TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

VOICE

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Texas Criminal Defense Lawyers Association

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VOICE
FOR THE DEFENSE
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Features

Columns

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

July

July 3
Declaration Reading

July 8-13
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
TCDLA, TCDLEI, & CDLP Orientation
South Padre Island, TX

July 21
CDLP | Mindful Monday - Motivational Interviewing
Webinar

July 23
TCDLA | New Lawyer – Building Trust With Clients
Webinar

August

August 6
CDLP | Core Concepts for Criminal Defense Lawyers
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

August 29
TCDLA | Financial Friday - Business Fundamentals: Taxes
Webinar

September

September 4
TCDLEI Board Meeting
Zoom

September 4-5
TCDLA | Beating the Rap: Trial & Motion Practice
Galveston, TX

September 5
TCDLA Executive & Legislative Committee Meetings
Galveston, TX

September 6
TCDLA Board & CDLP Committee Meetings
Galveston, TX

September 10
CDLP | Full Day Crimmigration: A Program for the Defense *w/ SBOT Immigration Section*
Webinar

September 10
TCDLA | New Lawyer – Courthouse Etiquitte
Webinar

September 12
TCDLA | Financial Friday - TBD
Webinar

September Continued

September 15
CDLP | Mindful Monday - Debiasing the Law: How Understanding Cognitive Biases Leads to a More Just Legal System
Webinar

September 17
Constitution Day

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

September 19
CDLP | Guardians of Sacred Justice
Fredericksburg, TX

September 26
CDLP | Guardians of Sacred Justice
Corpus Christi, TX

October

October 8
TCDLA | New Lawyer – What I Wish I Knew Before Starting My Own Practice
Webinar

October 9
CDLP | Bill Habern Corrections & Parole
Houston, TX

October 10
CDLP | Juvenile Mental Health
Houston, TX

October 10
CDLP | Guardians of Sacred Justice
Edinburg, TX

October 10-11
CDLP | 31st Annual Judge David C. Guaderrama El Paso Criminal Law
Ruidoso, NM

October 22-23
CDLP | 13th Annual Harris County PDO 10-Hour CLE *w/ HCPDO*
Houston, TX

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

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

October 24
CDLP | Guardians of Sacred Justice
Laredo, TX

November

November 6-7
TCDLA | 21st Stuart Kinard Memorial Advanced DWI
San Antonio, TX

November 14
TCDLA | Financial Friday – Year End Tax Strategies
Webinar

November 17
CDLP | Mindful Monday – TBD
Webinar

December

December 4-5
TCDLA | Defending Those Accused of Sexual Offenses
Round Rock, TX

December 5
TCDLA Executive & Legislative Committee Meeting
Round Rock, TX

December 6
TCDLEI & TCDLA Boards & CDLP Committee Meetings
Round Rock, TX

December Continued

December 12
CDLP | 18th Annual Hal Jackson Memorial Jolly Roger Criminal Law
Denton, TX

December 15
CDLP | Mindful Monday – TBD
Webinar

2026

January

January 7
CDLP | Prairie Pups *w/ LCDLA*
Lubbock, TX

January 8-9
TCDLA | 45th Annual Prairie Dog
Lubbock, TX

January 14
TCDLA | New Lawyer – HR Basics
Webinar

January 23
CDLP | Guardians of Sacred Justice
Waco, TX

January 28-31
TCDLA | DWI/SFST/DRE/ARIDE Defense Super Course
Dallas, TX

January 28
TCDLA | White Collar
Webinar

January 29
TCDLA | Family Violence
Webinar

January 29-30
CDLP | Mitigation Bootcamp
Dallas, TX

January 30
TCDLA | Drug
Webinar

February

February 4-8
TCDLA | Big Sky - President's Trip
Big Sky, MT

February 5-6
TCDLA | Federal Law
New Orleans, LA

February 5-6
TCDLA | Criminal Law
New Orleans, LA

February 5
CDLP | Appeals
Houston, TX

February 6
CDLP | Capital
Houston, TX

February 18
TCDLA | New Lawyer – TBD
Webinar

February 19-20
CDLP | MAC Training
Austin, TX

February 19
CDLP | Veterans
Dallas, TX

February 20
CDLP | Indigent Defense
Dallas, TX

February 26
TCDLEI Board Meeting
Zoom

February 27
CDLP | Career Pathways
Zoom

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

PRESIDENT'S MESSAGE

What Motivates You?

NICOLE DEBORDE HOCHGLAUBE

One of the responsibilities of TCDLA's President is writing this foreward to The Voice throughout the year. This message is the first of my presidency, and I wanted to take this opportunity to share with you what it has meant and continues to mean to me to be a part of our TCDLA family.

When I joined the private bar in 2002 after working for almost a decade as a prosecutor, I wondered what it would be like to be on my own with so much direct responsibility to people facing what, in many instances, would be the most challenging times of their lives. I wondered what I would do without the built-in office support network I had come to know and to lean on. Who would I turn to for my questions and to brainstorm about a case? It felt like making the leap from working for a predictable paycheck with predictable and more general responsibilities to an unpredictable solo, criminal defense practice so deeply and individually important to the clients I would be serving was a wild risk I would be navigating alone.

I thought I knew the basics like how to try a case and how to work up a case. I thought I understood what was at stake in a criminal courtroom and the extent of the impact of what takes place there. I thought I knew what it took to get to the facts and the law that matter and make a difference when it counted. I thought the scales of justice must have an automatic tilt toward truth and justice and fairness. I thought working hard enough and long enough would almost always bring about the right conclusion for my clients and that I could muscle through an unjust situation to achieve justice for the people counting on me. It turned out, there was a lot I did not know.

While hard work, tenaciousness and a passion for helping clients is a great start, as all who have been down this path learn, I was in for quite a surprise both about the challenges and the rewards of being a criminal defense lawyer. Many of the things I thought I knew turned out to not be so at all – some things for better and some for worse. Fortunately, one of my biggest surprises in my young practice was quickly learning I had not, in fact, struck out on my own, but that I had instead joined a wonderful, supportive family of brothers and sisters who were hard at work saving lives and families one client at a time. These same brothers and sisters were there to share in the victories and in the disappointments in a way that would continue to help me grow as a lawyer but also as a person.

