of autonomy that might lead to them feeling more curious, motivated, and open-minded. Especially if someone is in the pre-contemplation stage of change (unable to recognize that they have a problem), any chance to meet defendants where they are and allow them to have a voice in their treatment plans may be the difference between problem recognition and ongoing, destructive denial that can be detrimental to the defendant themselves, their families, or

society at large.

While not prescriptive, exhaustive, or in any particular order, the list below illustrates a wide variety of mutual aid support groups available for those looking to address their struggles with addiction:

SMART Recovery

- Description: SMART Recovery is a science-based addiction recovery support group that focuses on self-empowerment and employs evidence-based techniques. It emphasizes cognitive-behavioral approaches and aims to help individuals manage their thoughts, behaviors, and emotions related to addiction.
- Website: https://www.smartrecovery.org/

LifeRing Secular Recovery

- Description: LifeRing Secular Recovery is a non-religious, secular support group for individuals in recovery. It emphasizes personal responsibility, peer support, and the development of a sober, positive lifestyle. LifeRing's approach is inclusive and does not rely on spiritual or religious components.
- Website: https://www.lifering.org/

Recovery Dharma

- Description: Recovery Dharma is a Buddhist-inspired approach to recovery from addiction. It combines mindfulness and meditation practices with traditional Buddhist teachings to help individuals overcome substance abuse and live meaningful, mindful lives.
- Website: https://www.recoverydharma.org/

Refuge Recovery

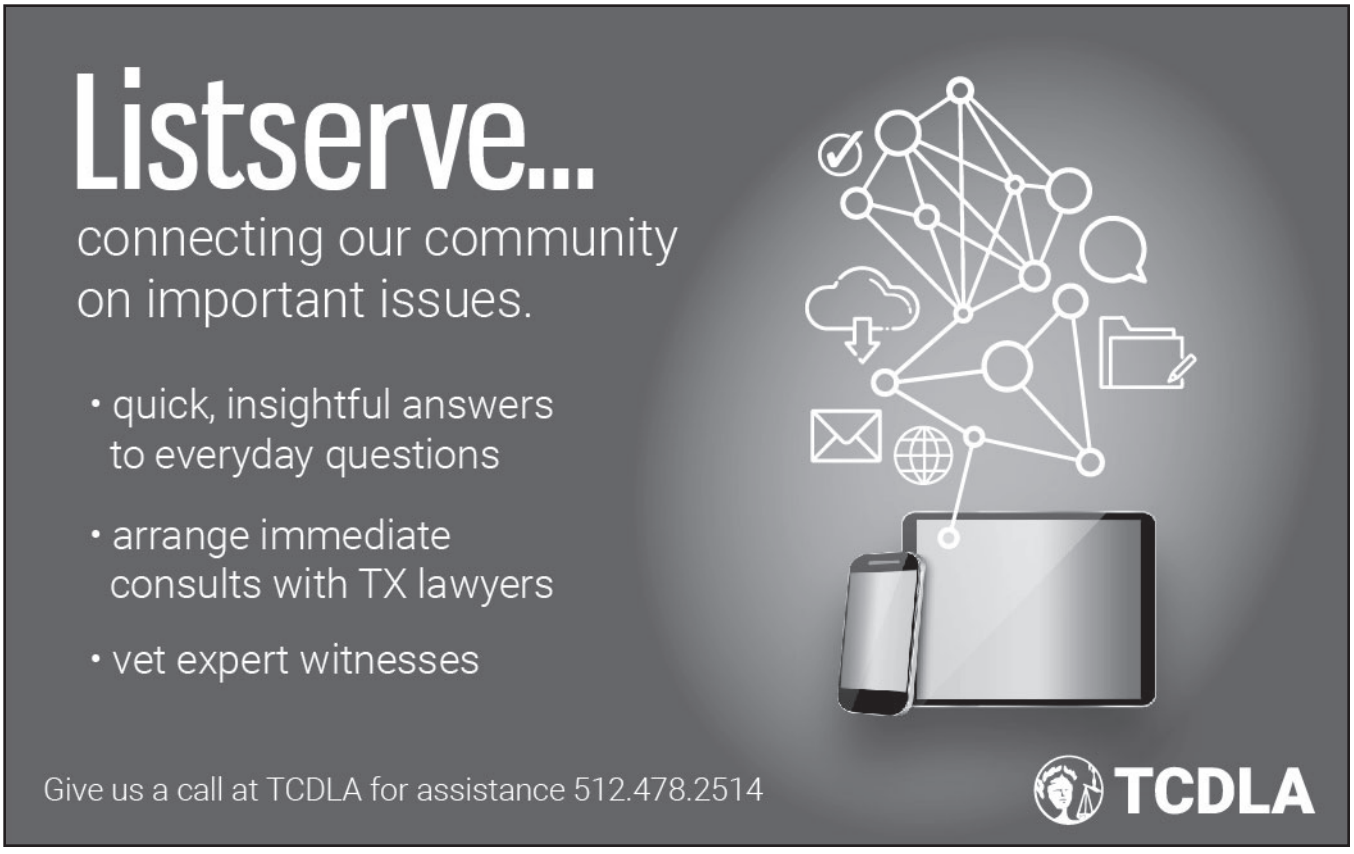
- Description: Refuge Recovery is a non-theistic, mindfulness-based recovery program that draws inspiration from Buddhist principles. It provides a supportive community for individuals seeking recovery, incorporating meditation, self-inquiry, and compassion as key elements in the healing process.
- Website: https://www.refugerecovery.org/

Women for Sobriety

- Description: Women for Sobriety is a program specifically designed to address the unique needs of women in recovery. It focuses on emotional and spiritual growth, self-help strategies, and the development of a positive and balanced lifestyle to support long-term recovery.
- Website: https://www.womenforsobriety.org/

Celebrate Recovery

- Description: Celebrate Recovery is a Christ-centered recovery program that integrates biblical principles and the teachings of Jesus Christ. It provides a supportive community for individuals dealing with a wide range of hurts, habits, and hang-ups, with a focus on spiritual growth and transformation.
- Website: https://www.celebraterecovery.com/



Our Jewish Recovery

- Description: Our Jewish Recovery is a program tailored to individuals of the Jewish faith seeking recovery from addiction. It combines Jewish values, traditions, and spiritual principles to provide a supportive environment for those on the path to sobriety.
- Website: https://www.ourjewishrecovery.com/

Millati Islami

- Description: Millati Islami is a recovery program rooted in Islamic principles, providing support for individuals seeking to overcome addiction and maintain a substance-free lifestyle. The program incorporates spiritual guidance, community support, and the teachings of Islam.
- Website: https://www.millatiislami.org/

Collegiate Recovery Programs

- Description: Collegiate Recovery Programs / Communities (CRPs / CRCs) are university-based support programs designed to help students in recovery from substance use disorders. These programs offer a supportive community, counseling services, and resources to aid students in maintaining their recovery while pursuing their academic goals.
- Website: https://www.collegiaterecovery.org/

Again, the writers do not endorse or necessarily recommend any of these particular recovery organizations. There are pros and cons to any organization, and we intend to demonstrate that there is a wide variety of mutual aid support groups available that defendants may participate in. Each defendant should be encouraged to explore recovery support organizations to find the one that they feel most comfortable in, relate to most, and are willing to engage in.

