TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

VOICE FOR THE DEFENSE

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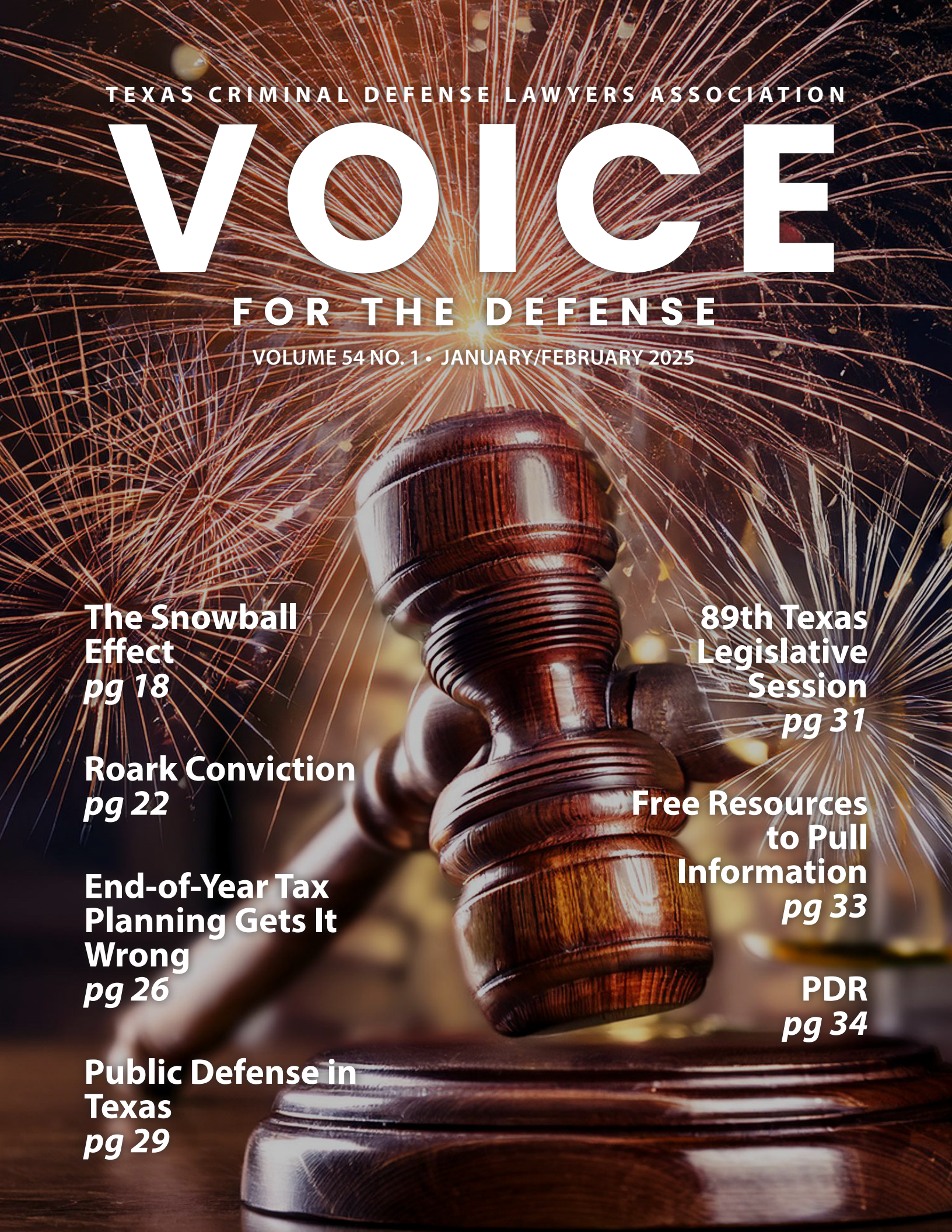

Texas Criminal Defense Lawyers Association

19th Annual

DWI DEFENSE:

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(*Prescription Drugs +Illegal Drugs + Marijuana)

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FRIDAY, MAY 2, 2025

NHTSA Resources for Cross Exam in Drug & Alcohol Cases ..... Tyler Flood

Other Resources for Cross Exam in Drug & Alcohol Cases ..... Carl Ceder

Search Warrants ..... Gary Trichter

Ethics Issues Facing the Defense Trial Lawyer..... Hon. Audrey Moorehead & John Hunter Smith – moderated by Carl Ceder

Discovering & Challenging THC & Alcohol Lab Results & Motions ..... Joseph Hoelscher

Understanding the Drug Toxicology Report & Incorporating in Cross (Including Delta's)..... Stephanie Alvarado

Boating While Intoxicated..... Mario Olivarez

Connecting Voir Dire to Final Arguments: Alcohol & Drugs ..... David Burrows & Matt Peacock

New DPS Testing, Including Testing Results..... Adam Tisdell

Updated Fourth Amendment & Other Legal Challenges in Cannabis & DWI Defenses..... Don Flanary

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VOICE
FOR THE DEFENSE

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Features

Columns

Available online at www.tcdla.com
Volume 54 No. 1 | January/February 2025

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

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 7
TCDLA | New Lawyer - DWI 101
Webinar

February 11
TCDLA | Federal Law
Webinar

February 13-14
TCDLA | Gumbo Advanced Trial Tactics
New Orleans, LA

February 21
CDLP | Indigent Defense
Dallas, TX

February 22
CDLP | Career Pathways
Webinar

February 27-28
TCDLA | Karton on Voir Dire: Communication in the Courtroom & Pozner on Cross: The Chapter Method
Arlington, TX

February 28
TCDLA Executive & Legislative Committee Meetings
Arlington, TX

March

March 1
TCDLA & TCDLEI Board & CDLP Committee Meetings
Arlington, TX

March 2-7
CDLP | 48th Annual Tim Evans Texas Criminal Trial College
Huntsville, TX

March 21
TCDLA | Financial Friday - Probate
Webinar

March 27-28
TCDLA | 31st Annual Mastering Scientific Evidence DUI/DWI *w/ NCDD*
New Orleans, LA

April

April 2-6
TCDLA | President's Trip
Boston, MA

April 10
CDLP | Juvenile
Webinar

April 11
CDLP | The Way of the Warrior
Tyler, TX

April Continued

April 16
TCDLA | New Lawyer - Plea Negotiations
Webinar

May

May 2
TCDLA | 19th Annual DWI Defense: Preparing for a DWI Jury Trial with Alcohol and Drug Intoxicants
Dallas, TX

May 12
CDLP | Mindful Monday - Stress, Anxiety, and Suicide Prevention: Mental Wellness for High-Stress Professions
Webinar

June

June 17
CDLP | Public Defense Leaders Training
San Antonio, TX

June 18
CDLP | Indigent Defense
San Antonio, TX

June 18
CDLP | Mental Health
San Antonio, TX

June 18
CDLP | Capital Training
San Antonio, TX

June 19-21
TCDLA | 38th Annual Rusty Duncan Criminal Law Course: Defending Liberty, Together!
San Antonio, TX

June 20
CDLP | Women Defenders & Clients
San Antonio, TX

June 20
TCDLEI Board, TCDLA Executive, Legislative, & CDLP Committee Meetings
San Antonio, TX

June 21
TCDLA: 53rd Annual Members' Meeting
San Antonio, TX

July

July 3
Declaration Reading

July 9-13
TCDLA | Members' Trip
South Padre Island, TX

July 9
CDLP | Trainer of Trainers
South Padre Island, TX

July 10-11
CDLP | The Way of the Warrior
South Padre Island, TX

July 12
CDLP, TCDLEI, & TCDLA Orientation
South Padre Island, TX

July 21
CDLP | Mindful Monday - Motivational Interviewing
Webinar

July 24
TCDLA | New Lawyer – Building Trust With Clients
Webinar

August

August 6
CDLP | Building Blocks for A Next-Level Criminal Defense Attorney
Webinar

August 7-8
CDLP | Innocence Work for Lawyers *w/ IPOT*
Austin, TX

August 15
TCDLA | 23rd Annual Top Gun DWI
Houston, TX

August 18
CDLP | Mindful Monday - Intellectual Disability
Webinar

August 21-22
CDLP | 3rd Annual Floyd Jennings Mental Health Symposium
Houston, TX

September

September 4
TCDLEI Board Meeting
Zoom

September 4-5
TCDLA | TBD
Galveston, TX

September 5
TCDLA Executive & Legislative Committee Meetings
Galveston, TX

September 6
TCDLA Board & CDLP Committee Meetings
Galveston, TX

September 10
TCDLA | New Lawyer – Courthouse Etiquette
Webinar

September 17
Constitution Day

September 17-20
TCDLA | 13th Annual Round Top
Round Top, TX

October

October 10
CDLP | 31st Annual Judge David C. Guaderrama El Paso Criminal Law
Ruidoso, NM

October 9-10
TCDLA | Corrections & Parole
Houston, TX

October 15
CDLP | Innocence for Students *w/ IPOT*
Austin, TX

October 16-17
CDLP | 22nd Annual Forensics
Austin, TX

October 23
CDLP | Capital
TBD

October 24
CDLP | Mental
TBD

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."

DAVID GUINN

"He'll do to ride the river with"

When Texas was full of cowboys moving cattle all over the territory, crossing swirling rivers with the panicky chaos of cattle herds, the phrase "He'll do to ride the river with" was a high compliment of great respect. It meant not only that the person was pleasant, honest, good company, but that when things became dangerous, the person was reliable, trustworthy and ready for any challenge. TCDLA has a bunch of just such people. There are too many to mention in one short article, but a few spring to mind and one weighs on it most heavily.

For starters, ask anyone who has been helped by Nicole DeBorde Hochglaube of Houston and Reagan Wynn of Ft. Worth on their fantastic Strike Force work. Ask what it felt like to have lawyers of their caliber drop their practices to protect a fellow lawyer. Some fired up young Ft. Worth lawyers facing contempt charges recently learned that Bobby Mims of Tyler, at 77, is nothing less than a hero and a complete class act. The same guy who patrolled outside the wire in Vietnam when the University of Texas beat Arkansas for the fictional "National Championship of College Football" in 1969 is still willing to stand up when a DA's office overreaches into a contempt matter that was purely for the trial court to handle. For no money, he drove from Tyler to Ft. Worth several times to do it. What examples to us. Steady river riders all.

Last year during his humble service as President of this organization -- amidst all the extra responsibilities, grass fires, meetings and distractions -- John Hunter Smith of Sherman managed to obtain five (5) NOT GUILTY verdicts for clients in various counties on allegations of Continuous Sexual Assault of a Child, (2) NOT GUILTY verdicts in an Aggravated Kidnapping trial, a NOT GUILTY in a DWI trial, and a NOT GUILTY in a Money Laundering & Fraud trial. Yeah—some of that was in federal court. To do that over the course of a career is rather special. To do so in a bit over a year with all the other competing responsibilities is simply stunning. Yeah, he'll do to ride the river with.

This fall Kyle Therrian and Aaron Diaz gave up a huge chunk of time to submit an *amicus* brief on behalf of TCDLA to the Texas Court of Criminal Appeals on the *State of Texas v. Heath* case in support of the outstanding work of member Jessi Freud. The State Prosecuting Attorney's Office and a host of twenty or so District Attorney's Offices moved for rehearing, warranting our call for help. Those gentlemen stepped up without blinking. They helped win the day, letting stand the excellent opinion of our Texas Court of Criminal Appeals, authored by Judge Newell. Every time we help each other, TCDLA gets stronger, and we all get better. And we need more people to step into the breach, as our heroes can't protect us forever.

TCDLA just lost such a hero—Martin Underwood of Comstock, Texas. He was a fantastic lawyer and the most pleasant, courteous and entertaining (okay, HILARIOUS) company. Anyone who spent time with him came away a little more knowledgeable and certainly grinning. You owe it to yourself to block out an hour on your calendar, hold your calls, turn OFF the cell phone, and go to TCDLA.com and enjoy his 2018 Hall of Fame interview. Mr. Underwood was his usual humble, humorous, self-deprecating self.

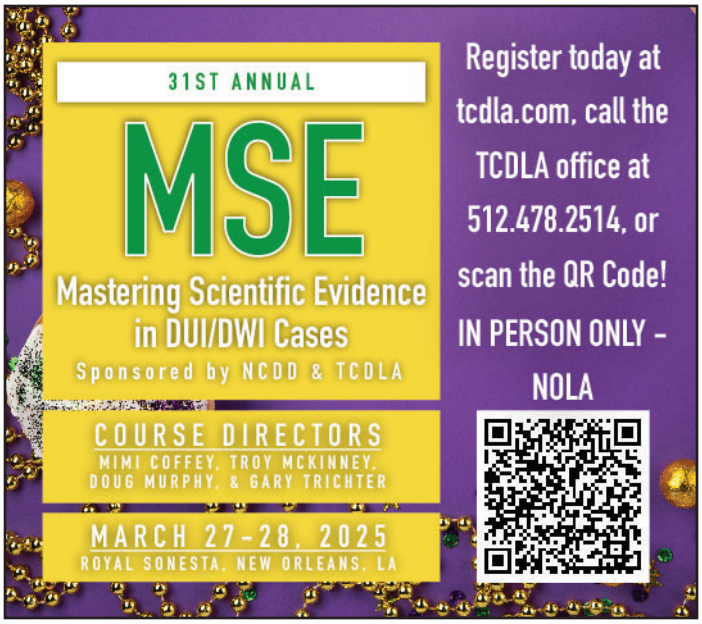
A 1975 graduate of the University of Texas Law School, he stayed active almost until the end. As recently as the August of 2022, he was trying a case in Alpine over a goat castration. Really—I didn't make that up. Check out the story on Pecos.net from the *Pecos Enterprise*. Reporter Rosie Flores gave a fair account of things under the headline "Jury Hung in Alpine trial of Lajitas goat's castration." Classic Martin. If that doesn't pique your curiosity, you are just having a bad day.

Martin was neither pretentious nor a clothes horse. When he introduced himself to me in August of 1992, in a Fort Stockton courtroom, I took one glance and mistook him for a defendant, thinking he was some trucker client of a lawyer who'd wandered past the bar to counsel table. He had slicked back hair combed over a balding top, craggy smile, sunburned face, well broken in cowboy boots and western yoke jacket. The sparkle in his eye was inviting and intelligent. I had horribly misjudged the book by the cover. But young lawyers are prone to such things. He invited me to join TCDLA, of which I was wholly ignorant. He explained the professional organization to me. I then admitted that I didn't have the money, having just opened my practice in Crane, with a wife and two small boys. Nodding understandably and kindly, without a hint of derision or condescension on his face, he immediately offered to pay my first-year dues on the condition that I attend Trial College in March of 1993. I accepted and am so glad I did.

Dan Hurley, one of my law partners, got to try multi-defendant Aggravated Assault case with him in Val Verde County a few years ago. It seems some college boys from Texas Tech had gone across the Rio Grande to drink the cheaper beverages and got into a mess once back on this side. Part of Martin's cross examination of a State's expert illustrates his awareness of the jury and courtroom vibe quite well. The expert, who said he was from Kearney, Nebraska and had once worked with Johnny Carson, gave boring, dry testimony. Time seemed to go slower the more the man spoke. He had a monotonous drone that could substitute for sleeping pills. When the witness was passed for cross examination, Martin began with the question "You quit working for Johnny Carson to do this?" Once the chuckles from the jury subsided sufficiently, Martin followed with "Is everyone from Nebraska as interesting as you?" –which brought the house down. All 10 of 12 jurors doubled over. The bailiff, shaking visibly, ducked his beet red, smiling face to the floor. The Judge just shook his head, grinning. No further questions. Not Guilty to all, and to all a good night was how that one turned out.

A quick Westlaw search shows Martin Underwood as counsel on numerous appeals, from Capital Murder to about everything else. Amazingly, he won many of them. But his excellence at his work was rivaled only by his encouragement and assistance to other lawyers. This past December he put on those black boots (well-polished), his best suit & bolo tie, went down to gaze upon the Pecos River, and breathed his last. That's where they found him. He'll ride that river well for all eternity now. Should you meet him at a crossing, you'll be in good company. He'll do to ride the river with.

David M. Guinn



Slate of Candidates TCDLA Board of Directors 2025–2026

Will be sworn in on June 21, 2025 at TCDLA Annual Members' Meeting

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Clay Steadman | President-Elect
Sarah Roland | 1st Vice President
Lance Evans | 2nd Vice President
Adam Kobs | Treasurer
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Cesar De Leon
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Blakely Mohr
Mario Olivarez
Jose Ozuna
Jason Parrish
Ishan "Shawn" Sareen
Kayla Staley
Kyle Therrian
Keltin VonGonten
Ronnie Lee Wilkins
Benjamin Wolff

CDLP Chair

Patty Tress

Voice for the Defense Editor

Jeep Darnell

The Hidden Costs of Putting on a CLE Seminar: What Criminal Defense Attorneys Should Know

MELISSA J. SCHANK

Strategic Plan Initiative: Understanding Member Resources to Increase Education Access

Authors:

Committee Members: Paul Harrell, Mario Olivarez, Rick Russwurm, Monique Sparks, Clay Steadman, and Judson Woodley
Staff: Grace Works (Lead), Meredith Pelt, Kierra Preston, Peyton Martinez

Continuing Legal Education seminars are essential for keeping criminal defense attorneys up-to-date with the latest legal developments. An in-person CLE seminar can also give the attendee a valued networking opportunity, making up for those years we missed. While the registration fees might seem straightforward, other costs associated with organizing the event can extend far beyond the obvious – many hidden expenses impact the overall budget. Below, we have the lesser-known costs to keep in mind when attending a CLE seminar.

Coffee and Food: A Small Fortune

Generally speaking, food is expensive! We've all been dealing with the rising costs of basic goods. In the world of meetings and events, the cost of food is not only coupled with taxes, but also service charges. Requiring careful budgeting is so important – if you have a large group, these expenses can easily reach thousands of dollars. Below are average prices for food and beverages at an event, taxes and service charges included:

Coffee = $125/gallon	**Lunch** = $50.18/person
Hot water for tea = $125/gallon	**Dinner** = $85.84/person
Continental breakfast = $23.77/person	**Soda** = $3.25/can
	Sweet treat = $7/person

Audio-Visual Equipment: Another Small Fortune

High-quality AV equipment is essential for a professional event, especially when providing livestream and on-demand registration options. Considering the entire point of this article, it shouldn't be a shock to hear that we are not getting an amazing deal. Renting a screen costs between $1500 and $2500 per day, and microphones cost about $400 per day. For a livestreamed seminar, we need hardwired internet, which can cost between $100 and $450 a day. Depending on the length of the seminar, these expenses can accumulate rapidly, especially when you consider taxes, service charges, and labor charges. And if you need specialized equipment or technical support, expect to pay even more.

Hotels: Room Blocks and Meeting Spaces

TCDLA offers our event attendees room block rates at the best value possible. For those who don't know, a room block is a portion of rooms we get that is offered at a lower price for our participants. If our room block doesn't hit a certain occupancy level, usually around 90%, we are at risk of an attrition fee (the contracted financial obligation owed to a hotel if we do not hit the contracted percentage of occupancy), which can start at $15,000 and reach up to $250,000. Additionally, we have to pay rental fees for meeting spaces and break out rooms. And, you're on the right track if you are wondering if there are service and labor charges (it is yes). On average, the price for room rentals range from $500 to $1500 per room, per day.

Staffing and Travel

The cost of staff hours is another hidden expense that can be substantial. This includes time spent traveling, the cost of traveling itself (rental car, gas, airfare, meals on the road, etc.), prices of hotel rooms and more. We use a freight company to ship materials to and from our office in Austin. They calculate our total, which averages about $600 round trip, depending on the weight of the pallets (2-3 pallets a seminar), plus the distance from our office to said location.

Virtual Costs: Streaming and Recording

In the age of digital learning, many CLE seminars offer streaming or recording options for remote attendees. We provide this option for every TCDLA seminar. The cost of our Zoom licenses for webinars and video storage/editing platforms are thousands of dollars a year. Providing these registration options invariably impacts our staffing at the seminars and at the office. For seminars that are livestreamed, we have one person onsite dedicated to our AV, and two people watching at the office. They make sure that everything runs smoothly, watch for any technical problem that occurs, post in the webinar chat, and help livestream attendees if they are having any issues. Lastly,

staff has to edit videos to upload to our website for our on-demand option, which can take up to a week.

Speaker Expenses: The Cost of Expertise

Inviting respected speakers to your seminar is an investment in quality content that heightens an organization's reputation. But, it can also be a significant expense. Speaker fees can vary widely depending on their reputation and experience. Although it is rare we use a speaker that charges a fee, thanks to our wonderful members who volunteer their time to share their knowledge, travel expenses for non-local speakers do add up. The costs associated with that can include airfare, ground transportation, a hotel stay, parking, personal mileage reimbursement, and meals.