I found myself welcomed into the TCDLA family with a network of mentors and colleagues at the ready to offer support, brainstorming, advice, or sometimes just an ear. I went to TCDLA's unparalleled CLE's to learn what it meant to work up and try a case for a human being in the cross hairs of a government accusation. Not only did I get to learn from the masters teaching these courses, but these same wonderfully brilliant teachers and mentors were quick to offer their time and friendship. Mentors and colleagues freely shared everything from business tips, to briefing, to their valuable time. In what could be such a competitive, ego driven field, I found instead the hearts of champions willing to give all they could to help. Their help and kindness was multiplied through the mentoring, networking and materials banks offered by them through TCDLA's channels and programs. The time they took to help me allowed and continues to allow me to help my clients. It has been a gift to be able to pay some of that TCDLA tradition forward through the various committees and through Strike Force. I have personally witnessed the most high-profile lawyers drop everything to answer a member's call for Strike Force help, sometimes driving hours to be in a court to provide legal support to a member in need.

When I joined TCDLA in 2002, I was a young, single, lawyer with a solo practice just setting out on this adventure. Since then, my husband and I have raised three children and grown our practice with you, the TCDLA family, by our side. My children grew up around the amazing friends and colleagues I have come to know through TCDLA. They have seen what it means to stand up for someone who may be unpopular, even loathed, in the face of impossible odds because it is right and necessary to preserve the rights we all hold so dear. They have watched you, friends, as you do this often at significant expense to yourselves personally. So, have I. We talk about you at our dinner table. Because of you, I am a better lawyer. Thank you for the energy, support and motivation you bring to do this "job" that is so much more than a job and for your continued friendship. Thank you for motivating me to be and do the very best I can. It is my hope that throughout my year as president, you will find what motivates you to feel welcomed into our TDCLA family, to be your best and to find the joy and rewards in this often challenging, but oh so meaningful criminal defense path we walk together.

Gratefully,

Nicole DeBorde Hochglaube

Why the Declaration Still Matters – and Why You Should Read It Aloud This July

MELISSA J. SCHANK

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

***— Thomas Jefferson**, The Declaration of Independence, 1776*

Every Fourth of July, members of the Texas Criminal Defense Lawyers Association (TCDLA) gather across the state for a tradition that blends patriotism with purpose — the public reading of the Declaration of Independence. From courthouse steps to small-town squares, defense lawyers raise their voices to remind the public (and ourselves) why we do what we do.

Why read the Declaration? Because it's not just a historical document — it's a powerful, living statement of liberty, individual rights, and resistance to government overreach. As criminal defense attorneys, we stand on the very principles laid out in that 1776 document: the right to due process, the idea that government derives its power from the consent of the governed, and that tyranny must be challenged.

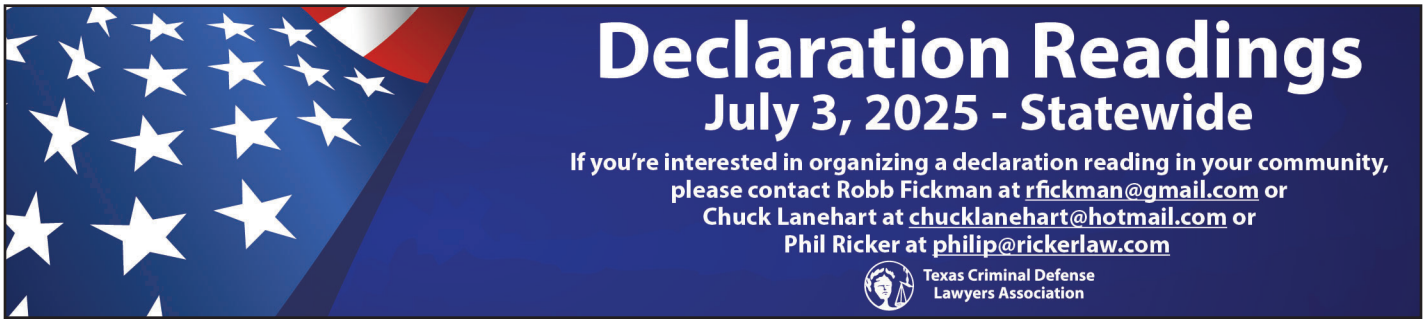
There's something electric about speaking those words aloud. It's easy to forget that the Declaration was once considered radical — even treasonous. That spirit still resonates today, especially for those of us who defend the accused against the machinery of the state.

A bit of history adds flavor to the tradition: In Boston, each year since 1776, the Declaration has been read aloud from the balcony of the Old State House, just as it was on July 18, 1776, to a cheering crowd of revolutionaries. It's a reminder that the words of freedom gain their power not just from being written — but from being spoken. While visiting Boston for our President's trip it was exciting to visit the historic building!

TCDLA's statewide readings are growing every year. It's fun, it's meaningful, and it's a chance to connect with your community in a visible, impactful way. So, if you haven't joined in yet — this is your year. Dust off the Declaration, find your nearest courthouse, and help us keep the spirit of independence alive.

Look at our readers last year and sign up! https://www.tcdla.com/TCDLA/July_4th_Readings.aspx

After all, what better way to celebrate freedom than by reading the very words that declared it?



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EDITOR'S COMMENT

SPIRIT RENEWED

JEEP DARNELL

By the time you read this column, this year's iteration of Rusty will have been completed and my friend Nicole DeBorde Hochglaube will have been sworn in as our newest President. I have to say, writing about something that will happen in the future is always awkward, but it fills my heart with a sense of anticipation and joy to think about one of my favorite weeks of the year coming just around the corner. Sure, I love seeing so many of my friends, my brothers and sisters in the fight we fight, over the course of Rusty each year. But, even more, I love being engrossed with the camaraderie of happiness and the overwhelming renewal of spirits that seems to permeate the entire seminar. Each of us is overwhelmed daily with our caseloads. We all carry the stress of the consequences our clients face, and we all face the realization that many of our clients are guilty, and we cannot change that fact. Our work is hard, and it can be both mentally and physically trying. I am sure I am not alone in feeling some days like I am just beating my head against a wall.

