TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

VOICE FOR THE DEFENSE

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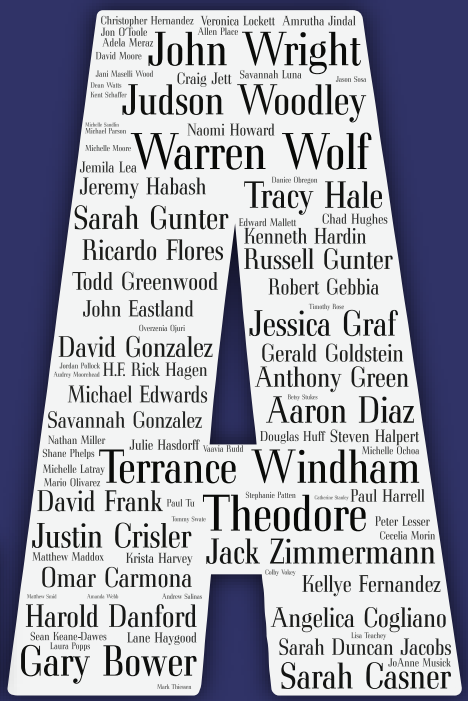

Texas Criminal Defense Lawyers Association

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SCHOLARSHIPS AVAILABLE AT TCDLA.COM

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 ..... CATHERINE EVANS

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

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

DNA FOUND IN CARSS ..... NICOLAS HUGHES

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

Volume 53 No. 6 | July/August 2024

Features

Columns

Available online at www.tcdla.com
Volume 53 No. 6 | July/August 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

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 7-9
CDLP | Mitigation Bootcamp
Austin, TX

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

August 16
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 3
CDLP | The Way of the Warrior
Wichita Falls, TX

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

September 6
TCDLA Executive & Legislative Committee Meetings
Dallas, TX

September 7
TCDLA Board & CDLP Committee Meetings
Dallas, TX

September 13
TCDLA | Financial Friday - Asset Protection
Webinar

September 13
CDLP | Crimmigration *w/ SBOT*
Webinar

September 16
CDLP | Mindful Monday - Reproductive Laws
Webinar

September 17
TCDLA | Constitution Day

September Continued

September 18
TCDLA | New Lawyer - Mental Health
Webinar

September 19
CDLP | The Way of the Warrior
Midland, TX

September 20
CDLP | The Way of the Warrior
Corpus Christi, TX

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 6-19
TCDLA | FIDL 5.0 *w/ TIDC and HCPDO*
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 Health
South Padre Island, TX

October 25
CDLP | Capital Defense
South Padre Island, TX

November

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

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

November 8
TCDLA | Financial Friday - Academics of Investing
Webinar

November 18
CDLP | Mindful Monday
Webinar

December

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

December 12-13
TCDLA | Attacking Sex Cases: A Fresh Perspective
Round Rock, TX

December 16
CDLP | Mindful Monday
Webinar

January

January 8
CDLP | Prairie Pups
Lubbock , TX

January 9-10
TCDLA | 44th Annual Prairie Dog
Lubbock, TX

January 10
TCDLA Executive & Legislative Committee Meeting
Lubbock, TX

January 11
TCDLEI & TCDLA Boards & CDLP Committee Meetings
Lubbock, TX

January 17
TCDLA | Murder
Webinar

January 24
CDLP | The Way of the Warrior
Waco, TX

January 29 - February 1
TCDLA | DWI/SFST/ARIDE/DRE Super Course
San Antonio, TX

January 31
CDLP | Capital
Austin, TX

January 31
CDLP | Veterans
San Antonio, TX

February

February 6
CDLP | Mental Health & Juveniles
Houston , TX

February 6
CDLP | Setting Up the Appeal
Houston, TX

February 7
CDLP | Capital
Houston, TX

February 11
TCDLA | Federal Law
Webinar

February 13-14
TCDLA | Criminal Law
New Orleans, LA

February 21
CDLP | Indigent Defense
Dallas, TX

February 22
CDLP | Career Pathways
Webinar

February 22
TCDLEI Board Meeting
Zoom

February 27-28
TCDLA | Killer Cross & Jury Selection: Law to Applied Technique
Arlington, TX

February 28
TCDLA Executive & Legislative Committee Meetings
Arlington, TX

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

Justice for All: Strange Days

Perhaps only in America could both homeless people and a former President end up in the same court seeking justice. The egalitarian notion that everyone matters and should get a fair chance in America gets at least a breath of life by the mere fact that both *Grants Pass v. Johnson* and *USA v. Donald J. Trump* were before the U.S. Supreme Court, and in the same year at that. By the time you read this, perhaps both will have been decided. While the issues are about the 8th Amendment's cruel and unusual punishment prohibition and immunity from prosecution, respectively, the fact that both cases got so far gives us hope, no matter the decisions.

While interesting, few of us are likely to represent a former President, so the *Trump* case probably won't affect our daily practices immediately. Well, wait a second. If the former President's immunity claims prevail, many of our clients will no doubt use it when they gripe at us when we communicate an unsatisfactory plea bargain offer. You can hear it now---"What!!! That is all you can get out of the D.A. for me on my little deal, and Trump got off?" Yeah, shake your head. You know that is what you will hear. But our clients will have a point. While it is from a dissent, this phrase can not help but come to mind:

…Our government is the potent, omnipotent teacher. For good or ill, it teaches the whole of our people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law. It invites every man to become a law until himself, it invites anarchy. *U.S. v. Olmstead*, 277 U.S. 438 (1928).

But it is the *Grants Pass* case that really deserves attention. Homelessness is a pervasive and growing tragic problem. Governments and society are grappling with how to deal with it. Loitering, criminal trespass, and criminal mischief are just the beginning of the list of charges we work on as a result. But, this is not the first time the High Court has had the opportunity to deal with the pervasive problem of homelessness and indigency: in the 1941 case of *Edwards v. California*, 314 U.S. 160, the Supreme Court was confronted with California's depression era law making it a crime to bring an indigent person across the state line. In that case, down and out Frank Duncan was completely broke in Spur, Texas. Using general post, as he had no address, he wrote a letter to his sister in California and asked her for help. She sent her husband, Fred Edwards, to go get her brother in Spur and bring him to their little home in Marysville, California. After getting to Marysville, the brother-in-law, Fred Edwards, was arrested for committing the misdemeanor of bringing an indigent person across the California state line. He was convicted then sentenced to six months in jail. Fred lost at the California Supreme Court, which upheld the regulation like the homeless of *Grants Pass*, so he sought relief and protection from our country's highest court, and he got it. The majority opinion held that the California statute encroached on the Art. 1 sec 8 Commerce Clause and was an invalid exercise of police power that posed an unconstitutional burden on interstate commerce. Justice Byrne's majority opinion is a pleasure to read, clear and concise. And he strikes a huge blow for the notion that we all matter—that we are in this together, quoting Justice Cardozo:

The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must **sink or swim together**, and that, **in the long run, prosperity and salvation are in union, and not division."** *Baldwin v. Seelig***,** 294 U.S. 511 (need year).

Though Frank Duncan was indigent, he was an American just the same. Justice Douglas wrote that, at a minimum, the right of a person to move freely within our constitutional system was no less than the right to move cattle, fruit, steel, and coal across state lines. Not only was it sharp legal thinking, but it also had some bravery by finding the "privileges & immunities clause" to be the source of the right, something the Supreme Court had been slow to do up to that point in time. However, the best part to read is in the concurring opinion of Justice Robert H. Jackson.

The last Supreme Court justice to have become a lawyer without attending law school, Justice Jackson

was uncomfortable just applying simple principles of commerce to the movement of an American citizen. He saw a different basis in law. Remarking on the power of the Apostle Paul's invocation of his Roman Citizenship, he said it was a shield against oppression, a privilege and immunity of U.S. Citizenship. He pointed out that while the government had a duty to be just, a citizen had a duty to serve when called up for military service. To move freely and enter any state of the Union, either temporarily or intending to stay, was national citizenship at its core—"**If national citizenship means less than this, it means nothing**," said Justice Jackson. *Edwards v. California*, 314 U.S. 160 (1941). He then pointed out the idea that making property the determiner of who has civil rights is contrary to how America had expanded but also served as a pretext for "exclusive" civil rights for some, but not all. Failing to say freedom of movement—regardless of economic status—was a privilege and immunity of citizenship "is only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." If you decide to read the opinion for yourself (highly recommended), it will be an immense help to play Woody Guthrie's "This Land Is Your Land" while you do. While it omits an original verse, the Avett Brother's cover is superb. But there is a real chance for irony in all of this.

Given that *Bullock v. Carter*, 405 U.S. 134 (1972) and *Griffin v. Illinois*, 351 U.S. 12 (1956) both stand for the proposition that when it is poverty alone that results in the deprivation of the protected liberty interest, that status –indigency—then rises to the level of a suspect class and merits the attendant protection of the 14th Amendment. Wouldn't it be ironic if the 14th Amendment protected freedom of movement to walk or stand in public, recognized in *Edwards*, affords them no 8th Amendment protection once they stop and lie down in the same spot? As John Lennon sang, "Nobody told me there'd be days like these. Strange days indeed. Strange days indeed".

CEO's Perspective

MELISSA J. SCHANK

Alone we can do so little; together we can do so much.
- Helen Keller

2023-2024 TCDLA Committee Highlights - Thank You

The Texas Criminal Defense Lawyers Association (TCDLA) has over 40 committees and 200 dedicated committee members. The collective strength and impact of our committee members, when working together, is impressive. These members collaborate via Zoom and in person to develop resources, support fellow members, and serve on the front lines of defense. If you have a passion for a specific area and wish to join a committee, visit our website for a complete list of opportunities. Committee-interest forms are available online, or you can email mschank@tcdla.com. A heartfelt thank you to our members who generously contribute their time and talents.

Affiliate: Co-Chairs Laurie Key & Jeremy Rosenthal

- Met with local bar presidents- several times via Zoom and once in-person
- Assisted with local bar meetings and CLEs
- Welcomed our newest affiliate – Cameron County Criminal Defense Lawyers Association

Amicus (Brief) Curiae: Chair Kyle Therrian & Vice Chairs Kristin Brown & Catherine Stanley

- Reviewed over a dozen requests and submitted numerous amicus briefs
- Defended the Fifth Amendment before the Texas Supreme Court
- Defended trial counsel misled by prosecutor's material false statements
- Defended stare decisis in case involving botched stacking order

Awards: Co-Chairs David Botsford & Betty Blackwell

- Met several times to review award applications and select recipients
- Hosted an awards banquet at Rusty Duncan

Budget and Financial Development: Chair Sarah Roland & Vice Chair Lance Evans

- Created a budget for FY25
- Stayed within Budget for FY24

By-Laws: Chair Adam Kobs & Vice Chair Paul Tu

- Updated Bylaws in June
- Amended Executive Committee composition

Capital Assistance: Chair Patrick McCann & Vice Chair Philip Wischkaemper

- Drafted a legislative letter to the Sunset Advisory Committee on the performance of the Board of Pardons and Paroles for Executive Committee's adoption
- Reached out to several execution defense teams to offer support for their efforts
- Created Guidelines for What You Need and Want to Know to do Capital Defense and created a webinar for new lawyers
- Created law school data contact list

Cannabis: Chair Don Flanary & Vice Chair Joseph Hoelscher

- Had their first seminar in conjunction with DWI Defense in Arlington
- Published *Voice* articles
- Created Cannabis Cheat Sheets on members-only resource section
- Client Mental Health: Chair Alyse Ferguson & Vice Chair Jon O'Toole
- Created TCDLA Client Mental Resource Page with Client Questionnaire on members-only resource section
- Updated resource flyer placed for seminar packets
- Hosted 8 Mindful Mondays and 18 Mental Health Seminars

Crimmigration: Chair Jordon Pollock & Vice Chair Julie Pasch

- Conducted online training for *MyPadilla*
- Put on SB4 legislative updates and Roundtable discussions on how criminal defense and immigration attorneys can work together
- Published *Voice* articles
- Responded to members inquiries on listserv regarding Crimmigration

Criminal Defense Lawyers Project: Chair Jeep Darnell & Vice Chair Paul Tu

- Put on and monitored over 75 in-person and online programs
- Held Trainer for Trainers educational event for new speakers
- Created an online Trainer for Trainers program

Corrections and Parole: Chair Gene Anthes

- Linked Corrections and Parole related *Voice* articles to the Corrections and Parole page in the members-only section

Diversity, Justice, and Inclusion: Co-Chairs Monique Sparks & Thuy Le & Vice Chair Mark Snodgrass

- Put on Navigating a Changing World seminar Communicated with members

DWI: Co-Chairs Tyler Flood & Doug Murphy

- Published *Voice* articles

Executive: Chair John Hunter Smith

- Met monthly to discuss TCDLA business

Ethics: Co-Chairs Robert Pelton & Brent Mayr & Vice Chair Laura Popps

- Contributed monthly articles for *Voice*
- Responded weekly to inquiries to the Ethics Hotline

Federal: Co-Chairs Roberto Balli & Camille Knight

- Submitted monthly articles for Federal Corner in the *Voice*
- Reviewed federal law changes and monitored possible shutdown
- Shared Retro motions and memos

Health and Wellness: Co-Chairs David Ryan & Savannah Gonzalez

- Added Raise Awareness of Unhealthy Triggers, and other helpful videos, links and resources ton members-only page
- Hosted a healthy snack table at Rusty Duncan
- Shared the Financial Fridays with the Committee, which will be posted on the listserv

Indigent Client Defense: Chair Jani Maselli Wood & Vice Chair Jessica Canter

- Assessed developing legal issues presented by courts of appeals' cases for every district in Texas, and updated members

Judicial Conduct: Co-Chairs Ed Mallett & Philip Wischkaemper

- Reviewed requests regarding judicial matters and assisted members

Juvenile: Chair Kameron Johnson & Vice Chairs Stephanie Stevens & Ruben Castaneda

- Created a Juvenile page on members-only section with several cheat sheets, including Sex Deregistration, Determinate Sentencing, and recorded podcast
- Published *Voice* Articles
- Put on Juvenile and Juvenile Training Immersion Program small group Seminars

Law School Students: Co-Chairs Anne Burnham & Molly Bagshaw & Vice Chair Dwight McDonald

- Updated criminal law related contact lists for each law schools
- Hosted TCDLA law student attended events at Texas law schools
- Assisted PD and MAC offices' recruitment efforts at law schools
- Put on Career Pathways to Criminal Defense Practice interactive on-line seminar
- Updated Student Membership Application/Brochure outlining benefits, including 3L Charlie Butts Scholarship
- Updated Law Student page on TCDLA website