Conclusion

Planning a CLE seminar involves much more than securing a venue and scheduling speakers. The hidden costs—from coffee, to AV equipment, to staff hours—quickly add up, making it essential for us to budget carefully and consider all potential expenses. By understanding these costs upfront, we ensure that our seminars are both financially viable and professionally successful.

EDITOR'S COMMENT

Defiance in the Face of Adversity

JEEP DARNELL

Maybe I'm weird (don't answer that question to me directly), but although I should be filled with optimism and hope entering the new year, I am usually a little down thinking about the work that the year will bring and the exhaustion that comes with that work. There will be ups, there will be downs, there will be wins and there will be losses, but I know at the end of the year I'll wish I had spent more time with my family and less time working, a feat that is impossible to accomplish in this line of work.

Running alongside my melancholy has been that of my oldest son. The end of last year brought some personal challenges for him that he had yet to face at the wise age of 9. Nonetheless, as he and I spent time riding along in my pickup truck contemplating the cosmos and the challenges of our respective ages, I turned to music to help us both. I have found over my 41 years that words of the poets sometime bring wisdom on how to keep moving forward. With certain songs, I saw his chin square and his shoulders broaden and I felt my own do the same. We knew the challenges we were facing now and the ones that were sure to come weren't disappearing. We also knew that prosperity lies in the future somewhere but remaining defiant to the weight of those challenges was the lesson. As I thought about the joys and challenges of being a parent and lawyer over my all-too-short break, I thought I might share some poetic inspiration that helped us. To you, my brothers and sisters, I hope some of these words help you who may need it, those who need to square their jaw, broaden their shoulders, and stand defiant against bullies and tyrants. I ask each of you to take a listen to some of these songs and see if they don't bring you strength. I would also ask you to send me some of the songs that bring you strength.

I told my son that no matter how hard sports, life, and friendship are in the moment, the point is to get better every day at your response to the challenge. Being a trial lawyer, like being a baseball player, can rip your heart from your chest in defeat, but we must keep going and remember our love for the challenge. In the words of The Lumineers:

She'll lie and steal and cheat
And beg you from her knees
Make you think she means it this time
She'll tear a hole in you, the one you can't repair
But I still love her, I don't really care.

"Stubborn Love"

Additionally, as explained by Tyler Childers, just keep working and strive to be your best:

See, the ways of this world will just bring you to tears
Keep the Lord in your heart, and you'll have nothin' to fear
Live the best that you can and don't lie and don't steal
Keep your nose on the grindstone and out of the pills
Well Daddy, I've been tryin', I just can't catch a break
There's too much in this world that I can't seem to shake
But I remember your words, Lord, they bring me the chills
Keep your nose on the grindstone and out of the pills

"Nose on the Grindstone" (OurVinyl Sessions)

But we can only keep working if we believe we are great. I tell my son all the time, "go be great." I challenge each of you to remember that every time the lumps get a little harder to take. Tyler Childers seemed to know exactly what I was thinking when he sang:

Now, I ain't the toughest hickory
That your ax has ever fell
But I'm a hickory just as well
I'm a hickory all the same

"Lady May"

Another lesson I have had to wrestle with is my own challenge of how I react to the noise from judges, prosecutors, clients' families, and the collective of people who aren't walking in my shoes. My son has been facing a similar challenge of developing his unique identity, regardless of the ridicule and criticism that come with stepping outside the norm. When you believe you are good, and you work like you believe it, the noise will only get louder. We both found solace in the words of Brent Cobb in "Keep 'Em on They Toes," where he sings:

They try to tell you how to live
They try to tell you how to die
They tell you don't get too low, but don't get too high
Best thing you can do is don't listen too close
Walk on to your own beat
Keep 'em on they toes
Keep 'em on they toes
Your business outta sight
Make 'em look left if you're gonna hang a right
If the pot's hot, don't let em see your hand
Make 'em gotta know what they wouldn't understand
The best thing you can do when the ignorance shows
Is walk on to your own beat
And keep 'em on they toes

"Keep 'Em on They Toes"

In facing that lesson, I shared a secret with my son: the

louder people talk bad about you, the more they wish they were you. Quiet folks don't get talked about as much, it's the winners and the fighters that get the most criticism. Take the challenge and the lumps and keep going. Like Sam Barber sang:

When there's a storm ragin' in your soul
You gotta thank God that you're still growin' old
If them demons you're fightin' won't go away
Drop on your knees and pray
Life can get hard sometimes, I know
You've gotta get up and walk the straight and narrow
When they're chasin' you down with an old bloodhound
And you're runnin' through the fields for your life
You've gotta get up, son, I know they're gunnin' for ya

"Straight and Narrow"

Along with the defiance and work comes fatigue. My son told me that he was tired of the challenges he had been facing. Welcome to life, success, and squaring your jaw. You'll be tired, it comes with the territory but dig a little deeper and find a little more. Ryan Bingham (my favorite singer) wrote it best:

Your heart's on the loose
You rolled them sevens with nothing to lose
And this ain't no place for the weary kind
You called all your shots
Shooting eight-ball at the corner truck stop
Somehow this don't feel like home anymore
And this ain't no place for the weary kind
This ain't no place to lose your mind
This ain't no place to fall behind
Pick up your crazy heart and give it one more try

"The Weary Kind"

Amazingly, as my son and I worked through our feelings on many a drive, we found a song that reiterated that message and it was a song he latched onto. If you're going to square that jaw, broaden those shoulders, stand defiant, and you think you are the best, then go be the best. The Lumineers spoke to my son when they sang:

And you wanna be a big shot
You wanna be the big man
You wanna hold a big gun
You gotta have a quick hand
You wanna be the big shot now

"Big Shot"

As our extended time together drew to a close at the end of the break and we both felt that the challenges, although difficult, wouldn't be insurmountable, we found a few songs that reminded us that even when we can't spend as much time together, we have each other. When we are weak, we need to rely on the people we love to help us refuel. We need to be there for each other as a family, just as our brothers and sisters across the State need to be there for each other. I found particular solace in the words of the song "All Your'n," where Tyler Childers sang:

The place you learned to say your prayers
The place I took to praying
Loading in and breaking down
My road dog, door deal dreams
Long before we ever met
I made up my direction
Long before I knew the half
Of half I'm sure of now
Though I'd say, it ain't the way that you'd a gone about it
Follow me and lead me on, and never let me down
So I'll love ya 'til my lungs give out
I ain't lying
I'm all your'n and you're all mine

"All Your'n"

I also found strength in knowing that I come from a line of family that has squared their jaws and broadened their shoulders. So too has my son. We spent a good bit of our break at our family ranch that my great-grandfather settled when he was 12 back in the 1890's. I never met the man, but I have always found strength in visiting his grave and that of his wife, his son that died at two-days-old, and my grandmother. There is a beautiful cemetery where they are all buried, hidden among pastures, wheat fields, and ponds, where the sounds of the cattle lowing in the pasture, songbirds sailing on the wind, and coyotes yammering for their pups can be deafening if you stop and get rid of the noise. Zach Bryan must have been there,

I'd like to get lost on some old back road
Find a shade tree and a honey hole
And talk to my grandpa again
And I see God in everything
The trees and pain and nights in the spring

"Burn, Burn, Burn"

Rest when it's time to rest. Fight when it's time to fight. Stand defiant in defense of what we hold dear and don't let anyone bring you down.

Be safe,

Jeep Darnell

Shout-Outs!

Congratulations to Kelli Childress for being recognized as one of El Paso's notable newsmakers of 2024! As the Chief Public Defender of El Paso County, Kelli has been a steadfast advocate for justice, tirelessly working to ensure that every individual receives fair representation. Her dedication and commitment to upholding the rights of the underserved have made a profound impact on our community. Thank you, Kelli, for your unwavering service and for championing justice for all. **Well done!**

Congratulations to Liz Rogers, Dolph Quijano, Jr., Jim Darnell, Joe Spencer, and Mary Stillinger from the 2024 El Paso Criminal Law Group! Their unwavering dedication to justice, skillful advocacy, and tireless defense of clients have rightfully earned them the title of Champions of the Defense. **Bravo!**

Snaps to Richard Ellison of Kerrville, TX! He got a hung jury in Kerr County for his client charged with felony terroristic threat. In November, he got another hung jury in Kimble County for his client harged with the murder of a man who sexually assaulted the client's granddaughter. **Top notch!**

Cheers to Romy Kaplan! He got a not guilty verdict from a jury in the 178th District Court in Harris County, Texas. Romy took over the case from a lawyer who was ill two years ago. The first jury hung. He successfully presented a claim of self defense. **Gold star!**

A thunderous round of applause for Chris Moutray! His client in Brazos County was accused of Unlawful Carrying of a Weapon by displaying it in a public place, not in a holster. The facts showed that his client had an altercation earlier in the evening. Later, four men attacked him and chased him for a city block. Eventually, one of the men tackled the client to the ground. At the same time the client was tackled, a police officer on the scene pepper sprayed everyone, including the client. Moutray's client then pulled out a pistol to defend himself. On the stand, the arresting officer admitted that if he had been in the same situation as the client he would have pulled out his gun. Moutray asked for, and was given, a self defense instruction to the jury. The prosecution asked for a provocation instruction, and was given it. Thereafter, Moutray asked for a withdrawal instruction to the provocation argument, and was given it too. The jury stayed out for about 2 hours, and eventually came back with a not guilty verdict. **Epic win!**

Hats off to Paul Chambers! The First Assistant Public Defender for the Far West Regional Public Defender's Office had an incredible victory recently. Judge Ferguson of the 394th Judicial District Court found the assistant District Attorney for Culberson County to be grossly negligent in his discovery duties. Judge Ferguson chastised the assistant District Attorney for 20 minutes from the bench and then suppressed evidence across a range of cases. Judge Ferguson ordered the District Attorney's Office to review every conviction for the past three years. He also denied the State's request for sanctions against Paul Chambers and the Chief Public Defender, James McDermott, and declined the District Attorney's Office request for a recommendation that the defenders lose their licenses. Judge Ferguson declared that their filing of the motions to suppress was a service to the people of their counties and that they were the only reason anyone discovered systemic failures of the District Attorney's office, failures that involved denying people their basic constitutional rights. **Bravo!**

Props to Geeta Singletary & Leah Jackson of the Barbieri Law Firm! They had a client charged with online solicitation of a minor sexual conduct. The trial was held in Collin County 380th District Court. The jury's verdict was Not Guilty. **Way to go!**

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Understanding the Effect That A Single Conjunction Can Have On Your Clients in Federal Sentencings: *Pulsifer v. United States*, 601 U.S. 124 (2024)

CATHERINE STANLEY

The interpretation of a simple conjunction in some federal cases can have a significant impact on your clients in a federal sentencing. When most people see the word "and," they assume "and" means just that. And. However, according to the Supreme Court, there can be two grammatically permissible ways to interpret the word "and." Determining the correct interpretation is not a matter of grammatical rules—but reviewing the text in its context. In some cases, the interpretation of the word "and" alone can result in a higher sentence for your client.

This issue was brought before the Supreme Court in *Pulsifer v. United States* when interpreting whether a defendant was eligible for safety valve relief under USSG § 3553(f). *Pulsifer v. United States*, 601 U.S. 124 (2024); 18 U.S.C.A. § 3553(f) (West). Safety valve allows some defendants convicted of drug offenses to avoid otherwise applicable mandatory minimum sentences if the court finds that five criteria are met. 18 U.S.C.A. § 3553(f) (West). One of those criteria—the criminal-history requirement—was drafted as follows:

1. the defendant does not have—
    b. more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
    c. a prior 3-point offense, as determined under the sentencing guidelines; and
    d. a prior 2-point violent offense, as determined under the sentencing guidelines. *Id.*

Pulsifer argued he met this requirement because he did not have a combination of all three elements listed in (a), (b), and (c). *Pulsifer*, 601 U.S. at 131. The Government argued Pulsifer did not meet this requirement because had one of those elements—in other words, the statutory minimum applies if he has (a), (b), *or* (c). *Id.* Although acknowledging both interpretations are grammatically permissible, the Court adopted the Government's interpretation and determined the statutory minimum applied. *Id.* at 133. The Court explained the word "and" is a conjunction whose function is to connect specific items—the difficulty is determining what the "and" connects. *Id.* The Court agreed with the Government's view that the introductory phrase "does not have" applies to each term seriatim, not on the combination of the three as Pulsifer argued. *Id.* at 134-135. The Court described this requirement as an "eligibility checklist." *Id.* at 153.

As mentioned above, the correct interpretation depends on the context, and the Court described the following examples to illustrate that principle. If a police officer tells you, "[d]on't drink and drive," that doesn't mean you shouldn't drink and that you shouldn't drive, but only that you shouldn't do both at the same time. *Id.* at 141. If a doctor tells you that he can perform a medical procedure only if you "don't eat, drink, and smoke for the preceding 12 hours," the "don't" carries over to each action on the list (eating, drinking, and smoking alike) in seriatim—not just to the three in tandem. *Id.*

When initially reading this provision, one may think if Congress intended the interpretation the Supreme Court adopted, it would have used the conjunction "or" instead of the conjunction "and." *Id.* at 137. This argument was not persuasive to the Supreme Court because they "do not demand (or, in truth, expect) that Congress draft in the most translucent way possible." *Id.*

The Court also reasoned Pulsifer's interpretation creates two statutory difficulties: it would render subparagraph (a) superfluous and the eligibility for relief would not correspond to the seriousness of criminal records. *Id.* at 141. Pulsifer's interpretation would result in superfluity because a defendant who has a prior three-point offense under (b) and a prior two-point violent offense under (c) would *always* meet the criteria in (a). *Id.* at 142. In other words, he would always have more than four criminal history points. *Id.* Pulsifer's interpretation was also rejected because it did not correspond to the seriousness of a defendant's criminal record. *Id.* at 146. The criminal history requirement at issue operates "as a gatekeeper: It helps get some defendants into, and keeps other defendants out of, a world free of mandatory minimums." *Id.* Pulsifer's interpretation would be inconsistent with that purpose.

The interpretation of the conjunction "and" in this context may have a significant impact on the sentence your client receives in federal cases because it affects whether a mandatory minimum sentence applies. However, this

is not the only context in which the interpretation of a conjunction can have a significant impact on your client's sentence. The same issue has arisen in connection with the 2-level adjustment for Zero-Point Offender which was first effective in November of 2023. The Sentencing Commission amended this provision this year (effective November 1, 2024) to address the same differing interpretations of the word "and" that courts considered when determining whether a defendant was eligible for safety valve relief.

Previously, under § 4C1.1 of the Federal Sentencing Guidelines, a defendant received the 2-level Zero Point Offender adjustment if the defendant met ten criteria. USSG § 4C1.1. The tenth criteria was "the defendant did not receive an adjustment under § 3B1.1 (Aggravating Role) *and* was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848." USSG § 4C1.1(10) (emphasis added). Defendants began raising the same legal arguments regarding the meaning of "and" with respect to § 4C1.1(10) as other defendants did with respect to safety valve relief. *See United States v. Milchin*, No. 24-1484, 2024 WL 4441419 (3d Cir. Oct. 8, 2024); *United States v. Cervantes*, 109 F.4th 944, 946 (7th Cir. 2024), reh'g denied, No. 24-1226, 2024 WL 4031623 (7th Cir. Sept. 3, 2024). To address the confusion, the Sentencing Commission proposed "technical changes to § 4C1.1 to divide subsection (a)(10) into two separate provisions, clarifying the Commission's intention that a defendant is ineligible for the adjustment if the defendant meets either of the disqualifying conditions listed in the provision." Sentencing Guidelines for United States Courts, 88 Fed. Reg. 246 (Dec. 26, 2023).

As the Supreme Court demonstrated in *Pulsifer*, "conjunctions are versatile words, which can work differently depending on context." *Pulsifer*, 601 U.S. at 151. When you are advising your clients concerning matters affecting their potential sentence, it is critical to ensure you are giving thorough and accurate legal advice. If you are reviewing a statute, a provision in the sentencing guidelines, or any other material that may affect your client's sentence, be mindful of each and every word, the different possible interpretations, and how those differing interpretations may impact your client. Even a word as short and seemingly insignificant as the word "and" can have a significant impact on the ultimate sentence they receive.

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Essentials for an Effective Fee Agreement)

LAURA POPPS

Essentials for an Effective Fee Agreement

An effective fee agreement does far more than establish your fee for representation of an individual. It establishes trust with the client, sets expectations about the attorney-client relationship, and clearly communicates important terms of the representation. In addition, a well-drafted fee agreement can be your best defense against a grievance or legal malpractice claim.

Unfortunately, many lawyers give short shrift to the fee agreement. In my work defending lawyers in Bar proceedings, I have noticed that many lawyers do not use a written fee agreement. Of those who do, their agreements are frequently missing key elements or fail to accurately state the law, especially regarding fees. In addition, written fee agreements often are not properly executed, making their protections largely worthless. This is regrettable, as the minimal effort it would take to get the agreement properly executed could make all the difference down the road should there be a dispute.

There is no one-size-fits-all approach for fee agreements, and it is important to tailor certain specifics to your particular law practice. But below are some basics that are essential for most criminal law practitioners.

Format & Procedure

It is important not only that the agreement be in writing, but that you actually make sure the client signs, dates, and promptly returns it. It sounds obvious, but I have defended numerous grievances where the lawyer had a written fee agreement, and even gave it to the client to be signed, but did not follow up to make sure the client returned a signed and dated copy. This renders the agreement useless for purposes of defending misconduct allegations.

Fees & Costs

Texas Disciplinary Rules of Professional Conduct, Rule 1.04(c) requires that for any new client, you communicate the rate and basis of the fee. Clearly detail whether you are billing hourly or via a flat or fixed fee. If billing hourly, state the amount of the hourly rate, whether a deposit will be required, and when or how it will need to be replenished during the representation. Explain that the deposit amount does not represent the entirety of the fees for the representation.

If charging a flat or fixed fee, be clear on exactly what services are encompassed within that fee. I encourage the use of benchmarks within a flat fee agreement, to lessen any disagreements about what amount has been earned should the representation end early. This also allows the attorney to deem portions of the fee "earned" during the representation rather than waiting until the representation is complete. Finally, it is common to see flat fees designated as "earned upon receipt" and "non-refundable." This is ***incorrect***. Flat fees are not earned until the legal work for which the fee is paid is completed. It is important not to misstate this in the fee agreement. If there is a dispute in the future over unearned fees, this language could actually work against you.

Clearly delineate that costs and expenses are ***not*** included within the fee. Spell this out in as much detail as possible, listing all costs that could reasonably be incurred and explaining that they are the client's responsibility.

Scope of Representation

This may be the most important element of a good fee agreement. It is **critical** to specify exactly what the representation does and does not encompass. Spell this out in detail, expressly stating the legal services to be provided and what services are NOT included, such as new cases or upgraded charges (without a new agreement), appeals, notices of appeal or motions for new trial, retrials, expunctions or petitions for nondisclosure, revocation proceedings, etc.

It is also important to state exactly who the client is, particularly when someone else is paying the fee.

Expectations

It is important to set the stage early for client expectations. Tailor this part of the contract to include issues that come up frequently and unique problems you have encountered in the past. A few provisions to consider:

1. actions by the client that will justify your withdrawal, including non-payment of fees or breach of any material term of the agreement;
2. no guarantees as to outcome;
3. copies of discovery provided by the State pursuant to CCP Article 39.14 cannot be provided to the client;
4. the expected mode and frequency of communication, as well as acknowledgement of the risks associated with certain forms of communication and consent, as appropriate;
5. expectations regarding client cooperation;

6. confidentiality of attorney-client communications and the consequences of revealing such communications to third parties; and
7. the client's right to terminate the representation at any time.

File retention

Explain your file retention process, how long the file will be retained, in what format the file will be provided, and the process for obtaining a copy of the client file.

The above list is not exhaustive and, depending on the facts and circumstances of a particular representation, there are other provisions that may need to be included. However, it is important to get a good fee agreement in place and to use it consistently with all new clients. Even a basic fee agreement is a great start and is something you will likely continue to work on and improve for years to come.