That's what I love about Rusty, a thousand lawyers who all feel the same stress day in and day out have a chance to come together and renew our collective spirits with a reminder that we do this job, not for the wins and losses, but because we believe that the Constitution and the Bill of Rights matter, that lives matter, and that the inalienable rights discussed in the Declaration of Independence matter; even for the worst people in society and for the people accused of the worst and most heinous of crimes. We all seem to collectively remember that the losses are hard, but it's the fight that matters. We took an oath to protect the Constitution, not just for the innocent clients or the clients with the most money or the clients who fit the most popular political profile. We protect the Constitutional rights of every man, woman, citizen, and non-citizen that we represent so that those rights are preserved for all of us. The spirit tank to stay in the fight and take our lumps gets a fill up every June in San Antonio.

If you've never been to Rusty, I ask you to please start making plans next year to attend. I promise you will never regret attending Rusty and basking in the renewed spirit of so many who understand precisely the challenges you face each day.

Be safe,

Jeep Darnell

2025–2026 Membership Directory
Order Form/Information Update

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

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

2025–2026 Membership Directory
Order Form/Information Update

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***to get a birthday coupon**

How sentences imposed during a pending federal appeal can turn an appellate "win" into a loss on remand: *United States v. Garza*, 127 F.4th 954 (2025)

KRISTIN KIMMELMAN

As my April 1 deadline approached for this article, Second Amendment issues were top of mind given recent decisions by the Fifth Circuit holding that felon-in-possession prosecutions are constitutional if:

- prior convictions were for theft-related convictions;[1]
- prior convictions involved violence, even without a firearm;[2] and
- the defendant was on supervised release for a felony conviction when he possessed the firearm.[3]

But I worried that an article about Second Amendment updates[4] would be dated, or at least incomplete, by the time this June issue came to print. The Fifth Circuit will hear arguments in late April about prior convictions for drug trafficking and failure to pay child support.[5] And maybe the Supreme Court will let us know if it will weigh in on this issue in the next term.[6]

So instead, this article focuses on an important issue of first impression that bridges the worlds of federal and state criminal defense, and happens to come up often in firearms cases: at resentencing, can the district court consider new sentences when calculating the Sentencing Guidelines range? Yes. *United States v. Garza*, 127 F.4th 954 (2025). Put simply, an appellate win could lead to a higher sentence on remand if the client picked up intervening sentences.

Garza in brief.

Garza was convicted in federal court of being a felon in possession of a firearm. On appeal, he challenged two aspects of his Sentencing Guidelines calculation: (1) a 4-level sentencing enhancement for possessing a firearm in connection with another felony offense, and (2) an elevated base offense level for possessing the firearm in close proximity to a large-capacity magazine.

The Fifth Circuit agreed with Garza (a win!), vacated the 75-month sentence, and remanded for proceedings consistent with its opinion. The opinion specified that the Government could "present additional evidence as to whether the firearm and magazine found in Garza's vehicle were compatible." *Id.* at 955.

On remand, the PSR removed the 4-level enhancement. After an evidentiary hearing, the district court concluded that the elevated base offense level applied because the firearm and magazine were compatible.

The "twist": between the original sentencing and the resentencing, Garza received additional criminal convictions amounting to 7 new criminal history points. *Id.* at 956. The probation officer added those new points, increasing the advisory Guidelines range to 77 to 96 months.

Garza objected to scoring those new convictions, arguing that doing so conflicted with the Guidelines and exceeded the scope of the mandate. The district court overruled the objections and sentenced Garza to 87 months—a year longer than he had received originally.

The Fifth Circuit affirmed. The Court joined the majority of circuits to interpret U.S.S.G. § 4A1.1 as including sentences imposed prior to resentencing. *Id.* at 956. The Court also held that the mandate rule did not prevent the district court from considering Garza's intervening sentences that did not exist at the time of his original sentencing. *Id.* at 957.

Effect of *Garza*.

In sum, if a defendant gets convicted and sentenced on Case Y while Case X is on appeal, and the defendant

1 *United States v. Schnur*, __ F.4th __, No. 23-60621, 2025 WL 914341, at *5 (5th Cir., Mar. 26, 2025) (robbery and burglary); *United States v. Diaz*, 116 F.4th 458, 471 (5th Cir. 2024) (vehicle theft).

2 *Schnur*, 2025 WL 914341, at *4 (aggravated battery causing great bodily injury); *United States v. Bullock*, 123 F.4th 183, 184 (5th Cir. 2024) (aggravated assault and manslaughter).

3 *United States v. Giglio*, 126 F.4th 1039, 1044 (5th Cir. 2025); *United States v. Contreras*, 125 F.4th 725, 732 (5th Cir. 2025).

4 The Fifth Circuit has also held the statute prohibiting receipt of a firearm while under felony indictment, 18 U.S.C. § 922(n), is not facially unconstitutional. *United States v. Quiroz*, 125 F.4th 713, 715 (5th Cir. 2025). But the Court remanded challenges to other statutes for further development. *United States v. Daniels*, 124 F.4th 967, 978 (5th Cir. 2025) (vacating 18 U.S.C. § 922(g)(3) conviction because jury was not instructed to find whether Daniels was intoxicated, and remanding for further proceedings); *United States v. Perez-Gallan*, 125 F.4th 204, 217 (5th Cir. 2024) (reversing order dismissing 18 U.S.C. § 922(g)(8)(C)(ii) as facially constitutional and remanding for consideration of the as-applied challenge); *United States v. Connelly*, 117 F.4th 269, 283 (5th Cir. 2024) (affirming dismissal of § 922(g)(3) charge as unconstitutional as applied to unintoxicated individual but reversing the dismissal of 18 U.S.C. § 922(d)(3) as facially unconstitutional).