Given the wide variation that can occur from group to group, even within the same organization, it is recommended that defendants attend at least three meetings from any particular organization before deciding whether they want to attend on an ongoing basis. Just as one 12-step meeting may differ considerably in number of attendants, engagement level, tone, and attendee demographics, non-12-step organizations are the same.

Most importantly, defendants should be encouraged to participate in meetings that are "solution-oriented", with an emphasis on accountability, introspection, and behavior change. Some 12-step meetings could be described as "dumping grounds", where members simply voice grievances, difficulties, and frustrations with their alcohol or other drug problems or life circumstances. In the same way, groups in alternative organizations that spend inordinate amounts of time complaining about, criticizing, or decrying 12-step recovery would likely be counterproductive for defendants to attend, no matter how strongly they agree with these sentiments.

Offering defendants a choice and an opportunity to explore multiple options can greatly increase the odds that someone will engage in and reap the benefits from mutual aid recovery programs. Given the proliferation of online mutual aid meetings, spurred on by the COVID-19 pandemic and subsequent lockdowns, individuals are now able to access support services that would not otherwise be available if they were limited to in-person meetings.

Lee Holley *is the owner of Holley Counseling, PLLC and therapist with 9 years of work experience in the field of mental health and addiction treatment, working in both inpatient and outpatient settings with adolescents and adults. Credentialed as a Licensed Clinical Social Worker (LCSW), Licensed Chemical Dependency Counselor (LCDC), Peer Support Supervisor (PSS), and Recovery Support Peer Specialist (RSPS), Lee is equipped to work with a wide variety of Texans with alcohol or other drug problems. Lee does not specialize in working with justice-involved individuals, but works extensively those with alcohol or other drug problems, even if their immediate goal isn't total abstinence (also known as harm reduction psychotherapy.) Lee is passionate about working with individuals who have been underserved by America's dominant, 12-step-only addiction treatment approach. At the same time, Lee has a profound appreciation for 12-step recovery programs and feels passionate about helping members of those organizations find a more integrated way of life. For more information on his practice, see www.holley-counseling.com.*

Michelle M Sandlin, *Therapeutic Consultant & Mitigation Specialist, is the Founder of Holistic Path Management LLC. Working in the behavioral healthcare industry for over 15+ years, she has acquired extensive knowledge regarding substance use disorders, alcohol use disorders, and mental health disorders. Michelle identifies the most effective therapeutic options for individuals and families by navigating the behavioral healthcare system and matching patients with the most beneficial level of care, treatment programs, psychiatric hospitals, therapy programs, and recovery support services. Michelle has an in-depth knowledge of the many programs, facilities, and services available to assist patients and families nationwide. She works closely with the attorney and learns the patient's challenges and the overall family dynamics to determine which services will provide the best outcomes for the individual and the family. Michelle also provides expert witness testimony. For a free consultation or to review a case, please contact Michelle M Sandlin at (806) 773-1882 or email her at michelle@holisticpathmanagement.com.*

Significant Decisions Report

KYLE THERRIAN

Does the law exist anymore? I think we are on a slow march from professionals to something more akin to lobbyists. Stop me if any of the following sentences are wrong. Powerful people get special treatment. Judges who don't give special treatment to powerful people don't get to be judges anymore. Prosecutors bury the misconduct of their political allies, and the hurdles to holding them accountable for their own are tantamount to granting them impunity to do so. Gideon and Ake are promises made with one hand crossing fingers and the other shoveling impossible caseloads onto the backs of defense lawyers with the Strickland wink that their forced mishandling of cases will almost always be forgiven.

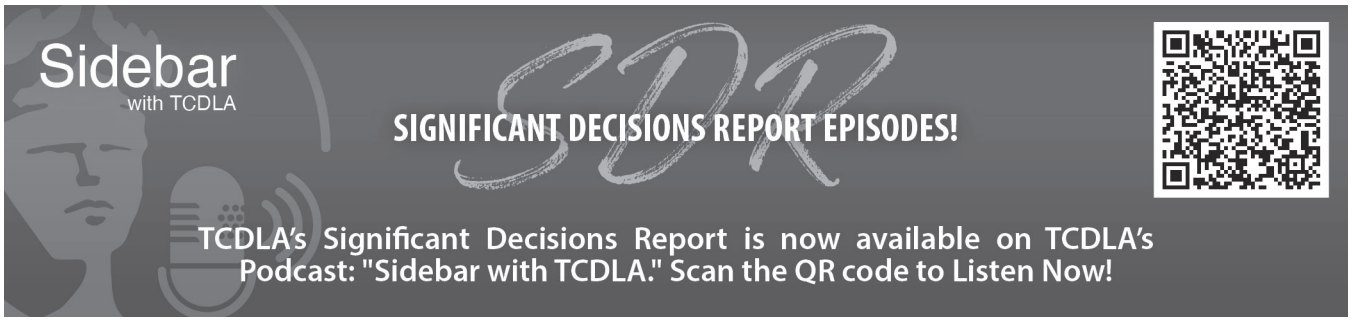
In the 1980s, scholars in psychology pushed the concept of "expressive writing," probably better known today as journaling. It's supposed to relieve anxiety. *Sigh*. I've been journaling the law now for four years (and with the internal voice of Lewis Black). It's been cathartic to rant and to commiserate with my colleagues who read the commentary and share my cynicism. But God honest, some days I wonder if ignorance might be more blissful. Maybe then I wouldn't know that judges' heads get lopped off by an attorney general who didn't get his way. I hate what happened to Judges Keller, Hervey and Slaughter. I agree with them less than others on the Court, but the integrity of our profession demands that we stand for a few simple propositions. One of them is that you don't lose your job because you opted to follow the law rather than respect a powerful person's "authoritah."