Laura Popps *is Vice-Chair of the TCDLA Ethics Committee and is based in Austin, Texas. Her practice is focused on attorney license defense, legal ethics consulting, and criminal appeals. Laura has been Board Certified in Criminal Law since 1999. She spent a decade at the Office of Chief Disciplinary Counsel, where she directed litigation and investigations for the Austin Region and handled some of Bar's more complex litigation. Before that, she was a prosecutor at the Attorney General's Office where she prosecuted cases statewide. You can contact her at laura@poppslaw.com or (512) 865-5185.*

BEYOND THE CITY LIMITS

The Highrise or the Hayfield? Why Young Attorneys Should Go Rural

GARRETT CLEVELAND

"You wanna do the opening statement, cross the lead detective, and cross the first-responding officer?" We were sitting in our conference room at the Hill Country Regional Public Defender's Office ("HCRPDO") in February 2022 when my old boss asked me this question. There were half a dozen attorneys in the room, so it took a second to register that he was talking to me…particularly because I had only been licensed for 15 months at that time and had only been with the HCRPDO for 8 months. And particularly because the case we were about to go to trial on was a first-degree murder. But who says no to that? I certainly did not, and it led to the first murder trial experience of my career. For me and other young attorneys in my office, it hasn't even been close to the last.

In the middle of the Hill Country, young attorneys are getting first-chair experience trying misdemeanors and felonies, conducting every type of hearing that can happen in criminal law, and doing all of it with quality support at their backs. And it's not just the HCRPDO. Texas has public defender offices in far west Texas, the Panhandle, Wichita Falls, and so much more. In each of these offices, young attorneys are building a wealth of experience that they may not have in urban areas.

Where there aren't public defender offices, courts are desperate to appoint attorneys. In 2021, no local lawyer accepted an adult criminal appointment in 65 rural counties.[1] And that's a downward trend. Since 2015, Texas has lost one-quarter of its rural defense lawyers.[2] So why aren't young attorneys champing at the bit to take advantage of all this potential experience? "[B]udding lawyers often express concerns about lack of access to cultural amenities, such as music and art in smaller places…other concerns include finding suitable employment for a professional spouse or having access to good public schools."[3] Although sometimes valid concerns, I'd encourage young attorneys to balance them with the opportunity to get courtroom experience early.[4]

Anecdotally, it has been my experience that recruiting young attorneys to the hayfield instead of the high-rise starts with one question. What about the pay? There is a belief that it's financially burdensome to go rural. Others and I have personally found that is not the case.

Let's start with student loans. The average student loan debt in the United States is around $130,000.00.[5] Under the federal Public Service Loan Forgiveness Program, however, much of that debt will be forgiven after a borrower has made 120 qualifying monthly payments while working in a public service sector.[6] Time spent at a public defender's office qualifies. The payments don't even need to be consecutive, meaning that you can work at a public defender's office for a bit, then work privately, and then complete some other form of qualifying public service employment later in your career.[7]

An additional advantage for those who choose to work for a public defender's office is the Texas County and District Retirement System ("TCDRS"). Here are the basics, straight from the TCDRS website:

- Every time you get a paycheck, a certain percentage of your money is deposited in your TCDRS account. That money is tax deferred, so it reduces the income you must pay taxes on.
- The money in your TCDRS account grows at an annual compound interest rate of 7%. TCDRS credits this interest to your account each month based on your account balance as of Jan. 1.
- The value of your account can increase a great deal due to compound interest (interest paid on your deposits and the interest you've already earned). At 7%, your money will approximately double every 10 years.
- The account "vests," or is completely earned generally when you turn 60 years old and have completed eight years of service to a county or district. **Just like with PSLF, the eight years of service does not have to be consecutive.**[8]

What does this look like in a practical sense? Every county sets their own employee deposit rate and employer match rate, but the counties are fairly similar to each other.

1 Pamela R. Metzger, Claire Buetow, Kristin Meeks, Blane Skiles & Jiacheng Yu, *Greening Criminal Legal Deserts in Rural Texas* (2022), https://doi.org/https://doi.org/10.25172/dc.10.

2 *Id.*

3 Elaine S. Povich, *Lack of Rural Lawyers Leaves Much of America Without Support*, STATELINE (Jan. 24, 2023), https://stateline.org/2023/01/24/lack-of-rural-lawyers-leaves-much-of-america-without-support/.

4 Lisa R. Pruitt, Amanda L. Kool, Lauren Sudeall, Michele Statz, Danielle M. Conway, & Hannah Haksgaard, *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 Harv. L. & Pol'y Rev. 15 (2018).

5 Melanie Hansen, *Average Law School Debt*, EDUCATIONDATA (Oct. 1, 2024), https://educationdata.org/average-law-school-debt.

6 Federal Student Aid, *Public Service Loan Forgiveness (PSLF)*, (Jan. 9, 2025), https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service.

7 *Id.*

8 Texas County and District Retirement System, *A Plan That Works for You*, (Jan. 9, 2025), https://www.tcdrs.org/members/the-plan/.

Let's just take Medina County for example. Medina County allows for a maximum deposit rate of 6%, meaning that you can deposit 6% of each paycheck into your retirement account. Medina County also matches **200%** of your account when it vests. Doing the math with those numbers, if an individual put in their minimum eight years of service with a $115,000.00 salary that never increased, and retired at the age of sixty, their account would be worth approximately a million dollars. This would equate to approximately $6,500.00 per month for life after retirement**, just from the TCDRS retirement account.** This does not consider whatever else someone might save from the rest of his or her career.

But let's address cost for someone that wants to work privately. Rural areas still have an advantage over urban areas when it comes to cost of living. Look at this chart provided by the Heart of Texas Council of Governments[9]:

Location	Cost of Living
U.S.	100
Texas	93.9
Bosque County	82.9
Falls County	75
Freestone County	79
Hill County	76.6
Limestone County	76.1
McLennan County	81.7
Waco	77
Austin	119.3
Cleburne	91.9
College Station	98.8
Waxahachie	102.9

The numbers in the right column reflect the Overall Cost of Living Rating. It clearly indicates that urban areas (like Austin) and urban-adjacent areas (like Waxahachie) cost more to live in than rural areas. Housing, utilities, groceries, and transportation are all cheaper in rural areas.[10] This is something to consider for someone that wants to purchase a home instead of rent, or someone who prides themselves on saving money.

The last point I want to make is one in which I cannot cite sources, other than giving you the phone numbers of my colleagues and associates. From the local judges, to the prosecutors, to my co-workers, we're just happier. Rural life might not be for you, and that's great if you like to be in an urban setting! But I know so many attorneys who have come to our rural area from an urban one just for the quality of life. I don't sit in traffic. My daily commute consists of bluebonnets in the spring and longhorns standing in the Guadalupe River in the summer. I get to make strong relationships with the other attorneys because there aren't a thousand of them like there would be in Dallas. I don't have a caseload that makes me sacrifice time with my wife and daughter. And selfishly, I get to rake in courtroom experience that some of my law school classmates wouldn't dream of getting for another five to ten years.

Between the relatively new public defenders' offices and the growing need for private attorneys that will take court appointments, rural areas in Texas are the perfect places for young attorneys to cut their teeth. Come join us out here. We'd be damn glad to have you.

Garrett Cleveland *is the Deputy Chief of the Hill Country Regional Public Defender Office and an adjunct professor of criminal law at Schreiner University in Kerrville, Texas. Since beginning with the HCRPDO soon after its inception in 2021, he has represented indigent clients in cases ranging from possession of marijuana to murder. He resides in Kerrville with his wife and daughter, and can be reached at garrett.cleveland@medinatx.org or (830) 315-2788. He welcomes any opportunity to discuss criminal defense with his peers.*

9 Heart of Texas Council of Governments, *A Favorable cost of Living Affords Major Advantages for The Heart of Texas*, (Jan. 9, 2025), https://www.hotcog.org/hotedd/life/cost-of-living/.

10 *Id.*

The Snowball Effect: The Role of a Defense Investigator in Misdemeanor Cases to Prevent Future Enhancements

ELDON WHITWORTH

Criminal defense attorneys dream of winning the big case, establishing precedent, and making a name for themselves. But what about all the thousands of misdemeanor cases that you must handle as well? How do those misdemeanors play into the big picture? How can defending these misdemeanors establish an expectation of a fair and impartial judicial system? How often do we see misdemeanor plea deals that seem great at the moment, turn into a snowball for the next charge?

As a child, I played out in the snow, making snowmen. I took the small snowball and rolled it around, making it larger and larger. I enhanced the size and weight of it until it became a large blob, conforming into a snowman. Something small became something very large with a little manipulation. The same process occurs in nature when snow builds up and an avalanche is created. What once was a harmless bit of snow, fun to play with or ski on, now poses a devastating threat to anyone in its path. Our justice system has a similar capacity built into our laws.

Misdemeanor offenses, while not as serious as felonies, can have long-lasting implications on an individual's life, particularly when those prior convictions lead to sentencing enhancements. In Texas prior offenses or aggravating factors can enhance sentences, transforming a seemingly minor misdemeanor into a felony-level offense with significant consequences. Given these high stakes, using a Criminal Defense Investigator for misdemeanor cases becomes a crucial (but often overlooked) component of an effective defense strategy.

Although I understand that you, as a seasoned defense attorney, understand the complexity of each case, I hope to remind you of the benefits of utilizing a defense investigator in misdemeanor cases as well as felonies. I additionally hope to show how investigations can help prevent future state sentence enhancements. While the purpose of this article is to discuss the benefits of thoroughly investigating your state misdemeanor cases and the effects of those convictions in the future, any attorney practicing in federal court can tell you about the huge negative impact they can have on a client's federal sentence as well. I am sure you are well acquainted with these facts, but sometimes a gentle reminder is helpful. I hope to do just that.

Sentence Enhancements

A sentence enhancement refers to the process of increasing the severity of a punishment due to various factors such as prior convictions, involvement of certain protected victims, or the use of a deadly weapon during the commission of a crime. These enhancements can elevate a misdemeanor charge to a felony, increasing the punishment and the long-term consequences of the conviction.

For instance, under Texas law, prior convictions can transform a Class-A misdemeanor into a third-degree felony. If we allow these misdemeanor charges to turn into convictions erroneously, they will have a snowball effect on the subsequent charges. The potential for these enhancements emphasizes the need for a robust defense strategy, especially for repeat offenders. Here, a defense investigator becomes indispensable.

What Does a Criminal Defense Investigator Do?

A criminal defense investigator works alongside the defense attorney to uncover facts, gather evidence, and challenge the prosecution's case. While attorneys primarily focus on legal arguments and court procedures, defense investigators take a hands-on approach by interviewing witnesses, reviewing crime scenes, examining evidence, and dissecting the details often overlooked. Their work ensures that the defense has all possible information to build a strong case.

One of the first cases I had with Lubbock Private Defenders Office (LPDO), which I often refer to at seminars, is what I call the "Twinkie case." It involved a homeless Desert Storm Veteran who was charged with aggravated robbery. The police report documented an armed robbery of a 7-Eleven. After reading the report, I located and interviewed the store clerk that made the accusation. During this interview the young clerk, who was an exchange student, explained to me that the homeless man entered the store, opened a twinkie, and started to eat it. The clerk told him he had to pay for it, at which time the man left the half-eaten twinkie on the counter and began to leave the store. The ambitious young clerk then blocked the man's only exit and started a confrontation, placing his hands on the man to stop him from leaving. The man backed up, pulled a small folding pocketknife from his jeans and told the clerk to leave him alone. During my interview, the clerk admitted that the man was more than likely acting defensively and

that the clerk should not have blocked the door, and the man never actually tried to rob him. The facts relayed to me by the store clerk sharply contrasted what was presented in the police report. All criminal charges were dropped after the defense attorney turned this interview over to the DA and the man was allowed to check into the VA for mental treatment for PTSD.

Unfortunately, I find too many situations like this where the whole truth is not reflected in the police report, yet that report is presented as complete fact in the court system if not challenged. If prosecutors had pursued this man for aggravated robbery, he would have faced years in prison without the mental treatment he needed and deserved for his service in the military. It would have affected the rest of his life as he carried an undeserved felony conviction. All for a Twinkie. Had this aggravated robbery charge held up, would we have served this Veteran well?

In misdemeanor cases, where resources are often more limited than in felony cases, the role of a defense investigator becomes even more critical. They help ensure the defense attorney does not rely solely on police reports or the prosecution's evidence, which can be biased or incomplete.

Using Investigative Support to help Prevent Sentence Enhancements

Defense investigators help in misdemeanor cases by reducing the possibility of future sentence enhancements. Here's how their work directly contributes to this goal:

1. Verifying the Accuracy of Prior Convictions

Enhancements often rely upon prior convictions. However, proving the legitimacy of past convictions is not always straightforward. In some cases, prior convictions may stem from faulty procedures that did not adhere to proper standards. For instance, judgments from previous cases may lack clear fingerprints, or there may be a need to produce evidence of a deferred conviction, thus eliminating the prior conviction.

A defense investigator can delve into these past cases to determine whether the evidence for the prior convictions was legitimate. If they find inconsistencies or procedural errors, the defense attorney can argue that the past convictions should not be used for enhancement purposes. In this way, a misdemeanor charge may remain as such, rather than escalating to a felony.

2. Uncovering Weaknesses in the Prosecution's Case

A defense investigator's primary responsibility is to challenge or confirm the prosecution's version of events and provide unbiased facts. This becomes especially important in cases where the use of a deadly weapon, or certain other aggravating factors, may lead to enhancements. For example, if the prosecution claims that a weapon was involved in a misdemeanor assault, which could result in a felony enhancement, the investigator can seek out witnesses who can provide testimony contradicting the weapon's presence or its use during the crime. I recently completed an investigation where the alleged victim now admits that the gun she claimed the defendant pointed at her was actually a TV remote, not a firearm. Had the attorney not secured an investigator, that charge would have remained "with a deadly weapon."

By presenting evidence that weakens or disproves the prosecution's claims, the defense can prevent the case from being escalated based on enhancement statutes. The same principle applies in cases involving protected victims such as public servants or minors, where enhancements may hinge on the alleged victim's role or circumstances at the time of the offense. Did the client know the alleged victim was an officer, acting in official capacity at the time of the confrontation? Did the client have knowledge of the child's age? What was the actual age of the alleged victim at the time of the allegations? Details like these may make a difference in statutes or charges.

3. Negotiating with the Prosecution

Prosecutors have significant discretion when it comes to deciding whether to pursue sentence enhancements. By uncovering mitigating evidence, defense investigators provide defense attorneys with the necessary leverage to negotiate more favorable plea deals or dismissals. In many cases, the prosecution may agree to dismiss or waive the enhancement if presented with compelling evidence that weakens their case.

For example, if a defense investigator finds that a client's alleged actions were coerced, non-factual or the client acted under duress, this information can be used to argue for leniency or dismissal. Such findings may encourage the prosecutor to dismiss or treat the offense as a misdemeanor, rather than pursuing an enhancement that would lead to harsher penalties. I have observed many plea deals recently where no investigation was carried out, but the client agreed to time-served. This may get the case load off the attorney's back, but the client now has a conviction that could enhance a future case. If the DA was willing to offer a time-served so easily, perhaps there is more to the story than meets the eye. A thorough investigation can help reveal case facts that dispute the allegation and help secure a dismissal instead of a plea.

4. Challenging the Use of Specific Enhancements

Certain enhancements are tied to the location of the crime or the status of the victim. For example, a drug offense committed in a school zone can lead to an enhancement, as can an assault on a public servant. In these cases, defense investigators can verify the prosecution's claims regarding these aggravating factors.

A defense investigator might visit the crime scene to determine whether it truly falls within the boundaries of a protected area like a school zone. If the investigator finds that the prosecution's claims are inaccurate, the defense attorney can argue against the use of these enhancements. Did the client know that the alleged victim was a public servant? Was this public servant acting in their official capacity?

5. Presenting Mitigating Circumstances

In some cases, even if the crime meets the legal criteria for an enhancement, the defense can present mitigating circumstances that warrant a reduced charge or sentence. A defense investigator helps by gathering evidence of the defendant's character, history, and circumstances that suggest leniency is appropriate. A thorough investigation into the defendant's charges can significantly impact the outcome of the case, particularly during sentencing and plea negotiations.

Many cases I handle involve domestic assault, ranging from a Class-A misdemeanor to a first degree felony. Domestic abuse cases are a very serious issue in our society today, but an effective investigation often reveals that what was presented to the police at the time they were called to the scene is not at all factual of what truly transpired. Often, after interviewing the alleged victim and others in the household, evidence is uncovered that the defendant reacted to an emotionally disturbed family member's outburst. Unfortunately, when the police hear the story emotions run high, and anger rages. The alleged victim sometimes exaggerates the situation or omits important details like starting the physical confrontation that got out of hand. Other times the accuser admits no assault occurred, but they declared that to have the defendant removed from the house at an emotional time, not realizing the effects to come.

The Long-Term Impact of Preventing Enhancements

Preventing a misdemeanor from being enhanced to a felony offers long-term benefits that extend far beyond the immediate case. A felony conviction carries with it severe penalties that affect a person's future in numerous ways. Individuals may be disqualified from certain jobs or housing options. Employers and landlords often conduct background checks, and a felony record can lead to disqualification. Additionally, a loss of important civil rights, including the right to vote, the right to serve on a jury, and the right to own firearms will have a serious impact on individuals. A felony or misdemeanor conviction may set the stage for even harsher penalties in the future. If a defendant is convicted of another crime in the future, the prior conviction can be used to enhance future sentences. Immigrants, or undocumented individuals, face possible deportation depending on the outcome of each case. The snowball keeps getting larger and larger.

Veterans are also affected by criminal convictions. A criminal conviction for active-duty Service members may lead to a discharge and loss of security clearance and loss of benefits from the U.S. Department of Veterans Affairs (VA). Veterans with a felony conviction who serve more than sixty days in prison may have their VA disability compensation reduced and Veterans who serve more than sixty-one days in prison may lose their VA pension benefits all together. Veterans discharged due to a conviction may also have reduced access to healthcare services. Disproportionately represented Veterans with Service-related mental health issues (PTSD) are often overlooked and not recognized as having mental health issues.

Conclusion

When defense attorneys and investigators work together to prevent a misdemeanor case from being enhanced, a defendant is protected from these long-term consequences, giving them a better chance to maintain their livelihood, rights, and freedom. The use of a defense investigator in misdemeanor cases plays a crucial role in preventing sentence enhancements that can escalate a minor offense into a life-altering felony conviction. Through meticulous investigation, verification of prior convictions, challenging the prosecution's evidence, and presenting a clearer picture of the totality of the circumstances, a defense investigator ensures that a defendant receives a fair and just outcome.

In a legal system where sentence enhancements can drastically increase the severity of penalties, the use of a defense investigator is essential to protecting the rights and futures of those facing misdemeanor charges. As part of a well-rounded defense team, investigators' efforts help ensure that a misdemeanor remains a misdemeanor, felonies are reduced to misdemeanors, or many charges are dismissed due to inaccurate facts presented, avoiding the severe consequences that come with an enhanced felony charge later down the road.

Eldon Whitworth, *is Chief Defense Investigator for Lubbock Private Defenders Office (LPDO), he is a Board Certified Criminal Defense Investigator (CCDI) and has worked with LPDO since 2020. Eldon has worked in the Criminal Investigations field since 2015, handling over 1,000 cases, in all levels of investigations from misdemeanors to Capital Murder. Eldon enjoys using his experience and training to provide ethical, effective, and unbiased defense investigations for each client's case. Prior to Criminal Defense Investigations, Eldon served 21 years as a Federal Law Enforcement Agent with INS/DHS, retiring as a Supervisory Border Patrol Agent in El Paso, TX. Eldon served in the United States Marine Corps from 1983-1987. Eldon is a native of Lubbock Texas and the Co-Founder and Vice-President of Fortress of Hope Ministries. Eldon is an active TCDLA member and currently serves on the Public Defender and Managed Assigned Counsel Committees. Eldon also served on the NACDL/TIDC research committee on "Strengthening the Sixth in Texas: Evaluating Investigator Use by Defense Counsel in Texas." Eldon can be reached at* ewhitworth@lpdo.org *or 806-853-3264.*

TCDLA Amicus Committee Files Beecher Montgomery

Overview

Physical presence of the defendant and those who accuse are indispensable components to the Sixth Amendment right to confrontation.

Beecher Montgomery was sentenced to 20 years' incarceration at the end of a hearing conducted in his absence. He sat in a jail cell watching witnesses accuse him of wrongdoing from the comfort of live video streams inside their homes or offices. He was unable to assist his attorney in challenging the accusations against him. The solemnity of the proceeding was underscored by the nature of the thing itself--Zoom--a platform for meetings where pants are optional.

TCDLA wrote on behalf of Beecher Montgomery and other litigants whose Sixth Amendment rights are denied when they are forced to defend themselves without full access to an attorney and the ability to meaningfully confront their accusers.

Scan QR to view more Amicus Filed!