Legislative: Chair William Harris & Vice Chair Bobby Mims

- Attended committee meetings and hearings
- Updated members on legislative changes
- Worked on the platform for the next session

Listserv: Chair Jeremy Rosenthal & Vice Chairs David Moore & Kristin Brown

- Monitored listserv

Long-Range Planning: Chair Nicole DeBorde Hochglaube & Vice Chair Monique Sparks

- Committee completed the first year of action items and goals from the three-year Strategic Plan

Managed Assigned Counsels

- Created Resource Page for the public with a Q & A section
- Worked on private file sharing for management and collaboration for universal documents

Media Relations: Co-Chairs Lisa Greenberg and John Torrey Hunter

- Met to go over Media Relations plan of action
- Collaborated with Strategic Planning for process and procedures

Membership: Chairs Dustin Nimz & Vice Chairs Cesar De Leon & Mario Olivarez

- Featured different TCDLA members in the Voice's Member Spotlight
- Posted new members on social media
- Promoted new member benefits
- Hosted member social events
- Created membership certificates to recognize members at 5 and 10 years

Memo Bank: Chair Tip Hargrove & Vice Chair Warren Wolf

- Reviewed posts on the listserv and selected invaluable posts to archive

New Lawyer: Co-Chairs Jenny Zarka & Patty Tress

- Welcomed new members by printing their names (with endorsers) in *Voice*
- Created a dedicated new lawyer listserv, with special offers
- Updated Know Your Rights Posters – free under publications
- Put on Building Blocks seminar for new lawyers
- Created cheat sheets
- Hosted monthly new lawyer CLE via Zoom

Nexus: Chair Paul Tu

- Conducted nine working sessions to review all seminars in the past year and come up with topics, format, venue, and other aspects related to CLE to present to the President

Nominations: Chair David Guinn

- Met several times, including in person, to review applications and present slate for FY25

Past Presidents: Chair Betty Blackwell

- Met monthly to stay up to date on legislative and TCDLA business and to provide assistance where needed

Prosecutorial Conduct: Co-Chairs Thomas Wynne & Monroe Solomon III & Vice Chair Kyle Therrian

- Reviewed potential prosecutorial misconduct issues
- Assisted members in facilitating appropriate responses to possible misconduct

Public Defender: Co-Chairs Rebecca Tavitas & Clifford Duke & Vice Chair Eric Davis

- Submitted articles for the *Voice*
- Put on an Indigent Defense Seminar in June 2024
- Created a Brown Bag Check-In & Bring Your Case session

Rural: Co-Chairs Paul Harrell & Shane Phelps

- Worked with the Affiliate Committee for local coordination and assistance
- Conducted Round Tables via Zoom
- Created as dedicated Rural listserv

Social Media: Co-Chairs Aaron Diaz & John S. Gilmore

- Met monthly to come up with campaigns
- Created and recorded video advertisements for seminars
- Created a Facebook group page

Strike Force: Co-Chairs Nicole DeBorde Hochglaube & Reagan Wynn

- Handled over 15 cases requiring briefing or some action, including several very complex matters
- Responded to several calls monthly, discussing with the members ideas for resolving their issue

Technology: Co-Chairs Clifford Duke & Sean Hightower & Vice Chair Rocky Ramirez

- Published *Voice* articles
- Maintained up-to-date Police Accountability Database and gathered Brady information
- Put the AI ChatGPT webinars on website

Transcript Database: Chair Mathew Smid

- Reviewed and collected hundreds of transcripts
- Organized transcripts on the members-only section
- Created marketing flyers to promote the transcript database and increase submissions of transcripts

Veterans Assistance: Co-Chairs Terri Zimmerman & Jon Shelburne & Vice Chair Paul Harrel

- Put on Veterans seminar

Women's Caucus: Co-Chairs Betty Blackwell, Amanda Hernandez & Sarah Roland & Vice Chairs Kristen Gavigan & Leah Jackson

- Held Women Defenders CLE and roundtable at Rusty Duncan
- Maintained a dedicated listserv

Editor's Comment

JEEP DARNELL

A Call to Arms

As lawyers, our weapons are our minds and our mouths. More specifically, as criminal defense lawyers, we can solve problems at the highest level imaginable, and we use our silver tongues to convince 12 people that what they thought walking in the door was not so. Among our nearly 4,000 members are knowledge, ideas, and experiences that we can all learn from. Collaboration and knowledge sharing are essential to our professional growth and success. We face unique challenges and triumphs every day, and only by sharing our experiences with each other, can we continue to strengthen the greater collection of misfits and outlaws we call our membership.

In this light, I invite you to contribute to our members in defending their clients by submitting an article to the Voice for the Defense magazine. Your insights and experiences are invaluable and sharing them can have a profound impact on your colleagues and the profession as a whole. Whether it is a unique case, a successful legal strategy, or a challenge you faced and how you overcame it, your story can offer valuable lessons and inspiration to others in our field. What you submit may be precisely what one specific lawyer needs to succeed and overcome that day.

We, the Editorial Committee, encourage you to write about anything you think would be relevant to the criminal defense world. Here are some ideas to get you started:

Case Studies: Share details about a particularly challenging or groundbreaking case you handled. Discuss the legal strategies you employed, the obstacles you encountered, and the outcomes achieved.

Legal Strategies: Write about innovative legal strategies or approaches that have worked well for you. This could include trial tactics, negotiation techniques, or unique defenses.

Professional Challenges: Discuss the challenges you have faced in your career and how you overcame them. This could include dealing with difficult clients, prosecutors, or judges (without specific names), navigating ethical dilemmas, or managing work-life balance.

Motions: In addition to articles, we invite you to submit novel or unique motions that have been particularly effective in your practice. By contributing a motion, you provide a practical tool your peers can adapt and use in their cases.

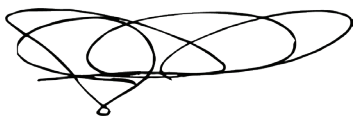
Legislative Changes: Provide an analysis of recent changes in laws or regulations and their implications for criminal defense practice.

Personal Reflections: Share your journey in the field of criminal defense. What motivated you to become a defense attorney? What have been your most rewarding experiences?

Your articles can be as brief as one page, approximately 500 to 2500 words. We understand that time is a precious commodity, so we aim to make the submission process as straightforward as possible. If you are new to writing for publication, we offer videos and resources to help you through the process. The Editorial Committee that Sarah Roland began assembling before me, and the members that have been added during my tenure, are outstanding. Our goal is to make it easy for you to share your knowledge and insights.

By contributing an article or motion, you put your name out there and become an integral part of our collective criminal defense team. You never know what impact your story or strategy will have on someone else's career or life. Your knowledge and experience, both good and bad, help us become who we are today. We fight the good fight, and we do not do it alone. We do it with the support of our brothers and sisters in the field.

To submit your article or motions, send to voice@tcdla.com We look forward to reading your contributions and thank you for your dedication to the criminal defense profession.



The Federal Corner

T.W. BROWN

In *Perkins*, Judge Smith Makes Plain Procedural-Reasonableness Protections

The Fifth Circuit's recently published opinion in *United States v. Perkins* will assist subsequent panels (and parties) in assessing the adequacy of in-court sentencing explanations for many years to come. For one, the opinion is a comprehensive review of the Fifth Circuit's procedural-reasonableness precedent, and its author, Judge Jerry Smith, begins by helpfully cataloging the prior authority coming out both ways on the adequacy of a district court's on-the-record explanation. From there, Judge Smith compares the holdings from those cases to the specific challenge presented by Mr. Perkins, a defendant sentenced to over 150 years for a series of child-pornography offenses. Judge Smith's careful analysis leads to a well-reasoned reversal, and the overall result is a helpful anthology of concrete rules for use by future panels, litigants, and district-court judges. The opinion's clarity will help defense lawyers spot error on the fly and make compelling objections at federal sentencing hearings. On top of all that, Judge Smith has a little fun along the way with colorful retorts to the government's arguments for affirmance. What is not to like?

The rule applied in *Perkins* is deceptively simple—a district court must adequately explain the specific sentence imposed.[1] In 2007, the Supreme Court first recognized this commonsense procedural requirement in *Gall v. United States*,[2] and the rule announced in *Gall* tracks Congress's explicit instructions to district courts. "[A]t the time of sentencing," 18 U.S.C. § 3553(c) sets out, the district court "shall state in open court the reasons for its imposition of the particular sentence." Section 3553(c)(2) likewise requires sentencing judges to state "the specific reason" for a variance or departure from the advisory range. The Supreme Court noted in *Gall* that the failure to follow these rules constitutes "significant procedural error."[3]

A simple rule may nevertheless prove difficult to apply in the real world. The requirement for an adequate in-court explanation is complicated at the outset by the case-specific nature of federal sentencing. As the Supreme Court recognized in *Gall*, § 3553(a) requires "an individualized assessment" of each offense and offender, and to avoid procedural error, the district court's explanation must "allow for meaningful appellate review" of the specific sentence at issue while "promot[ing] the perception of fair sentencing" as a general matter.[4] This standard provides some play in the joints and for good reason. Overworked district-court judges hoping to complete their sentencing dockets in a timely fashion may feel the urge to resort to shorthand explanations or a quick recitation of the goals of punishment set out in § 3553(a). These workaday realities, in turn, complicate the assessment of in-court sentencing explanations in real time and on appeal.

The freedom to vary from the advisory range adds a second wrinkle to the analysis. A judge who sets out to justify an unusually harsh or unusually lenient sentence "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance."[5] The greater the variance, the greater the need for a compelling on-the-record explanation. This sliding scale further complicates the real-time assessment of a district court's explanation at sentencing and any after-the-fact challenges raised on appeal.

The available context is a third factor complicating the assessment of in-court sentencing explanations. A sentencing judge may, for example, offer only a terse explanation for a defendant's non-Guidelines sentence but nevertheless make its reasoning plain by incorporating by reference a variance argument advanced by one of the parties, or suggested in the presentence report. Keeping these realities in mind while attempting to absorb the

1 *United States v. Perkins*, 99 F.4th 804, 817-18 (5th Cir. 2024) (quoting *United States v. Jones*, 75 F.4th 502, 510-11 (2023)).

2 552 U.S. 38, 51 (2007).

3 *Id.*

4 *Id.* at 50.

5 *Id.*

district court's explanation and managing a defendant's response to the sentence imposed is a tall order.

For example, in *Perkins*, Judge Smith addressed these complexities head-on and extracted from the Fifth Circuit's prior published authority a series of helpful rules. First, the available context can serve to support an in-court explanation only where the relationship between that context and the judge's on-the-record statement is clear. A short explanation from the bench citing unspecified § 3553(a) factors in support of an upward variance, for example, satisfies the requirement for an adequate in-court explanation where a subsequently issued statement of reasons specifies the factors relied upon to support the sentence.[6] By contrast, "a single passing reference to § 3553(a)" will be insufficient to explain an upward variance where the sentencing court attempts to incorporate by reference arguments advanced by the government in support of an upward departure under the Guidelines Manual, rather than an upward variance under § 3553(a).[7] In the former situation, the sentencing record as a whole supports what otherwise may have been an inadequate in-court explanation and elucidates the district court's reasoning by providing helpful context for the judge's on-the-record statement. The latter situation presents an internal inconsistency and obscures, rather than sheds light on, the reasons for the sentence imposed. There, the one-to-one relationship between the district court's explanation and the available context is missing, and remand is necessary to clear up the record. The Fifth Circuit's pre-*Perkins* authority had not clearly recognized the need for a direct relationship between the district court's in-court explanation and other portions of the sentencing record, but in Perkins, Judge Smith helpfully elevates that relationship to a necessity.

After addressing context, Judge Smith pulled another useful rule from § 3553(c)'s text. Section 3553(c) clearly requires a judge to "state in open court" its reasoning "at the time of sentencing." Section 3553(c)(2) imposes an additional requirement whenever the judge imposes a variance or departure. In those circumstances, the judge must also state "the specific reason for the imposition of a sentence" outside the advisory range, and once more, must do so in the defendant's presence. Judge Smith explained that these plain-text requirements necessarily foreclose any attempt by the government to rationalize a district court's sentencing explanation where the court never even attempts to incorporate by reference a sentencing

6 *Perkins*, 99 F.4th at 818 (citing *United States v. Conlan*, 786 F.3d 380, 394-95 (5th Cir. 2015)).

7 *Id.* (quoting *United States v. Chon*, 713 F.3d 812, 823-24 (5th Cir. 2013)).

suggestion advanced by one of the parties in a prior filing or by a probation officer in the PSR. In short, Congress meant what it said in § 3553(c), and in *Perkins*, Judge Smith reiterated the significance of the statute's timing requirement. This approach will focus the attention of subsequent panels on the district court's actual explanation and removes the guesswork for litigants assessing a district court's in-court explanation at sentencing.

Last, Judge Smith recognized that a sliding scale applies in this context and affects the usefulness of earlier precedent. "The magnitude of the sentence," he explained, "impacts what counts as an adequate explanation."[8] A short term of imprisonment, or a sentence within the advisory range, therefore requires less justification than an extraordinarily harsh or extraordinarily lenient sentence. On appeal, this reality requires a close look at precedent. Whether a district court's on-the-record justification sufficed to explain one sentence may shed little light on what would be necessary to explain a dramatically different sentence imposed for another defendant. This lesson will help parties on appeal and subsequent panels separate useful authority from distinguishable precedent.

After identifying these helpful rules, Judge Smith applied them to the challenge brought by Mr. Perkins. Despite nine counts of conviction, the Guidelines Manual only suggested an aggregate term of imprisonment somewhere between 210 and 240 months. The district court imposed a 210-month term of imprisonment on each count and then ordered them to run consecutive to one another for a total sentence of 157 years and six months. This amounted to an upward variance of just over 137 years, but the sentencing court initially referred to the term of imprisonment as within the advisory range. When pressed on that point, the district court recharacterized the sentence as an upward variance but then supported the massive term of imprisonment with only a passing reference to § 3553(a). In a subsequently issued statement of reasons, the sentencing judge referred the parties back to the "reasons stated in open court," but the paucity of the district court's on-the-record explanation, Mr. Perkins argued on appeal, rendered the statement of reasons effectively meaningless.