TCDLA thanks the Court of Criminal Appeals for graciously administering a grant that underwrites the majority of the costs of our Significant Decisions Report. We appreciate the Court's continued support of our efforts to keep lawyers informed of significant appellate court decisions from Texas, the United States Court of Appeals for the Fifth Circuit, and the Supreme Court of the United States. However, the decision as to which cases are reported lies exclusively with our Significant Decisions editor. Likewise, any and all editorial comments are a reflection of the editor's view of the case, and his alone.

Please do not rely solely on the summaries set forth below. The reader is advised to read the full text of each opinion in addition to the brief synopses provided.

This publication is intended as a resource for the membership, and I welcome feedback, comments, or suggestions: kyle@texasdefensefirm.com (972) 369-0577.

Sincerely,



United States Supreme Court

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

Fifth Circuit

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

Texas Court of Criminal Appeals

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

1st District Houston

Milton v. State, No. 01-22-00583-CR (Tex. App.—Houston [1st Dist.], Apr. 16, 2024)

Attorneys. Aimee Bolletino (appellate), Jose Vela (trial) Jacob Vela (trial), Jonathan Vela (trial), Adam Corral (trial)

Issue & Answer 1. Recently the Fourteenth Court of Appeals held that the State cannot convict a child younger than 14 of prostitution because a child under 14 lacks the legal capacity to enter into an agreement to have sex. Can this rationale be extended to cases where a defendant is accused of compelling the prostitution of a teenager who is 14 years or older?

Facts. The defendant sought out a young girl on the internet whom he eventually met and enticed her into having sex with people for money. He arranged for approximately 60 different sexual encounters (as many as seven or eight in a single day). The defendant would not let her sleep, forced her to take drugs, and would not feed her if she did not earn money as a prostitute.

Analysis. "Texas . . . established a two-step scheme that differentiates between sex with a younger child and sexual relations with an older teen." The Legislature has expressed a belief that, under some circumstances, a teen between the ages of 14 and 17 can consent to sex (see Romeo and Juliet defense and certain teenage marriages). "This refutes [the defendant's] blanket assertion that children fourteen to seventeen years of age can never consent to sex as a matter of law."

Comment. I tried to explain this case to Jeremy Rosenthal and Doug Gladden over a basket of chips and salsa. I think it went something like "there's a case where kids can have sex but they can't agree to it" (a very Tim the Toolman Taylor recitation). I got the blinky eyes from Jeremy, but God bless Doug who said "yeah, I know what case you're talking about, not sure I'd do a better job explaining it." This was all in response to commiseration over a case involving a Polaris Ranger driven on private property and Jeremy's 2019 DWI argument that this thingamabob is incapable of being driven on a roadway because it is not legal to drive it on the roadway. Truly the Van Gogh of practicing law—not appreciated in his own time (or by the Second Court of Appeals).

2nd District Fort Worth

Martinez v. State, No. 02-22-00291-CR (Tex. App.—Ft. Worth, Apr. 11, 2024)

Attorneys. D. Miles Brissette (appellate), Daniel G. Cleveland (trial)

Issue & Answer. Can officers extract a SIM card to obtain a cell phone's digital identification number (IMEI) to identify it for a search warrant? **Yes.**

Facts. The State prosecuted and convicted the defendant of aggravated burglary and impersonating a public servant. They tied the defendant to the commission of the crime by search warrant authorizing the inspection of a cell phone that fell out of the defendant's pocket during the commission of the offense. According to at least one occupant of the burglarized home, the defendant dropped his cell phone, a mask, a fake badge, a fake deportation order, a balaclava, a baseball cap, and his cell phone. A detective took possession of the cell phone and used a special tool to access the cell phone's sim card and obtain the cell phone's IMEI number. The detective used the IMEI number to describe the cell phone in his application for a search warrant. The ultimate search of the phone revealed the defendant as the owner of the cell phone dropped at the crime scene. The defendant moved to suppress the search of the phone.

Analysis. In *Riley v. California,* SCOTUS distinguished cell phones from typical physical objects that are searchable incident to arrest. 573 U.S. 373 (2014). In *Riley* the court reconciled seizure protections with the acknowledgement that a cell can reveal the sum of an individual's private life. The court declared special protections for cell phone searches but still recognized the legitimacy of police examining physical aspects of the phone (ensuring that it not be used as a weapon or removing power sources to prevent destruction). The CCA has further recognized the ability of police to test an abandoned cell phone for fingerprints or DNA material. Many courts have addressed the appropriateness of police extracting an IMEI number from a cell phone and have found no police misconduct. This conclusion makes sense as it is how officers (and good Samaritans) identify a cell phone's ownership. Even if opening the phone to extract the IMEI number was improper, the defendant did not have standing to challenge the search. A person has no expectation of privacy in an abandoned property.

Abandonment can be deduced from a criminal's flight from a scene where his or her property is left behind. Abandonment can also be imputed when a criminal's property is discovered in a place where he has no right to be. Here the defendant fled after having dropped numerous items in a scuffle with a victim. His conduct is consistent with abandonment.

Comment. I don't love the abandonment argument. I mean, why state clearly and concisely at the beginning of the analysis that "[a]bondonment is primarily a question of intent" if abandonment is truly just a question of whether the court thinks you suck enough to apply the doctrine of abandonment? I think the better approach is a recognition that suppression is a mechanism for deterring police misconduct. It's hard to make the case for police misconduct here where the police did what we would want them to do: got a warrant and described the thing they wanted to search with the utmost particularity.