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

Drafters: Scott Stillson and Aaron M. Diaz

Scott Stillson Bio

Scott Stillson is a distinguished attorney based in Wichita Falls, Texas. He earned his Bachelor of Science in Criminal Justice, graduating Magna Cum Laude from Midwestern State University. Scott went on to receive his Juris Doctor from Texas Tech School of Law. Admitted to the bar in 2007, Scott has dedicated his practice to criminal trial and appellate cases, providing expert legal representation and counsel to his clients in North Texas. When not practicing law, Scott enjoys spending time with his family and woodworking.

Aaron M. Diaz Bio

Aaron Diaz is a Visiting Clinical Assistant Professor of Law with the St. Mary's Law School Criminal Justice Clinic. Before joining the criminal justice clinic, Aaron spent six years working with the Goldstein & Orr law firm in San Antonio, Texas. Prior to law school, Aaron spent over a decade as a paralegal working for a criminal defense firm in South Texas and various State agencies. During that time, Aaron received his Bachelor of Science degree in Criminal Justice from the University of Texas Pan-American, and a Master of Arts degree in Legal Studies from Texas State University. Aaron graduated from St. Mary's University School of Law, cum laude, in May of 2020.

Since becoming licensed, Aaron has solely practiced juvenile and adult criminal defense, representing clients charged with misdemeanor and felony crimes. He has also handled State and federal appeals and post-conviction writs of habeas corpus cases. Aaron is currently on the Texas Criminal Defense Lawyers Association Board of Directors and serves as Vice Chair of the Amicus Committee. He is also a member of the San Antonio Criminal Defense Lawyers Association.

Shaken Baby Syndrome and New Science: The Wrongful Conviction of Andrew Roark

GARY UDASHEN

I. Introduction

In July of 1997, Andrew Roark, along with his girlfriend and her 13-month-old daughter, was living in DeSoto, Texas with Andrew's parents. The child was learning how to walk and fell and hit her head on a coffee table. She seemed okay and there were no symptoms of a head injury.

Several weeks passed. On July 16th, Andrew's parents and girlfriend were at work and Andrew was taking care of the child. He took the child to her one-year doctor's appointment where she received several shots. There were no issues or signs of a head injury noted during the doctor's visit. During the day while Andrew cared for the child, she fell and hit her head in the bathtub while Andrew was bathing her. She also fell out of a bed onto the floor.

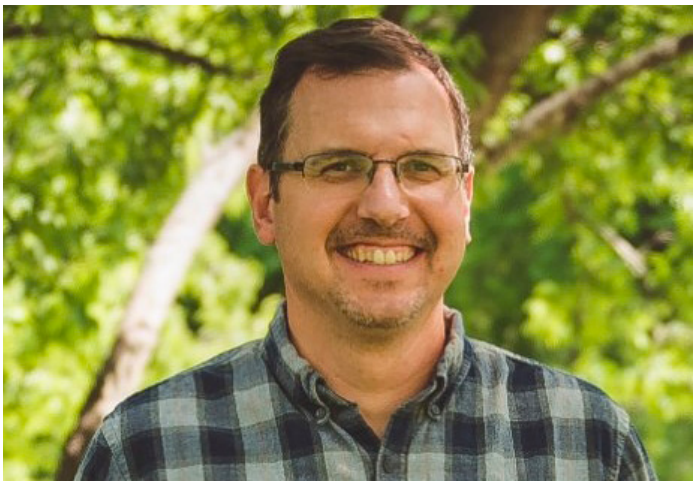
Around 4:00 p.m. that afternoon, Andrew called 911 and frantically reported that the child was unconscious and barely breathing. The child was initially transported by EMS to Charlton Methodist Hospital and then transferred to Children's Medical Center in Dallas. The child was diagnosed with brain injuries. After a lengthy period of recovery, the child nearly fully recovered.

II. Criminal Charges

Based on the nature of the child's injuries, Dr. Janet Squires was called in to examine her. Dr. Squires was a child abuse pediatrician based at Children's Medical Center in Dallas. She was not a treating physician. Rather, her job was to evaluate children where there was a suspicion of child abuse and report to law enforcement whether criminal charges should be filed.

The role of Dr. Squires at Children's Medical Center was one that was being filled by physicians at hospitals in large counties around the country. The idea behind the existence of a child abuse physician was that the physicians who treat children in the hospital were not qualified to diagnose child abuse, and this decision was delegated to physicians such as Dr. Squires.

Based upon her examination of the child and review of the medical records, Dr. Squires reported this child had been the victim of intentional child abuse. Specifically, Dr. Squires submitted an affidavit to law enforcement stating that this child had been vigorously shaken by Andrew Roark immediately prior to him calling 911.



Andrew Roark

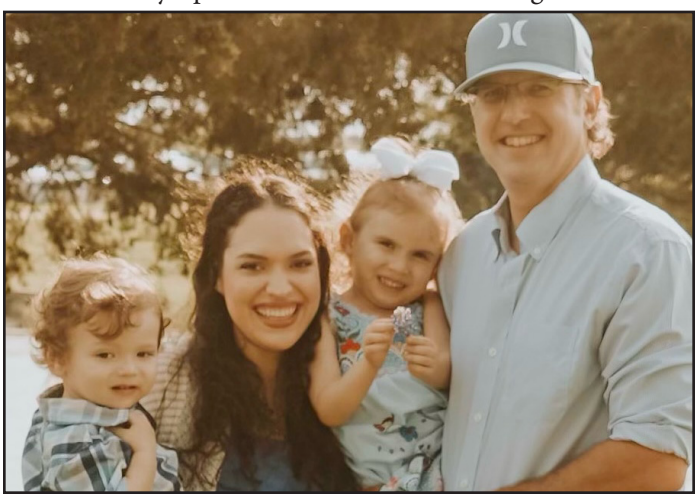
Based strictly upon Dr. Squires's affidavit, the police arrested Andrew Roark and charged him with Injury to a Child.

III. Shaken Baby Syndrome

In the years preceding Andrew Roark's arrest, prosecutors around the country, as well as in other Texas counties, had begun prosecuting caregivers of children under the Shaken Baby Syndrome theory. A claim that a child was the victim of Shaken Baby Syndrome was based on the following factors:

1. The child exhibiting the following conditions:
    a. Bleeding beneath the outer membrane layer of the brain, also known as a subdural hematoma.
    b. Retinal hemorrhages, which is bleeding in the retina of the eye.
    c. Cerebral edema, which is swelling of the brain.
2. No legitimate explanation as to how the child developed these symptoms. The only explanations considered legitimate included being in a high-speed automobile accident or a fall from a multi-story building.

The Shaken Baby Syndrome proponents supported their claims with several subsidiary theories. They claimed that shaking alone could cause the brain injuries and that short distance falls could not. They further contended that there could never be a lucid interval between when the injuries began to develop and the child becoming symptomatic and that this meant that whatever adult was with the child when she became symptomatic had done something to the child.



Andrew Roark Family

The Shaken Baby Syndrome proponents further argued that retinal hemorrhages were a sign of shaking and that an existing subdural hematoma in a child would never rebleed.

When the child abuse physicians noted these factors, their conclusion was always that the child's condition was caused by vigorous shaking by the adult who was last in possession of the child.

IV. The *Roark* Case

Dr. Squires's affidavit concluded that the condition of the child in the *Roark* case checked all the boxes for a Shaken Baby Syndrome diagnosis. The child had a subdural hematoma, retinal hemorrhages and cerebral edema. Moreover, Andrew and the child's mother had no explanation for these conditions. The child had not been in a high-speed automobile accident and had not fallen from a multi-story building.

Based on the child seeming okay at her doctor's appointment and Andrew being alone with the child when she became symptomatic, Dr. Squires also concluded that Andrew had intentionally caused the child's condition by vigorously shaking the child.

The fact that Andrew, by all accounts, was a loving and responsible caretaker for this child, played no role in the case analysis by Dr. Squires. And the fact that there were no indications that Andrew, or anyone else, had ever abused or mistreated the child, were equally considered irrelevant.

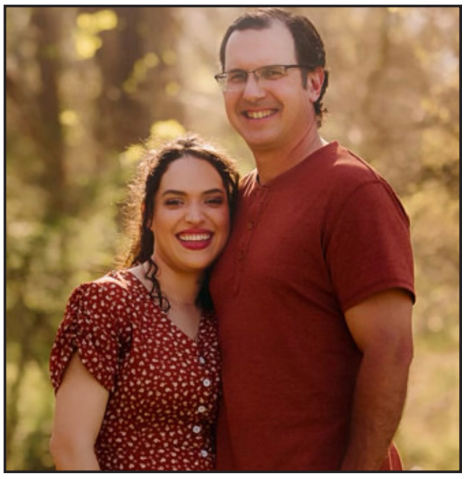
In Andrew's case, as in the hundreds of other Shaken Baby Syndrome prosecutions, the only thing that mattered was the diagnosis and opinion of the child abuse doctor. Based on that alone, Andrew was taken to trial for Injury to a Child. He was convicted and received a 35-year sentence.

Andrew was in prison when Gary Udashen entered an appearance as his attorney and began a 24-year effort to convince the courts of the scientific invalidity of the Shaken Baby Syndrome hypothesis. This effort culminated on October 9, 2024, when the Court of Criminal Appeals issued a decision finding that the development of new science since the time of Andrew's trial undermined and contradicted the Shaken Baby Syndrome theory, and therefore, Andrew's conviction should be vacated. *See Ex parte Andrew Wayne Roark*, ___ S.W.3d ___, 2024 WL 4446858 (Tex. Crim. App. 2024). This decision was followed by the Dallas County District Attorney's Office dismissing the indictment against Andrew on the basis that Andrew was actually innocent.

V. What Really Happened

The evidence in this case shows that the child's condition was not the result of shaking. Instead, it was caused by a rebleed of an existing subdural hematoma.

As noted previously, a few weeks prior to the child becoming symptomatic and winding up in the hospital, she had fallen and hit her head on a coffee table. When the child was in the hospital, a CAT scan showed both old blood and new blood in her subdural hematoma. The legitimate medical testimony presented by the defense established that the old blood was several weeks old and was consistent with being caused by the child falling and hitting her head on the coffee table. As is common, this subdural hematoma was non-symptomatic and caused the child no problems. However,



once there is an existing subdural hematoma, in either a child or an adult, that subdural hematoma can rebleed and cause significant problems.

The testimony presented by the defense at trial, which was further explored during Roark's post-conviction litigation, was that an existing subdural hematoma can rebleed with minor trauma, such as a minor bump on the head. The testimony was also that an existing subdural hematoma can rebleed spontaneously.

Nevertheless, when defense experts explained this to the jury at Andrew's trial, the state called Dr. Squires back on rebuttal to refute this explanation. Dr. Squires told the jury that there is a question as to whether rebleeds of subdural hematomas even occur in infants such as the child in the *Roark* case. She further stated that if they do occur, they are rare and only occur in children with abnormal spaces above their brains. Because the child in this case did not have an abnormal space above her brain, Dr. Squires's conclusion was that it was not possible for her condition to be caused by a rebleed of the existing subdural hematoma. Rather, Dr. Squires reiterated that the child's condition was caused by Andrew shaking her, and that there was no other possible explanation.

VI. Post-Conviction Litigation

Gary Udashen began his representation of Andrew in 2000 by filing a direct appeal of his conviction to the Fifth District Court of Appeals. Once that was denied, the lengthy writ process began. Ultimately, Udashen filed three separate state writ applications under Art. 11.07, Code Crim. Proc., and one federal application under 28 U.S.C. § 2254. This post-conviction writ process lasted until 2024. Initially, the Dallas County District Attorney's Office opposed writ relief, but ultimately agreed that there was new science that undermined the conviction.

In 2012, the District Attorney's Office, under Craig Watkins, agreed that the new science required the vacating of Andrew's conviction. The District Attorney's Conviction Integrity Unit Chief Russell Wilson entered agreed findings with Udashen, that were adopted by the Dallas County trial court. The entry of these agreed findings allowed Roark to be released on bail while the Court of Criminal Appeals considered his case.

In 2013, while the case was pending at the Court of Criminal Appeals, the legislature enacted Art. 11.073, Tex.

Code Crim. Proc. This was a statute that was initiated by the Innocence Project of Texas that allowed the granting of writ relief, and vacating of convictions, based on new science that undermined a conviction. When Art. 11.073 was enacted, Udashen refiled Andrew's writ application relying upon this new provision.

Over the ensuing years, Udashen and the District Attorney's Office continued to hold hearings in the trial court on this case. Ultimately, an extensive writ record was developed with live testimony from two forensic pathologists and a pediatrician. Affidavits were also filed from a biomechanical engineer and a world-renowned hematologist. Thousands of pages of additional material showing the change in science was also submitted.

In 2019, the District Attorney's Office under District Attorney John Creuzot, once again agreed that the writ application should be granted based on new science. Cynthia Garza, the Chief of the Conviction Integrity Unit under Creuzot, entered into two sets of additional agreed findings recommending that this conviction be vacated under Art. 11.073, based on new science. The Dallas County trial court agreed and recommended that the Court of Criminal Appeals grant Andrew writ relief. On October 9, 2024, in a lengthy and detailed opinion written by Judge Barbara Hervey, the Court of Criminal Appeals vacated Andrew's conviction, leading to a dismissal of the case and Andrew's exoneration.

VII. Areas of New Science

This case involved all the now debunked theories that underly Shaken Baby Symptom prosecutions. And, on each of these theories, the Court of Criminal Appeals recognized that new science contradicted the scientific basis of the conviction. These particular areas of new science include:

1. Rebleeds of existing subdural hematomas. Dr. Squires herself signed two affidavits admitting that new scientific and medical research showed that her testimony about rebleeds was incorrect. In fact, rebleeds of existing subdural hematomas in infants can and do happen.

2. Shaking alone causing the injuries. A substantial body of scientific, medical, and biomechanical engineering studies has developed since the time of Andrew's conviction showing shaking alone cannot cause the injuries seen in these cases. In particular, the biomechanical engineering studies have established that a human being cannot generate enough force by shaking to cause the injuries that children have in these cases. The Court of Criminal Appeals recognized this new scientific evidence in vacating Andrew's conviction.

3. Short-Distance falls. In *Ex parte Henderson*, 384 S.W.3d 833, 834 (Tex. Crim. App. 2012), the Court of Criminal Appeals recognized the possibility of a short distance fall causing a serious brain injury in an infant. The scientific, medical and biomechanical engineering studies clearly establish this. In Andrew's case, the Court of Criminal Appeals found that the state's experts' claim at the trial that a short distance fall could not cause these injuries was incorrect under current scientific standards.

4. Lucid intervals. At Andrew's trial, the state experts claimed that it is not possible to have a lucid interval after an incident which leads to the condition the child had in this case. This was an important argument by the state in Andrew's case, as well as all the other Shaken Baby Syndrome cases. If there was no possible lucid interval, the state was able to argue that the adult with a child when she became symptomatic must have caused the child's condition. In fact, as the Court of Criminal Appeals recognized in its opinion, infants such as the child in this case can have lucid intervals of up to several days, where the child would not display the symptoms of brain injury. This means that, even if someone did something to the child, it is not necessarily the adult with the child when she becomes symptomatic.

5. Retinal hemorrhages. The new science, as recognized by the Court of Criminal Appeals, refuted the claim that retinal hemorrhages are an indication the child was shaken. In fact, retinal hemorrhages can be caused by any number of things.

VIII. Outcome of Trial Would Be Different Under Current Scientific Standards

In granting writ relief, and vacating Andrew's conviction, the Court of Criminal Appeals stated,

> "We believe there would be a marked shift in the testimony today concerning the effect of a short-distance fall to a child, the effect of shaking a child, rebleeds in subdural hematomas, lucid intervals, retinal hemorrhaging, and SBS in general as applied to B.D.'s injuries." (p. 34)
>
> . . .
>
> "We also find it persuasive that doctors who testified for the State in Applicant's trial have shifted their testimony in later trials. And successors to the doctors in their position have testified differently in later trials. We find it likely the State's witness testimony would shift even further given the weight of scientific research today." (p. 34).
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> . . .
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> "We find the testimony during writ hearings from Dr. Plunkett, Dr. Bux, and Dr. Galaznik to be credible in demonstrating the change in medical science. The science today supports the proposition that B.D.'s injury could have been sustained by a short-distance fall, or occurred spontaneously, due to the acute-on-chronic subdural hematoma. We find the retinal hemorrhaging, applied through today's scientific method, to be non-specific and of no value in assigning causation for its existence. We accept Dr. Squires's sparse recantation that rebleeds are not controversial, rare, and limited to children with abnormal spaces above the brain. They are in fact not controversial but are common and could happen to any child with a chronic subdural hematoma." (p. 35).

The Court also found that Andrew would likely not have been convicted under the current science. The court stated:

> "We find that if the newly evolved scientific evidence were presented at Applicant's trial, it is more likely than not he would not have been convicted." (p. 36).
>
> . . .
>
> "The jury heard dueling experts at Applicant's trial. Today, the jury could hear consensus on primary issues (such as short-distance falls, shaking causing

injury, retinal hemorrhages, lucid intervals, and chronic rebleeds). If not, it is doubtful the State's witnesses would speak with the same confident manner. The experts would be confronted with twenty years of reputable scientific studies and publications that, if graphed, continually point away from their stated positions. If the expert were to experience the ostrich effect and wish to bury his or her head in the sand, then that expert would have to bear the brunt of a grueling cross-examination. One in which they would be confronted with twenty years of reputable scientific evidence that contradicts their trial testimony." (p. 36).

Following issuance of the Court of Criminal Appeals opinion, the Dallas County District Attorney's Office filed a motion to dismiss the indictment which stated:

> "The undersigned State's Attorney moves for a dismissal on this indictment in cause number F99-02290-L on the basis that no credible evidence exists that inculpates defendant Andrew Wayne Roark. The undersigned State's Attorney believes defendant Andrew Wayne Roark is actually innocent of the crime for which he was convicted and sentenced in this cause."

VII.Conclusion

Hundreds of people remain in prison, both in Texas and around the country, based on the thoroughly debunked theory of Shaken Baby Syndrome. Moreover, in various parts of the country, these cases are still being prosecuted based on this scientifically invalid theory. Time will tell if the excellent opinion from the Court of Criminal Appeals in the *Roark* case will help to stop this continuing injustice.

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

End-of-Year Tax Planning – Important Financial Tasks Not to be Overlooked

JAMES HENRY

Senior Vice President, Partner, Financial Advisor at EP Wealth Advisors

As we approach the end of 2024, many are ready to close the book on a year filled with significant changes and challenges. However, before you bid farewell to this year, it's crucial to focus on essential end-of-year financial tasks. This is the ideal time to assess your tax situation and implement strategies that can optimize your financial standing for the new year.

Effective tax planning goes beyond minimizing tax liability; it's also about making strategic decisions that can improve your overall financial health. Here, we outline tasks to consider before December 31st, to help you potentially optimize available tax benefits and prepare for 2025.

1. Maximize Retirement Plan Contributions

One of the most powerful tools for tax planning is your retirement savings plan. For 2024, the contribution limits for 401(k), 403(b) and 457 plans have been set at $23,000. If you're aged 50 or older, you can contribute an additional $7,500, bringing your total to $30,500.

Why should you consider maximizing these contributions? First, they can help reduce your taxable income for the year, potentially leading to tax savings. For example, if you contribute the maximum amount and you're in the 24% tax bracket, you could save over $5,500 in federal taxes alone. Additionally, contributing enough to capture any employer match is important, as it provides additional funds that can help grow your retirement savings.

It's also wise to assess your investment choices within your retirement account. If your employer offers a range of investment options, consider diversifying your portfolio to balance risk and growth potential.

2. Health Savings Accounts (HSAs)

If you're eligible for a Health Savings Account (HSA), consider contributing the maximum amount allowed for 2024. The contribution limits are $4,150 for individuals under 55 and $8,300 for families. An additional $1,000 catch-up contribution is available for individuals 55 and older.

HSAs are a unique savings vehicle because contributions are tax-deductible, grow tax-free and withdrawals for qualified medical expenses are also tax-free. This triple tax advantage makes HSAs a valuable option for saving for healthcare costs and potentially reducing your taxable income.

If you have unspent HSA funds at the end of the year, consider using them for qualified medical expenses. Keep in mind that funds in HSAs roll over from year to year, so you can build your savings over time.

3. Required Minimum Distributions (RMDs)

For individuals aged 73 or older, taking your required minimum distributions (RMDs) is a crucial task as the year ends. RMDs are mandatory withdrawals from retirement

accounts like traditional IRAs and 401(k)s. Failing to take your RMD by the deadline could result in a hefty penalty of 25% of the amount that should have been withdrawn.