5 *See United States v. Kimble*, No. 23-50874 (5th Cir.); *United States v. Cockerham*, No. 24-60401 (5th Cir.).

6 Viable petitions for writ of certiorari are pending in several felon-in-possession cases *See, e.g.*, *United States v. Diaz*, No. 24-6625 (U.S.); *United States v. Moore*, No. 24-968 (U.S.).

"wins" the Case X appeal and goes back to district court for resentencing, the Case Y sentence can now add criminal history points and potentially increase his criminal history category and advisory Sentencing Guidelines range.

Yep, the appellate "win" could end up hurting the client and resulting in a higher sentence. And, at least in some parts of Texas—such as Midland and San Antonio—these simultaneous prosecutions are super common.

What to do?

For the federal trial attorney: gather information while the federal case is still active in the district court about the status of any pending cases and the possible or even likely outcomes of those cases. A global resolution of the charges would probably be ideal. But even if that's not possible, key information can be gathered:

- Is the pending state case for relevant conduct with an anticipated state sentence? Get that evidence into the record, ask for the federal sentence to run concurrently, and (if pre-sentence custody time will not be credited by the Bureau of Prisons) ask the court to adjust the sentence downward accordingly. *See* U.S.S.G. § 5G1.3(c); *United States v. Taylor*, 973 F.3d 414, 419 (5th Cir. 2020).
- If the client wants to appeal and will be represented by a different attorney, give that new attorney any information you have about pending cases.

For the state trial attorney: ask the client if his federal case is on appeal and keep the federal appellate attorney apprised of developments in the state trial case—especially of any offers and the ultimate sentence.

For the federal appellate attorney: talk to your client about any proceedings that have happened since the federal sentencing. The presentence report's "pending cases" section can clue you into these issues, but PSRs are imperfect, and the client may have picked up a new charge since sentencing.

Get records from those post-sentencing cases.

Discuss with your client any possibility of getting a worse sentence on remand so that they can make an informed decision about whether to continue the appeal.

Frame your argument and requested relief, as best you can, in a way that does not result in a remand for further proceedings that could result in resentencing.

Just when the appellate minefield seemed difficult enough to navigate, new obstacles arise. Good thing you are up to the challenge.

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

ETHICS

Beyond *Padilla*: Detained Noncitizens, and Mental Health

AGLAE EUFRACIO

While *Padilla* advice alone can be life changing for noncitizens, their criminal proceedings are only half the battle. *See Padilla v. Kentucky*, 559 U.S. 356 (2010) (holding that criminal defense attorneys must advise noncitizen clients about the immigration consequences of a guilty plea). In criminal proceedings, noncitizens, like citizens, are entitled to an attorney to represent them in those proceedings even when they cannot afford an attorney. However, noncitizens in immigration removal proceedings, while they are entitled to the counsel of their choice, legal representation cannot be at the expense of the government. *See* INA § 240(b)(4)(A). At the end of December 2023, there were approximately 3 million noncitizens in removal proceedings, but only thirty percent of noncitizens had representation in their immigration proceedings. Transactional Records Access Clearinghouse, Too Few Immigration Attorneys: Average Representation Rates Fall from 65% To 30% (Jan. 24, 2024), https://trac.syr.edu/reports/736. Furthermore, only fourteen percent of noncitizens in immigration detention were able to obtain legal representation. American Immigration Council, Access to Counsel in Immigration Court 2 (Sept. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf. This means that the burden of representation falls on immigrant-rights nonprofits, which, even if they wanted to, do not have the capacity to represent every single noncitizen that needs *pro* or *low bono* representation. The reality is that, in most cases, Public Defenders are the last defense attorneys noncitizens speak to before entering their immigration removal proceedings and, potentially, before they are deported. While noncitizens are a vulnerable subset of the population, noncitizens with mental health conditions are particularly more vulnerable in an immigration system that fails them time and time again. Without having to become immigration attorneys, Public Defenders can fruitfully protect and safeguard the rights of detained noncitizens with mental health conditions in their immigration cases beyond their *Padilla* duties. The "how" is simple.

There is one exception to the prohibition of the right to a court-appointed immigration counsel. Noncitizens with disabilities and mental health conditions can be afforded appointed legal representation through the National Qualified Representative Program (NQRP). *See U.S. Dep't of Justice Executive Office for Immigration Review, Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented [Detained Noncitizens] with Serious Mental Disorders or Conditions* (Apr. 22, 2013), https://www.justice.gov/eoir/pr/department-justice-and-department-homeland-security-announce-safeguards-unrepresented#:~:text=The%20policy%20entails%20implementation%20of,detention%20facility%3B%20working%20with%20non%2D. But while this Nationwide Policy aims to give noncitizens with mental health conditions a semblance of a full and fair immigration hearing, it falls short of that, and many obstacles exist before a noncitizen is afforded the protections under the policy.

For the sake of putting the criminal justice and the immigration system into perspective, the criminal justice system, while it has its many flaws, provides more accessible avenues for an individual with mental health concerns to be recognized, diagnosed, treated, and restored so that they can participate in their criminal proceedings. Anyone within the criminal justice system like a judge, guard, or criminal defense attorney, who notices that an accused individual is showing signs that they are incompetent to continue with their criminal proceedings, can alert the criminal court about their concerns. A judge then will order a mental health evaluation for the individual. Once a mental health evaluation is completed, through a prove-up hearing, the judge will make a formal finding of competency and institute the recommendations outlined in the mental health evaluation by the mental health professional. The focus then shifts to getting the individual treated and restored so that they can continue with their criminal proceedings. Once an individual is restored, their misdemeanor charges, except for Driving While Intoxicated (DWI) charges, can be dismissed, and felony charges can be handled through a Mental Health Diversion Program. Furthermore, Mental Health Diversion Programs are designed to give individuals with mental health concerns realistic opportunities to complete the program even if they cannot fully comply with the requirements of the program. Of course, all these steps are guided and handled by a criminal defense attorney like a Public Defender.