The Fifth Circuit, in a unanimous published opinion authored by Judge Smith, reversed the district court's efforts as insufficient. The district court's passing reference to § 3553(a) completely failed to explain its reasoning for the massive variance imposed, and the government's attempts to rationalize the sentence based on other aggravating facts elsewhere in the record but unremarked upon when Mr. Perkins actually received the 157-year term of imprisonment violated § 3553(c)'s requirement for an explanation "at the time of sentencing."[9] Sure enough, the government had filed a sentencing motion highlighting various aggravating facts, but the district court never actually adopted any of those arguments by referencing them at sentencing.[10] In similar fashion, the PSR described many of the same bad facts but did not suggest an upward departure or variance to account for them. Those omissions mattered, and as a result, neither the government's motion nor the PSR could bridge the gap between what the district court said and what it did.[11]

Judge Smith concluded with a point about the sliding scale. To support affirmance, the government cited *United States v. Bonilla*, but Judge Smith distinguished Bonilla's holding based in part on the extent of the variance imposed in that case.[12] In *Bonilla*, the Fifth Circuit affirmed the district court's in-court explanation as "minimally

8 *Id.* at 820.

9 *Id.* at 819.

10 *Id.*

11 *Id.* at 819-20.

12 *Id.* at 820.

sufficient" after crediting the district court's adoption of arguments advanced by the government for an upward variance in support of a 41-month term of imprisonment.[13] "[W]hat is minimally sufficient" for the modest variance challenged in Bonilla may not be "sufficient for a 137-year sentence," Judge Smith cautioned.[14]

In addition to drafting a helpful opinion on a complex area of law, Judge Smith added a few zingers for good measure. The first playful comment was at the district court's expense. To undercut one of the government's arguments from context, Judge Smith simply excerpted the portion of the sentencing transcript where the district court back tracked on its earlier characterization of the sentence as within the advisory range and instead recharacterized the sentence as an upward variance. "The district court," Judge Smith noted, "did not expressly reference detailed material to justify its action as in *Bonilla*."[15] No more was necessary to support this particular point, but Judge Smith went a bit further. The district court, he continued, "may have been somewhat uncertain as to what its actions were."[16] That is a good line, and as it turns out, Judge Smith was only getting warmed up. A paragraph later he again rejected the government's reliance on *Bonilla*, but this time, pointed out the obvious difference between a modest variance and a major one. To further illustrate the point, Judge Smith concluded with a fun play on a classic English idiom: "What is good for the goose is good for the gander—but not necessarily a pterodactyl."[17] Delightful.

In addition to providing a lively read, Judge Smith's opinion in *Perkins* provides a series of helpful lessons for litigants, district courts, and subsequent Fifth Circuit panels. First, a sentencing court must show its work. The district court can do so by either developing its own § 3553(a) analysis with reference to case-specific facts or by explicitly adopting an adequately developed sentencing position advanced by one of the parties or the PSR. Either approach is fine, but the record must be clear. Second, the court must explain the sentence in the defendant's presence to comply with § 3553(c)'s plain text. Third, the court must be prepared to offer an especially thorough explanation whenever it chooses to impose an especially unique sentence.

How can defense attorneys help enforce these rules at sentencing? By adequately preparing in advance and listening closely to the district court's actual words. Defense attorneys should come to each sentencing hearing with a firm grasp on the available context and the arguments pending before the district court. Defense attorneys must also listen closely to the district court's in-court explanation and be prepared to object whenever the court skirts one of the procedural safeguards recently highlighted by Judge Smith. Easier said than done, but Perkins helps clarify the ground rules, and clear rules help lawyers to spot error in real time. This is a useful development, and defense attorneys will no doubt put *Perkins* to good use moving forward.

T.W. Brown *is an Assistant Federal Public Defender in the Northern District of Texas. He graduated from the University of Arkansas School of Law in May 2013 and joined the FPD's Fort Worth office in January 2015. He spent a few years in the trial division and has been in appeals since May 2019. You can reach T.W. at Taylor_W_Brown@fd.org.*

13 *Id.* (quoting *United States v. Bonilla*, 524 F.3d 647, 657 (5th Cir. 2008)).

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

2024 Hall of Fame Inductees

The Hall of Fame Award honors a qualified lawyer for membership in the Hall of Fame who meets the following criteria: Minimum of 30 years has elapsed since engaging in active practice of law, or the candidate is deceased; Substantial commitment to defense of persons accused of crimes on appeal or trial, based on court excellence; and significant contributions to the profession.

Lydia Clay-Jackson

Lydia has been a TCDLA member since 1986. She had the grand honor of serving as the 2012-2013 President of TCDLA. She serves, along with Tim Evans, as Dean Emeritus of the Tim Evans Texas Criminal Trial College.

In 1996, Lydia became the first African American woman to be Board Certified in criminal law by the Texas Board of Legal Specialization.

Want to nominate someone?

Go to tcdla.com, select About, and click on Awards to see the applications. Or, scan the QR Code!

Philip Wischkaemper

Philip is a 1989 graduate of Texas Tech University School of Law. After one year as Assistant County Attorney for Hockley County, he entered the private practice of law with a focus in criminal law. He took his first capital case in 1994 and by 1998, he was totally focused on capital litigation. In 2001, Philip went to work for the Texas Criminal Defense Lawyer's Association as their first Capital Assistance Attorney, providing training and resources for capital lawyers across the state. He joined the Regional Public Defender for Capital Cases office in October 2010 as its Deputy Director. He took the position as Professional Development Director for the Lubbock Private Defender Office in December 2013 and became the Chief Defender in 2020.

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Beyond the City Limits

DEAN WATTS

Rural Practice 101

Perhaps you want to ditch the big city stress and start your own rural criminal practice. Or maybe you got suckered into doing a client a favor and making a three-hour drive to some rural area you may have never heard of. In either case, it is important to understand how different things are when you walk up the courthouse steps in a county of less than 100,000. So, for those of you who may be ready to become a country criminal practitioner, or even if you come to a rural community just to handle one case and get the hell outta Dodge, here are a few tips to get you started. By the way, some of these tips may seem like just common sense, but I am always surprised by the lack thereof when I see out-of-town lawyers in my hometown.

Dealing with Prosecutors

Every county is going to have a unique vibe. Some counties will have good old boys or girls who want to collect a good paycheck with as little work as possible. Others have sincere prosecutors who try to do the right thing. Some prosecutors may be looking to be a Judge, so they may want to appear to be tough on crime. They will not be sympathetic to your side of the story. Just keep in mind that every place is different, and you need a different approach for each county. Whatever your tactic may be, the most important thing to remember is that lawyers in rural areas tend to have long memories. They tend to stay in the same place for a long time too. So, think your approach through carefully. How you act will be remembered for a long time! You may want to just pick up the phone and ask a local lawyer how the local DA rolls. Even if you do not hire that person as local counsel, a ten-minute phone call can make a big difference in your rural legal experience.

Dealing with Judges

If you think prosecutors have long memories, it is nothing compared to judges. Above all else, be straightforward and honest. You may be dealing with this person for 20 or more years if you stay here. Even if you are here for just one case, you want to put your best foot forward. That does not mean that you must lay down to Judges, but you want to treat them the way you want to be treated. Know their idiosyncrasies and flow around them the best you can. Again, a phone call to a local lawyer is always a good idea. At the very least, you want to ask one of the local lawyers you see milling about, just how your judge views the world. It will save you stress down the road.

Investigators

In my opinion, having a good investigator is crucial in criminal defense cases. This is especially important in rural areas. Get one whenever you can. If your client can afford one, get one. If your client cannot afford one, go to the court under *Ake v. Oklahoma*, 470 U.S. 68 (1986) and ask for one to be appointed. You might get blowback from rural judges who do not always understand that your client may qualify for one even if they had the money to pay you-- but stick with it. If you meet the qualifications under Ake, your efforts should result in you either getting an appointed investigator or having a sound issue for an appeal.

Pretrial hearings

Before Michael Morton, pretrial hearings were often a chess game between the defense and prosecution on what kind of discovery you could get. That is all in the past. Now, the big issues are usually suppression hearings. Be advised

that every Judge handles suppression hearings differently. Some may carry them forward onto trial if they are not dispositive, while others will give you one pre-trial. Do not just assume that since you filed a motion to suppress, the court will cater to your views on what you want.

Voir Dire

The smaller your county, the more everyone knows each other. Your elected prosecutor will know a hell of a lot more people than you do, or they would not have gotten elected. That said, the longer a prosecutor has been there, the more people they will likely tick off. People who tend to hate the prosecutor think it is best to speak up and say so, hoping to embarrass them. However, they do not wind-up being jurors in your trial. They proudly walk out of court thinking they have embarrassed the prosecution, but they have done them a favor getting off the jury panel. Pro-prosecution jurors often keep their mouths shut in loyalty to their friendship with the prosecutor. If you know people in your area who have lived there awhile, ask if they can look over your jury list. This is also where a local investigator or local counsel will be worth hiring. You will probably learn more about them than anything you may hear in voir dire.

Trials

The big question with trials in rural areas is: jury or bench? This is where you must know your judge. Most rural judges think there is something wrong with the criminal justice system. Is it too focused on deterrence and not enough on rehabilitation, or vice versa? You need to know before you sign that jury waiver. On the same note, it is also important to have an idea about what kind of cases jurors in your county like/hate. In Angelina County many years ago, a jury gave a person probation on an aggravated sex case. The newspaper had a field day. They covered every sexual assault case tried in that county in detail for years to come. In response, juries in that area would tend to hammer those cases for years. Out-of-town lawyers got hammered and did not understand the back story. So, do your research before you waive or exercise your right to a jury trial.

I hope this helps in giving you a summary of what to expect when you open a rural practice. As always, I wish you good luck, take care, and have fun!

Dean Watts *has been a TCDLA member since 1998. He's a graduate of SMU law school and the National Criminal Defense College in Macon, Georgia. He has been board certified in criminal law since 2004, has been selected to the Texas lawyers list for three years, and practices criminal law in Nacogdoches, Texas*

Together We Can

SARAH ROLAND

You don't have to look far or ask many people to find someone affected by an opioid overdose. My family has been. My youngest brother, Randy "Roo" Roland, died of an opioid overdose in 2016, at the inception of the fentanyl drug busts in Lubbock. And, certainly as criminal defense lawyers, we have all been at least indirectly affected by the proliferation of fentanyl and the steady surge in opioid related deaths. We have met with clients when they are high. We have experienced the overdose deaths of clients. We have represented the clients who, because of and to support their own substance use disorder, began selling opioids.

August 31st is International Overdose Awareness Day (IOAD). It's a day to wear purple in support of a worldwide campaign that seeks to end overdose, remember without stigma those who have died, and acknowledge the grief of family and friends left behind. The theme for 2024's campaign is "Together We Can." There are IOAD events not just in Texas and the United States, but throughout the world. You can visit www.overdoseday.com to learn more.

Together We Can.

Together we can…what?

1. Collectively, help stop the stigma surrounding opioid use disorder (OUD). Eliminate the stigmatizing language (addict, druggie, etc.) for those who have substance use disorder;
2. Recognize that everyone lost to an opioid overdose is someone's child, parent, sibling, spouse, and/or friend, and that they did not always have opioid use disorder;
3. Acknowledge that no one with opioid use disorder ever really thinks that they will die of an overdose and that many people with OUD truly want to stop but do not know how or have not been able to;
4. Understand that substance use disorder is a recognized mental health disorder according to the Diagnostic and Statistical Manual of Mental Disorders;
5. Educate ourselves not just about traditional substance use residential treatment providers in our areas but expand our knowledge to include knowledge about medications for opioid use disorder (MOUD).

There are currently 3 medications approved by the FDA to treat OUD: buprenorphine, methadone, and naltrexone. These medications are evidence-based, safe and effective to help treat OUD in conjunction with counseling. Although not as readily available as traditional residential treatment providers, there are treatment providers and clinicians who provide MOUD throughout the state as part of a comprehensive treatment program.

Together We Can.

And who is the "we"? Certainly, the "we" is us individually in our communities. Specifically, as criminal defense lawyers, there are things that we can do. We are often the last line of defense for the person with OUD to help with defending their case and also to see them as an individual worthy of treatment for their disorder. Many

times, our clients do not have a support structure in large part due to the path of destruction caused by OUD. We can help provide that support. We can become involved in and knowledgeable about our local drug treatment courts or help launch one if it does not yet exist. We can make sure the jails in our areas have a structure in place to treat those people coming into the jail who are already on MOUD treatment just like those coming in with other medical conditions are treated. We can ask questions.

Further, as defense lawyers, perhaps equally as important given the prevalence of fentanyl in so many illicit drugs, is to challenge the fentanyl murder statute which went into effect last September. Tex. P. Code § 19.02(b)(4). We also need to be familiar with Texas's version of a Good Samaritan Law in the Health and Safety Code for possession cases. Tex. Health & Safety § 481.115(g).

Together We Can.

If you were one of the over 1,000 people who came to Rusty Duncan this year, you received a box of naloxone (Narcan nasal spray) in your bag courtesy of Responding to Opioid Overdose (R.O.O.), the nonprofit my family started after my brother died. The box contains two life-saving doses. Naloxone is a rapid-acting opioid antagonist. Importantly, it has no effect on someone who is not overdosing on an opioid, and a second dose can be given. Many first responders and law enforcement carry and are trained to administer naloxone when they are confronted with opioid overdose. Texas law specifically addresses opioid antagonists like naloxone; specifically, subchapter E of Chapter 483 of the Texas Health and Safety Code. A prescription is not necessary to possess an opioid antagonist (483.105), and perhaps most importantly, a person acting in good faith and with reasonable care who administers an opioid antagonist to another person who is suffering from an opioid-related drug overdose is not subject to criminal or civil liability (483.106(a)).

We keep Narcan at our office and freely give it to people, not just clients, who ask. Parents ask. Spouses ask. Friends of clients ask. People in the community ask. After all, substance use disorder does not discriminate. We have a sign on the front door indicating we have Narcan. People are grateful.

Together We Can…and We Should.