Make sure to calculate your RMD based on the balance of your accounts at the end of the previous year and your life expectancy factor, as provided by the IRS. If you're unsure about how to calculate your RMD or how to take the distribution, consult with a financial advisor to ensure compliance.

4. Tax Loss Harvesting

Tax loss harvesting is a strategy used in taxable investment accounts aiming to minimize capital gains tax. By selling investments that have lost value, you can offset gains realized during the year. For example, if you have $10,000 in capital gains from one investment and you sell another investment at a $4,000 loss, you'll only pay taxes on $6,000 of capital gains.

If your losses exceed your gains, you can use up to $3,000 of those losses to offset ordinary income. Any remaining losses can be carried forward to future years. Be mindful of the "wash sale" rule, which disallows claiming a tax deduction for a security sold at a loss if you repurchase the same security within 30 days.

5. Charitable Contributions

December 31 marks the deadline for claiming tax deductions on direct charitable contributions if you itemize your deductions. If you are considering making charitable donations, now is the time to do so. Donations made to qualified charities can lower your taxable income, providing both personal satisfaction and financial benefits.

One strategy is to consider making a qualified charitable distribution (QCD) from your IRA. Individuals aged 70½ and older can transfer up to $105,000 directly to a charity without counting it as taxable income, which can also satisfy your RMD requirement. This can be beneficial if you do not need the funds for living expenses.

If you're thinking of establishing a donor-advised fund (DAF), this can also be a way to manage your charitable giving. A DAF allows you to make a charitable contribution, receive an immediate tax deduction and then distribute funds to charities over time.

6. Donor-Advised Funds and Gifting Appreciated Stock

Setting up a donor-advised fund can be a strategic way to manage your charitable giving. With a DAF, you can contribute assets and receive an immediate tax deduction, while retaining the ability to recommend grants to your favorite charities over time.

Gifting appreciated stock is another strategy that that can help you avoid paying capital gains tax while supporting causes you care about. When you gift stock that has increased in value, you may be able to deduct the fair market value of the stock on the date of the gift, potentially maximizing your tax benefits.

7. Gifting and Wealth Transfer

Utilizing the annual gift tax exclusion can be a way to transfer wealth to your heirs tax-free. For 2024, you can gift up to $18,000 per recipient ($36,000 for married couples) without incurring gift tax or using any of your lifetime exemption. This strategy can potentially help reduce your estate tax exposure while benefiting your heirs.

Consider gifting appreciated assets, such as stocks, to potentially benefit from favorable tax treatment. When you gift appreciated assets, the recipient assumes your cost basis, and you can avoid paying capital gains tax on the appreciation.

8. 529 Plans for Education Savings

While contributions to 529 education savings plans are not federally tax-deductible, they offer a way to save for educational expenses. Earnings grow tax-free, and

withdrawals used for qualified education expenses are also tax-free.

Encourage your children or grandchildren to use these accounts for college savings. Many states also offer tax benefits for contributions to 529 plans, making them an attractive option for long-term education savings.

9. Work with Your CPA

As the year comes to a close, it's vital to collaborate with your CPA to ensure your financial strategies align with your tax goals. Your CPA can help you review your paycheck withholdings to avoid unexpected tax bills in April. Ideally, you want to strike a balance where you neither owe a large amount nor receive a significant refund, allowing you to keep more of your money throughout the year.

Consider discussing strategies to potentially reduce your taxable income, such as increasing retirement contributions or utilizing tax credits. Your CPA can also help you navigate any changes in tax laws that may affect your situation.

10. Property Tax Payments

If you do not escrow property tax payments, ensure that you make your property tax payment in December or January. This timing is important to maximize your $10,000 property tax deduction, which can be beneficial if you itemize your deductions.

Property taxes can be significant, so keeping track of when payments are due can help you manage your cash flow and tax deductions effectively. If you have questions about how property taxes affect your tax situation, consult with a tax professional.

Conclusion

By addressing these essential end-of-year financial tasks, you can manage your tax situation and prepare for the upcoming year. Effective tax planning requires a proactive approach, and the decisions you make now can lead to financial benefits down the line.

Take the time to review your financial landscape, consult with professionals when needed, and implement these strategies before December 31. As you wrap up 2024, taking the time to review your tax planning can help alleviate stress during tax season and pave the way for a financially healthy 2025.

Disclosures:

EP Wealth Advisors is not in the business of providing legal advice. Please consult with a CPA, tax professional, and/or attorney regarding your specific situation before implementing any of the strategies referenced directly or indirectly herein.

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James P. Henry *is a partner and senior vice president at EP Wealth Advisors in Dallas. He works closely with a select group of families, individuals, and institutions to provide holistic and customized financial planning and investment solutions. He can be reached at JHenry@epwealth.com or 214.720.7500.*

An Overview of Public Defense in Texas: Dallas County Public Defender's Office

CLIFFORD DUKE
Member of Public Defender Committee

This is the first installment of a series of articles that will introduce the various types of indigent and public defense offices throughout the State of Texas. Public defenders working in traditional Public Defender's Offices, Regional Public Defender's Offices, Managed Assigned Counsel, and Federal Public Defender's Offices assist more than half a million Texas citizens accused of crimes every year. The Voice is excited to introduce you to those offices across the State.

The Dallas County Public Defender's Office is the second oldest Public Defender's Office in Texas, established in 1983. From humble beginnings forty-one years ago with a total staff of fourteen, including eight attorney's representing clients in four criminal district courts, two investigators, two secretaries, a receptionist and one interpreter is now the largest Public Defender's Office of its kind in the State of Texas. The office now employs 179 people including the adult Felony and Misdemeanor Trial Division, a Family Law division, Juvenile division, Appellate division, Mental health and Specialty Court division, a Civil Commitment division, Immigration attorneys, an Actual Innocence and Exoneration Division, and Capital division, mental health professionals, social workers, support staff, and interpreters.

The Dallas County Public Defender's Office is a centralized defense service, managed under a Chief Public Defender appointed by the Commissioners of Dallas County. The office handles over half of the indigent defense criminal cases in Dallas County. All the individuals appointed to the Dallas County Public Defender's Office are found to be indigent by the courts and have requested an attorney to represent them in their pending cases. The Office is not affiliated with the private attorneys who are appointed by the courts for the remainder of the indigent defense cases.

As an office we focus on holistic client defense, which means addressing all the issues that may have brought a client and their families into the criminal justice system. Working with public and private entities throughout Dallas County and the State, our attorneys and staff strive to address issues including mental health, addiction, housing, employment, abuse and neglect, victimization, and education. The Office plays an integral part of nineteen Diversionary and Specialty Court programs, social welfare programs, addiction and rehab aftercare, and programs focused on avoiding the criminalization of poverty.

Dallas County contains forty-nine cities, encompassing over 875 square miles, with over two and a half million Texas Citizens in its borders. We maintain offices at the Frank Crowley Court Building, the Henry Wade Juvenile Justice Center, the George Allen Courts Building, and the Dallas County Mental Health Court. We also operate multiple satellite offices throughout the metroplex to meet with clients nearer to where they work and live to decrease the time and expense of commuting downtown.

The Office is currently led by Interim Chief Public Defender Paul Blocker. In addition to our full-time staff, the Office maintains a robust internship program for high school students, undergraduate, and law students interested in public service and public defense. For more information, please visit https://www.dallascounty.org/government/public-defender/.

Clifford Duke *has been with the Dallas County Public Defender's Office for the last fifteen years after a short miserable term practicing personal injury and worker's compensation law. He is a graduate of Gonzaga University, a Past President of the Collin County Young Lawyers Association and the Dallas County Criminal Defense Lawyers Association, and currently serves on as a Director for TCLDA. He enjoys occsaionally volunteering with Legal Aid of Northwest Texas, as well as speaking for TCDLEI and TCDLA. He and his wife are both avid hockey fans and players, and are enjoying getting their nine year old son into the best game on earth.*

Texas Criminal Defense Lawyers Association Bylaws Amendments

Approved by Bylaws Committee 12/16/24, Executive Committee 1/10/25, TCDLA Board 1/11/25
Will be presented at the TCDLA Annual Members Meeting, June 21, 2025

Article VII—Board of Directors

Sec. 1. Powers, Membership, and Terms.

a) The business and affairs of the Association shall be managed by a Board of Directors. The Board of Directors shall consist of the elected officers of the Association, the past presidents of the Association, the editor of the ~~VOICE~~ Voice *for the Defense,* and fifty-four (54) directors. Each past president of the Association is a member of the Board of Directors, provided said past president is a member in good standing. Directors shall be elected for terms of three (3) years. (b) No Director may be elected to serve for more than two (2) full consecutive terms, ~~not to include any term or terms served as an associate Director (under prior Bylaws),~~ provided this restriction shall not prevent officers and the editor of the ~~VOICE~~ Voice *for the Defense* who are Directors by virtue of office from serving on the Board of Directors, and further provided that Directors who have served two full consecutive terms may apply for and serve as a Director again after two (2) years out of the office as a Director. The executive committee shall have the responsibility for establishing rules to ensure the orderly election of the board of Directors. (c) Each membership area designated in Section 11 of Article III shall be represented by a director from that area. The nominations committee shall have responsibility for establishing rules for elections which will achieve this objective.

~~(d) On a one-time basis in 2019, the board shall assign the fifty-four (54) directors into 6 groups of 9 members for election synchronization purposes. This group assignment may create a minimal number of terms that slightly exceed 6 total years and that is~~ permitted ~~on this one-time basis.~~

Sec. 5. Vacancies.

A vacancy occurring for any reason in the Board of Directors ~~caused by the death, resignation, lack of qualified applicants, or removal of the person elected or appointed thereto~~ may be filled by Presidential appointment of any eligible member ~~by the President~~, subject to confirmation by the Board of Directors. Confirmation shall be secured at the option of the President either by a majority vote of a quorum of the directors or by a poll of the directors. The failure of any director to send in his or her vote within ten days after the date the poll is placed in the mail to him or her shall be counted as a vote for confirmation. Under this section the appointee's term ends when the original term of the director replaced ~~by death, resignation, or removal~~ for any reason would end.

Article VIII—Officers

Sec. 1. Officers.

The elected officers of the Association shall consist of a President, a President-Elect, a First Vice-President, a Second Vice-President, Treasurer, and Secretary. The appointed officers are the editor of the Voice for the Defense and the Chief Executive Officer.

Sec. 10. Chief Executive Officer

(a) Duties of the Chief Executive Officer the Chief Executive Officer shall act as the Recording Secretary of the Association and shall be the custodian of the records of the Association. The Chief Executive Officer shall also perform all duties usually required of a Chief Executive Officer and such other duties as may be assigned by the President or the Board of Directors, and shall be a non-voting member.

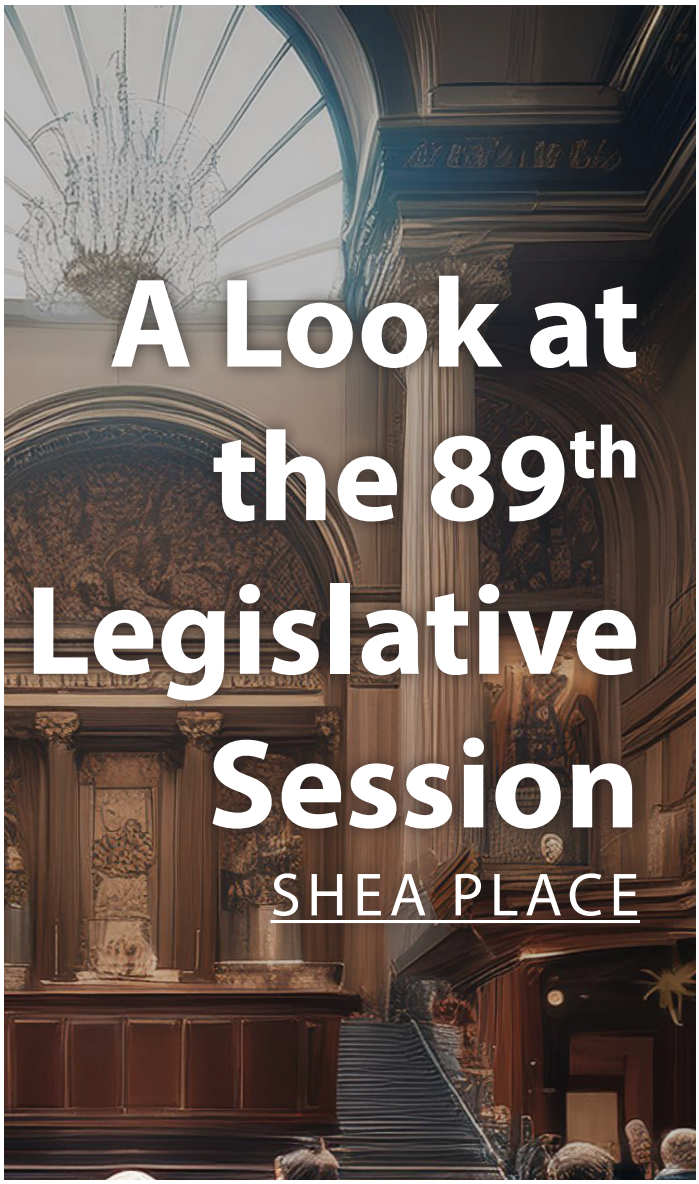
Sec. 11. Duties of the Editor.

(c) The editor of the Voice for the Defense shall have voting rights on the Executive Committee.

Article IX—Elections

Sec. 2. Nominations Committee.

Prior to January 31st of each year, the President-Elect shall appoint a Nominations Committee consisting of one member from each of the Association's membership areas and all officers, editor of the Voice for the Defense. The Chief Executive Officer is a non-voting member. Each member shall be an attorney who is a current member of TCDLA and has a minimum of five years of practice in criminal law. Past presidents may be appointed to the committee as a voting member as a district representative or may participate as a ~~but shall be~~ non-voting member~~s~~. The chair of the Nominations Committee shall be the President-Elect ~~designated by the President~~. The Nominations Committee shall meet, and the members present shall select its nominee(s) for those positions in the Association which are open for election or reelection. The chair of the Nominations Committee shall report in writing on or before 90 days prior to the next annual meeting all said nominee(s) for each such position to the President, the Board of Directors, the Chief Executive Officer, and the editor of the *Voice for the Defense* ~~magazine~~.



A Look at the 89th Legislative Session

SHEA PLACE

The 89th Texas regular legislative session is here. Your TCDLA governmental affairs team consists of Allen Place, David Gonzalez, and me, Shea Place Taylor. The session will convene at noon on January 14th, 2025, and adjourns sine die on June 2nd, 2025. Bill filing began on November 12th, 2024.

Allen, a former State Representative of nearly 10 years, has been with TCDLA for over 24 years. He was Chairman of the House Committee on Criminal Jurisprudence and authored the Penal Code revision. He maintains his law practice in his hometown of Gatesville, Texas, at Place Law Office, where he works with his wife and daughter. In and out of session, you can often find Allen meeting with legislators, staying up to date on current Texas politics and races, and talking to the media.

I (Shea) practice with Allen at Place Law Office in Gatesville and Austin offices with a focus on parole law. I have been with TCDLA for 8 years and this will be my fifth session. I regularly attend legislator, stakeholder, and affiliate group meetings, meet with legislators and their staff, follow current events, keep track of member requests, and provide legislative updates to members. You can access these updates in the legislative list serve on the TCDLA website.

David has worked for TCDLA for over 14 years. He is a partner in Sumpter & Gonzalez in Austin and serves as an adjunct professor in the Trial Advocacy Program at the University of Texas School of Law. He is board certified in criminal law, was appointed by the Supreme Court to serve on the Board of Disciplinary Appeals, and has served as a special prosecutor for Travis, Kendall, and Panola Counties. David joins Allen and I for the session and brings a unique perspective to pending legislation affecting the Penal Code or Code of Criminal Procedure.

TCDLA Legislative Committee members are: Chair William (Bill) Harris, Vice Chair Bobby Mims, Mark Daniel, Danny Easterling, Michael Heiskell, Peter Lesser, David Moore, Jeremy Rosenthal, and Mark Snodgrass. Additionally, TCDLA President David Guinn Jr., TCDLA CEO Melissa Schank, TCDLA staff attorney Rick Wardroup, and TCDLA legislative counsel Allen Place, David Gonzalez, and Shea Place Taylor all serve on the legislative committee.

The legislative committee meets for an in person meeting every quarter at the TCDLA board meetings. We have regular calls to discuss new business and often meet weekly during session. The committee reviews, discusses, and votes on each legislative request submitted for consideration. These suggestions form a list of priorities for the next legislative session. The committee also follows Texas politics and current events to better understand the political landscape and works to hash out the finer details of legislation like bill language and sponsors.

During session, Allen, David, and I spend most of our time at the State Capitol. We work to draft legislation, defend against bills we do not support, testify in support of or in opposition to bills of interest, maintain continual interaction with legislative members, committee chairmen, and their staff, and often work to make last minute changes in order to garner the most support for a bill. We attend any and all hearings relevant to our bills. These hearings are known to have delays and last well into the night. There are approximately 6,000-7,000 bills filed each year. The lobby team reads each bill and finds those of interest to TCDLA. We then track those bills, usually about 800-1,000 bills that relate to criminal justice. We continue following our bills of interest through each chamber and on to the Governor's desk.

During the interim, we immediately start to formulate our agenda for the next session, prepare our full legislative report paper, and teach legislative update CLEs around the state to inform members about the new laws. Throughout the interim we also attend affiliate group, state agency, and stakeholder meetings, as well as individual meetings with legislators.

It is difficult to predict what may or may not occur in

any session, but here is a look at some interim developments relevant to TCDLA we think will impact the session.

On the first day of filing bills for the 89th regular session, members filed nearly 1,500 bills and proposed constitutional amendments. This number is unusually high for the first day of filing.

Following the 2024 election, both chambers of the legislature will retain a Republican majority. Governor Abbott and Lt. Governor Patrick were not on the ballot in 2024 as they are in the middle of a 4-year term.

The Texas House is experiencing a speaker's race. One of the first orders of business for the House will be to elect a speaker. Current Speaker, Dade Phelan, was being challenged by members of his own party as well as from the Democratic party. While there will still be 150 members of the Texas House regardless of the person elected Speaker, the flow of legislation greatly depends on the person elected Speaker of the House. On Friday, December 6th, 2024, Speaker Phelan withdrew his bid to return as House Speaker. The Republican Caucus later chose Representative David Cook as their nominee for Speaker. Representative Dustin Burrows filed to be the Speaker in December 2024, so the race continues.

[Please note this article was completed on December 10th, 2024. By the time this article is printed the Speakers race will already have been decided on January 14, 2024.]

In terms of anticipated legislation for 2025, the Senate has announced an intention to address and amend all current legislation affecting hemp. The Senate has once again indicated a desire to seek a constitutional amendment seeking to deny bail on a wide array of offenses. Additionally, interim hearings in the Senate have focused on changes to organized retail theft in Texas.

On the House side, the Committee on Criminal Jurisprudence has held interim hearings regarding the "junk science" law passed several sessions ago. It is anticipated there will be House bills filed addressing this issue. Also, this same House committee has been reviewing the definition of "duress" as it applies to human trafficking and reviewing recent prosecutions under the new statute regarding fentanyl passed in 2023.

Although two committees were created in response to the Uvalde Robb Elementary Shooting in 2022, and a significant number of bills were filed addressing the issue in 2023, no substantive bill addressing firearms passed the legislature in 2023. We expect to see more attention on this matter in 2025.

Numerous bills were also filed in the 2023 session following the *Dobbs* decision overruling *Roe v. Wade*. Similar to firearms, no substantive legislation passed on this subject matter in 2023. While a substantial number of bills on this issue have already been filed for the 2025 session, the political climate in Texas remains unchanged on this important issue.

It is anticipated that criminal justice and border issues will again be high priority topics in 2025 following such being a focal point of recent campaigns. As mentioned, around 15% of bills filed deal with criminal justice and many of these are punitive. We are prepared to vigorously defend against any bill that attempts to dilute individual rights. Although our legislative agenda is finalized for the 2025 session, you can email us at legislative@tcdla.com. Please do not hesitate to reach out if you have any questions or concerns. You can also keep up with what we're doing through my legislative listserve updates. Lastly, keep an eye out for emails throughout the session regarding action you can take to assist TCDLAs lobby efforts.