In contrast, detained noncitizens with mental health concerns in immigration proceedings have to navigate even

the first step of recognition on their own. An unrepresented noncitizen with mental health concerns can be identified through immigration detention staff at intake processing, a legal service provider servicing the detention center, or the immigration court. During intake processing, immigration detention staff briefly conduct health screenings on newly detained noncitizens. However, these health screenings are often inadequate since they are not thorough or have language and cultural barriers. Some detention centers have Legal Service Providers that conduct Legal Orientation Presentations (LOP) for the benefit of noncitizens. Some of these orientations include brief legal screenings to better assist and inform noncitizens about potential immigration relief. If a Legal Service Provider notices that a noncitizen is showing signs of a mental health condition or incompetency, they can appear as a *Friend of the Court* to notify the immigration judge about their observations. While this is great, Legal Service Providers often do not have the capacity to fully represent these noncitizens in their immigration removal proceedings. They are also seeing hundreds of noncitizens daily, and they may not have the capacity or staff to thoroughly screen for mental health concerns. Furthermore, a noncitizen on their own can also disclose their mental health conditions to the immigration judge but, assuming that the noncitizen can articulate the issues they are struggling with, a self-report allows the immigration judge to consider the noncitizen's credibility. While at first glance, a credibility consideration is not out of the ordinary, an immigration judge can consider minor immaterial facts disclosed and entirely dismiss the noncitizen's self-report and deem them competent to continue with their proceedings without any safeguards. *See* INA § 240(c)(4)(C). Additionally, an immigration judge has to "take measures to determine whether a noncitizen is competent to participate in proceedings" when a noncitizen exhibits an indicium of incompetency during their immigration proceedings. *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011). However, immigration judges have wide discretion in how they assess competency as there is no set measure. *Id*. From my experience, some immigration judges are resistant to fully and fairly evaluate a noncitizen's competency, and some immigration judges do not even order Mental Health Evaluations, while others accept a noncitizen's statement that they believe they can continue with their removal proceedings. In essence, detection, recognition, and a *Matter of M-A-M-* hearing (i.e., competency hearing) are difficult to achieve for a nonrepresented detained noncitizen. So, how can these noncitizens obtain appointed representation through the NQRP, and what can their Public Defenders do about it when they are not the noncitizen's immigration attorney?

When a Public Defender is representing a noncitizen with an ICE detainer, at the conclusion of criminal proceedings, the Public Defender can inform the immigration court or ICE about the noncitizen's mental health condition. In fact, large Public Defender's Offices in Texas, like Dallas, Harris, Bexar, and Travis, already have immigration attorneys on staff, who can assist in filing the Third-Party Notification (TPN) with the immigration court or notifying ICE. If the noncitizen has a pending case with the immigration court, a Public Defender can draft a TPN letter to the immigration court with jurisdiction over the noncitizen's case. This ensures that the immigration court receive a credible report of mental health concerns for a noncitizen. The TPN can be short and simply state the observations, symptoms, or diagnosis that the Public Defender noticed or became aware of during their representation and interactions with the noncitizen. It should avoid any facts relating to specific criminal matters since mental health and criminal history can negatively affect a noncitizen's immigration case. The TPN can be accompanied by any supporting documentation like a short medical report that discloses a medical diagnosis, but the TPN should not have any police reports or incriminating documents with it. Once the TPN is sent to the immigration court, the Public Defender can notify ACACIA Center for Justice that they filed a TPN. ACACIA, being the immigrant-rights nonprofit with the NRQP contract with the Executive Office for Immigration Review (i.e., the immigration courts), can track and ensure that the immigration judge follows through with a mental health inquiry and appoints an NQRP representative. When a noncitizen does not have a pending case with the immigration court, the Public Defender can notify ICE regarding the noncitizen's mental health concerns. Much like the TPN, the notification to ICE should be brief and include specific facts and observations relating to the noncitizen's mental health, but it should not include police reports. While most defense attorneys are reluctant to share any type of information with ICE, ICE is obligated to inform the immigration court about a noncitizen's mental health, so in this case, the communication would be appropriate.

A TPN or notification to ICE can ensure that an NQRP representative is appointed to a noncitizen's immigration case. An NQRP counsel can then obtain an appropriate mental health evaluation, ensure that an immigration judge conducts a fair *Matter of M-A-M-* hearing, require that the judge articulate the reasoning for their competency finding and acceptance or denial of specific safeguards. *Matter of M-A-M-*, 25 I&N Dec. at 474. Some safeguards include: appointing counsel, as discussed above, requiring special considerations for service of Notice to Appear and pleadings to determine removability, waiving the noncitizen's appearance in court, allowing the appearance of a family or friend on behalf of the noncitizen, granting continuances to seek treatment, developing the record like allowing counsel to lead the noncitizen during direct examination, considering mental health as a mitigating factor in certain forms of relief, administratively closing or terminating removal proceedings in cases where the competency issues are so serious that they prevent due process or raises ethical concerns for counsel, and conducting bond hearings every six months. *Id.* at 481-83. Appointed counsel and safeguards

in immigration proceedings are imperative since, unlike in criminal proceedings, immigration proceedings must continue despite a finding of incompetency. *Id.* at 479. After all, detained noncitizens with counsel were four times more likely to be released on bond, eleven times more likely to seek relief like Asylum, and twice as likely to gain deportation relief than nonrepresented noncitizens. American Immigration Council, Access to Counsel in Immigration Court 2-3 (Sept. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

Without ignoring the fact that Public Defenders already have a lot of obligations and responsibilities, notifying immigration authorities about a noncitizen's mental health concerns is a relatively small task and it can make the difference between a summarily deportation hearing or a full and fair hearing with a statistically higher chance to stay in the United States. So, while Public Defenders are not their clients' immigration attorneys, they sure can be a significant force for a noncitizen with mental health issues.