Sarah Roland *grew up always wanting to be a criminal defense lawyer like her late dad, George Roland. She has a criminal trial and appellate practice in Denton where she is fortunate enough to practice with her brother, George Roland. She has been an active member of TCDLA since 2001 when she became a student member. She has been very involved in TCDLA from the beginning. Sarah was editor of The Voice for 5 years. She has also served as chairperson of CDLP and the prosecutorial integrity committee. She is currently the Second Vice President of TCDLA. She continues to be an active speaker and author on criminal law topics throughout the state. She has been serving as part of the Denton County DWI Treatment court, Mental Health Treatment Court, and is presently serving on the Drug Treatment Court. Sarah is also a past president of the Denton County Criminal Defense Lawyers Association, a member of NACDL, has an AV Preeminent Rating by Martindale-Hubbell, and has been consistently voted as a Super Lawyer since 2013.*

Sarah is a co-founder, along with her mom and brother, of the nonprofit R.O.O. (Responding to Opioid Overdose) in honor of her youngest brother, Randy. Sarah loves family vacations, the outdoors, an occasional run, baseball, a good book, Pearl Jam, and is wildly proud of Ellie and Sam.

Shout-Outs!

Shout out to Joseph Esparza! He won a hotly contested general court martial at Fort Sam Houston for an Army Captain accused of serious domestic violence against his foreign spouse. The client was a Military Police Commander and these accusations alone derailed his career and the Army tried to use his position and power against him as part of their case, highlighting the imbalance of power, his alleged violent and controlling nature, etc. A conviction would have ended his career, likely meant military prison given the alleged injuries and scenario, and cost him his retirement as well. Esparza prepped the case hard after the client hired him to take over from his Army counsel. He successfully kept out 404b evidence of two previous alleged assaults claimed by the now ex-wife and focused on the case at hand. Esparza proved at trial circumstantially that she was lying about the charged offense, and that her motive to do so was the client's filing of divorce against her in her home country and his withdrawal of support for her residency application allowing her to live in the U.S. Esparza further showed that a key supporting witness for her was lying because of inconsistencies that caught him in at trial over his and her version of events. Esparza then turned her pics of alleged injuries and the government medical evidence against her and showed successfully that her injuries did not correspond with the assaultive actions claimed. Other government witnesses were impeached or shown to be biased due to their relationship with the complainant. The fact that the complainant had never been in a real fight before and had never thrown a punch before helped tremendously in showing how her story of a lengthy, brutal assault was just that, a story. Final verdict: NOT GUILTY. **Way to go!**

Kudos to Bill Mason of Cleburne, a member of TCDLA since 1997. Mason got a not guilty from a jury on an indictment for Continuous Sexual Abuse of Young Child on June 6, 2024 (a.k.a. D-Day). The trial was held in the 18th Judicial District Court of Johnson County, judge Sydney Hewlett presiding.

A 37-year-old defendant was accused in 2022 of sexual assault of his 20-year-old stepson, the complainant, whom the defendant had raised since he was three years old. The allegation arose while the defendant was in custody fight with his ex-wife over his own 11 year-old son. The complainant claimed that he was orally and sexually assaulted by way of anal intercourse between ages of 9 and 13 (2013 - 2017). A sexual assault nurse – examiner testified to healed, anal, scarring or tearing "consistent with "the descriptions of the assaults. **Great work!**

Congrats to Matthew Hefti and Johnny Day! They just won a civil jury trial involving a complex real estate matter in which their client claimed a breach of an informal fiduciary duty and statutory fraud. The jury came back with a unanimous verdict and found by clear and convincing evidence that the client had proven his claims of breach of fiduciary duty and statutory fraud. In addition to finding for them on liability, the jury decided our client was entitled to $350,000 in punitive damages. The verdict paved the way for a settlement in which the client received the two things he wanted most: his house returned to him and an end to litigation. **Wow!**

Fantastic work by Sarah Roland! Ronald Singer, a 38-year-old man from Denton County, was found not guilty of the 2021 murder of his ex-wife, Maria Romero-Ramos, by reason of insanity. On the night of March 2, 2021, Singer killed Romero-Ramos in her Carrollton apartment. During the trial, Singer's defense attorney, Sarah Roland, successfully argued that Singer was legally insane at the time of the crime. The verdict acknowledged that Singer was unable to understand the nature of his actions due to his mental illness. **Amazing!**

Roadside Testing and Cannabis; What You Need to Know to Protect Your Clients

SOL BOBST, PHD DABT, TOXSCI ADVISORS LLC

Member of Cannabis Committee

Saliva

Saliva testing is a fairly new screening tool, currently it is being used in the State of Alabama (AFDS, 2023).[1]

Some jurisdictions in Texas may be testing this technology. Saliva testing is appealing for its ease of collection, but while there are some correlations of saliva concentrations and blood concentrations, there are a lot of issues with the interpretation, standardization, and validation of the testing. There are emerging companies in Texas that are developing rapid testing technologies for saliva (Dallas Innovates, 2023).[2]

Breath Testing

There is also ongoing research and interest in the measurement and detection of cannabis in breath testing (NIST 2023[3], Hound Labs, 2024).[4]

Field Testing of Products to Evaluate if it contains greater than 0.3 % THC

There are also jurisdictions that are evaluating technologies to field test Hemp or CBD products if they contain greater than 0.3 percent THC. (Wisconsin DOJ, 2023).[5] This is also a product safety and quality issue for your clients. If your client buys a product and they are charged with greater than 0.3 percent THC content, you will want to ask them to preserve the product, their receipt, location of purchase, and any product information you can get. Mislabeled products are a common issue that

1 :.

2 **Dallas Innovates, Rapid THC Testing Program:** https://dallasinnovates.com/utd-bioengineers-develop-rapid-saliva-test-for-thc-levels/.

3 NIST Testing: https://www.nist.gov/news-events/news/2023/05/researchers-analyze-thc-breath-cannabis-smokers.

4 **Hound Labs, 2024:** https://houndlabs.com/#:~:text=THC%2C%20the%20psychoactive%20compound%20in,detected%20in%20urine%20and%20hair.

5 **Wisconsin:** https://www.doj.state.wi.us/sites/default/files/dles/clab-forms/2020-04_LE%20Bulletin%20Hemp%20test-%20final.pdf.

your client may not be aware of.

What you need to do in any case involving field testing of physical data or samples

Ask the testing laboratory for all their discovery, just as you would ask for discovery in a blood alcohol case. These new companies will likely not have accreditation or testing methods and standards that meet the current standards for forensic testing in common crime labs. There are also scientific weaknesses with rapid and indirect testing.

Dr. Sol Bobst *is the President and Principal Advisor for ToxSci Advisors LLC. He is currently on the TCDLA Cannabis committee and is an affiliate member of TCDLA. He has been retained as an expert in over 200 Drug and Alcohol cases including dozens of cases involving Cannabis. Dr Bobst is also an adjunct assistant professor at the University of Texas Medical Branch in Galveston, Texas. Contact information: 2016 Main St Suite 1901, Houston, Texas 77002 Office 832-581 2686 Cell 281-686-6363 Fax 832-581 2587 Sol@toxsciadvisors.com www.toxsciadvisors.com*

The MAC Series: Vol. 1

KENNETH HARDIN

Member of MAC Committee

Floor 1. The doors open and the sounds of shuffling feet and buttons clicking quickly consume one of several congested elevators at 1201 Franklin in Harris County, TX. Wearing my red and white lanyard, I file in amongst them. "Office of Managed Assigned Counsel," one attorney slowly says in a skeptical tone as he squints reading the words on my lanyard. Another attorney blurts out "MAC Office" as if she was correcting what was read. Without getting a chance to say my name or confirm our office, the cacophony of random voices saturates the elevator.

Floor 8. "The MAC is just a different form of doing the same thing—taking away attorney independence."

Floor 9. "I have been practicing for 12 years. What can a MAC even do for me?"

Floor 10. "I am better off with the devil I know, [the judiciary], than the one that I don't [the MAC]." As I walk off the elevator, one attorney follows me out: "What do you have to say about all of this?" I smiled widely and said:

Schedule Flexibility: While the MAC is different, the MAC empowers, rather than takes away attorney independence. The MAC uses an automated appointment process that fairly and equally distributes appointments based upon attorney availability. An attorney's practice may change periodically. Therefore, attorneys self-report their availability every 8 weeks by informing the MAC of their percentage of practice dedicated to receiving misdemeanor appointments. The larger their misdemeanor practice, the more often an attorney may appear as next up to receive a case appointment.

Attorney Services: The MAC can do much of what a public defender's office can. Each "MAC-Appointed Attorney" is added to a password-protected portal created by the MAC. There, an attorney can access a motions bank, past monthly CLEs hosted by the MAC, and their assigned MAC Resource Attorney. In addition, the MAC offers attorneys second chair support, access to free and confidential jail calls, notary services, and Westlaw. Additionally, some attorneys do not have offices within walking distance to the courthouse. The MAC in Harris County has two satellite offices for attorneys to use upon reservation—one within the MAC office and the other in the courthouse.

Client Services: While I certainly do not align with the MAC or the judiciary being the "devil," there are differences between the one you know [the judiciary], and the one you don't [the MAC]: Counsel can jump through hoops seeking an ex parte appointment for an investigator or immigration specialist from the judiciary, but the MAC stands ready to provide defense counsel access to a pool of investigators, social workers, and immigration specialists, should your client need one.

At times, the opinions that people have about the MAC are like the voices in the elevator.

Each builds off the other, *from* others, and it is human nature to focus on the loudest or most recognizable voice. Like that one attorney, however, take a chance and inquire further. Ask questions about the MAC from the MAC. Gather validated information to form an independent impression about what the MAC is and can do for attorneys and clients. You may love what you find out.

Kenneth Hardin *is the Executive Director of Harris County's first MAC Office in Houston, Texas where he leads an office that makes appointments, provides oversight, and offers supportive services for attorneys who are qualified to accept misdemeanor appointments. Prior to his appointment, Kenneth practiced at both the Harris County Public Defender's Office and the Orleans Parish Public Defender's Office. Kenneth is licensed to practice law in Texas and Louisiana and is recurring faculty for the Harvard Trial Advocacy Workshop and at Gideon's Promise.*

The State's Proposed Judgments: Let Defense Counsel Beware

JOHN BENNETT

In many parts of Texas, trial courts informally assign the trial prosecutor the task of preparing written judgments, and that prosecutor prepares and forwards a proposed judgment in each case to the judge for his or her signature. But all too often the prosecutor does not bother to show the proposed judgment to defense counsel before (or even after) submitting it to the trial court. At the very least this entails an improper *ex parte* communication. Even worse, any debatable matter will almost certainly be described on those judgments in the State's favor.

The most obvious manifestation of this bias occurs in deadly weapon findings. Under *Guthrie-Nail v. State*, 506 S.W.3d 1 (Tex.Crim.App. 2015), the trial court has "the discretion to decline to make a deadly-weapon finding even after finding the defendant guilty of an offense in which use of a deadly weapon was a charged or necessary element," and where the charging instrument alleges a deadly weapon, orally pronouncement is unnecessary – "the finding may be included for the first time in a written judgment." *Id*. at 4, 6. When the trial court receives and signs the prosecutor's proposed judgment a day or two or more after the fact, the judge is unlikely to remember whether he or she meant to include the finding or not, and is likely to simply sign the document.

Although it takes time, it is accordingly imperative that we look at recent judgments in our cases as soon as possible and file *nunc pro tunc* motions where appropriate. The possible consequences of not doing so are enormous. A deadly weapon finding means the client will have to serve half the sentence before becoming eligible for parole. Tex. Code Crim. Proc. Art. 37.07, § 4 (Vernon supp. 2023). And a sentence of sixty years or more without a deadly weapon finding means parole eligibility when the defendant's "good time" plus "flat time" equal fifteen years, but the same sentence *with* the finding means no parole eligibility for thirty years, "good time" notwithstanding. Even further, unless clients are natural-born citizens or at least lawful permanent residents, under 8 U.S.C § 1227(a)(2)(c) they may be deported even if guilty of merely possessing "a firearm or destructive device," regardless of the length of the sentence or the offense to which the finding is attached.

And once the judgment is signed and filed, getting a deadly weapon finding removed from the judgment will be next to impossible, particularly after the 30 days for a motion for new trial has expired. Reviewing courts seem careful to enter deadly weapon findings on judgments but loath to erase them. Case in point: I represented an Asian immigrant on a PDR. The jury at his murder trial wasn't asked to make a deadly weapon finding at either phase of trial and the judgment contained none, but the Seventh Court of Appeals took it upon itself to reform the judgment to reflect such a finding. So the PDR's issue was: *Guthrie-Nail* established that appellate courts cannot put the words of a deadly weapon finding in a trial judge's mouth. Can the appellate courts put such a finding in *jurors*' mouths?

After all, the *Guthrie-Nail* Court noted that its ruling "renders our treatment of" entry of deadly weapon findings "the same for trial judges as for juries." *Id.* at 6. What was the PDR's fate? You guessed it. Not even one judge voted to grant review.

John Bennett *is an appellate attorney for the Panhandle Area Public Defender and has been doing criminal defense appeals for nearly 30 years. He holds a J.D. from Texas Tech, a Ph.D. in Anglican history from the University of Birmingham and, more recently, an L.L.M. in international criminal law from the University of Northampton. His first scholarly book, A History of Pew-Renting in the Church of England, was published this past June by Palgrave MacMillan of New York City.*

Welcome New TCDLA Members!

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Grand Jury Packets: The Most Underused Tool in our Toolbox

MOLLY BAGSHAW

Member of TCDLA Board

In a felony case in Texas, every criminal defendant is entitled to an indictment by a grand jury. The grand jury is made up of 12 private citizens who determine whether there is probable cause for the case to continue. We, as defense attorneys, do not get to go inside. Our clients do not get to either unless the prosecutor agrees. But we CAN submit a packet – and hope for the best. It can be a one page letter, or it can be a 50-page packet with 15 exhibits. It really depends on the case and the prosecutor. But this is the most underused tool in our toolkit. You do not want to give away too much to the grand jury unless you think the prosecutor is looking for a reason to drop the case. If they are – it may be worth the risk. Here are some steps to follow when evaluating whether your case is a "packet case" and how to execute one if you decide it is.

Step 1: Ask the prosecutor to hold the case back from grand jury for you to evaluate whether or not you want to submit anything. It is better to do this in writing if possible. The last thing you want is to get a notice of an indictment before you have had a chance to do your own evaluation.

Step 2: Identify early on whether this is potentially a good "packet" case. How do you do that?

- Are you working with a prosecutor who is open to your version of events? Is this a prosecutor who will actually take the time to read our packet and encourage the grand jurors to do the same?
- Are there witnesses to the incident that could write a letter about what happened? Is there data or information out there (see below) that will make a meaningful difference regarding the facts of the case?
    - Character letters alone do not make up a good packet case. There needs to be something that cuts against the probable cause other than "he/she is a good person who I love but I know nothing about these circumstances."