Shea Place *graduated from Baylor Law School where she was a technical editor on the law review. Shea has practiced with Place Law Office in Austin and Gatesville since 2016, focusing primarily on parole law. Shea is a lobbyist for TCDLA and has assisted other organizations with their legislative efforts and grassroots development. She can be reached at shea@allenplacelaw.com or 512-477-6424.*

Empowering Defense Attorneys: Key Resources to Research Law Enforcement Backgrounds

RYAN KRECK

Member of Technology Committee

Have you ever felt like you did not have all the information about a police office in one of your cases? Did you ever feel like there should be some *Brady* disclosures that you may have not received from the State of Texas? Fortunately, there are ways to get more information on the officers involved in your client's case without waiting for the State to provide you with that information, if they ever would have.

There are two main sources of information at your disposal: TCOLE and the TCDLA Police Accountability Database. This article is a short guide on how to utilize these resources when researching the law enforcement officers in your case.

TCOLE stands for the Texas Commission on Law Enforcement and their missions is as follows:

"The mission of the Texas Commission on Law Enforcement, as a regulatory State agency, is to establish and enforce standards to ensure that the people of Texas are served by highly trained and ethical law enforcement, corrections, and telecommunications personnel."

On their website, www.tcole.texas.gov, there is an Online Services Tab with an option of "Public License Lookup." To utilize this service, you need to create a free account. Once you start a Public License Lookup, you can search for any licensee by name, agency, or license number.

Once you locate the officer, you will be able to review their licenses, employment history, education, and training and certification hours. If you would like more detailed information, including disciplinary records, you will have to make a formal Public Information Request.

TCDLA now offers another, easier method to search for information on any law enforcement officer. TCDLA has launched the Texas Accountability Database. This database is one of the many benefits offered by TCDLA. This database allows you to search for an officer by name, badge, or TCOLE number. You will find *Brady* disclosures that have been submitted by TCDLA members and local bar associations.

To access the Texas Accountability Database, simply log into your account on TCDLA.com and click on the "MEMBERS ONLY" tab. Once you are there, you can search for an officer to see what information has been reported. The database will allow TCDLA members to submit Brady disclosures on an officer, and the disclosure will track all future employment with the officer.

The Texas Accountability Database is a new a growing tool, and TCDLA encourages all its members and local affiliates to submit disclosures they maintain to assist in building this tool for members to use statewide.

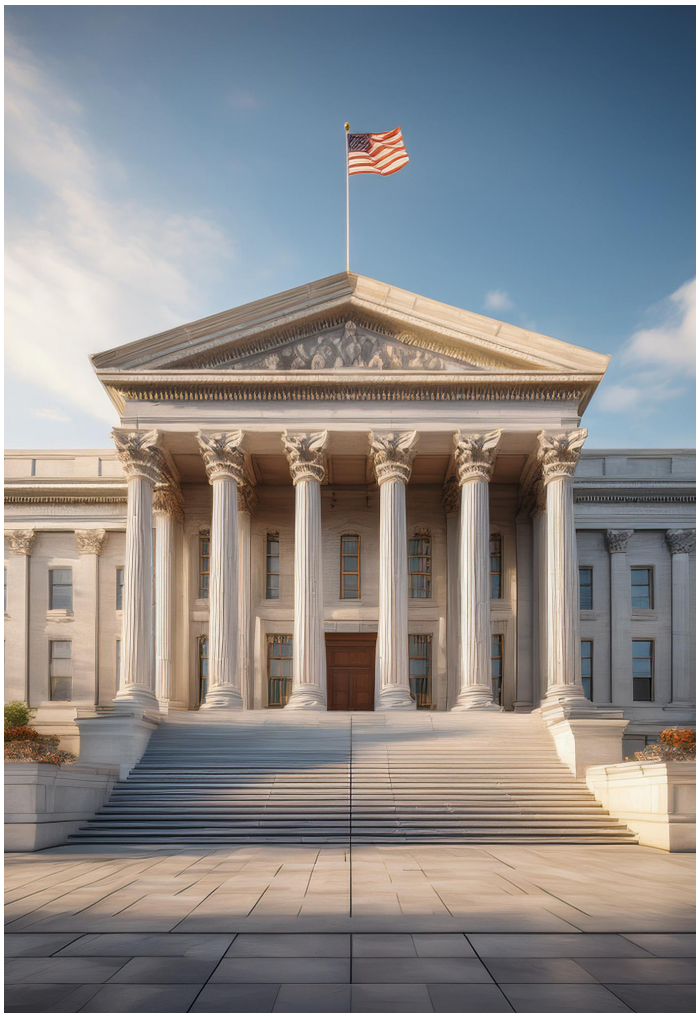
TCDLA and the Technology Committee are developing a "How-To" video and guidance on submitting information to the Texas Accountability Database. While the video is in progress, if you have information to contribute, please email it to brady@tcdla.com.

By using the Public License Lookup and Texas Accountability Database, you will obtain helpful information that may discredit the law enforcement officers in your case. These two options are free to use and can be great tools to resolve a case without a trial.

Ryan Kreck *is Board Certified in Criminal Law since 2021. He represents clients facing murder, sexual assault of a child, and other crimes in North Texas from Collin, Dallas, and Grayson counties. Ryan is on the Board of Directors for TCDLA and Collin County Criminal Defense Lawyers Association. Ryan can be reached at rkreck@wynnesmithlaw.com or 903-893-8177*

Petitions for Discretionary Review Granted by the Court of Criminal Appeals

NILES ILLICH, PH.D., J.D.



Niles Illich *is board certified in criminal appellate law. He has practiced before the Court of Criminal Appeals, the Texas Supreme Court, most of the federal circuits, and in every criminal appellate court in Texas.*

The Court of Criminal Appeals granted the following petitions for discretionary review. These summaries are taken from the "questions presented" by the parties and not altered by Niles Illich or the editorial board. These are intended to provide an easy resource for our members to identify the issues that are pending before the Court of Criminal Appeals. Some summaries include a commentary to add context to the issue.

How the members incorporate these issues into their practice is left to the attorney and his or her client. I welcome feedback, comments, or suggestions: Niles@palmerperlstein or (972) 204-5452.

Petitions Granted:

For the Defense:

GRANTED ON DECEMBER 18, 2024:

Larry Dewitt Jackson, Jr. v. State of Texas, PD-0451-24.

Attorney: Pro-se at the Court of Criminal Appeals

Originating Court: Fourteenth Court of Appeals [Houston].

Opinion by Justice Randy Wilson, joined by Justice Kevin Jewell and Justice Charles A. Spain who concurred in the judgment.

Issues Presented:

- "Whether the Court of Appeals erred in finding that the Petitioner failed to satisfy the *Strickland* test for ineffective assistance of counsel claim. . ." and
- "Counsel's performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding."

Commentary: Appellant contends his trial counsel did not participate in punishment because the trial court refused to fund a defense expert. Ultimately Appellant received the statutory maximum sentence.

The Fourteenth Court of Appeals explained trial counsel never abandoned his role as counsel during punishment and "remained engaged." The Fourteenth Court of Appeals looked to the entire scope of representation and concluded that "having reviewed the entire record, including his pretrial, guilt/innocence and punishment phase representation, we conclude any failure in his conduct at punishment was not enough to render his total representation ineffective."

For the State:

None.

On the Court's Own Motion:

On December 11, 2024, the Court granted thirty-six (total) PDRs from Kinney, Webb, and Zapata Counties. The Court granted review on the question "Did Appellant make a prima facie case that he was arrested and prosecuted because of his gender?" The Court vacated the judgments and remanded for consideration of the Court's recent opinion in *Aparicio*. *See Ex parte Aparicio*, No. PD-0461-23, __ S.W.3d __, 2024 WL 4446878 (Tex. Crim. App. Oct. 9, 2024).

Texas Criminal Defense Lawyers Educational Institute

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JOIN THE LEGACY

We invite you to be part of history by becoming an **Inaugural Distinguished Lifetime Fellow for the Texas Criminal Defense Lawyers Education Insititute.** This prestigious honor recognizes individuals whose exceptional support and dedication have a lasting impact.

By contributing **$25,000 cumulatively by May 31**, you secure your place among the distinguished leaders who are shaping the future of our mission.

Your contribution is more than a gift – it's a commitment to excellence and a legacy that will inspire generations to come. Fellows receive:

- **Exclusive recognition** at events, in Voice for the Defense magazine, and on the TCDLA website.
- A commemorative keepsake diamond pin and etched plaque to honor your lifetime achievement.
- Invitations to special events celebrating our fellows.

Don't miss this opportunity to be a founding pillar of this elite community. Your support will help us drive meaningful change and further the causes we champion.

Join today and make your legacy official.

How to Donate

- **Annual Gift**: Set up a recurring gift (annually, quarterly, or monthly).
- **One-time donation**: Donations of any amount are welcome.

To pledge or learn more, please Miriam Duarte at (512) 646-2732. If you're unsure where your contribution is, email mduarte@tcdla.com.

Significant Decisions Report

KYLE THERRIAN

The ethos of our profession. I think it would be hard to appreciate if you weren't a criminal defense lawyer. The most successful of us lose our cases most of the time. When we lose, the person who asked us to help is snatched from the table we defended them from—whisked away, often wrongfully in our eyes. Some days, it's us versus the prosecutor, versus the judge, versus our client, versus the world. Writ large, we pursue the fool's errand of *Gideon* with a flawed yet necessary ideology that grit and grind can somehow counterbalance the efforts of those on the inside of an inside joke who under-fund, under-resource, and load lawyers up with too many cases (and at the same time reduce the standard for effective representation).

We do these things with a strong sense of democracy and a recognition that the strength of our judicial system is unreasonably and unfairly dependent on a strong criminal defense bar. We do these things often through great personal sacrifice—mentally, physically, emotionally. We do these things knowing that soccer moms and football dads will never adorn their Nissan Rogues and F150s with an "I support criminal lawyers" bumper sticker or donate to a cause seeking justice for a person they don't know.

I try to start every year by saying something a little more meaningful. So, I will tie it back to the start and put it in the parlance of criminal defense lawyers: you don't know s**t if you've never carried the briefcase. I've commented on how my authorship of this publication is therapeutic. Every month, I get to unload to 3,800 colleagues who *get it*. This probably isn't what therapy is in a formal sense, but I know I'm fortunate to have the audience. Importantly, the ethos of our profession, and specifically of this Organization, is that you don't have to be the author of the SDR to have an audience. If you're struggling If you're a criminal defense lawyer, go find yourself an anchor TCDLA seminar (one of the ones where a board meeting is held). Your colleagues from around the state converge in Dallas, Houston, Austin, San Antonio, and elsewhere every three months. When we get together, we share, lament, and unload. When we tell our stories, we "give each other grace."

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

Please do not rely solely on the summaries set forth below. The reader is advised to read the full text of each opinion in addition to the brief synopses provided. This publication is intended as a resource for the membership, and I welcome feedback, comments, or suggestions: kyle@texasdefensefirm.com (972) 369-0577.

Sincerely,

United States Supreme Court

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

Fifth Circuit

Texas Tribune v. Caldwell County, 121 F.4th 520 (5th Cir. 2024)

Attorneys. Scott B. Wilkens (appellate)

Issue & Answer. Can the county exclude members of the public from magistration proceedings (initial bail setting and probable cause determination)? **No.**

Facts. In Caldwell County, magistrations are closed to the press and the public pursuant to a policy established and enforced by the County's magistrate judges, justices of the peace, and sheriff. This policy led two nonprofit news organizations, The Texas Tribune and Caldwell/Hays Examiner, and an advocacy organization, Mano Amiga, to file a complaint for declaratory and injunctive relief, alleging that the policy violates the First Amendment. The district court granted relief and enjoined the County from enforcing its policy of categorical exclusion from magistrations.

Analysis. The court uses a two-factor test to determine whether a legal proceeding falls under the First Amendment's protections. The "experience and logic test" asks "whether the place and process have historically been open to the press and general public," and "whether public access plays a significant positive role in the functioning of the particular process in question." The American legal system has both a history of open preliminary hearings and hearings relating to bail and public. Moreover, public access ensures fairness and accuracy by the courts conducting the hearings.

Comment. In Collin County, attorneys can access the court's file online and download documents contained therein. This used to include probable cause affidavits uploaded as part of the magistration process. One of the local police departments did not like the fact that lawyers were getting probable cause affidavits and complained to the magistrate who promptly restricted access. Now the magistrates in Collin County will not produce a probable cause affidavit unless the requestor proves he or she is the attorney for the person arrested. I would imagine this might be true in other places, and I think this case basically says "this isn't Guantanamo."

Texas Court of Criminal Appeals

Williams v. State, No. AP-77,105 (Tex. Crim. App. Nov. 6, 2024)

Attorneys. Clay Dean Thomas (appellate), Steven Richard Miears (trial), Dennis D. Davis (trial), Susan E. Anderson (trial), Edward Ray Keith (trial)

Issue & Answer 1. The Sheriff's Office revealed to the prosecutor the identity of appointed confidential defense mental health experts who visited the defendant in the jail. The State used the disclosure to file a motion to conduct a countervailing evaluation of the defendant. Was the trial court required to grant a motion to dismiss on the basis of prosecutorial misconduct? **Not necessarily**.

Issue & Answer 2. Must the trial court disqualify the prosecuting attorney in the above-scenario when the prosecuting attorney positioned himself as the only witness to a purported Sixth Amendment violation? **Not necessarily.**

Facts. The State convicted the defendant of capital murder. The defendant was known to assault his girlfriend habitually—one of the two victims in the instant case. The defendant killed her and her mother on the day she left him with their mutual children. She called 911 during the murder and was heard screaming for help and saying the name Tyrone (the defendant's first name). The defendant's vehicle was found within a mile of the crime scene, and he was ultimately found walking on a railroad track the same evening.

Analysis 1. The defendant has the burden to show actual prejudice or a substantial threat of prejudice before dismissal is appropriate. This is true even if the defendant can show that the constitutional violation was deliberate. The defendant argues he was prejudiced by the wrongful disclosure because it led to the State learning his trial strategy. However, there is nothing in the record indicating how the State gained an advantage by learning the identity of the defendant's expert witnesses.

Analysis 2. Rule 3.08 disqualifies a lawyer from representation when the lawyer "knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client." The impropriety of the prosecutor's actions are unclear because Rule 3.08 does not pertain to pretrial matters (here a motion to dismiss for Sixth Amendment violation). Regardless, the defendant has not shown he was prejudiced by the prosecutor's purported dual role (witness and advocate) in this case.

Comment. I guess maybe I can agree that the prosecutor learning the defendant was evaluated by a mental health expert who the defendant did not ultimately call as a witness is not necessarily harmful. As I rack my brain to think about how the State would use this information, my mind wanders quickly to other expert witness scenarios that would be almost per se harmful. Handwriting analyst, toxicologist or chemist, forensic accountant. There are a multitude of experts whose professions lend themselves to blacker and whiter deductions. You call if they have something good to say and you don't call if their findings inculpate your client.

Ex parte Halprin, No. WR-77,175-05 (Tex. Crim. App. Nov. 6, 2024)

Attorneys. Paul Mansur (writ)

Issue & Answer. Should a Jewish defendant convicted of capital murder get a new trial when the judge is later exposed as a rampant anti-Semite—who referred to the defendant in private and in semi-private settings as a "fucking jew" a "filthy jew" and a "goddamn kike?" **Yes.**

Facts. 11 witnesses testified in the defendant's habeas hearing that they had personally experienced or observed then-judge Vickers Cunningham to have expressed anti-Semitic sentiments toward Jewish people generally and the defendant specifically. The defendant also presented testimony from expert witnesses. They testified to the history of the Jewish community in Dallas, the history of anti-Semitism, and cognitive bias in judicial decision-making. The trial court adopted the defendant's proposed findings of fact and recommended habeas relief.

Analysis.

Following the live hearing, the habeas court adopted Halprin's proposed findings of fact and conclusions of law virtually verbatim and once again recommended that Halprin receive habeas relief. While we agree that Halprin is entitled to a new trial, we decline

to adopt any of the habeas court's findings and conclusions, which exclusively reflect Halprin's interpretation of the evidence, are often unsupported, and exceed the scope of our remand orders. Instead, we take on our role as the ultimate factfinder in habeas cases and dispose of Halprin's judicial bias allegation based upon our independent review of the record.

The evidence that is uncontroverted in this case includes evidence that:

From adolescence up to the time Cunningham began working professionally in the legal system, he used derogatory language regarding Jews of his acquaintance. And Cunningham—apparently unironically—repeated unsupported anti-Semitic narratives, such as the ideas that Jews as a group have all the money and run the banking system.

Once Cunningham began working in the legal system, he continued to use derogatory language about Jews in general and those remarks became even more offensive ("Goddamn Jews," "filthy Jews"). Further, Cunningham referred to specific Jewish people as "Fucking Jew," "kike," and "goddamn kike." Cunningham continued to use this kind of language (outside of the courtroom) when he became a judge, with "great hatred, [and] disgust" and increasing intensity as the years passed.

In mid-October 2001, Cunningham learned that he had been appointed to preside in the court where five of the Texas Seven [of which the defendant is a member] would be tried for capital murder. About a month later, Cunningham stated that the appointment was significant "because [he was] going to get them all the death penalty, even the driver because he's guilty." Each of these defendants (Donald Newbury, Joseph Garcia, Michael Rodriguez, Halprin, and Patrick Henry Murphy) was in fact convicted of capital murder and sentenced to death in Cunningham's court.

Halprin, whose capital murder trial occurred in June 2003, is Jewish, and Cunningham was aware of that fact. Halprin's Jewish faith was mentioned during both the guilt and punishment phase testimony.

During and after Halprin's trial, Cunningham made offensive anti-Semitic remarks about Halprin in particular and Jews in general.

Following Cunningham's November 2005 resignation from the bench, he ridiculed Jewish donors who financially supported his political campaign for Dallas County District Attorney, including a Jewish former judge with whom Cunningham has a longstanding, ostensibly cordial personal and professional relationship.

According to expert testimony, it is not inconsistent with negative bias to have a friend or two who belong to the group that is the target of the negative bias.

While not necessarily evidence of anti-Semitism in and of itself, Cunningham created an irrevocable living trust for his children in 2010 that financially rewarded them only if they married a white Christian person of the opposite sex.

Welcome New TCDLA Members!

November 16, 2024 - December 15, 2024

Regular Members

Lucy Adame-Clark - San Antonio

Michelle Beck - Pearland
Endorsed by Loretta Muldrow

Christopher Crozier - Austin
Endorsed by Jeremy Sylestine

Evan Davis - Denton
Endorsed by Andrew Lloyd

Leo Gonzalez - Cibolo
Endorsed by Kim Gonzalez

Monica Guerrero - San Antonio
Endorsed by Andrew Froelich

Curtis Lovelace - McKinney

Ian Mayfield - San Antonio
Endorsed by Jessica Gonzalez

Patrick McGuire - Plano
Endorsed by Darlina Crowder

Megan Parker - Rockwall
Endorsed by Lara Bracamonte Davila

James Perl - Dallas
Endorsed by John Thomas Wolf

Tyler Richied - Plano
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Public Defender Members

Alyssa Craze-Awbrey - Houston
Endorsed by Jennifer Gaut

Steven Goble - Lubbock
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Duncan Isaac - Houston
Endorsed by Jani Maselli Wood

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Investigator Members

Keith Kucifer - Houston
Endorsed by James Gradoni

Brucus Owdley - Houston
Endorsed by Sonja Rafeet

Andrew Taravella - Houston
Endorsed by Tammy Barette-Taravella

Expert Members

Kevin Scully - Tyler
Endorsed by Mr. Dillion Matt Bingham

When Cunningham's daughter dated a Jewish man after the establishment of the trust, Cunningham disapproved. After his daughter broke up with the Jewish man, Cunningham expressed happiness that the relationship had ended, and he referred to the man using an anti-Semitic phrase.

The evidence supports a finding that Judge Vickers Cunningham formed an opinion about the defendant derived from an extrajudicial factor—"[his own] poisonous anti-Semitism." The record reveals such a high degree of antagonism as to make fair judgment impossible.

Concurring (Richardson, J.). Would pose the issue presented as it was by the defendant "Does the Federal Constitution guarantee of due process tolerate an antisemitic and racist judge presiding over the death penalty trial of a Jewish defendant? "The conviction violates the ethos of the Constitution and threatens the legitimacy of our justice system by undermining impartiality in both appearance and actuality."

Concurring (Yeary, J.). The Court uses the wrong standard, but the judge's conduct was sufficiently egregious to warrant relief under the correct one.

Dissenting (Keller, P.J., joined by Slaughter, J.). The defendant must show that the judge's derogatory views influenced his conduct in the criminal proceeding. He did not show that here.

Comment. Bless their hearts. I'm not from the South, but I understand this is what you say when what you want to say wouldn't pass editorial scrutiny. If you know me or this isn't your first time tuning in, you can guess whose hearts I am hoping get blessed.