Mason v. State, No. 02-18-00138-CR (Tex. App.—Ft. Worth, Mar. 28, 2024)

Attorneys. Thomas Buser-Clancy (appellate), Savannah Kumar (appellate), Allison Grinter (appellate), Warren St. John (trial)

Issue & Answer. A person who casts a provisional ballot while ineligible to vote commits the offense of illegal voting. The State must prove the person knew of their ineligibility (by virtue of the CCA opinion remanding the instant case and subsequent legislation). To sustain its conviction (prove intent), can the State rely on an inference or presumption that the defendant read the ineligibility admonishments contained in the affidavit she signed before casting an ineligible provisional ballot? **No.**

Facts. This case is on remand after reversal from the Court of Criminal Appeals. The travesty of a fact pattern was summarized in the July 2022 edition of the Significant Decisions Report:

Defendant submitted an "Affidavit of Provisional Voter" form in 2004. The ballot form contained the following affirmation: "the voter had not been finally convicted of a felony, or if a felon, had completed all punishment including any term of incarceration, parole, supervision, or period of probation, or had been pardoned." The completion of this form registered Defendant as a Tarrant County voter. Later, in 2013, Defendant was convicted of the felony offense of "conspiracy to defraud the United States." She was sentenced to five years imprisonment and three years of supervised release. The Tarrant County Elections Administration (TCEA) received notification of the defendant's final felony conviction and ultimately canceled her voter registration. The TCEA sent notice of the cancellation to her home, but while she was incarcerated and serving her federal sentence. Defendant finished her prison term and began supervised release. Defendant's supervision officer testified that they did not discuss the loss of voting rights while on supervision. While on supervised release, Defendant went to her designated polling place for the November 2016 election. When poll workers could not locate her name on the voter roll, they permitted her to cast a provisional ballot accompanied by another "Affidavit of Provisional Voter." The election judge reported his concern about the defendant's ballot to the defendant's precinct election judge who then reported the matter to the Tarrant County District Attorney. The defendant's ballot was never counted. Tarrant County District Attorney Sharen Wilson indicted her for voting in an election in which she knew she was ineligible to vote and alleged she had not been fully discharged from her sentence. The defendant had a trial before Tarrant

TCDLEI Memorializes, Fallen But Not Forgotten …

Charles Baldwin
Quinn Brackett
Peter Bright
Jack H. Bryant
Phil Burleson
Charlie Butts
Ward Casey
Byron Chappell
Emmett Colvin
Rusty Duncan
C. David Evans
Elaine Ferguson
C. Anthony Friloux Jr.
Jim Greenfield
Richard W. Harris
Richard 'Race - horse' Haynes
David Hazlewood
Odis Ray Hill
Weldon Holcomb
Floyd Holder
W. B. "Bennie" House
David Isern
Hal Jackson
Knox Jones
Joe Kegans
George F. Luquette
Carlton McLarty
Ken Mclean
Kathy McDonald
George R. Milner
Daniel Mims
Roy Minton
Ebb Mobley
Brian E. Murray
Harry Nass
Anthony Nicholas
David A. Nix
Rusty O'Shea
Mike Ramsey
Charles Rittenberry
George Roland
Travis Shelton
Robert William Tarrant
Charles Tessmer
Doug Tinker
Don R. Wilson Jr.

To memorialize a loved one, email athomas@tcdla.com

Texas Criminal Defense Lawyers Educational Institute

County District Judge Ruben Gonzalez. She argued that she did not read the admonishments in the Affidavit of Provisional Voter, the government did not advise her she was ineligible to vote, and she would not have voted had she been aware of her ineligibility. The trial court convicted and issued two findings that the State had proved the essential elements of the offense: (1) the State proved the defendant was ineligible, and (2) the State proved the defendant voted. Judge Gonzalez sentenced the defendant to five years of incarceration. Defendant raised several arguments before the court of appeals, including that evidence was insufficient without proof that the defendant knew she was ineligible to vote. The Second Court of Appeals affirmed her conviction and found that knowledge was not an element of the offense. While the defendant's case was pending PDR to the Court of Criminal Appeals, the Legislature passed a bill stating that a person may not be convicted "solely upon the fact that the person signed a provisional ballot . . ." and made this language retroactive to all individuals except those whose convictions had become final.

Analysis. In reversing the Second Court of Appeals, the CCA held that the State was required to show that the defendant realized the circumstances that rendered her ineligible to vote. Here, it is true the defendant signed an affidavit containing admonishments regarding ineligibility, but in criminal proceedings, a presumption of awareness and understanding does not attach to the contents of a document by virtue of a defendant's signature. This was the thrust of the State's evidence and is insufficient to prove the Defendant's knowledge.

Comment. It's one thing for the Court of Criminal Appeals to say that you erred. That's normal. But here the legislature passed a bill to address the gravity of the Second Court's error. I could stop my comment here, but I feel I would be loath to not mention that the legislation was bipartisan. Republicans and Democrats agreed to pass a bill in response to this case (they referenced it by name). At least the Second Court ultimately gets it right in the end. Unfortunately, the Tarrant County District Attorney is not getting the message.

3rd District Austin

Wade v. State, No. 03-23-00389-CR (Tex. App.—Austin, Apr. 19, 2024)

Attorneys. Vikash M Bhakta (appellate), Jennifer Earls (Trial)

Issue & Answer. Who is Karen Wade? The defendant.

Facts. The defendant pleaded guilty to a drug offense in front of Judge 1. Judge 1 placed the defendant on deferred adjudication probation. A few years later, the State filed a motion to adjudicate. Trial Judge 2 conducted a hearing on the State's motion in which the defendant challenged the issue of identity. The State presented three witnesses: the defendant's initial presentence investigation officer, the defendant's first probation officer, and the defendant's second probation officer. The presentence officer identified the defendant in court but admitted her identification was speculation based on the defendant sitting next to a lawyer. The defendant's first probation officer hardly met with her and did not have an independent recollection of her appearance but did take a photo of the defendant that was contained in her file. The first probation officer answered "no" when asked whether there was a possibility that the person sitting in the courtroom was a different Karen Wade than Karen Wade, who was serving a term of probation. The second probation officer had no testimony regarding the defendant's identity because he had never met the defendant.

The trial court admitted [defendant's] guilty plea, probation file (including a personal data sheet with a photograph), and recent arrest records, which all contained matching identifiers, including her full name, her date of birth, her Social Security number, and her state identification number. The defendant's first probation officer testified that the probation file datasheet is created immediately following a person's guilty plea.

Analysis. Although the witnesses could not identify the defendant from personal recollection, competent evidence established the defendant's identity as the person whom the trial court placed on probation, namely the probation file containing matching identifiers and a photograph of the defendant. This combined with the first probation officer's certainty regarding the absence of a mistake sufficiently proved that the person sitting in the courtroom was the same Karen Wade who was placed on probation years prior.

Comment. Okay. In February, we had the "is meth really meth" case. March, we had the "is mail really mail" case. Now we have the "is Karen really Karen" case (truly a Karen argument).