Aglae Eufracio *is an Assistant Public Defender - Immigration Specialist with the Dallas County Public Defender's Office, where she focuses on crimmigration analysis and advises noncitizens and their criminal defense attorneys on the immigration consequences to criminal charges and convictions. Prior to this, she was a Senior Staff Attorney at RAICES – Dallas, where she represented noncitizens facing deportation and sought Asylum and humanitarian protections for her clients. She also had her private practice in Brownsville, Texas, where she is originally from, representing noncitizens subject to the dehumanized Migrant Protection Protocols (MPP) program. Before opening her private practice, she was Clinical Fellow at St. Mary's University Immigration and Human Rights Clinic in San Antonio, Texas. She received her J.D. from St. Mary's University School of Law in 2016 and has been a fierce immigrant's rights advocate and immigration attorney since then. She can be contacted at* Aglae.Eufracio@dallascounty.org *or 945-500-2901.*

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TCDLA STAFF SPOTLIGHT

CLE Director
Meredith Pelt

Native State: Texas

Zodiac Sign: Virgo

Favorite Color: Sage Green

Favorite Animal: Cat

Hobbies: Reading, Walking, Coloring, Latch Hooking, & Listening to Podcasts

Fun Fact: One of her nicknames is beaver because her last name is pelt

Meredith Pelt graduated from the University of Texas at Austin in May 2022 with a BA in International Relations and Global Studies and Geography. She is a native Texan born in Dallas, and has lived in Austin for 7 years now. This position at TCDLA started her career, and she loves to tell people this is her very first "big-girl job"! In her free time, she enjoys hanging out with friends, finding new bars and restaurants to spend money at, walking around, practicing yoga, reading, and watching movies.

BEYOND THE CITY LIMITS

Federal Appeals 101 for the Rural Practitioner

CONVERSATION WITH DEAN WATTS & J. MATTHEW WRIGHT

Members of the Rural Practice Committee

As a rural practitioner, those unacquainted with federal appeals may find the process daunting - like trying to assemble an Ikea bookcase with the instructions in Swedish.

In order to help advise rural practitioners about federal appeals, I reached out to J. Matthew Wright, who works as an Assistant Federal Public Defender in the Northern District of Texas, so that rural practitioners can understand the basic nuts and bolts of federal appeals.

Matthew, the first question I wanted to ask is what are the main differences between state and federal appeals?

"The biggest differences in appeals arise from differences in sentencing law and procedure. In both federal and state court, most convictions are the result of guilty pleas, with a far smaller number of convictions coming after jury or bench trials. But in federal court, there will always be a separate, contested sentencing hearing. Even when the prosecution and defense agree about what the sentence should be, there will still be a separate sentencing hearing where the court will decide whether to accept that agreement or follow that recommendation. More often, the parties disagree about what the sentence should be, so they will fight about how to apply the sentencing guidelines and then fight more about whether the court should follow the guidelines or sentence outside that recommendation.

At the sentencing hearing, the judge will make a series of rulings that could give rise to an appeal. Usually, the statutory range (including both the statutory maximum and any mandatory minimum) will be established by the guilty plea or the trial verdict. But there are some types of cases where the judge will make rulings at sentencing that will determine the statutory range of punishment.

In every sentencing, the court will have to correctly calculate the "advisory" sentencing guideline range, which sometimes involves vigorous disputes about the law or the facts. But even where the defendant raised no objection to the guideline range, the appellate court can review the sentencing rulings for "plain error." Once the court adopts the final guideline range, it will then decide whether to sentence within, above, or below that range either as a "departure" authorized by the guideline manual or a "variance" based on the statutory sentencing factors. Any or all of these steps can give rise to an appeal.

Another difference I have noticed is the way the appellate courts respond to a waiver of appellate rights. From what I understand about state court, the judge must certify whether the defendant has the right to appeal a sentence or a pretrial ruling, and if the plea agreement includes a waiver of the right to appeal, the appellate court will immediately dismiss the case without waiting for a brief.

In federal court, the appeal goes all the way through the briefing process, even if the defendant has waived appellate rights. Some issues are not waivable at all, and the court will decide on direct appeal whether the waiver of appellate rights was knowing, intelligent, and voluntary.

Finally, the "sentence" in federal court will typically include a term of imprisonment followed by a term of supervised release to follow. Federal supervised release is like probation or parole—my clients describe all of three of these as being "on paper"—because the defendant must report to a probation officer, submit to drug tests, and comply with a variety of conditions. But unlike parole or probation, supervised release is not an *alternative* to imprisonment. It's an *additional punishment* after the initial prison term is complete. Other components of the sentence include a fine, forfeiture of money or property, and restitution. Any one of these components might give rise to an appeal."

So, let's say that your client has just been sentenced by a federal judge and wants to appeal. What appellate documents do you have to file and what are the deadlines? If you are appointed, should you also file a motion to withdraw and ask for another attorney to be appointed?

"The most important thing to do is file a notice of appeal within 14 days of the entry of judgment. I tell all of my friends, and most of my enemies, that they should try to meet with the client in person after the sentencing hearing and get the client to indicate, in writing, whether she wants you to appeal or not. Of all the various claims of ineffective assistance of counsel that are raised at the post-conviction stage, the type that most often results in an evidentiary hearing is "I told my lawyer I wanted to appeal, and he refused." It's always better to have contemporaneous documentation, signed by the client, about her preferences regarding the appeal. But either

way you need to file the notice within 14 days after entry of judgment, which usually happens the day of sentencing or within a couple of days after that day.

If you were appointed because the client was indigent, then you will not have to pay a filing fee for the appeal. If you were retained, your client will generally have to pay the filing fee or move for leave to proceed *in forma pauperis* on appeal. Once the appeal is docketed, the Court of Appeals will notify you of the deadline to order transcripts and make payment arrangements with the court reporter(s). If the client is indigent, there is a form you will fill out and send to the court reporter that will allow the court to pay for the transcripts once they are complete.

As for whether to withdraw, there is an official answer and a real-world answer. Officially, if you accept appointments in federal court, the Criminal Justice Act says you should plan to stay on the case all the way through the direct appeal—even if that goes to the U.S. Supreme Court. I always encourage people to work on a direct appeal because it makes you a better sentencing lawyer and a better pretrial motions lawyer. But I have found that many district judges and magistrate judges understand that practice before the Fifth Circuit can be intimidating. There are also lawyers, especially in big-city divisions, who only want to work on appointed appeals. So, it makes sense to allow an attorney to withdraw from the appeal and hand it to someone who enjoys that work—especially if it means the first lawyer can accept another appointment in the district court.