Step 3: Start constructing the packet. Anything goes! You do not need to worry about admissibility or the rules of evidence. Below is a list of things we have included but you can get creative here.

- Screenshots of text messages
- Surveillance videos – RING cameras (ask your client if they have one)
- Maps
- Polygraph results
- Character letters
- Witness letters

Step 4: Decide whether or not you want to submit the packet. Sometimes it is better to hold on to the information you have if you're working with a

prosecutor who will not take the time to consider it. Remember – you are showing your cards here so it is a strategic decision. Packets are not right for every case. Once you have decided you are not going to submit a packet, it is a courtesy to let the prosecutor know they no longer need to hold it back.

Step 5: Construct the packet. Your packet should have a cover page, a letter written by the attorney explaining the broader context and summary of your argument, and exhibits. If you have enough exhibits, consider tabbing them and/or creating an index. Print and bind the packets so they look professional. We always make 13 copies – 12 for the grand jurors and 1 for the prosecutor.

Step 6: Hand deliver your packets to the prosecutor or their front desk or staff. If you just send them a PDF then they have to print it out which makes it much less likely they will actually take it in. We want to make it as easy for them as possible.

Step 7: Temper client expectations. Let them know that you have submitted a grand jury packet on their behalf but that it would be very unusual to get a no bill. Even if we get a true bill, explain to them ahead of time that this is just another step in the process and you will continue to fight and push no matter what the result.

Please consider using grand jury packets in every single felony case. As a defense bar, we need to take better advantage of this opportunity we are given. As soon as a client is appointed to you or hires you, this should be one of the first things you consider and discuss. Happy packet creating!

Molly Bagshaw *is a Senior Associate at Hochglaube & DeBorde, P.C. in Houston, Texas. Molly works on every type of criminal case from juvenile record sealing to complex appeals. In addition to representing clients who come her way with any criminal issue, Molly accepts appointed cases in federal court in the Southern District of Texas and misdemeanor court in Harris County. She prides herself on impeccable client communication and attention to detail. Molly can be reached at molly@houstoncriminaldefense.com or (713) 526-6300.*

TCDLA Declaration Readings 2024

CHUCK LANEHART

Once again this year, the Declaration of Independence was shared with the public by criminal defense lawyers across Texas in early July. TCDLA sponsored community readings from Nacogdoches to El Paso, from Perryton to Brownsville, and many towns and cities in between.

Statewide coordinators Robb Fickman of Houston, Chuck Lanehart of Lubbock, and Phil Ricker of Levelland assisted organizers who led readings in about 100 communities - including Texas County seats, city halls, and places in other states.

This year was the 15th anniversary of the beginning of the criminal defense bar's public Declaration reading tradition, when Robb Fickman organized the first event in Houston, a symbolic protest against tyranny everywhere. The following year, TCDLA and the Texas criminal defense bar got involved, and the tradition has grown over the years.

In 2016, TCDLA sponsored readings in each of Texas' 254 counties in celebration of the 240th anniversary of the signing of the Declaration. Advanced planning is underway to reach every Texas county again in 2026, so if you want to be a part of the 250th remembrance of the 1776 Declaration, please let us know.

TCDLA Declaration Readings Organizers 2024

Abilene - Taylor County
Jenny Henley

Alpine - Brewster County
Shane O'Neill

Amarillo - Potter County
Joe Marr Wilson

Anson - Jones County
Jenny Henley

Archer City - Archer County
Dustin Nimz

Austin - Travis County
Bradley Hargis

Bandera - Bandera County
Gary Trichter

Beaumont - Jefferson County
Eric Franklin

Belton - Bell County
James Stapler

Benjamin - Knox County
Dustin Nimz

Big Spring - Howard County
Robert Miller

Bonham - Fannin County
Myles Porter

Brady - McCulloch County, Texas
Tom Swearingen

Brownfield - Terry County
Anna Ricker, Phil Ricker

Brownville - Cameron County
Sheldon Weisfeld

Bryan - Brazos County
Sarah Wilkinson

Canyon - Randall County
Vaavia Rudd

Center - Shelby County
Stephen Shires

Centerville - Leon County
Michelle Latray

Channing - Hartley County
Rick Russwurm, Tim Salley, Daniel Sieloff

Childress - Childress County
Bethany Stephens

Clarksville - Red River County
Mac Cobb

Comanche - Comanche County
Keith Woodley

Conroe - Montgomery County
Amanda Webb, Josh Zientek

Cooper - Delta County
Brent McQueen

Corpus Christi - Nueces County
Lisa Greenberg

Corsicana - Navarro County
Kerri Donica

Crockett - Houston County
Jody Griffith

Crowell - Foard County
Dustin Nimz

Daingerfield - Morris County
Mac Cobb

Dalhart - Dallam County
Rick Russwurm, Daniel Sieloff, Tim Salley

The first public reading of the Declaration of Independence by the Harris County Criminal Defense Lawyers Assn, 2010

Lubbock, Lubbock County. Organized by Rusty Gunter

Dallas - Dallas County
Stephanie Alvarado

Denton - Denton County
Patty Tress

Dumas - Moore County
Rick Russwurm, Daniel Sieloff, Tim Salley

Edinburg - Hidalgo County
Jose Ozuna

El Paso - El Paso County
Jim Darnell, Jeep Darnell

Emory - Rains County
Brent McQueen

Fairfield - Freestone County
Michelle Latray

Fort Worth - Tarrant County
Andrew Decker

Gatesville - Coryell County
Paul Harrell

Georgetown - Williamson County
Lisa Hoing

Gilmer - Upshur County
Brandon Winn

Groesbeck - Limestone County
Michelle Latray

Halletsville - Lavaca County
James M. Reeves

Hereford - Deaf Smith County
Vaavia Rudd

Horseshoe Bay - Llano County
Tom Stansbury

Houston - Harris County
Robb Fickman, Damon Parrish

Huntsville - Walker County
Wynonne Hill

Jourdanton - Atascosa County
Megan Harkins

Kermit - Winkler County
Alvaro Martinez

Kerrville - Kerr County
Gary Trichter

Lampasas - Lampasas County
Paul Harrell

Levelland - Hockley County
Anna Ricker, Phil Ricker

Littlefield - Lamb County
Anna Ricker, Phil Ricker

Llano - Llano County
Shane Jennings

Lockhart - Caldwell County
David Schulman, Roger Nichols

Longview - Gregg County
Lew Dunn, Brandt Thorsen, David Moore

Lubbock - Lubbock County
Rusty Gunter, Chuck Lanehart

Marfa - Presidio County
Dick DeGuerin

Mason - Mason County
Tom Swearingen

McAllen - Hidalgo County
Lucia Regalado

Mentone - Loving County
Alvaro Martinez

Midland - Midland County
Suzie Prucka

Morton - Cochran County
Anna Ricker, Phil Ricker

Mount Pleasant - Titus County
Mac Cobb

Mount Vernon - Franklin County
Mac Cobb

Nacogdoches - Nacogdoches County
Sean Hightower

Ouray - Ouray County, Colorado
Brent McQueen

Odessa - Ector County
Johanna Curry, Feliz Abolos

Paint Rock - Concho County
Tip Hargrove

Pearsall - Frio County
Katie Roberts

Perryton - Ochiltree County
Rick Russwurm, Seth Lujan

Pittsburg - Camp County
Mac Cobb

Plains - Yoakum County
Anna Ricker, Phil Ricker

Gatesville, Coryell County. Organized by Paul Harrell

Conroe, Montgomery County. Organized by Amanda Webb and Josh Zientek

Plainview - Hale County
Paul Holloway, Troy Bollinger

Post - Garza County
Chuck Lanehart, Lindsey Craig

Richmond - Fort Bend County
Paul Tu

Rockwall - Rockwall County
Justin Hall

Rusk - Cherokee County
Brent McQueen,
Mac Cobb

San Angelo - Tom Green County
Tip Hargrove

San Antonio - Bexar County
Adam Kobs,
Warren Wolf

San Diego - San Diego County, California
Knut Johnson

San Marcos - Hays County
Scot Courtney, Charmaine Wilde, Chevo Pastrano

Halletsville, Lavaca County. Organized by James M. Reeves

Waco, McClennon County. Organized by David Bass

Spearman - Hansford County
Rick Russwurm, Seth Lujan

Stinnett - Hutchinson County
Rick Russwurm, Seth Lujan

Stratford - Sherman County
Daniel Sieloff, Tim Salley

Sulphur Springs - Hopkins County
Brent McQueen

Texarkana - Bowie County
R.C. Bunger

Tyler - Smith County
Mitch Adams

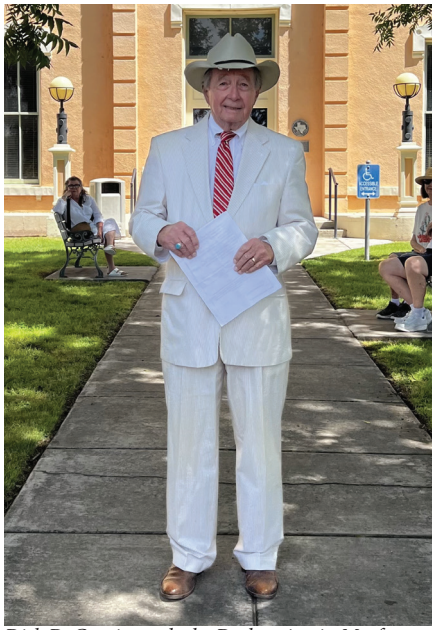
Van Horn - Culberson County
Jim Darnell, Jeep Darnell

Vernon - Wilbarger County
Dustin Nimz

Waco - McLennan County
David Bass

Waxahachie - Ellis County
Chad Hughes, Theresa Peel

Wharton - Wharton County
Holly Willis



Dick DeGuerin reads the Declaration in Marfa, Presidio County

San Antonio, Bexar County.Organized by Adam Kobs and Warren Wolf

TCDLA

CONSTITUTION DAY

BILL OF RIGHTS READING

TUESDAY, SEPTEMBER 17, 2024

TCDLA to Honor "Constitution Day"

Texas Criminal Defense Lawyers Association (TCDLA) calls on defense lawyers in every criminal courthouse across our state, to participate in a 10 minute ceremony honoring our state and federal constitutions on Tuesday, September 17, 2024. Please meet in front of your local courthouse at Noon and join your colleagues in a public reading of the Bill of Rights on "Constitution Day." Be sure to invite press and your entire local judiciary to pay their respects by attending this important event. Take plenty of photos so we can celebrate, commemorate, and know who stands with us.

If you would like to lead the Bill of Rights reading in your local jurisdiction, kindly email Keri Steen at ksteen@tcdla.com. We will send you instructions and everything you need.

Significant Decisions Report

KYLE THERRIAN

What is the State? Is it the social contract that exists under Thomas Hobbes' pessimistic view of mankind or the optimistic one of Jean-Jacques Rosseau? These are questions that only the most confident 22-year-old poli-sci undergraduates can answer. Perhaps someday, Hon. David Newell will be added to the course syllabus for his contribution to solving the ostensibly very difficult question of "is the State just the prosecutor?" For now, I will settle for his opinion to be added to the syllabus of Baby Prosecutor School, but I will not hold my breath.

I used to have a law professor who transitioned topics by saying, "what else this morning?" What else this morning? (Feels right, *sips/slurps coffee*) Well, there are some songs that slap in this month's SDR and some do far more egregious things. Back in the day, I would have burnt a bunch of CDs to pass out at Rusty for everyone to keep in the visors of their car windshields between their Napster downloaded copy of Confessions and their Creed / Nickelback / Puddle of Mud mix (also downloaded from Napster). We'll call my little gem below a close second. Enjoy!

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 month's edition includes summaries and commentary by Doug Gladden, a pre-trial and post-conviction writ attorney whose contributions are in cases arising in his practice area. 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

Hervey v. State, No. PD-1101-19 (Tex. Crim. App., May 1, 2024)

Attorneys. Rebecca Ruddy (trial), David Bost (trial), Niles Illich (appellate)

Issue & Answer. Is a defendant who pulled a gun on his drug dealer but claims accidental discharge entitled to a voluntariness instruction? **Issue not preserved by the State.**

Issue & Answer 2. When a defendant claims accidental discharge of a firearm and a trial court instructs the jury on voluntariness, must the trial court make the voluntariness instruction applicable to the defendant's act of pulling the trigger? **No.**

Facts. This case is a botched drug deal resulting in the shooting death of the dealer. The defendant claimed that he pulled a gun on the victim when he refused to get out of the defendant's car. According to the defendant, a struggle ensued where the victim caused the defendant's finger to slip within the trigger guard and shoot. The trial court instructed the jury on murder and the lesser-included offenses of manslaughter and criminally negligent homicide. Sua sponte the trial court included an instruction on voluntariness as it related to the crime of murder. The trial court denied the defendant's request to instruct the jury on voluntariness in relation to the lesser-included offenses. The Fifth Court of Appeal reversed.

Analysis. The court of appeals envisioned a voluntariness instruction applicable specifically to the pulling of the trigger. This does not properly set forth the law as it relates to voluntary conduct. The defendant's "conduct" must be voluntary, not necessarily the ultimate act of firing the gun. As it relates to the lesser-included offenses, the State's theories included theories for which the defendant presented no evidence that his conduct was involuntary—they included bringing a loaded firearm to a drug transaction, brandishing the firearm, putting the firearm against the victim's neck, and engaging in a struggle.

The court notes that the State failed to object to the voluntariness instruction in the trial court and thus forfeited its right to challenge whether the defendant was entitled to the voluntary act instruction at all.

Concurring (Keller, P.J.). It was unnecessary for the Court to declare that the State forfeited its claim regarding the trial court's voluntariness instruction. Moreover, the Court's rationale is at odds with our recent decision in *Lozano v. State*, 636 S.W.3d 25 (Tex. Crim. App. 2021) "where we held that an error in a defensive instruction was harmless because the defendant was not even entitled to the instruction." It is also at odds with *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985) which holds that jury charge error is reviewable even without objection (but subject to a heightened harm analysis).