Floyd v. State, No. PD-0148-23 (Tex. Crim. App. Nov. 13, 2024)

Attorneys. William Biggs (appellate)

Issue & Answer. In a two-paragraph indictment alleging the same robbery as both threat-based robbery and injury-based robbery, must the trial court require jury unanimity regarding the type of robbery? **No.** (are the various methods of committing robbery independent offenses? **No.**)

Facts. The State convicted the defendant of aggravated robbery using an indictment using alterative pleading paragraphs: (1) aggravated robbery by threat, and (2) aggravated robbery by bodily-injury. The evidence showed that the defendant shot a husband and wife in the course of robbing them, ordered the wife to relinquish her debit card and pin, and threatened to return and kill her if the pin did not work. The trial court gave a general unanimity instruction but did not instruct the jury regarding unanimity among the two alternative paragraphs (threat-versus-injury). The court of appeals found that threat-robbery and injury-robbery are different methods of committing the same offense and thus a unanimity instruction making the requested distinction was unnecessary.

Analysis. Threat-based robbery and injury-based robbery are not distinct offenses. Threat and injury are different ways of committing the offense of robbery. The jury need not reach unanimity regarding the manner and means. Here the jury unanimously found that the defendant robbed the victims using either threats or violence. The court's instruction was sufficient to ensure they were unanimous in this outcome.

Concurring (Keller, P.J.). Compound offenses are offenses with a root offense and various manners of commission. Compound offenses require unanimity only as to the root offense.

Concurring (Yeary, J.). The court does not explain its statutory interpretation sufficiently. It relies on its own precedent not sufficiently explaining statutory interpretation. The precedent is of fractured opinions and the Fifth Circuit recently held that the Texas robbery statute presents separate offenses, contrary to the court's precedent. We should do more to stake our position.

Dissenting (Walker, J.). threat-robbery and injury-robbery are separate offenses.

Comment. If the Fifth Circuit just held that the Texas robbery statute presents separate offense, is that court not a higher authority on constitutional law?

State v. Johnson, No. PD-0665-23 (Tex. Crim. App. Nov. 13, 2024)

Attorneys. Allan Fishburn (appellate), Reynie Tinajero (Trial)

Issue & Answer. Can the police obtain a valid *Miranda* waiver from a suspect who earlier invoked his *Miranda* rights during an unrelated custody event that ultimately morphed into custodial *Mirand*-ized interrogation? **Yes.**

Facts. An eighteen-month-old boy went missing. The defendant's girlfriend was the child's legal guardian. Hundreds of people converged at the police department to help search for the child. The defendant went, too. He participated in a series of voluntary interviews with police. After his interviews, he learned his children had been taken to the child advocacy center for interrogation. When he confronted officers about this, they placed him in handcuffs. When this happened, he stated "Okay. I need to talk to a lawyer." Officers placed him in a room, spoke with him about his children being interviewed, informed him that he was being arrested for out-of-county warrants. For the remainder of that evening the communications related to the whereabouts of the defendant's children. At 1:20 AM the next day a different detective entered the room, *Mirand*ized the defendant and interrogated him regarding the missing child. The defendant expressly waived his right to remain silent and then admitted to dumping the child's body in a dumpster after the child died randomly.

Analysis. Once a suspect invokes the right to counsel the police cannot attempt interrogation again. *Edwards v. Arizona*, 451 U.S. 477, 484 (1981). Once a suspect invokes the right to counsel, the prohibition on police-initiated questioning persists, even after the suspect consults counsel, if counsel is not present for the interrogation. *Minnick v. Mississippi*¸498 U.S. 146, 151 (1990). A suspect cannot anticipatorily invoke *Miranda* rights, they must be invoked in the context of actual custodial interrogation. *McNeil v. Wisconsin*, 501 U.S. 171, 182 (1991)(invocation of the right during the bail hearing did not preclude later unrelated *Mirand*-ized interrogation by law enforcement). At one point, the Sixth Amendment invocation of counsel at a bail hearing precluded later *Mirand*-ized interrogation on the offense that was the subject of the bond hearing, but the Supreme Court later overturned this precedent as an unnecessary layer of protection.

Under McNeil and Montejo, the *Miranda* right to counsel—with all of its prophylactic protections—becomes ripe for invocation only after (1) *Miranda* warnings have been given while the suspect is in custody or (2) if custodial *Miranda* warnings have not been given, when custodial interrogation begins.

Here the defendant voluntarily participated in two non-custodial interviews, was placed into custody without interrogation. When interrogation later began it coincided with a *Miranda* warning. "It was at that point—when the detective

read the warnings—that Appellee had the choice contemplated by *Miranda* . . . Appellee could have invoked [the right to remain silent]. He chose not to."

Comment. I've never written a comment for my own benefit. I mean, I guess I write them to make myself chuckle and to see who else will. But from time to time, I try to put stuff in here as a "hey practitioners you may need this later." This one is for me (and I guess my appellate peeps). Footnote 3:

We view the facts in the light most favorable to the trial court's ruling, giving almost total deference to the trial court's findings of fact. *State v. Ruiz*, 577 S.W.3d 543, 545 (Tex. Crim. App.2019). That deferential review includes a review of electronic recordings, but that deferential review does not bind us to fact findings that an electronic recording shows are not supported by the record. *Tucker v. State*, 369 S.W.3d 179, 184-85 (Tex. Crim. App. 2012).

There is another case called *Carmouche* that says the same thing less succinctly. Add to standard insufficient evidence paragraph.

State v. Villa, No. PD-0756-23 (Tex. Crim. App. Nov. 13, 2024)

Attorneys. Bruce Anton (appellate) Madison McWithey (appellate) *Pro se* (trial)

Issue & Answer. Texas Government Code §§ 30.0014 and 30.00027 provide the basis for an appeal of a class C misdemeanor to one of the fourteen courts of appeal. It limits the "appellant's" right to appeal to outcomes or things adverse to the defendant at trial. Does this, by implication, mean the State has no right to appeal (to become the appellant)? **No.**

Analysis. "[T]he State is never labeled the 'appellant' in an appeal, even when the State is the party bringing the appeal." The words appellant and appellee under the applicable rules are words designated for defendants, not the State. To read this otherwise would lead to absurd results. To say that the State is an appellant is to say that the legislature envisioned the State appealing on the limited number scenarios identified in the Government Code all adverse to the defendant and favorable to the State.

Nixon v. State, No. PD-0556-23 (Tex. Crim. App. Nov. 20, 2024)

Attorneys. Michael Gross (appellate), Anthony Odiorne (trial), James Drummond (trial), Alexander Calhoun (trial), Scott Pagwan (trial), Robert Cowie (trial), Deepali Meenu Walters (trial)

Issue & Answer. Does one find themselves in a jail when inside of a building where people are incarcerated, with a sign outside telling visitors they are entering the jail, with additional signs inside telling visitors they are inside of a jail? **Not necessarily.**

Facts. The State tried the defendant in an auxiliary courtroom. This courtroom was inside of a building that people would consider to be the jail.

The photos show that a sign posted above the entrance to the building read "Medina County Jail[.]" After entering the building through a glass door and passing through an outer vestibule that provides access to restrooms and vending machines, visitors enter a main lobby either through another glass door or a metal detector. The main lobby includes: (1) a reception window for, and entrance to, the Sheriff's Department; (2) doors to two visitation rooms and a multipurpose room; (3) a jail information window; (4) a door stating "Authorized Personnel Only[,]" which the witness identified as the entrance to the jail; and (5) a pair of double doors leading into the auxiliary courtroom where Appellant's trial was held. A placard on the entrance to the courtroom reads: "District Court in Session[.]" Along the way, visitors encounter multiple signs advising that cell phones, cameras, recording devices, food or drink, purses, packages, and openly carried handguns are prohibited.

The trial court overruled the defendant's objections to the nature and setting of his trial. The Court of Appeals reversed, finding that the defendant was tried in a "jailhouse courtroom" and that such a procedure was inherently prejudicial to his presumption of innocence and without a showing of sufficient necessity.

Analysis. Courts must guard against factors that undermine the fairness of a trial and erode the presumption of innocence. This includes courtroom practices. The Supreme Court has found such practices as trying a defendant in a jail uniform or in visible shackles violative of the presumption. Only when a practice is inherently prejudicial is it incumbent on the State to justify it as necessary to address a security concern or to further some other essential State interest. A courtroom setting or practice is inherently prejudicial when "the challenged practice would necessarily be interpreted by the jury as a sign that the defendant is particularly culpable or dangerous." The facility in question housed three distinct government facilities (1) a jail, (2) the Sheriff's office, and (3) an auxiliary courtroom. Notwithstanding the fact that the building was labeled with a sign that said, "Medina County Jail" and furnished with a lobby that had all the trappings of a jail, including signs prohibiting possession of things one cannot possess in a jail, "we conclude . . . these considerations would not have led the jury to necessarily conclude that [the defendant] must be guilty or dangerous."

Indeed, we are persuaded that average jurors may have more likely understood that the government and the courts use whatever facilities they have available to get their work done, and that the facility where a trial is held ordinarily does not reflect inherently on the guilt or dangerousness of an accused.

The courtroom was sufficiently segregated as an area within the building and was not part of the Sheriff's Office nor the Jail. The negative inferences suggested by the defendant are, at best, part of a wider range of inferences that would not necessarily have impacted a presumption of innocence.

Dissenting (Walker, J.). The trial court gave no instruction or admonishment to the jury explaining why they were trying the case in the instant facility. The primary purpose of the building was a jail and it created an unacceptable injurious risk to the defendant's presumption of innocence.

Comment. Go ahead and try this logic at the airport. Walk right past the TSA checkpoint, ignore the security folks, and when they arrest you, just say: "I'm sorry, I thought this was a Starbucks." Better yet, try to bring a cell phone and a purse into the "government facilities [where people] get their work done" in Medina County. I'm sure everyone would understand why you would do such a thing, especially if you are an "average juror [person]" unimpressed by and none the wiser to all of the jail-like surroundings.

Swenson v. State, No. PD-0589-22 (Tex. Crim. App. Nov. 20, 2024)

Attorneys. Troy Hornsby (appellate), Deborah Moore (trial), Bart Craytor (trial)

Issue & Answer. Is a live stream of an armed defendant's "hunt" to find and kill a police officer, coupled with his pursuit

of the first officer he found, sufficient evidence to support a conviction for attempted capital murder? **Yes.**

Facts. Appellant was a member of the anti-government and anti-law-enforcement "Boogaloo" movement. In February and March of 2020, his social media accounts included posts and comments glorifying the killing of police officers. This culminated in a post stating he intended to find a police officer to kill and a livestream of his "hunt." Throughout the livestream the defendant expressed his intentions repeatedly. The defendant eventually spotted and then pursued an officer who got away from him. Shortly after, other officers apprehended the defendant. They located several handguns, a sword, and lots of ammunition.

Analysis. Criminal attempt requires an act beyond mere preparation in furtherance of the attempted crime. The court found that attempts that primarily threaten people appear to require the defendant to (1) be in striking distance of the victim, (2) possess resources to attack the victim, and (3) take a weapon in hand and position or move it in the direction of the victim. This conflates cases in which courts have found evidence sufficient with a finding that such evidence is necessary. The purpose of the criminal attempt statute is to provide a margin of safety for intervention. Here the defendant crossed the line past mere preparation. He spotted a police officer, he drove to the place he spotted the officer, he had a loaded firearm within easy reaching distance.

Dissenting (Slaughter, J.). The defendant is despicable but he did not commit attempted capital murder.

Dissenting (Walker, J.). The defendant blew a lot of smoke for his viewers but he did nothing more than drive around Texarkana with guns in his car.

Comment. I like to think it at least gave everyone else pause during the conference on this case when Judges Slaughter *and* Walker said, "hold on, this is messed up."

Bittick v. State, No. PD-0013-24 (Tex. Crim. App. Nov. 27, 2024)

Attorneys. Max Stricker (appellate), Mark D. Scott (Trial)

Issue & Answer. In *Martin v. State* the CCA held that the State could not prosecute a person for unlawful carrying of a weapon by virtue of their membership in a criminal street gang without showing the defendant individually participated in that gang's criminal activity.

This case challenges the organized criminal activity (EOCA) statute as applied in an assault case where the proof of the defendant's association with the gang's criminal activity is the predicate assault itself. Is it appropriate to apply the organized criminal activity enhancement without proof of the defendant's participation in gang crimes other than the instant gang-based assault? **Yes.**

Facts. The defendant and other members of the Vagos motorcycle gang beat up a guy at a gas station. The State convicted the defendant of Aggravated Assault and successfully enhanced his punishment range based on his engaging in criminal activity (as a member of a criminal street gang).

Analysis. In *Martin v. State*, 635 S.W.3d 672 (Tex. Crim. App. 2021), the State attempted to prosecute otherwise lawful activity on the basis of who the defendant associated with (irrespective of whether he ever personally engaged in violent conduct with a gang). This case is different. In fact it is the "inverse of *Martin*[]." The EOCA statute simply enhances the severity of already criminalized acts. Here, the State proved that the defendant individually participated in a crime pursuant to his gang membership. He committed the instant aggravated assault along with some of his gang associates.

Comment. I am okay with the Legislature enhancing the punishment for gang violence. They should. I don't think that's what they did, though. They require that the gang "continuously or regularly" associate in the commission of criminal activities and that the defendant committed his offense with other people and as a member of the gang. A single data point of criminal activity committed with other gang members does not establish that the defendant or the gang regularly or continuously commits criminal activity. That testimony may exist in the case, but that is now how the opinion is written.

Tanner v. State, No. PD-0302-24 (Tex. Crim. App. Nov. 27, 2024)

Attorneys. Travis Berry (appellate), Dion A. Craig (trial)

Issue & Answer. Trial counsel did not know he had to file an election for jury punishment. The trial judge previously rejected an agreed plea and sentence of 4 years. Trial counsel eventually realized his mistake and hastily tried to make a late election for jury punishment. The trial court rejected the request and gave the defendant a 20-year sentence. Is this record sufficient for an ineffective assistance of counsel reversal on direct appeal? **No.**

Facts. The defendant tried to enter an agreed plea whereby he would serve 4 years imprisonment. The trial court accepted the plea but reset sentencing twice before proceeding to trial. The court's docket sheet indicates that the court set the matter for trial when the defendant expressed discomfort. Trial counsel filed a confusing writ of habeas corpus and sworn verification for appeal asserting that the trial court judge first expressed discomfort with the plea agreement and indicated that he was "not going to accept it." A jury trial commenced without the defendant first filing an election for punishment. After voir dire the defendant's attorney and the trial court argued about the historical record and whether the defendant should be permitted to make a late election. The next day, trial counsel filed a hasty (typographically erroneous) election for jury punishment that the defendant did not sign. He also filed a motion to recuse that was denied. Ultimately, a hearing on punishment occurred before the trial judge, and the trial judge sentenced the defendant to 20 years in prison. This direct appeal for ineffective assistance of counsel ensued. The court of appeals reversed the defendant's conviction. It held that "counsel's failure to timely assert [defendant's] right to have the jury assess punishment cannot be considered a strategic decision, as defense counsel's ignorance of the law deprived [defendant] of the ability to reasonably rely on defense counsel to effectuate his desires."

Analysis. To show prejudice in an ineffective-assistance claim where a specific right is lost based on counsel's deficient performance, the defendant must show "a reasonable probability of a different decision" at the critical juncture (i.e. he would have made a different decision than the one that counsel effectively caused to be made).

[T]he record before us is inadequate to sustain Appellant's ineffective-assistance claim. The only evidence before us of Appellant's intention to elect jury punishment comes from an untimely-filed election for jury punishment and unsworn statements from his trial counsel.

The only indication in the record regarding the defendant's intent is the late-filed election with another defendant's name appearing in the signature block and without the defendant's

signature. Even if this were sufficient to show the defendant's intention after the conclusion of voir dire, it does not speak to the defendant's desire at the time the election was required "the day before, prior to the commencement of voir dire." Trial counsel's unsworn statements suggesting the defendant's pre-existing intent were contested by the trial court and were similarly insufficient to establish prejudice.

Dissenting (Newell, J.). The court focused on the trial court's contradiction of trial counsel's unsworn statements. The court should instead hold that trial counsel's unsworn statements were not offered under circumstances in which an attorney's unsworn statement of fact can be regarded as evidence. The court should remand for a proper prejudice analysis in light of this fact.

Comment. The attorney for the State can consent to a late election. Let me put this another way. The attorney for the State [whose recommended sentence of 4-years was rejected] can consent to a late election. Let me put this another way. The attorney for the State [who had to litigate this direct appeal and who will have to litigate the ensuing writ of habeas corpus and who will have to yet again litigate this case] can consent to a late election. Defense counsel was deficient. The prosecutor was at least inefficient.

Finley v. State, No. PD-0634-22 (Tex. Crim. App. Nov. 27, 2024)

Attorneys. William Biggs (appellate), Mark Daniel (trial)

Issue & Answer. In a trial during the COVID-19 pandemic, did the trial court violate the defendant's right to confrontation when it allowed the complaining witness to testify with a surgical mask covering her nose and mouth? **Yes.**

Analysis. There is no general pandemic exception to the Sixth Amendment. There has never been a general during other global events such as wars and natural disasters. Face-to-face confrontation can be dispensed with only when a court makes a case-specific and evidence-based finding that doing so furthers an important public policy. The trial court made no finding as to why the complainant in this trial needed to wear a mask while testifying. At best, there may be an implication that the complainant may have known more about the importance of mask-wearing through her employment at a healthcare facility and a legal argument that she had a statutory right to be treated fairly as a crime victim. This fails to satisfy the important public policy standard. This is not enough.

Dissenting (Yeary, J.). The court gives insufficient attention to the core issue: whether covering the mouth and nose constitutes a sufficient denial of the core confrontation right. A mask is no different than underwear or Elton John's fancy glasses. It's just a garment. A remand is necessary for the court of appeals to consider whether this particular garment impairs the right to confront.

Comment. Listing a bunch of clothing articles that people wear seems a little . . . I don't know. I just don't think I'd want Judge Yeary as my Family Feud partner (we asked 100 people "what part of the body would you most like to observe in evaluating their honesty." Doo-doo-doot "any part of the lower body." Dangit, Uncle Kevin).

Elsik v. State, No. PD-0703-23 (Tex. Crim. App. Nov. 27, 2024)

Attorneys. John Lamerson (appellate), Eric Flores (trial)

Issue & Answer. Are individuals who the prosecutor assumes are deported "unavailable" for purposes of hearsay exceptions relating to unavailable declarants? **No.**

Facts. The State convicted the defendant on 13 counts of human smuggling. The facts at trial showed that Agent Gonzales stopped the defendant in order to conduct a weight check on his vehicle. During this detention and ultimate arrest, the agent discovered the vehicle was weighed down by 13 individuals hidden in the bed of the truck underneath blankets. The State called Agent Gonzales to testify about these people's names, nationalities, and dates of birth. The trial court overruled the defendant's hearsay

objection, raising the State's failure to satisfy a hearsay exception by showing the unavailability of the declarants (the 13 allegedly smuggled individuals). The prosecutor simply responded that he assumed they were deported. The court of appeals found that the trial court erred but reversed only the convictions relating to the smuggling of minors based on harm analysis.

Analysis. "We decline the State's invitation to . . . adopt two per se evidentiary rules in this case." First, a prosecutor's assumptions are not a reliable basis for determining the admissibility of evidence. Second, deported witnesses are not categorically unavailable for purposes of Rule 804 (witness unavailable hearsay exceptions). Unavailability means "not able" to procure a witness through "reasonable means." Reasonable means requires more than making assumptions and doing nothing.

Ochoa v. State, No. PD-0745-23 (Tex. Crim. App. Nov. 27, 2024)

Attorneys. Jeromie Oney (appellate)(trial)

Issue & Answer. Is a juvenile's confession obtained in violation of due process when the magistrate required to advise him of his rights downplays the significance of the interrogation and the investigator makes promises of assistance in exchange for coming clean? **Yes, under these circumstances.**

Facts. The State convicted the juvenile defendant of kidnapping and aggravated sexual assault of a young child. At the time of the offense, the defendant was 14 years old. The defendant confessed to committing the offense during a misleading interrogation and juvenile magistration process (applicable to juvenile interrogations). The juvenile magistration and giving of juvenile *Miranda* rights (Tex. Family Code § 51.095) occurred only after the interrogation began. The magistrate editorialized the warnings, seemingly to the benefit of the defendant's interrogator. The magistrate advised the defendant that she was there to preserve his rights. The magistrate incorrectly informed the defendant that the ranger wanted to speak to him as a witness, not as a suspect. The magistrate downplayed the potential for the defendant's statements to be used as evidence. The magistrate downplayed the necessity of a lawyer. The magistrate encouraged the defendant not to be afraid of interrogation. Thereafter, interrogation resumed. The defendant's mother was not permitted to be present, and the defendant confessed only after the investigator also minimized the significance of confessing and made varying degrees of promises to help the defendant.