Tucker v. State, No. 03-22-00697-CR (Tex. App.—Austin, Apr. 25, 2024)

Attorneys. Linda Icenhauer-Ramirez (appellate), Charles Arnone (appellate)

Issue & Answer 1. When evidence shows that a defendant's penis penetrated a child's mouth, does the evidence support an aggravated sexual assault conviction when the defendant claims that the child placed the defendant's penis in his mouth without the defendant's consent? **Yes.**

Issue & Answer 2. Penal Code 22.021 provides the elements of aggravated sexual assault. Subsection (f)(1) provides for an enhancement of the minimum term of

imprisonment when the State proves the victim of the offense is younger than six years of age. When the trial court omits the (f)(1) finding in its judgment can the court of appeals reform the judgment on appeal? No.

Facts. The State convicted the defendant of aggravated sexual assault of a child and the trial court sentenced the defendant to 25 years. The testimony established that a child living in the same group home as the defendant placed his mouth on the defendant's penis. A separate complaining witness accused the defendant of similar conduct. The defendant claimed that the child was the rapist (by jumping into the defendant's bed and putting his mouth on the defendant's penis without the defendant's consent). The State presented other evidence showing the defendant's consciousness of guilt, notwithstanding the defendant's claim at trial.

Analysis 1. The trial court as factfinder could "rationally infer instead that it had to have been the large adult, who is about 6-foot five or 6-foot six tall, who caused the young child to do what the child did." Other evidence showed the defendant's consciousness of guilt, including lying to police about the incident initially, offering to apologize to the complainant, and not telling the complainant's mom about the incident.

Analysis 2. A court of appeals has limitations on its judgment reformation authority:

- The authority does not extend to non-errors in a trial court's judgment;
- The authority is used "to make the record speak the truth;
- The authority is used to "to reform whatever the trial court could have corrected by a judgment nunc pro tunc where the evidence necessary to correct the judgment appears in the record;"
- The authority is used to delete improper findings or add proper findings; and to resolve "conflict[s]" between an oral pronouncement of sentence and a competing sentence as reflected in the written judgment;
- The authority extends to at least some kinds of judicial errors as well as to mere clerical errors.

The State contends that modification is appropriate because the State merely requests that the judgment reflects a statute accurately describing an element of the offense the State proved at trial. "Neither the Court of Criminal Appeals nor our Court has resolved whether Subsection (f)(1) defines an element of an offense under Section 22.021." Contrary to this contention, the court finds that subsection (f)(1) that provides for greater punishment for younger victims is a mere punishment enhancement and not an element of the offense. Given this conclusion, the judgment cannot be reformed under a theory that (f)(1) accurately describes an element of the offense and the State has not shown any other appropriate basis for reformation.

Comment. *Alleyne v. United States* was decided in 2013 (more than 10 years ago). 570 U.S. 99 (2013). Yet, somehow, the word has yet to reach Texas that "facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt." If the victim's age was a fact found by the jury in this case, then the court of appeals

should be able to reform the judgment.

Torres v. State, No. 03-23-00044-CR (Tex. App.—Austin, Apr. 25, 2024)

Attorneys. Linda Icenhauer-Ramirez (appellate), Raymond Esperson (trial), Russell Hunt, Jr. (trial)

Issue & Answer. Robbery is a nature-of-conduct offense. Murder is a result-of-conduct offense. Capital murder can be proven by combining these two offenses. Both require intentional conduct but there is a statutory definition for intentional nature-of-conduct acts and a statutory definition for intentional result-of-conduct acts (albeit smashed together in a single sentence that courts must dissect appropriately). Does the trial court err by using only one of these intent definitions? **Not necessarily.** Does it err by failing to limit the chosen definition to the appropriate aspect of the capital murder allegation? Y**es, but harmless.**

Facts. The defendant shot and killed an employee of an auto-leasing dealership in Austin. The State convicted the defendant of capital murder because he killed the employee in the course of committing robbery (stealing a vehicle from the dealership).

Analysis. The statutory definition of "intentional" provides "a person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." The definition combines the appropriate definitions for intentional nature-of-conduct offenses and intentional result-of-conduct offenses. When instructing the jury, it is incumbent on the trial court to give the appropriate variation of the definition of "intentional."

- Result-of-conduct: "a person acts intentionally, or with intent, with respect to the result of his conduct when it is his conscious objective or desire to cause the result."
- Nature-of-conduct: "a person acts intentionally, or with intent, with respect to the nature of his conduct when it is his conscious objective or desire to engage in the conduct."

Intentional murder is a result-of-conduct offense. "Generally speaking, it is error for a trial court not to limit the definition of a culpable mental state to the result of conduct in an intentional murder case." An exception to this rule arises in a capital murder case when the basis of the allegation is that a defendant committed murder in the course of a *nature-of-conduct* offense "provided that the nature-of-conduct language is limited to the elements of the offense or offenses that are nature-of-conduct ones." To prove robbery, the State must prove theft. Theft is a nature-of-conduct offense. Here the trial court did not err to include a nature-of-conduct definition for "intentional" but did err in failing to limit that definition to the robbery portion of the capital murder offense.

In a second issue, the defendant argues that the error was compounded by the trial court's omission of a culpable mental state in the application section of the jury charge. There the trial court instructed the jury to convict if it found that the defendant "did then and there . . . cause the death of Jerry Lee with a firearm . . . in the course of committing and attempting to commit the offense of robbery." Contrary to the defendant's contention, the application section of the jury charge need not necessarily include the culpable mental state. Here, the abstract portion of the charge defined capital murder and included a requirement of intentional conduct side by side with the other elements of the offense.

The single error pertaining to the nature-versus-result definitions for intentional conduct is analyzed under the *Almanza* egregious harm standard for unobjected-to jury charge error (see legend below). How the trial court described the offense in the abstract portion of the jury charge came close enough to communicate the appropriate standards: "A person commits the offense of capital murder if the person intentionally causes the death of an individual and the person intentionally commits the murder in the course of committing or attempting to commit a robbery." Moreover, the parties argued the case to the jury consistent with the requisite definitions for intentional conduct; the evidence overwhelmingly supported that the defendant acted consistent with the requisite definitions for intentional conduct; and nothing in the record suggests that the jury was confused. Accordingly, the error is not egregious.

Comment. This is what happens when you drink too much Gravamanischewitz (this joke is designed to make no more than seven specific people laugh).