Ex parte McMillan, No. WR-88-970-01 (Tex. Crim. App. May 1, 2024)

Attorneys. Brent Wilder (trial), Claire McNeely Hunt (writ), Ebb B. Mobley (writ)

Issue & Answer 1. Does the holding of *Ex parte Pue*, that the finality of an out-of-state conviction is determined based on Texas law, apply retroactively? **Yes.**

Issue & Answer 2. Was the Applicant's federal felony conviction final under *Pue*? **Yes.**

Facts. In 2001, the defendant was convicted of two federal felonies (bank fraud) in Alaska. She served 10 months imprisonment followed by 5 years of supervised release. In 2015, the defendant was convicted of second-degree felony theft in Rusk County. In the punishment hearing, the State used her 2001 federal felony conviction to enhance the sentence, and the trial court sentenced her to 40 years. After her conviction became final, the CCA decided *Pue*.

Analysis 1. When a case does not announce a new rule, it automatically applies retroactively. A court's interpretation of a criminal statute is a new rule if it is a "clear break with the past"—meaning there was a prior inconsistent interpretation of the statute that was authoritative. A prior interpretation is authoritative if either 1) it was articulated in CCA precedent; 2) it is "a practice arguably sanctioned in prior cases" from the CCA; or 3) it is a "longstanding practice that lower courts had uniformly approved." The holding in *Pue* falls into none of those categories. There were no prior on-point cases from the CCA, the prior cases in "this general area" had been "stretched" too far, and "less than half of all the appellate districts in Texas" had held, when *Pue* was decided, that an out-of-state conviction is final for enhancement purposes if it was final under the law where the conviction occurred. *Pue*, therefore, "did not announce a new rule and is therefore automatically retroactive."

Analysis 2. Under Texas law, an appealed conviction is final when the conviction is affirmed and the appellate court mandate issues. That happened in the defendant's federal case in 2002. Under *Pue*, the defendant's felony

conviction was final in 2015 and was, therefore, a proper enhancement.

Concurring (Keller, P.J.). The majority opinion "does not adequately explain … whether Applicant's conviction was in fact final under Texas law." "I shall explain" why a federal sentence that includes both incarceration and supervised release "is a non-probated sentence of incarceration under Texas law."

Concurring (Yeary, J.). Applicant loses regardless of whether *Pue* applies, why are we deciding this case? This is just an advisory opinion. Also, challenges to enhancements shouldn't be cognizable on habeas, anyway. "The only thing I *can* agree with is the Court's bottom line: Relief should be denied."

Comment by Doug Gladden. The footnotes in this case are where the story is. According to footnote 3, the Court decided the retroactivity question because "there are several other cases that are being held pending a resolution of this retroactivity question. We filed and set the case in order to settle this statewide recurring issue." That seems to be a response to Judge Yeary's "Why are we here?" opinion. The next 3 footnotes—4–6—try to explain the mess that is modern retroactivity analysis. The Court acknowledges that it invoked *Teague v. Lane* when it filed and set the writ, which was wrong: *Teague* applies to constitutional rules; while *Stovall v. Denno* applies to statutes. The tests "employ different frameworks to determine retroactivity," and even though they both start with the same threshold question (Is the rule new?), they have "distinct tests" for that question. The Court also points out that the U.S Supreme Court's recent decision in *Edwards v. Vannoy*, which "stripp[ed] watershed procedural rules from retroactivity on federal collateral review, raises a question of whether the CCA should continue using *Teague* to evaluate the retroactivity of constitutional rules. That's a question for another day.

Hart v. State, No. PD-0677-22 (Tex. Crim. App., May 8. 2024)

Attorneys. Thomas Robert Cox, III (trial), Ronald L. Goranson (appellate)

Issue & Answer. Did the prejudicial value of the defendant's rap lyrics substantially outweigh the value of said lyrics in proving the defendant's character and sophistication during the guilt phase of trial? **Yes.**

Facts. A jury convicted the defendant of capital murder. The defendant was the driver of a vehicle who participated wittingly or unwittingly in a robbery-murder. One of the occupants purportedly told the defendant about the plan to commit robbery. The defendant claimed he did not understand or believe the plan was real. The defendant tried to present evidence of his low IQ. Although it does not appear the trial court permitted the defendant to do this, the State was nonetheless allowed to present evidence of the defendant's rap videos in which he glorified crime and violence. The State claimed such evidence was probative of the defendant's ability to comprehend a plan to commit robbery and to rebut the defendant's claim that he was "friendly." The Fifth Court of Appeals upheld the trial court's ruling and found that the lyrics were kind of prejudicial but permissibly prejudicial in light of the State's need to rebut the defendant's claim that he was not smart enough to understand the plan to commit a burglary. Justice Reichek dissented:

> Gangsta rap like that at issue in this case is characterized by 'lyric formulas,' a key one of which involved fictionalized bragging about the performer's 'badness' vis-à-vis criminal behavior . . . The genre often emphasizes violence in inner cities albeit not necessarily in an accurate manner.

Analysis. The rap video evidence provided a "small nudge" toward proving a point of consequence. The defendant testified that he is friendly and not particularly sophisticated. According to the State, the rap videos

showed the defendant was a "bad person" who had the ability to communicate and form his own opinions about things. The State did not prove that the defendant wrote the lyrics in one of the videos, but it nonetheless tended to show the defendant's awareness of criminal activity in the Dallas area. The State invested substantial time and focused on the rap videos in their cross-examination of the defendant and drew special attention to this evidence. The danger of unfair prejudice weighs heavily. Rap lyrics are often inflammatory but are also often fictitious. "Other than Taylor Swift who is known to write songs based on her personal experiences, it is not reasonable to assume that all lyrics are autobiographical as to past or future conduct, unless there is direct evidence to suggest otherwise." Here, the state introduced the evidence to show the glorification of criminal activity and encouraged the jury to convict the defendant on an improper basis. "Here the State did not offer anything demonstrating that the lyrics and video were somehow representative of Appellant's character in that they applied outside of the artistic rendering, nor did they demonstrate that, even if they had some real-world application, it was relevant to the charged offense." Given that the State's argument for needing the evidence was also weak, the admission of the rap videos and their lyrics was in error, violative of Rule 403.

Concurring (Richardson, J.). See comment below.

Dissenting (Keller, P.J.). The Court should not review 403 error without a request for a limiting instruction.

Dissenting (Yeary, J.). Rule 403 affords more deference to the trial court than given by the majority opinion.

Dissenting (Keel, J.). has "additional objections to the majority opinion for its distortions of unfair prejudice and probative value and its garbled harm analysis."

Comment. "We think Appellant stated our view on the issue at hand best when he said 'It's just rap, ma'am.'" An intentionally ironic mic-drop conclusion to this opinion by Judge McClure. Not to be outdone, Judge Richardson, in concurrence, gave a non-exhaustive but authoritative recitation of penal code music (below). And, now, thanks to me not having anything better to do with my time, you can find this as a Spotify playlist called "Bert's Penal Jams."

Blues Rock

- "Don't bogart that joint, my friend. Pass it over to me." FRATERNITY OF MAN, Don't Bogart Me (1968). *Possession of Marijuana Tex. Health and Safety Code § 481.121*

Folk Rock

- "I shot my baby. Down by the river. Dead, ooh, shot her dead." NEIL YOUNG, Down by the River (1969). Murder, Tex. Penal Code § 19.02.

Reggae

- "I shot the sheriff, but I didn't shoot the deputy." BOB MARLEY & THE WAILERS, I Shot the Sheriff (1973); also ERIC CLAPTON, I Shot the Sheriff (1974). Aggravated Assault with Deadly *Weapon, Tex. Penal Code § 22.02.*

Disco/Soul

- "If the price is right, you can score, if your pocket's nice." DONNA SUMMER, Bad Girls (1979). Promotion of Prostitution, Tex. Penal Code § 43.03.
- "Burn, baby burn, burn that mother down." THE TRAMMPS, Disco Inferno (1976). Arson, Tex. Penal Code § 28.02.

Pop

- "So lay your cards down, down, down. So park your Lexus. And throw your keys up." BEYONCE, Texas Hold'em (2024). Aggravated Robbery, Tex. Penal Code § 29.03.
- "Hey, let's touch in public." CHARLES MCMANSION, T.I.P. (2015).

Public Lewdness, Tex. Penal Code § 21.07.

- "I eat boys up, breakfast and lunch. Then when I'm thirsty, I drink their blood." KESHA, Cannibal (2010).
  Abuse of Corpse, Tex. Penal Code § 42.08.
- "I met her in a hotel lobby, masturbating with a magazine." PRINCE, Darling Nikki (1984).
  Indecent Exposure, Tex. Penal Code § 21.08.
- "Private eyes. They're watching you. They see your every move." HALL & OATES, Private Eyes (1981).
  Stalking, Tex. Penal Code § 42.072.

Country

- "I just killed a man. Left him in his drive. Watched the light go out of his loving eyes." CATIE OFFERMAN, I Just Killed a Man (2023).
  Murder, Tex. Penal Code § 19.02.
- "I drew a bead on him, to practice my aim. My brother's rifle went off in my hand." JOHNNY CASH, I Hung My Head (2002) (cover of a STING song).
  Murder, Tex. Penal Code § 19.02.
- "Goodbye Earl. Those black-eyed peas; they tasted alright to me, Earl." DIXIE CHICKS, Goodbye Earl (1999).
  Murder, Tex. Penal Code § 19.02.

Jam

- "Wilson, kill you 'til you die." PHISH, Punch You in the Eye (1989).
  Terroristic Threat, Tex. Penal Code § 22.07.
- "I just jumped the watchman, right outside the fence, took his ring, four bucks in change." GRATEFUL DEAD, Jack Straw (1972).
  Robbery, Tex. Penal Code § 29.02.

Metal

- "So I kissed him upside the cranium with that aluminum baseball bat." PRIMUS, My Name is Mud, (1993).
  Aggravated Assault with Deadly Weapon, Tex. Penal Code § 22.02.

Indie/Alternative

- "Think I'm drunk enough to drive you home now. I'll keep my mouth kept shut under lock and key." DEATH CAB FOR CUTIE, Champagne from a Paper Cup (1998).
  Driving While Intoxicated, Tex. Penal Code § 49.04.

Ex parte Lewis, No. WR-94, 237-01 (Tex. Crim App., May 8, 2024)

Attorneys. Angela Moore (writ)

Issue & Answer. Does it violate a defendant's due process right to a fair trial and an impartial judge when one of the prosecutors on the defendant's case is also working as a paid "judicial clerk" for the judge presiding over the defendant's trial? **Yes.**

Facts. Ralph Petty was a Midland County prosecutor who simultaneously worked as a law clerk for the judges in Midland County. (Additional facts from Judge Richardson's concurring opinion follow.) In 2005, Michael Lewis was indicted for capital murder, convicted, and sentenced to LWOP. While Lewis's case was pending in the 238th District Court, Petty did at least $3,400 worth of legal work for the judge. Meanwhile, Petty actively prosecuted Lewis in the same court by representing the State at pre-trial conferences, filing written responses to Lewis's motions, examining witnesses and presenting arguments against Lewis's motion to suppress, and moving to amend Lewis's indictment.

Analysis. (Per curiam). A fair trial in a fair tribunal is a basic requirement of due process. The "appearance of impropriety" can be enough to disqualify a judge. When the judge allowed his paid judicial law clerk to prosecute the defendant without disclosing the employment relationship, it "tainted" the trial.

Concurring (Richardson, J.). This case is "utterly bonkers." "The prosecutor was simultaneously dual-employed as a prosecutor for the district attorney and law clerk for the judge presiding over the case. Adding to the impropriety, this relationship remained undisclosed to Applicant and his trial counsel. Our adversarial system of law before an impartial judge malfunctioned. The barrier to prevent ex parte communications between the prosecutor and the neutral judge vanished (unknown to the defense). This situation leaves lasting stains on a system of justice that will take years to restore."

The issue in this case "is that Petty worked as a judicial clerk for the trial judge while prosecuting Applicant. The dual-natured employment irredeemably tainted [Lewis's] right to a fair trial."

Dissenting (Keller, P.J.). What happened here didn't deny due process. The court and Judge Richardson rely on unpublished cases and unproven assertions and are wrong to make assumptions. Instead, the court should assume that Petty was "effectively screen[ed] … from any pending prosecutions" while he worked for the judges.

Hughes v. State, No. PD-0164-22 (Tex. Crim. App., May 22, 2024)

Attorneys. William Gifford (trial), Patrick McCann (appellate)

Issue & Answer. Does the Due Process Clause afford

a defendant the right to be present and to participate in a probation revocation hearing? **Yes.**

Issue & Answer 2. Must a defendant object during a hearing he is not present for in order to preserve his complaint that he was not present and could not participate? **No.**

Facts. A trial court revoked the defendant's probation in a hearing via Zoom. When the defendant tried to speak during the hearing, the trial court ordered him muted. On direct appeal, the defendant claimed the trial court violated his right to be present under the Due Process Clause. The court of appeals reversed, citing an unraised Confrontation Clause right to be present.

Analysis 1. On appeal, the State presents the question regarding the applicability of the Confrontation Clause to a revocation proceeding. "However, after viewing the arguments of the parties and the record, the question presented by the State does not need to be answered." This case is correctly about the Due Process right to be present.

> Recently, we reiterated that while: the right to be present in the courtroom at every stage of trial is guaranteed by the Confrontation Clause of the Sixth Amendment[,] [i]t is also based in the Due Process Clauses of the Fifth and Fourteenth Amendments and applies at any stage of the criminal proceeding that is critical to its outcome, if the defendant's presence would contribute to the fairness of the procedure.

Analysis 2. Courts have analyzed whether an objection is required to preserve a complaint about the right to be present under the Sixth Amendment. At the root of these analyses is a Supreme Court opinion based on due process and holding that error is reviewable without objection.

> [] we think that characterizing the right to be present as waivable makes sense because a defendant should not be required to insist upon being accorded his right to be present in the courtroom. Were we to classify the right to be present as forfeitable, we would on the one hand say that a defendant has a right to be present, but on the other hand allow a proceeding to stand where he was excluded and unable to object to the trial court's failure to ensure that he was there.

Dissenting (Keller, P.J.). The defendant was present via Zoom, so he wasn't completely absent, and thus, he should not be able to avail himself completely of the favorable rules of appellate review.

Dissenting (Yeary, J.). The Court decides the case on an issue not raised.

Comment. Someday it will be "another day." At least, I hope. Whenever "another day" comes, the CCA will tell us whether the right to confrontation applies in a revocation hearing. Here, the CCA went out of its way (a little bit) to emphasize that today is yet another day that is not "another day."