Analysis. The parties focus on the "positive promise" standard of *Garcia v. State*, 919 S.W.2d 370 (Tex. Crim. App. 1994)(when a police promise renders a confession involuntary) and whether the circumstances of this case fit within that standard or a potentially adjusted standard applicable to juveniles. The court does not need to resolve this more granular issue because the combination of misleading magistrate warnings and overbearing interrogation violated due process.

The due process requirement of voluntariness affords special protection to juveniles. A juvenile's lack of experience and maturity compared to an adult defendant is part of the totality of circumstances courts must consider. Here, Ranger Holland intended to downplay the seriousness of the situation and create a false sense in the defendant's mind that a confession would set him free.

Ranger Holland repeatedly told Appellant that he would "help him through this," suggesting that he would help obtain a favorable resolution for Appellant; that it was not his job to put teenagers in prison; that there was "no reason" Appellant should not be treated as a juvenile; and that Appellant was "not going to prison" or anything horrible like that. Ranger Holland also suggested repeatedly that the situation could be treated as a minor "mistake," an "accident," or a "bump in the road," but only if Appellant immediately confessed, otherwise things would go "bad" and he would likely be adjudicated as an adult. Ranger Holland put pressure on Appellant by reminding him, repeatedly, that M.G. was "talking" and that Appellant could not afford to wait even a couple of days to confess if he wanted "help." So long as Appellant confessed quickly, however, Ranger Holland expressed near certainty that Appellant would be treated as a juvenile and would receive lenient punishment (or possibly no punishment at all). And despite the fact that Ranger Holland acknowledged it was the job of the district attorney to decide what happened next, he also suggested with confidence that, if Appellant accepted responsibility and showed remorse, he would be "forgiven" and could remain in the juvenile system, rather than being criminally charged as an adult.

Additional "great weight" is given to the defendant's isolation during his interrogation. His mother was not invited into the interview room despite her protestations, and the magistrate's misleading advice may have led the defendant not to invoke the assistance of an attorney. These tactics may not be sufficient to invalidate the voluntariness of an adult confession, but "when deployed against a 14-year-old boy who lacks sophistication or maturity to appreciate the legal consequences to such serious conduct, can erode that child's free will."

Comment. Among the voices in my head is one that says, "don't be so critical; you're not that smart." I was super critical of the Second Court of Appeals' erroneous ruling in this case. Voice of modesty, take that! Other voices keep up the good work.

State v. Hradek, No. PD-0589-22 (Tex. Crim. App. Dec. 11, 2024)

Attorneys. Jim Darnell (appellate), Jeep Darnell (appellate), Cris Estrada (appellate), Dave Contreras (trial), Nicole Maesse (trial), Sara Priddy (trial)

Issue & Answer. A determination of prejudice under the *Strickland* standard for effective assistance of counsel is reviewed on appeal de novo. Does a de novo review give a reviewing court latitude to simply reweigh the credibility and impact of the evidence contrary to the determination of the trial court? **No.**

Facts. This case is a prosecution over the death of the defendant's child who was born six weeks early and had serious breathing problems, including sleep apnea. The defendant explained the death as related to these medical conditions. The State patched together some other indications that the child died upside down in a car seat. The focal point of the new trial was a recorded jail phone call that, once the trial court ruled admissible to show the defendant's cocaine usage, second-chair defense counsel asserted that the entire recording should be admitted.

In the 43-minute recording, Appellee referenced her job as an exotic dancer, cursed out the medical examiner and his findings, complained about the unfairness of her incarceration, and claimed that she was in jail for cocaine use rather than her baby's death. She said everyone was making her regret her son, and she wished she had never gotten pregnant and that her son had never been born. She complained about being in jail; she did not believe she had done anything wrong and was focused on getting out on bond. She relayed her plan to dye her hair and get a spray tan

when she got out of jail so no one would recognize her from news coverage of her case. She promised that she was "not going to go out and start dancing again," but she did not believe she could get a job because everyone had seen the case on the news. She dismissed her family's hardship in dealing with the situation and was concerned about being in jail, losing her son, being called a murderer, and having her picture on the news. She expressed fear that the State could increase the charges against her and said she was considering pleading guilty.

Appellee said she was "125% sure" that Colton was next to her the whole night and that she would have felt it if someone had moved him because she was a light sleeper. She asked her mother to send her photos of Colton and Bobby and to put money in Bobby's commissary account. Toward the end of the call, she expressed feelings for Colton and tearfully said she just wanted him back, but her sadness was short lived. The next minute she was no longer crying and was again asking for more money for herself and for Bobby.

[The defendant's mother] was frustrated with Appellee throughout the call. She expressed her love and support for Appellee but was sometimes dismissive, harsh, or angry. She told Appellee to stop listening to "jailhouse lawyers" and to follow her attorney's advice. She repeatedly admonished Appellee to tell the truth and take this seriously. She told Appellee to stop being so demanding. When Appellee mentioned that her jail friend charged with a more serious crime had been released on bond, [The defendant's mother] pointed out that the friend's victims did not die and reminded Appellee that her baby died. [The defendant's mother] pointed out Appellee's selfishness in complaining about unfairness and asked Appellee, "was it fair to Colton what happened?" She referred to the medical examiner's conclusion that Colton was upside down in the car seat when he died. [The defendant's mother] suggested that Appellee undergo a "psych eval" and said everyone thinks she is a murderer.

After the jury convicted, second-chair defense counsel admitted she had not reviewed the entire recording, was relying on an instruction from lead counsel and an assumption that he had, and articulated the objectionable content. The trial court granted a motion for new trial based on ineffective assistance of counsel (IAC). The court of appeals reversed and reinstated the conviction.

Analysis. The court of appeals applied a *de-novo* review of the trial court's ruling on ineffective assistance, and in particular, the prejudice prong. The court of appeals effectively reweighed the impact of the erroneously admitted recording vis-à-vis other evidence and reached a different opinion than the trial court. The court of appeals is correct, that prejudice in an ineffective assistance claim is reviewed de novo, but the trial court should be afforded deference on any underlying historical fact determinations. Here, the trial court's prejudice conclusion was based on its evaluation of the credibility and demeanor of new-trial witnesses and the impact of the recording. The trial court was in the best position to judge the impact of the recording because it not only heard but saw the testimony of the witnesses at trial. This, combined with objective weaknesses in the State's case, put the trial court's determination outside of the zone of abusing discretion within the zone of reasonable disagreement and

Dissenting (Keller, J.). The problem here is the assumption that most of the jail phone recording was inadmissible. It was not.

Comment. It appears Appellant's brief was written in WordPerfect and it looks (and is) great!

Steele v. State, No. PD-0427-24 (Tex. Crim. App. Dec. 18, 2024)

Attorneys. Alexander Bunin (appellate), Ted Wood (appellate), Terrance Jewett (trial)

Issue & Answer. Can an appellate court delete a DWI probation condition requiring a $100 payment to a women's shelter when the defendant did not object to the imposition of this condition when it was pronounced? **No.**

Facts. "This case is about $100." After the trial court placed the defendant on probation for DWI, the trial court ordered him to pay $100 to the Houston Area Women's Shelter. He did not object, but the court of appeals deleted the condition, nonetheless.

Analysis. A defendant waives any complaint about a condition of probation if he fails to object at the time it is imposed (so long as he is made aware of the condition in time to object at trial). The only exception to this rule is applied to conditions "that the criminal justice system simply finds intolerable and is therefore, by definition, not even an option available to the parties." The defendant relies on Article 42A.651's delineation of appropriate monetary conditions of probation as an absolute prohibition reviewable as a systemic error or a waivable-only right (reviewable without objection). However, mandatory statutory language does not necessarily give rise to a right immune from waiver. Because the defendant did not object to the condition, and because "[p]ayment to a women's shelter is neither intolerable nor antithetical to justice," nothing is preserved for appellate review.

Concurring (Yeary, J.). The court needs to write opinions like this in the framework of *Marin* rights: (1) absolute systemic non-waivable, (2) waivable-only, and (3) forfeitable.

Comment. Superficially, I think the opening to this case is kind of funny. "This case is about $100." Hell, it's funny, objectively. But something can be both funny and meaningful. Whereas Judge Keller looks at a case and may see a can of soup, I see the fine art of what we do as criminal defense lawyers. I like to picture myself in a gallery looking at this case on a wall, imagining Harris County politicians coming up with some new policy and someone saying, "the PD's office is going to kick us in the pants for this," and then choosing to do something a little less exploitative than they originally planned. Fecklessness is the other side of impunity.

Bradshaw v. State, No. PD-0577-23 (Tex. Crim. App. Dec. 18, 2024)

Attorneys. Jessica Freud (appellate), Abel Reyna (trial)

Issue & Answer. An old statute imposed a court cost of $133. A new statute imposes the same cost as $185. The new statute specifically states that the new cost shall be imposed based on the *offense date* (any conduct occurring or after January 1, 2020). A different statute generally states that all court costs are imposed according to the law on the *conviction date*. Which court cost statute controls in the case of a defendant whose *offense date* falls under the old statute but whose *conviction date* falls under the new statute? **The new statute.**

Analysis. "This case is about $52." The law requires the court to impose a court cost based on the law at the time of conviction. "It appears that the 2020 [effective date of the new statute] applies only to a subset of cases in which a defendant commits an offense and is convicted before 1/1/2020."

Concurring (Yeary, J.). Without more effort to reconcile the two statutes, the majority is "essentially reading the Transition and

Effective Date provision of the 2019 amendment into oblivion."

Comment. Same can of soup. Same comment.

3rd District Austin

***Love v. State*, No. 03-23-00281-CR (Tex. Crim. App.—Austin, Dec. 23, 2024)**

Attorneys. Janet Burnett (appellate)

Issue & Answer 1. Does a trial court need to provide a culpable mental state in the abstract portion of its jury charge in a prosecution for Continuous Sexual Abuse of a Young Child? **No.**

Issue & Answer 2. Is it an error to define the mens rea element of the Continuous Sexual Abuse of a Young Child as a nature of conduct offense rather than a result of conduct offense? **Yes, but harmless here.**

Facts. The State convicted the defendant of Continuous Sexual Abuse of a Young Child. Without objection, the trial court submitted to the jury a charge that omitted the culpable mental state from the application paragraph. The court also failed to identify the applicable knowing and intentional definition applicable to this result of conduct offense (nature of his conduct) (result of conduct)(circumstances surrounding conduct).

Analysis 1. The application section of the jury charge in this case instructed the jury to convict if it found beyond a reasonable doubt that the defendant committed two or more qualifying sexual acts against the victim without reference to any mens rea. Contrary to the defendant's argument, Continuous Sexual Abuse of a Young Child "has no mens rea element of its own; the applicable culpable mental states are those required for the commission of the constituent offenses." These predicate offenses are not elements but evidentiary facts, or manners and means, by which the actus reus element is committed. The abstract portion of the jury charge identified the culpable mental states for these predicate offenses.

Analysis 2. A trial court must tailor the definition of culpable mental state to the conduct elements of the charged offense (nature of conduct versus result of conduct versus circumstances surrounding conduct). Continuous Sexual Abuse of a Young Child is a nature of conduct offense (a person acts intentionally or knowingly with respect to the nature of his conduct or to a result of his conduct when . . .). The trial court's instruction that included a result of conduct definition was in error. However, "where no defense is presented which would directly affect the assessment of mental culpability, there is no harm in submitting erroneous definitions of intentionally and knowingly." The defendant argued to the jury that the victim had fabricated her allegations. He did not litigate his mental process in the commission of a sexual act against a young child.

***McDonald v. State*, No. 05-23-00419-CR (Tex. App.—Dallas, Nov. 14, 2024)**

Attorneys. Michael Mowla (appellate), Thomas Ashworth (trial), Daniel Lewis (trial).

Issue & Answer. The defendant was found incompetent to stand trial at various points before competency was restored sufficiently to try, convict, and sentence her to life without parole. Two psychologists testified regarding insanity. One testified the defendant did not believe her children would remain permanently deceased if she killed them. The other testified that the defendant still understood her conduct would result in legal sanctions. Did this record sufficiently support the jury's rejection of the defendant's insanity defense? **Yes.**

Facts. The defendant killed her daughters by asphyxiation. She was motivated by delusions that her ex-husband, her mother, and others were part of a sex trafficking ring that was subjecting her daughters to child pornography and planning on selling them into sex slavery. In her mind, it was a mercy killing to free her daughters from the abuse. Two separate forensic psychologists found the defendant incompetent to stand trial during various phases of the pretrial proceedings. The defendant pursued an insanity defense at trial, and the jury heard from the two psychologists. One testified that the defendant suffered from schizoaffective disorder, bipolar type, causing delusions, hallucinations, obsessions, mania, depression, and insomnia. According to the first psychologist, the defendant heard voices that told her the only way to save her children was to send them to heaven and that God would send them back to her. The second psychologist testified that the defendant was suffering from psychosis at the time of the offense but retained the ability to understand that her conduct was wrong and would result in legal sanctions. The second psychologist believed the defendant's act of turning herself in to the police after murdering her children reflected this conclusion.

Analysis. A reviewing court applies the civil standards of factual sufficiency when reviewing a jury's rejection of an insanity defense. This requires the court to review the evidence in a neutral light and reverse only when the evidence contrary to the verdict greatly outweighs the evidence supporting the verdict. Here, the question was whether the evidence greatly outweighed a conclusion that the defendant was sane—that she *did* know that her conduct was *wrong* (and in the context of insanity, wrong means *illegal*). Two experts seemed to agree that the defendant's actions were influenced by a serious mental health condition and episode, but at least one thought that the defendant still knew that what she was doing was wrong and illegal. Thus, the jury's rejection of the defense was not greatly outweighed by contrary evidence.

Comment. I don't know and am almost curious enough to research whether the defendant's insanity led to a belief in an affirmative defense. Alternatively, did the defendant believe that the legal sanctions would be lifted once her children came back to life?

8th District El Paso

***In re State*, No. 08-24-00378-CR (Tex. App.—El Paso, Dec. 9, 2024)**

Attorneys. Joe A. Spencer (trial)

Issue & Answer. May a defendant seek an *ex parte* order from a judge directing that the jail perform certain medical treatment and retain certain evidence? **No.**

Facts. At issue in this mandamus proceeding are three *ex parte* sealed orders requested by the defendant and granted by the trial court. One order prohibited the jail from giving certain medical treatment to the defendant, the other two were spoliation orders prohibiting the jail from destroying or altering surveillance tapes of the defendant or his housing location. The State filed the instant mandamus in response to defense counsel's motion requesting sanctions for the State's interference with confidential representation by collecting visitor logs and records from the jail to document defense attorney and investigator visitation of the defendant at the jail.

Analysis. *In re City of Lubbock*, 666 S.W.3d 546 (Tex. Crim. App. 2023) controls the disposition of this case. The CCA held that ex parte proceedings must be expressly authorized either by statute or by Constitutional interpretation. Because statutory authorization existed and because *Ake* and *Williams* had not been extended beyond the context of expert assistance and appointment, an ex parte order directing evidence produced by a third party was improper. The same rationale applies here. The trial court's order was improper.

12th District Tyler

***State v. Coleman*, No. 12-24-00104-CR (Tex. App.—Tyler, Oct. 31, 2024)**

Attorneys. Mark W. White III, Dick DeGuerin (appellee)

Issue & Answer. Article 2.125 allows the director of DPS to appoint up to 50 "Special Rangers" employed by Texas & Southwest Cattle Raisers Association (TSCRA) to "aid law enforcement in the investigation of theft of livestock or related property." Generally, a Special Ranger is not a police officer (except in the limited context of livestock theft). When a Special Ranger interrogates a suspect in a non-livestock case under the guise of being a law enforcement officer, is the resulting confession admissible? **No.**

Analysis. The Special Ranger extracted a confession from the defendant in violation of the law (impersonating a public servant).

At the suppression hearing, the trial court heard testimony that (1) Jeter was employed solely as a TSCRA cattle ranger when he interviewed Appellee; (2) no law enforcement officer or agency deputized Jeter; (3) when Jeter went to Appellee's residence, he wore blue jeans, boots, a dress shirt, a gun, and his TSCRA special ranger badge; (4) Jeter agreed that he appeared to be a law enforcement officer; (5) although Jeter told Appellee that he was a cattle ranger, he also told Appellee that he was "still a police officer" and described his law enforcement background; (6) Jeter asked Appellee if he knew why Jeter came to his home; and (7) when Appellee stated that he believed Jeter was at his home because of Doe's allegations regarding Sam, Jeter responded affirmatively. In addition, the audio recording indicated that although Jeter told Appellee that he was a cattle ranger at the beginning of their encounter, Jeter also discussed his law enforcement background with the Texas Rangers and the sheriff's department and told Appellee that he had "been in law enforcement a few days." Furthermore, the recording reflects that after Appellee's inculpatory statements, Jeter again told Appellee that he worked for the cattle rangers and clarified that he was retired from the Texas Rangers, but Jeter also stated, "I'm still a police officer."

The record supports the trial court's decision to grant a motion to suppress.

Comment. What a niche case. I'd say something like, "aren't you a special little ranger," but I think Jeep Darnell might tell me those guys would kick my butt.

13th District Corpus Christi/Edinburg

***Gutierrez v. State*, No. 13-24-00208-CR (Tex. App.—Corpus Christi, Dec. 16, 2024)**

Attorneys. William Pavord (appellate)

Issue & Answer. Is Penal Code 20.05(a)(1)(A) (knowingly using motor vehicle to transport an individual / smuggling persons) an unconstitutional statute because it is preempted by federal law? **An initial panel held that the pervasive federal statutory framework and dominant federal interest precludes even complementary state regulation. However, the court recently withdrew its opinion and en banc rehearing was granted. TBD.**

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

- 1st District Houston
- 2nd District Fort Worth
- 4th District San Antonio
- 6th District Texarkana
- 7th District Amarillo
- 9th District Beaumont
- 10th District Waco
- 11th District Eastland
- 14th District Houston

Abbreviations

AFV: assault family violence
AFV-S: assault family violence strangulation
CCA: Court of Criminal Appeals
CCP: Texas Code of Criminal Procedure
COA: court of appeals
IAC: ineffective assistance of counsel
MTA: motion to adjudicate guilt
MTR: motion to revoke probation
SCOTX: Supreme Court of Texas
SCOTUS: Supreme Court of the United States
TBC: trial before the court
UPF: unlawful possession of firearm by a felon

Concepts

Open plea: guilty plea and trial on punishment to a judge

Slow plea: guilty plea and trial on punishment to a jury

Factor Tests

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

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

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

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THURSDAY, JUNE 19

Crossing the Complainant in the "He Said, She Said, They Said" Case ..... Timothy Zerillo

Liberty Warriors

CCA Update ..... Hon. David Newell
Immigration Issues & Consequences ..... Marisa Feil
Legislative Update ..... David Gonzalez

Federal

Federal Updates ..... Hon. Henry Bemporad
Privilege Logs & Privilege Issues ..... Cynthia Orr

Liberty Warriors

Creative Motions in Limine ..... EG Morris
Warrants ..... Keith Hampton
Handling TB Discoveries ..... Sean Hightower

Federal

Staying Out of Trouble and Other Strategies in Federal White Collar Cases ..... David Gerger
Sentencing Guidelines ..... Joel Page
White Collar Defense Strategies: Stark, Kickbacks ..... Michael McCrum

FRIDAY, JUNE 20

Social Media/Digital Investigations ..... Brent Mayr

Technology

Digital Searches ..... Molly Bagshaw
Ethically Integrating AI ..... Rocky Ramirez
Understanding Phone/Dump ..... Damon Parrish
Defenses ..... Michael Heiskell

Drugs

Marijuana/Hemp ..... Don Flanary
Drug & Analogue ..... Joseph Hoelscher
Fentanyl ..... Angelica Cogliano

Defending Liberty

Search & Seizure ..... Michael Gross
Extraneous Matters ..... Catherine Burnett
Jury Selection ..... Mark Stevens

Defending Liberty

Ethical Advertising ..... Stephanie Stevens
Protective Orders ..... Sam Bassett
Grand Jury PTI ..... Dwight McDonald

SATURDAY, JUNE 21

Supreme Court Update ..... Gerry Goldstein
Valuing Sanity ..... Dr. Kelly Jameson
Closing ..... Shaun Kent

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