4th District San Antonio

Ex parte Valencia, No. 04-23-01044-CR (Tex. App.—San Antonio, Apr. 17, 2024)

Attorneys. Billy Pavord (appellate)

Issue & Answer. In a pretrial writ of habeas corpus, is the ruling "The Application is denied without issuing writ" an appealable order? **No.**

Facts. The defendant is a Hispanic man and thus meets the two criteria for Greg Abbott's selective prosecution program, Operation Lone Star. The defendant filed an application for writ of habeas corpus before Judge Susan Reed. Judge Reed issued an order stating, "The Application is denied without issuing writ." The defendant appealed.

Analysis. The trial court did not issue the writ and thus did not issue a ruling on the merits. An intermediate court of appeals has jurisdiction to hear a direct appeal from a pretrial writ of habeas corpus only when the trial court issues a ruling on the merits of relief requested.

Comment. Mandamus. It's what happens when you drink too much, man . . . [still workshopping this one].

Morganfield v. State, No. 04-22-00567-CR (Tex. App.—San Antonio, Apr. 24, 2024)

Attorneys. Angela Moore (appellate)

Issue & Answer. It is an affirmative defense to age-based sexual assault when the defendant is no more than three years older than the victim. Is a defendant entitled to this affirmative when he is 19, the victim is 16, but he is 3 years and several months older than the victim? **No.**

Facts. A jury convicted the defendant of sexual assault by virtue of the complainant's age (under the age of 17) ("age-based sexual assault"). At the time of the offense, the complainant was 16 years old and the defendant was 19 years old. The exact age difference between the two teenagers was three years and two months.

Morganfield and two other males, all unknown to S.V. before the night of the assault, picked up S.V. at her house. After a series of events unrelated to the underlying offense, Morganfield ended up alone with S.V. in the back seat of the car. Morganfield asked S.V. for sex and oral sex, and S.V. declined. Despite S.V. rejecting Morganfield's requests, S.V. testified that Morganfield "eventually pulled out his penis, and he insisted, and I eventually gave in [and performed oral sex on him] because I thought that if I didn't, I wouldn't get home that night.

Analysis. Penal Code 22.011(a)(2) provides an affirmative defense to age-based sexual assault: "if the actor is not more than three years older than the victim, and the victim was fourteen years old or older at the time of the offense." The three-year time limit is measured from the victim's birth date to the defendant's birth date. Accordingly, the defendant was not entitled to an affirmative defense based on a three-year-or-less age difference.

Comment. Was it mean-spirited to prosecute something like this so close to the line?

7th District Amarillo

Mayo v. State, No. 07-23-00243-CR (Tex. App.—Amarillo, Apr. 4, 2024)

Attorneys. Joe Marr Wilson (appellate), Brent Huckabay (trial)

Issue & Answer. When a defendant is on probation for strangling his girlfriend, and, while on probation, chokes a new girlfriend, is the maximum term of punishment and fine a disproportionate sentence in violation of the Eighth Amendment? **No.**

Facts. The trial court revoked the defendant's deferred adjudication probation. By motion, the State alleged that the defendant committed assault by strangulation of a new girlfriend on multiple occasions while on probation for assault by strangulation. The trial court sentenced the defendant to the maximum term of confinement and fine: 10 years and $10,000.

Analysis. The first step in an Eighth Amendment proportionality review is to "conduct a threshold comparison of the gravity of the offense underlying the current conviction as well as offenses underlying prior convictions against the severity of the sentence." Only once the reviewing court infers a sentence is grossly disproportionate to the offenses does the court consider factors set out by the Supreme Court in *Solem v. Helm*, 463 U.S. 277 (1983)(gravity of the offense and harshness of sentence, sentences imposed on other defendants in the same jurisdiction, and the sentences imposed for the same offenders in other jurisdictions). It is exceedingly rare that a punishment falling within the range of punishment is assailable on appeal. "Appellant's punishment is not the exceedingly rare occurrence in which a sentence within the statutory range can be overturned on appeal."

Comment. I am neither better educated about Eighth Amendment proportionality law nor intrigued by the uniqueness of the facts in this case.

Ex parte Segovia, No. 07-23-00456-CR (Tex. App.—Amarillo, Apr. 16, 2024)

Attorneys. Alexander Nunez (appellate), Audie Reese (trial)

Issue & Answer 1. Is $189,000 bail too high for a defendant who cannot afford that amount, who has significant ties to the community, but who menaced and assaulted his girlfriend and son with a baseball bat? **No.**

Issue & Answer 2. Can a reviewing court consider the

trial court's failure to consider a public safety report in a bond hearing when the defendant did not raise this as an issue in his pretrial writ of habeas corpus now on appeal? **No.**

Facts. The State charged the defendant and set his bail accordingly: aggravated assault (deadly weapon), $60,000; aggravated assault (serious bodily injury), $60,000; endangering child, $60,000; criminal mischief, $6,000; criminal mischief, $3,000. He filed a pretrial writ of habeas corpus challenging the constitutionality of his high bond amounts. The trial court declined to reduce the bond and thus denied his requested relief.

Analysis 1. Despite evidence that the defendant could not afford his bond amounts and that he had ties to the jurisdiction in which he has lived his entire life, other evidence supported the trial court's denial. It included the gravity of potential punishment, the nature of the facts underlying the State's allegation (bruising his girlfriend and threatening his son with a bat), and the arresting officer's opinion of the defendant's reputation as not law-abiding.

Analysis 2. Simple error preservation rules apply.

Comment. Not an interesting opinion but it's published and pretrial writs are my jam, so we siggin' this one.

13th District Corpus Christi/Edinburg

Aguilera v. State, No. 13-22-00308-CR (Tex. App.—Corpus Christi, Mar. 28, 2024)

Attorneys. Travis Hammack (appellate), David Silberthau (appellate), Natalie Ganem (trial)

Issue & Answer. The CCP provides for an affirmative defense in a motion to revoke alleging failure to report. The literal text applies the affirmative defense to revocations where no [person with the State] "contacted or attempted to contact the defendant in person . . ." Do these words mean what they literally say? **No.**

Facts. The defendant was serving probation for family violence assault. On April 4, 2022, the State filed a motion to adjudicate guilt. The defendant pled not true and the trial court conducted a hearing. At the hearing, a probation officer testified about the activities of the relevant probation offices supervising the defendant: Live Oak probation (transfer county) and Medina County probation (originating county). The probation officer testified that the defendant did not report upon transfer to Medina and did not report when transferred back to Live Oak. The probation officer testified that neither office attempted a field visit at the defendant's home.