Baltimore v. State, No. PD-0436-22 (Tex. Crim. App., May 22, 2024)

Attorneys. Samuel Martinez (trial), Jessica Freud (appellate)

Issue & Answer. Unlawful carrying is enhanced to a Class A Misdemeanor if a person unlawfully carries their firearm on the "premises" of a business that sells alcohol. Is the parking lot part of the business a "premises?" **Not here.**

Facts. A jury convicted the defendant of unlawful carrying of a weapon, enhanced by the allegation that he was on a premises that sold alcohol.

> One evening, [the defendant] went to the Crying Shame, a bar located in McLennan County. He parked his motorcycle near the bar's entrance, and before he entered the establishment, he put his registered handgun in the saddle bag attached to his vehicle. After spending less than thirty minutes inside, [the defendant] exited the bar to go home. At his motorcycle, [the defendant] retrieved his gun from the saddle bag and placed it in the waistband of his pants.

Shortly after, the defendant and two other people with whom he had beef fought in the parking lot. The defendant pointed his firearm at one of them. The State

relied on testimony from a detective to establish that the definition of "premises" included the bar's parking lot.

Analysis. In *Curlee v. State*, 620 S.W.3d 767 (Tex. Crim. App. 2021), the CCA held that the State could not rely on factually unsupported lay opinion testimony to establish that a playground was "open to the public." (for purposes of a drug-free zone enhancement). Here, like in *Curlee*, the detective did not offer any basis for his conclusion that the parking lot was included as part of the bar's premises. "A parking lot is not necessarily 'directly or indirectly under the control' of an establishment simply because the lot is connected to or adjacent to the establishment."

Dissenting (Yeary, J.). *Curlee* was wrongly decided. The Court needs to construe the meaning of "premises"

Dissenting (Keel, J.). The jury reached a logical conclusion that the adjacent parking lot was part of the bar's premises.

State v. Heath, No. PD-0156-22 (Tex. Crim. App. Jun. 12, 2024)

Attorneys. Luke Giesecke (trial), Alan Bennett (appellate)

Issue & Answer. Does the mandate in Article 39.14(a) of the Texas Code of Criminal Procedure that the "the state" produce discovery "as soon as practicable after receiving a timely request" include discoverable items which, unbeknownst to the prosecuting attorney, are in the possession of law enforcement agencies? **Yes.**

Facts. The defendant requested discovery. The State provided most of it. Days before trial and after 14 months and 4 previous trial settings, the State discovered a 9-11 call and provided it to defense counsel days before trial. The trial court suppressed the recording on the motion of the defendant. No evidence suggested bad faith on the part of the prosecutor. However, the recording had been in the possession of law enforcement for approximately two years. At a hearing on the defendant's motion, the State argued that a continuance was the appropriate remedy to a no-fault failure to disclose. The defendant rejected continuance. The trial court suppressed the 911 call and granted the State's request to stay the proceedings for an interlocutory State's appeal.

Analysis. Judge Newell gives the bottom line in the first paragraph of the opinion.

> In [the context of Article 39.14], "the state" means the State of Texas and includes prosecutors and law enforcement. "As soon as practicable" as the phrase appears in Article 39.14(a) means as soon as reasonably possible and does not contain a knowledge requirement on behalf of the prosecution. Thus, items discoverable under Article 39.14(a) that are in the possession of law enforcement must be produced as soon as practicable after the State's receipt of a timely request for discovery. This case also requires us to consider whether a trial court has the authority to exclude evidence that was not timely disclosed by the State absent a showing of bad faith or prejudice. We agree with the court of appeals that under the circumstances of this case the trial court had the authority to exclude the evidence at issue.

The State argues that, under Article 39.14: (1) the "as soon as practicable" timeliness requirement applies only to materials in the actual possession of the prosecutor, and (2) "the State" does not include law enforcement agencies. The State further argues that exclusion of evidence must be limited to nondisclosures in which the State acted in bad faith.

In 2013, however, the Michael Morton Act revamped Article 39.14 completely, overhauled discovery in Texas, and, on the whole, made "disclosure the rule and non-disclosure the exception" in Texas. "According to the plain text of Article 39.14, criminal defendants now have a right to discovery in Texas beyond the guarantees of due process." The Michael Morton Act is understood to have broadened the State's discovery obligations.

Article 39.14's use of the word "state" means exactly what one would think it means—the "State of Texas." . . . The word "state" refers to the State of Texas as a party to the lawsuit. . . . Where the statute limits the word's applicability to a particular representative or agent of the State of Texas, it specifically does so.

The State's argument that the Legislature used the term "state" to refer only to the prosecutor and no other state actors is inconsistent with the Legislature's use of the phrase "counsel for the state" in the same statute where it certainly meant to limit the statute's application to the prosecutor and no other state actors. The State's interpretation is also inconsistent with the recent passage of Article 2.1397, which imposes an obligation on both the prosecutor and law enforcement to ensure the production of discoverable materials. These are two of the most absurd results that would flow from adopting the State's interpretation. But, the State's interpretation would also create a loophole whereby the State may withhold evidence so long as it is not produced by the prosecutor. This runs contrary to the Legislature's intent to impose discovery obligations broader than imposed by the Fifth Amendment and *Brady*.

The State's contention that the statute's requirement of expediency—"as soon as practicable"—is a condition imposed only upon discovery once known to the prosecutor is equally unsupported by the Legislature's intent. "The Legislature is certainly capable of limiting an obligation imposed on counsel for the State with

a knowledge requirement if it so desires." Thus, the obligation to produce evidence quickly is an obligation that exists even when the prosecutor is unaware of the evidence's existence. As soon as practicable means "as soon as it is capable of being accomplished or feasible."

Here, Article 39.14 was violated. The 9-11 call was material; it was requested, but it was not produced until days before the trial. A trial court has inherent authority to fashion a remedy to control its docket, this includes the authority to exclude evidence not promptly produced, regardless of bad faith. This is the same remedy that is exercised by courts following the civil rules of discovery that served as models for the creation of Article 39.14.

Comment. Some cases—especially well-articulated ones—are just better to block quote. Word is that the prosecution bar is "really mad" about this case. I wish I could say something to make them all feel better. Not getting a favorable interpretation of the law on appeal must be awful.

1st District Houston

State v. Beck, No. 01-23-00003-CR (Tex. App.—Houston [1st Dist], May 2, 2024)

Attorneys. Conrad Day (trial), Craig Hughes (appellate)

Issue & Answer. When the State is to blame for 22 months of delay, but the defendant did not file his demand for speedy trial or motion to dismiss until after the State had delayed for 22 months, are counsel's allegations of the defendant's anxiety and memory loss sufficient to tip the balance of a speedy trial analysis in favor of dismissal? **No.**

Analysis. Speedy trial denial is analyzed using the *Barker* factors. Here, the length of delay is one year and ten months, which is sufficiently prejudicial to trigger consideration of the other factors. The delay was due to a DPS backlog in testing for drugs in DWI blood samples. This delay was worsened by DPS failing to notify the prosecutor that testing had been completed. DPS is an agent of the State, and thus, the State is to blame for the delay. The State contends that the defendant agreed to resets by signing the trial court's reset form, but no evidence supports the contention that the defendant's signature on the form indicated his acquiescence or agreement. Indeed, the trial court found that it requires the defendant's signature on its reset forms to acknowledge the existence of a new court date. Some of the delay is attributable to the defendant, but it is sufficient that most of the delay is due to the State's negligence. Importantly, however, the defendant's assertion of a speedy trial right was delayed. He waited one year and ten months before filing a demand for speedy trial and a motion to dismiss. The CCA has characterized this sort of delay in making a demand "tardy." This weighs heavily against the defendant. The defendant's prejudice is not well-established and consisted primarily of counsel's assertions that his client suffered anxiety and memory loss. The defendant provided no underlying substance for these conclusory claims. Balancing these four factors, they do not weigh in favor of a speedy trial dismissal.

Cormon v. State, No. 01-22-00524-CR (Tex. App.—Houston [1st Dist], May 7, 2024)

Attorneys. Fred Dahr (trial), Susan Clouthier (appellate)

Issue & Answer. Must a court accept the prosecutor's race neutral-reason for striking a black juror when the prosecutor did not strike a non-black juror for the same reason? **Sometimes**.

Facts. The prosecutor exercised peremptory strikes to remove four of six black potential jurors. The defendant objected under *Batson v. Kentucky*, 476 U.S. 79 (1986). The trial court conducted a hearing and found that the Defendant had not shown purposeful discrimination.

Analysis. The procedure for a *Batson* challenge is this: (1) the defendant makes a prima facie showing of racial discrimination, (2) the prosecutor is afforded an opportunity to articulate a race-neutral explanation for the strike, (3) if the prosecutor can make such a showing, the defendant must show the prosecutor's explanation is pretextual and that the strike was the product of purposeful discrimination. The debate concerning Potential Juror 3 was the closest case *Batson* error. The State claimed to have struck this juror for lying about the existence of a case that was dismissed. However, the defendant showed that a different non-struck juror lied in the same manner. "Disparate treatment may not automatically be inferred from every situation in which the State's reasons for striking a veniremember apply to another veniremember that the State did not strike." Here, the non-struck lying juror also held opinions about evidence the State found favorable.

> The State's proffered reason for striking Potential Juror 3 was not that the State desired to strike every juror that lied, nor was it that the State desired to strike every juror with a criminal record. Instead, the State said that in comparing notes between co-counsel, the State had noted that Potential Juror 3 lied and that this was the "last deciding factor between myself and co-counsel about striking Juror Number 3."

Baptiste v. State, No. 01-22-00714-CR (Tex. App.—Houston [1st Dist], May 7, 2024)

Attorneys. Sean McAlister (trial), BreAnna Schwartz (appellate)

Issue & Answer 1. The sisters of a sexual assault victim were awakened by the victim's screams. They testified that they believed the defendant had sexually assaulted their sister, but they also knew that the victim and the defendant had taken ecstasy and the victim had lost consciousness during points of the evening. Is this testimony, together with the victim's recollection of non-consent, sufficient to prove that the defendant did not have consent? **Yes.**

Issue & Answer 2. The defendant filed a motion requesting that he be permitted to testify free from impeachment by his prior criminal offenses. If a defendant declines to testify after the court denies such a request, is there sufficient record for the court to review on appeal? **No.**

Facts. The victim and her sisters went to a nightclub together with the defendant and another man who was the boyfriend of one of the sisters. One of the sisters claimed the group took ecstasy pills and drank at the club. However, the victim testified she refused to take ecstasy and did not drink. At some point during the evening, the victim lost consciousness, and the group escorted her back to her sister's home, where they spent the night. The victim awoke two of her sisters with screams. They discovered the defendant penetrating the victim with his sexual organ. One of the sisters physically removed the defendant from her sister, and the defendant fled while under physical attack from the others in the group.

Analysis 1. The defendant argues the evidence is insufficient to show that he lacked consent (that he used force, he knew the victim was unaware a sexual assault was occurring, or he took advantage of the victim's inability to resist). "While the State need not prove all three manner and means, the record includes ample testimony for each of them." Sufficient evidence showed that the victim lost consciousness and did not regain it in a significant fashion until well after the assault. The victim testified that she did not consent to sexual intercourse, and due to her state, she was likely unable to resist and unaware the assault was occurring. The evidence established that the defendant used force to continue his assault when the victim gained sufficient consciousness to scream. The jury also heard that one of the victim's sisters had to remove the defendant from the victim forcibly.

Analysis 2. The Court of Criminal Appeals provides a list of non-exclusive factors a court should weigh to determine the probative value of a conviction against its prejudicial effect. "[The defendant] has not preserved this claim for our review. To preserve for review a claim of improper impeachment with a prior conviction, the defendant must testify." Otherwise, the court would be required to speculate, and reversal without testimony would encourage abuse.

Comment. In *Luce v. United States*, 469 U.S. 38 (1984), the Supreme Court held that even a proffer of the defendant's testimony was insufficient. I don't agree. At least to the extent that a proffer is sufficient to develop a record in other contexts, there is no reason it can't here.

4th District San Antonio

***Briones v. State*, No. 04-23-00090-CR (Tex. App.—San Antonio, May 15, 2024)**

Attorneys. John J. Fahle (trial), James P. Sieloff (appellate)

Issue & Answer 1. Rules of Evidence 106 and 107 give a party the ability to introduce a complete recording or writing when only part was introduced by their opponent. When the State introduces an entire interrogation but publishes only part of it for the jury, may the defendant

use these rules to require a more robust publication of the State's evidence by the State in its direct examination? **No.**

Issue & Answer 2. "Do you have an opinion about whether she would be capable of doing anything like that?" Is that a proper character or reputation question? **No.**

Facts. The State convicted the defendant of murder on the following facts. The defendant sought help from the San Antonio Police Department because her four-year-old daughter ("Daughter") was unconscious and having difficulty breathing. Police witnesses testified that Daughter was not moving, did not respond to touch or the sound of her name and her eyelids did not react to light. Doctors evaluated Daughter and found she suffered a severe brain injury (brain had no gray/white differentiation, meaning she probably had a profound injury caused by lack of blood to her brain). Swelling indicated that Daughter suffered the kind of intercranial pressure that results from a non-survivable injury. Paramedics testified they observed multiple other injuries on Daughter's body. Daughter eventually died from her injuries.

Analysis 1. The defendant claims the State's excerpting of video-recorded interrogations falsely portrayed her as uncaring, unfeeling, and calm following Daughter's death. The defendant argues that Rules of Evidence 106 and 107 required the trial court to force the State to publish the entirety of the interrogation to avoid a lingering false impression that the defendant could not cure until cross-examination. Those rules, together, provide:

> [106] If a party introduces all or part of a writing or recorded statement, an adverse party may introduce, at that time, any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.
>
> [107] If a party introduces part of an act, declaration, conversation, writing, or recorded statement, an adverse party may inquire into any other part on the same subject. An adverse party may also introduce any other act, declaration, conversation, writing, or recorded statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent.

Introduced "can mean only introduced into evidence." These rules do not work as mechanisms for the defendant to force the State to publish the entirety of an exhibit or piece of evidence. Even if the defendant could rely on these rules to require a more thorough publication, the trial court would not have abused its discretion in denying the defendant's request. The trial court has broad authority to determine the order of examining witnesses and presenting evidence. The entirety of the video was admitted, and the defendant had a fair shot to publish more thoroughly in cross-examination.

Analysis 2. Framing a question in terms of an accused's reputation for not having committed a specific act does not transform an improper conduct-based inquiry into a proper one. The appropriate inquiry in an accusation involving violent conduct is the accused's reputation for peacefulness or nonaggressive behavior.