Because this answer differs from division to division, and even from judge to judge, I would suggest you contact either the CJA Panel representative or someone who does a lot of criminal work in that court to find out whether the judges have a permissive attitude or if they prefer that you stay on the case."

What are the appellate standards that the 5th Circuit Court of Appeals looks at when you do an appeal regarding sentencing? What are common issues with sentencing that often necessitate an appeal.

"Well—I just said I hope appointed defense attorneys will stay with their cases through appeal, and now you want me to scare them all away? (Just kidding.) There are a variety of standards of review, and I quite often disagree with my friends in the Department of Justice about what standard of review should be applied in a particular appeal.

For constitutional issues and questions of statutory interpretation, the appellate court will review *de novo*. Assuming the sentence is within the statutory maximum (and does not violate the Constitution), the court will then review the sentence for "procedural and substantive reasonableness." The most important component of *procedural* reasonableness concerns the calculation of the guideline range. The court will review the district court's interpretation and application of the sentencing guidelines *de novo*, and its factual findings for clear error. If you can show error under this framework, the court will vacate the sentence and remand for resentencing unless the government can show that the error is harmless.

That all assumes you preserved "plenary" appellate review by making a timely objection during or before the sentencing hearing. If you did not object (or if the court decides your objection was not specific enough), then you will have to show "plain error"—error, that is clear or obvious, that affected the defendant's substantial rights, and that seriously affects the fairness, integrity, or public reputation of judicial proceedings. As if that were not complicated enough, the Supreme Court has held that *most* errors in calculating the guideline range satisfy the "substantial rights" and "fairness, integrity, or public reputation" prongs, so that a plain error in calculating the guidelines should usually (but does not always) lead to a new sentencing."

When is it appropriate to file a motion for a new trial? What is the format for a federal motion for a new trial? What are the deadlines for federal motions for new trials?

"Here is another difference between federal and state appellate practice. I've been working on federal criminal appeals and post-conviction cases since 2008, and I think I've only ever worked on one motion for a new trial during that time. I had to look up which Federal Rule of Criminal Procedure governs a motion for a new trial (it's Rule 33).

If the motion is based on new evidence, it must be filed

within 3 years after the verdict or finding of guilty. A motion based on any other grounds must be filed within 14 days after the verdict or finding of guilt. In federal court, I have never heard of someone filing a motion for new trial if the case was resolved by a guilty plea.

It is more common to see a motion to withdraw a guilty plea under Rule 11(d). If the defendant files that motion after the district court has accepted their guilty plea, but before sentencing, she must show "good cause" for withdrawal. There are a variety of factors the court will consider in deciding that motion.

Rule 35(a) also grants limited authority for a court to correct a sentence "that resulted from arithmetical, technical, or other clear error," but the court must act within 14 days after pronouncing sentence."

Let's say you've just had a trial and your client wants to appeal. I'm sure the basic procedure is the same, but what should you file in that case? For example, at the state level, it is common to file a motion for a new trial to extend the appellate deadline. Is there anything similar with federal appeals?

"Once again we run into the difference between the two different sentencing systems. From what I have seen, non-capital sentencings in Texas usually happen pretty quickly—if not immediately—after the defendant has pleaded guilty or been convicted at trial. In federal court, the U.S. Probation Office has to prepare a Presentence Investigation Report which includes all kinds of information about the offense and the defendant's background as well as proposed calculations under the U.S. Sentencing Guidelines. That report takes time to complete, and it must be provided to the defendant and the prosecution at least 35 days before sentencing. So, it is common for the sentencing to happen months after the guilty plea or jury verdict.

Nothing is appealable before the sentence is pronounced. By the time sentencing rolls around, it's too late to file a motion for a new trial. It is possible to request an extension of up to 30 days (beyond the original 14) to file a notice of appeal. And a timely motion to correct the sentence under Rule 35 will toll the appellate deadline, but those are pretty rare.

You would initiate an appeal after a jury trial the same way you initiate an appeal after a guilty plea. You would file a notice of appeal after the sentence is pronounced and no more than 14 days after entry of the written judgment of conviction and sentence."

What if there are no issues to appeal?

"As in state court, an appointed appellate defense attorney is forbidden from raising frivolous arguments on appeal. If you can't find any colorable issues to raise on a defendant's behalf, you file a motion to withdraw and a brief pursuant to *Anders v. California*. This is usually what I end up doing when the defendant signed a plea agreement that included a waiver of most appellate rights. The Fifth Circuit has provided a helpful checklist of items that an attorney must discuss in any *Anders* brief involving a guilty plea. The checklist is divided into issues relevant to conviction (and acceptance of the guilty plea) and issues relevant to sentencing. By identifying the requirements for a valid guilty plea and requiring you to list the page numbers in the record that show compliance with the rules, the checklist very deftly ensures that you have fully reviewed the important parts of the record. On the other hand, the checklist can only ask whether the guidelines were correctly calculated—there are a variety of potential issues that could fall under that heading, and it is probably impossible to make a single checklist or flowchart to cover all potential guideline errors."

Are there any special rules about formatting appellate briefs in federal court?

"I confess it has been many years since I worked on a

state-court appellate brief, and that was in a civil case. But you should know that, when the transcripts are completed and filed, the Fifth Circuit will assign consecutive pagination to all parts of the electronic record on appeal. Unlike state court, there is no separation between the "Clerk's Record" and the "Reporter's Record." The Fifth Circuit will send you an explanation of the right way to cite the electronic record on appeal: "ROA.xxx" (where xxx is the page number). Apparently, the court has some kind of system that produces a hyperlink from that kind of citation, so that when a judge (or clerk) clicks on your ROA citation, it automatically brings up that page of the record. I have never seen this work, but I am happy to know that the Court can easily see the exact page of the record when reviewing my briefs.