Analysis. Article 42A.109 states:

> [I]t is an affirmative defense to revocation for an alleged violation [of community supervision] based on a failure to report to a supervision officer as directed or to remain within a specified place that no supervision officer, peace officer, or other officer with the power of arrest under a warrant issued by a judge for that alleged violation contacted or attempted to contact the defendant in person at the defendant's last known residence address or last known employment address, as reflected in the files of the department serving *the county in which the order of deferred adjudication community supervision was entered.*

Known as the "due diligence affirmative defense," the CCA has limited its application to "instances in which the State has timely alleged violations but has not arrested the defendant before the community-supervision period has expired." The defense does not apply if the State arrests the defendant within the supervision period. Here, it was undisputed that the defendant did not report as instructed and that the State arrested him for this violation prior to the expiration of the community supervision period.

Comment. Troy McKinney and Shana Stein Faulhaber (and others) run a criminal defense lawyers study group (formerly the "CCP Study Group") where they take deep dives into lesser-known parts of criminal statutes and rules. I feel like I would have known 42A.109 before reading this case had I attended.

Rodriguez v. State, No. 13-23-00081-CR (Tex. App.—Corpus Christi, Apr. 4, 2024)

Attorneys. Sandra Eastwood (appellate)

Issue & Answer. In child sex prosecutions the rules of evidence almost never apply. When an outcry witness at the Child Advocacy Center is unavailable to testify, can the State substitute another really good witness who reviewed the child's outcry recording? **No, but it's okay.**

Facts. A jury convicted the defendant of continuous sexual abuse of a young child. The child alerted adults to her abuse by first contacting a school counselor figure who then alerted authorities who ultimately interviewed the child at the Children's Advocacy Center (CAC). Esmeralda Garza was the person who conducted the CAC interview, but Garza was not available at the time of trial. In Garza's place, the State sponsored testimony of a CAC co-worker who had never met the child and only reviewed the video recording of the child's interview with Garza.

Analysis. The non-interviewing CAC co-worker was not the proper outcry witness under Article 38.072 § 2. Based on the State's representations at trial, the proper outcry witness was Garza. There is no exception to this rule and the trial court's reliance on the non-interviewing CAC co-worker's testimony as reliable was misplaced. But, as per usual, a wrong-outcry-witness error is subject to harm **analysis.** [Although the court does not explicitly

state this, the law is that] anytime a complainant testifies to the abuse, a wrong-outcry-witness error is harmless.

Comment. I mean we've basically turned harm analysis into a joke, let's just be honest about it. Find me a case where the complainant testifies to the abuse and there is reversible error. I'll write about it when you find it.

Grimaldo v. State, No. 13-23-00228-CR (Tex. App.—Corpus Christi, Apr. 4, 2024)

Attorneys. Brett Ordiway (appellate), Madison McWithey (appellate) James Beeler (trial)

Issue & Answer. *McCoy v. Louisiana* provides that trial counsel violates the defendant's Sixth Amendment right when trial counsel concedes guilt over the defendant's express objection. Is the following a sufficiently express objection:

> I know I did not do these actions. . . . I don't want people to say I did this. I want to prove my innocence. I know it might take time, but at least I don't want to look like some kind of mad man. And I know what I did, and I know what I didn't do.

In other words, is this *McCoy* error? **No.**

Analysis. "Here, it is not entirely clear what Angel meant by 'I know I did not do these actions.'" Cases in which courts have found that trial counsel erred in conceding guilt involve defendants who "insisted that they did not commit the actus reus of murder." Here, defense counsel's strategy was to admit that the defendant hit two people with his vehicle but did so by accident. "Denying the State's specific version of events could be consistent with [the defendant's] desire to 'prove his innocence,' especially in light of his concession, 'I know what I did, and I know what I didn't do.'" Even if this court were to assume that the defendant meant to deny the actus reus of the alleged offense, defense counsel cannot err unless he admits guilt over the defendant's express objection. The only time the defendant expressed a desire to maintain his innocence was at a pre-trial hearing in front of a different judge and different defense attorney than those presiding over his trial. Given that there were other opportunities for the defendant to express his objection, it was not unreasonable for trial counsel and the trial judge to assume the defendant was satisfied with counsel's chosen strategy.

Comment. What oh what on earth could he mean when he says, "I did not do these actions." Gee golly what a perplexing **comment.** At least he didn't say "give me a lawyer dog."

State v. Newton, No. 13-22-00616-CR (Tex. App.—Corpus Christi, Apr. 18, 2024)

Attorneys. Stan Schwieger (appellate), Micah Haden (trial)

Issue & Answer. Is a home a per se non-suspicious place for purposes of conducting a suspicious place arrest (one of many ways an officer may statutorily arrest a defendant without a warrant and without personally observing the commission of the offense)? **No.** Is the absence of exigent circumstances fatal to a suspicious place arrest? **Not necessarily.**

Facts. At 8:47 PM a DPS officer arrived at the scene of a single vehicle accident. The officer followed skid marks from the scene to a nearby home where he discovered the defendant's vehicle extremely damaged. The officer made contact with the defendant at 9:12 PM, noted alcohol on his breath, dilated bloodshot glassy eyes, performed the horizontal gaze nystagmus test, took the defendant to the hospital, and obtained a blood warrant which led to the BAC analysis used in the defendant's DWI conviction. The officer admitted that there was nothing suspicious about the defendant's presence inside his home but also testified that the defendant's presence at his home was suspicious "considering the totality of the circumstances." The trial court granted the defendant's motion to suppress his arrest on the basis that it was conducted without authority under Article 14.

Analysis. Article 14 sets forth statutory requirements for conducting a warrantless arrest. When an offense is not committed in an officer's presence, one exception to arrest under a warrant is to attain probable cause and the discovery of the defendant in a suspicious place. The defendant contends that, to support a suspicious place arrest, the State must also show exigent circumstances. This appeared to be the position of the CCA in 2005 when it decided *Swain v. State*, 181 S.W.3d 359 (Tex. Crim. App. 2005). The CCA was recently invited to resolve uncertainty about its opinion in *Swain* and declined to do so in *McGuire v. State*, No. PD-0984-19 (Tex. Crim. App. Feb. 21, 2024). In her **concurring** opinion, with which this court agrees, Judge Keller indicated that exigent circumstances are "one circumstance in the totality" of circumstances that could give rise to a suspicious place finding. Here, the trial court focused its rationale on the fact that the defendant's home could not constitute a suspicious place. This reliance was in error, numerous cases have found that a home can constitute a suspicious place.