Comment. I actually like it when the State plays games with selective publication. Playing the part where the arresting officer told the backup officer he did not believe there was probable cause hits different when the State tried to bury it first.

Ex parte Marcos-Callejas, No. 04-23-00327-CR (Tex. App.—San Antonio, May 15, 2024)

Attorneys. Aron L. Israelite (writ)

Issue & Answer 1. (1) When a defendant shows that men but not women were arrested and charged, has he raised a selective-prosecution claim or a selective-enforcement claim? **Selective enforcement.**

Issue & Answer 2. (2) Is a selective-enforcement claim cognizable on pretrial habeas? **Yes.**

Issue & Answer 3. (3) Under the facts of this case, did the defendant make a prima facie case of selective enforcement? **Yes.**

Issue & Answer 4. (4) Did the State justify its discriminatory conduct? **No.**

Facts. The defendant was arrested in Jim Hogg County and charged with criminal trespass as part of Operation Lone Star. As of the day after his arrest, there had been 550 criminal trespass cases filed in Jim Hogg County related to OLS. No women had been arrested or charged, only men. A state trooper testified that he once found 5 men and 1 woman on private property; he arrested the men but turned the woman over to Border Patrol without even identifying her. The trooper also testified that, at the time of the defendant's arrest, it was DPS policy under OLS to arrest men, but not women, for criminal trespass.

Analysis 1. "Selective prosecution" is when the *prosecutor* pursues similar cases differently based on an impermissible consideration. "Selective enforcement" is when *law enforcement officials* decide who to investigate, arrest, and charge based on those considerations. The testimony in this case showed that men were *arrested and charged* when women were not, so he made a selective-enforcement claim.

Analysis 2. A claim is cognizable on pretrial habeas if it is the type of claim "in which the protection of the applicant's substantive rights or the conservation of judicial resources would be better served by interlocutory review." In *Aparicio*, the court held that a selective-prosecution claim is cognizable on pretrial habeas under that standard. Even though selective prosecution

and selective enforcement are different claims, they "are generally evaluated under the same two-part test, and there is no practical difference" between them "for purposes of cognizability" on pretrial habeas.

Analysis 3. The first part of the two-part test for selective enforcement is whether the defendant makes a prima facie showing that law enforcement policy had a discriminatory effect and that it was motivated by a discriminatory purpose. To show gender discrimination specifically, the defendant must show both 1) that "similarly-situated" individuals of the opposite sex could have been arrested or charged but were not and 2) that the decision to arrest or charge the defendant was based on his sex. Individuals are "similarly situated" when "there are no legitimate factors that might justify" treating them differently. The facts in this case—550 arrests but no women, DPS had an explicit policy, and a trooper could have arrested and charge women but didn't—established prima facie case of selective enforcement.

Analysis 4. The second part of the test is whether the State can justify its discrimination. Here, the State presented *no evidence at all*. Instead, it asserted that it had a legitimate interest in "protecting its citizens" from the "massive influx of undocumented migrants from all over the world" because their "arriving without any screening involving their criminal backgrounds, health backgrounds, and security risk backgrounds creates a real danger to both public health and public safety." But without any evidence to back up such xenophobic statements, the court of appeals concluded that the State did not justify its discrimination.

Comment by Doug Gladden. Two comments. First, the CCA has granted PDR in *Aparicio* on 1) whether a selective-prosecution claim is cognizable on pretrial habeas, and 2) whether the defendant had a prima facie case of sex discrimination. The case is PD-0461-23. Keep an eye out for that opinion.

Second, Operation Lone Star brings out the worst in prosecutors, and the briefs in this case put it on full display. As writ counsel points out in his reply brief, the State filed its brief over a month after *Aparicio* was decided, but "you would never know that . . . from reading the State's brief." But it's even worse than that: The State's brief doesn't mention *Aparicio* the case, but it *does* mention "Mr. Arparicio" the defendant, stating the issue as "Did the lower court err by denying **Mr. Aparicio** relief . . . ?" That's because the State's brief is a nearly word-for-word copy of the State's brief in *Aparicio*—right down to the typos and a snarky footnote criticizing an error in the Appellant's brief. The only real difference appears to be the attorney who signed his name to it—the County Attorney of Jim Hogg County rather than the County Attorney of Maverick County. (If you want to know who actually wrote both briefs, go look at the metadata in each.)

Rodriguez v. State, No. 04-22-00763-CR (Tex. App.—San Antonio, May 22, 2024)

Attorneys. Jorge Aristotelidis (trial), Christopher Perri (appellate)

Issue & Answer 1. Following an illegal arrest, police kept the defendant handcuffed for four hours, kept him in a room alone, and then brought his father in to persuade him to confess. After the defendant's father left, a detective *Mirandized* the defendant and extracted a confession. Under these circumstances, did the taint of the illegal arrest persist through the defendant's confession? **No.**

Issue & Answer 2. When police invited a 17-year-old's father into the interrogation room to beg the defendant to confess and to lie to him about the advice of an attorney, did the defendant's father act as an agent of law enforcement for *Miranda* purposes? **No.**

Facts. The State convicted the defendant of manslaughter based, in part, on the defendant's confession. The police handcuffed the 17-year-old defendant for more than four hours and held him incommunicado in a room for a long period of time before calling the defendant's father to encourage the defendant to confess.

> At the station, officers left Rodriguez alone in an interview room for approximately 90 minutes. He was still handcuffed. At 1:11 a.m., his father entered the room with Investigator Waits and Detective Frank Stubbs. Investigator Waits explained to Rodriguez that they brought his father in to calm him down. Rodriguez's father faced his son and spoke directly to him, telling him that he loved him and that the officers "are here to help us." Detective Stubbs left the room. Rodriguez's father continued talking, encouraging his son to give a statement "to let them know what happened, exactly what happened, I mean, the way, the way it happened, okay." Rodriguez asked his father, "Can I just talk to the lawyer?" Investigator Waits responded, "Accidents happen, man, you know? So." Rodriguez's father repeated that it "was an accident," and his son said, "I know." Rodriguez's father then told his son, "I already talked to the lawyer, the lawyer just said it's fine . . . let him know that what happened because it was an accident. You know what I'm saying." Rodriguez responded, "No." His father then explained that the officers know the boys are like brothers and they know the shooting was a mistake. Detective Stubbs reentered the room and Investigator Waits told Rodriguez's father, "Let us talk to him for a little bit." Rodriguez's father left the room, telling his son, "Let them know what they need to know,

okay? Love you." Rodriguez's father was in the room for approximately two minutes.

After the defendant's father left the room the detective gave the defendant his *Miranda* warning and extracted a confession.

Analysis 1. The taint of an illegal arrest can be attenuated from the extraction of a later confession. In deciding attenuation, the court considers facts set out in *Brown v. Illinois*, 422 U.S. 590 (1975): (1) whether *Miranda* warnings were given, (2) the time between arrest and confession, (3) the presence of intervening circumstances, and (4) the purpose and flagrantly of the official misconduct. Here, *Miranda* warnings were given, the significant length of time was broken up by a time when the defendant sat in a squad car in front of his own house, the intervening circumstance of the defendant's father trying to lull him into a confession weighed in favor of attenuation, as did the fact that the investigator did not act flagrantly. Considering the *Brown* factors, the taint of the illegal arrest was attenuated.

Analysis 2. The father did not interview his son; at most, he just talked to him. The defendant's father was there to provide comfort and did not act in tandem with the police.

11th District Eastland

***Polanco v. State*, No. 11-23-00015-CR (Tex. App.—Eastland, May 16, 2024)**

Attorneys. Michael McLeaish (trial), E. Jason Leach (trial), Mike Holmes (appellate)

Issue & Answer. Are murder and failure to stop and render aid the same offenses for purposes of double jeopardy? **No.**

Facts. Based on the following facts the State convicted the defendant of murder, failure to stop and render aid, and tampering with evidence. A witness saw the defendant driving his Tahoe and his girlfriend walking ahead of him in the road. The witness saw the defendant swerve in order to hit his girlfriend. The defendant fled the scene and went to a bar to get drunk. His mom later picked him up and she drove the Tahoe to a car wash at the defendant's direction.

Analysis. The law has been consistent since 1938. Killing a person by hitting that person with an automobile and failing to stop and render aid are two different offenses. *Powell v. State*, 114 S.W. 2d (Tex. Crim. App. 1938).

To convict Appellant of failure to stop and render aid resulting in the death of Carrillo as charged in this case, the State was required to prove beyond a reasonable doubt that Appellant: (1) was the operator of a motor vehicle; (2) had knowledge that he was involved in an accident; (3) knew that the accident was reasonably likely to result in Carrillo's death; and (4) failed to immediately stop or return to the scene of the accident, determine whether Carrillo required aid, and remain at the scene to comply with the requirements of Section 550.023. Here, to convict Appellant of murder as charged in the indictment, the State was not required to prove that Appellant, knowing that an accident occurred, left the scene of the accident without providing the required information, and failed to render reasonable assistance to anyone who was/were reasonably likely to have been injured or killed as a result of the accident.

14th District Houston

***Edwards v. State*, No. 14-22-00699-CR (Tex. App.—Houston [14th Dist.] May 21, 2024)**

Attorneys. Cary Faden (trial), Michael Diaz (trial), Crespin Michael Linton (appellate)

Issue & Answer 1. Can a jury disregard the opinion of numerous experts who testified that the defendant was legally insane at the time he committed the offense? **Yes.**

Issue & Answer 2. Can a judge disregard the opinion of numerous experts who testified that the defendant was legally insane at the time of his interrogation. **Yes.**

Issue & Answer 3. Can a trial judge delay a competence inquiry until after the jury's guilty verdict when the defendant raises competence mid-trial. **Yes.**

Facts. The State convicted the defendant of capital murder for the killing of his girlfriend's baby. He drowned the child and then smashed his head in. He made numerous nonsensical remarks in the presence of his girlfriend and a next-door neighbor who attempted to intervene. He asserted a defense of insanity at trial.

Analysis 1. "The affirmative defense of insanity is a legal issue, not a medical one, and the jury is not restricted to medical science theories of causation." A fact-finder may appropriately choose to reject overwhelming medical testimony in favor of rebuttal medical testimony or even lay testimony. Moreover, a jury can reject an insanity defense of a defendant who was also intoxicated at the time he committed the offense. Here, the jury's rejection of the defendant's insanity defense could have been on either basis.

Analysis 2. Appellant contends that his statements to investigators "were borne by coercion or overreaching" Investigators did nothing inappropriate in their interrogation.

> Appellant points to the fact that he had been diagnosed with schizophrenia and bipolar mood disorder and was suffering from a mental illness at the time of the killing and during his interviews. Thus, appellant's argument falls under Article 38.22 [] not the Due Process Clause.
>
> [In conclusory fashion the court determines] that the

defendant had basic comprehension skills, understood his *Miranda* waiver, and knew what he was doing when he confessed.

Analysis 3. Article 46B.005(d) says a trial judge may determine competency "at any time before the sentence is pronounced."

Concurring (Poissant, J.). It is not always appropriate for the trial court to delay until post-verdict its competency determination. Competency can be fleeting and incompetency can impair the attorney's ability to represent his client during witness examinations. The legislature should amend Article 46B.005(d) because it violates Due Process.

Comment. I don't like the facts of this case. I don't even like my watered-down version of them. I also don't like the doctrine of presto-change-o. Under the doctrine of presto-change-o the court of appeals can convert your actual argument into something different and easier to reject. It's similar to the doctrine of not-the-droids-you're-looking-for. "You asserted due process, but you meant 38.22, we reject your 38.22 argument." Finally, I'm confused by Judge Poissant's concurring opinion. If the statute violates due process, then her opinion should declare the statute unconstitutional.

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

- 2nd District Fort Worth
- 3rd District Austin
- 5th District Dallas
- 6th District Texarkana
- 7th District Amarillo
- 8th District El Paso
- 9th District Beaumont
- 10th District Waco
- 12th District Tyler
- 13th District Corpus Christi/Edinburg

Abbreviations used in this publication include

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

Factor tests cited without recitation include:

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

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

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

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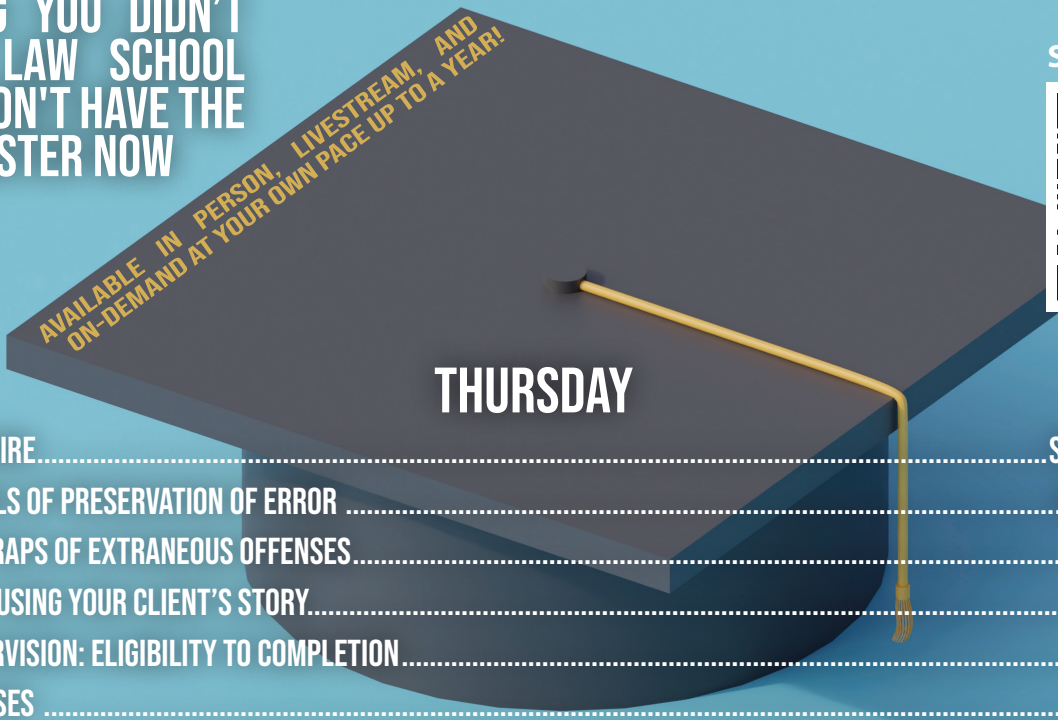

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