Comment. Here is the problem with this **analysis.** The State has the burden to prove that the arrest was made in a suspicious place. Exigency is a factor. There was no exigency here, which weighs in favor of the defendant. The trial court believed that a person's home is per se non-suspicious. That was wrong. So, several questions

remain: was this particular home suspicious? Did some other circumstances make this place suspicious? These are all things that the State has to prove. Just because the trial court was wrong to hold that homes are per se non-suspicious does not mean the State carried its burden. Keep fighting Stan!

14th District Houston

Brimzy v. State, No. 14-22-00631 (Tex. App.—Houston [14th Dist] Mar. 28, 2024)

Attorneys. Janie Maselli (appellate), Lance Hamm (trial)

Issue & Answer. 42A.751(i) imposes a burden on the State in failure-to-pay revocations:

> In a revocation hearing at which it is alleged only that the defendant violated . . . by failing to pay community supervision fees or court costs or by failing to pay the costs of legal services, the state must prove by a preponderance of the evidence that the defendant was able to pay and did not pay as ordered by the judge.

"Does the statute apply when the State raised other grounds for revocation . . . but the trial court only affirmatively found a failure to pay as grounds for revocation? **Yes.**

Facts. The defendant was on probation for family violence assault. The State moved to revoke the defendant's probation and alleged various violations, including failure to pay her monthly supervision fee, failure to complete anger management, and the commission of a new offense. The State withdrew its new offense allegation. After the hearing the trial court declared "I find by a preponderance of the evidence that the State has proven at least some of these allegations in this matter." However, the trial court's judgment only listed the defendant's failure to pay supervision fees as the grounds for revocation.

Analysis. The courts of appeal are split on the question of whether the State carries an ability-to-pay burden when it proves a failure to pay and alleges other non-financial violations (specifically supervision fees and court costs) that the trial court ultimately rejects. The statutory evolution of the ability-to-pay burden demonstrates why the state's pleadings (the inclusion of additional allegations) should not define whether an ability-to-pay burden exists. Common law has always required the State to carry the ability-to-pay burden. In 1977 the legislature assigned the burden to the defendant to prove non-ability-to-pay in cases where "it is alleged only that the probationer violated . . . by failing to pay." The CCA held in *Stanfield v. State* that the affirmative defense was not limited by the number of allegations raised in the State's motion. When the legislature recodified this part of the statute and reassigned the burden to the State, the legislature could have corrected *Stanfield* had the CCA decided *Stanfield* improperly. Given that the legislature did not do this, it implicitly adopted the *Stanfield* interpretation.

Concurring (Christopher, C.J.). The court must follow Stanfield even if Stanfield ignored the plain language of the predecessor statute.

Comment. The court of appeals gives a useful overview of the law requiring proof of the ability to pay. "Three sources of Texas law have addressed the permissibility of revocation when a defendant is unable to pay . . ."

1. Due process – due process is violated when probation is revoked for failure to pay and the trial court does not consider alternatives to imprisonment for a defendant who is unable to pay.
2. Texas common law – "it is unclear whether the Texas common law requirement that the State must show a defendant was able to pay and her failure to do so was intentional survived the passage of relevant statutes."
3. CP 42A.751(i).

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

- 5th District Dallas
- 6th District Texarkana
- 8th District El Paso
- 9th District Beaumont
- 10th District Waco
- 11th District Eastland
- 12th District Tyler

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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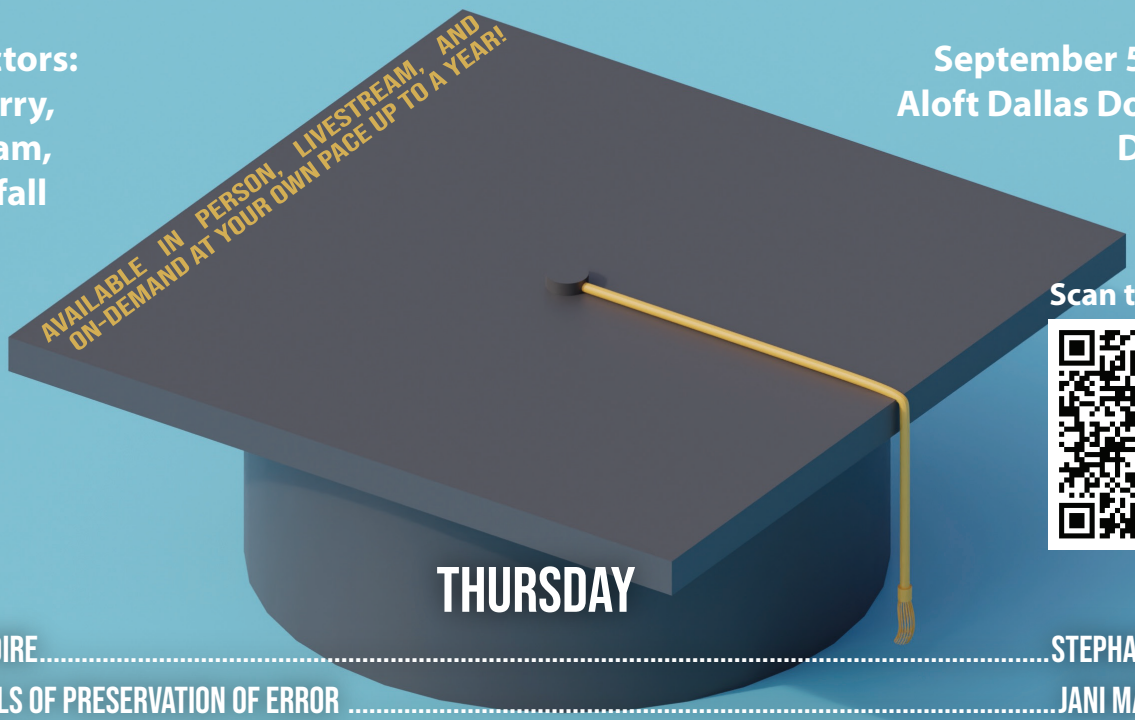

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THURSDAY

THE LAW OF VOIR DIRE	STEPHANIE STEVENS
THE BROADER GOALS OF PRESERVATION OF ERROR	JANI MASELLI WOOD
NAVIGATING THE TRAPS OF EXTRANEOUS 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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