The Fifth Circuit also requires the filing of "Record Excerpts" rather than a joint appendix. I suspect this is a holdover from the paper-filing days, when the court or its screening attorneys wanted easy access to the most important documents when deciding whether a case should be scheduled for oral argument. (If any judges are reading this, please tell me if I'm wrong!). The good news is that the court now provides an online tool that will *automatically* generate Record Excerpts that comply with local rules. You still have to file them along with your brief."

In state cases, you can ask for oral argument or waive it. Is the federal system the same?

"Yes, every federal appellate brief requires a statement regarding oral argument."

If you lose your appeal, what is the next step?

"First, you need to decide whether it makes sense to take additional steps in the case. The rules allow you to file a petition for panel rehearing or rehearing en banc within 14 days of the Fifth Circuit judgment. But the rules also warn you that a request for rehearing *en banc* is rarely granted, and there are only certain types of cases that should qualify (i.e., there is a division of authority within the Fifth Circuit, or the Fifth Circuit has adopted a rule that diverges from the rule of another circuit court). Filing a timely rehearing petition extends the deadline to seek certiorari from the Supreme Court of the United States.

If no rehearing petition was filed, a petition for certiorari is due at the Supreme Court within 90 days of the Court of Appeals' judgment, which always (or almost always?) issues the same day as the opinion. There are also rules and traditions governing what sort of cases the Supreme Court will review. That would probably require another article at least as long as this one to explain.

Once the Fifth Circuit has decided the appeal, you are not required to keep going. But you are required to move to withdraw if you decide not to seek rehearing or to pursue a petition for certiorari. You do not have to file an *Anders* brief after the Fifth Circuit's decision. However, you simply need to explain why you do not believe the case presents a plausible claim to satisfy the criteria in Supreme Court Rule 10. You should always notify your client of the deadline to file a petition for certiorari and the deadline to file a post-conviction challenge under 28 U.S.C. § 2255."

What do you do if you are not licensed to practice in the Supreme Court of the United States?

"This is the rare question that can be answered with good news and better news.

The good news is that if you are appointed under the Criminal Justice Act, the Supreme Court allows you to file a petition as counsel of record without being admitted to that Court's bar. You still have to file a motion to proceed *in forma pauperis* in that court, but you just have to say in the motion that the defendant was represented by counsel appointed under the CJA in district court or the court of appeals. (If you have a paying client, you must have the petition professionally printed before it is filed - again, beyond the scope of this article).

The better news is that if you (and your sponsor) can afford the time and expense of travel to Washington, D.C. after your application for admission is complete, you can be admitted to the bar in open court. It's very difficult to convey the excitement and gravity of Supreme Court oral arguments, and only a small percentage of Americans will ever get the chance to see the Court work *in person*. So, my advice is to find someone willing to sponsor your admission who is also willing to move in open court for your admission and make the trip."

Conclusion:

There you have it! I hope this article has helped those unacquainted with federal appeals find their way in navigating the federal process. I encourage anyone handling a federal appeal to contact their local federal public defender's office if they ever have questions about the ins and outs of the federal appellate process. They are great people who always have time to help. As always, I wish you good luck, take care, and have fun!

Dean Watts *received his undergraduate degree from George Washington University and his law degree from Southern Methodist University. Dean is board certified in criminal law by the Texas Board of Legal Specialization and has been selected to the Texas Super Lawyers list.*

Matthew Wright *is an Assistant Federal Public Defender in Amarillo, Texas. He represents indigent defendants in direct criminal appeals and post-conviction litigation in the Northern District of Texas, the Fifth Circuit, and the U.S. Supreme Court. He can be reached at Matthew_Wright@fd.org.*

Texas Criminal Defense Lawyers Association

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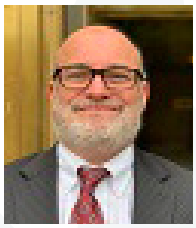

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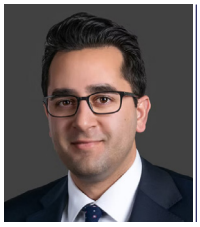

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Texas Criminal Defense Lawyers Association

The Case for Handlebys: How Extraneous Police Reports Uncovered a Key Pattern in Our Defense

KATHERINE MAYER, CCDI
Member of the Capital Assistance Committee

Understanding the Importance of Context in Criminal Defense

In early 2024, my investigations firm was hired to support the defense team on an aggravated assault case. Their client was accused of violently attacking his girlfriend. The initial evidence—a blood-covered apartment and claims of a hammer attack—seemed overwhelming. However, I've learned to adhere to a core investigative principle: **never assume**; always dig deeper, even when the evidence appears insurmountable.

While foundational, police reports and discovery materials often lack the critical context to effectively challenge the prosecution's narrative. My client adamantly denied the complaining witness's (CW) allegations and described the incident as a culmination of long-standing manipulation and emotional abuse. Given this disconnect, it was critical to establish whether this case was an isolated incident or part of a broader pattern.

A crucial step in exploring the credibility of a CW is often the procurement of "handlebys"—records of any prior encounters an individual has had with law enforcement, whether as a complainant, witness, or arrestee. These records provide valuable insight into past allegations and behavioral patterns.

The Power of Handlebys

Our investigation began with reviewing the probable cause affidavit, offense report, and the responding officer's bodycam footage. These materials provided insight into the alleged incident and helped pinpoint areas for further inquiry. From there, we identified the appropriate avenues for relevant records that may help us gain a better understanding of the CW.

Any information acquired or produced by a government entity acting in their official capacity is a matter of public record. In my experience, a records specialist is invaluable in drafting effective requests. My firm employs a dedicated team member who is well-versed in the complexities of the FOIA, state-specific open records laws, and HIPAA.

The three most commonly encountered laws regarding public records are:

- Freedom of Information Act (FOIA) is a law that applies to federal agencies but does not cover state or local police reports.
- Health Insurance Portability and Accountability Act (HIPAA) is a federal law that restricts access to medical records. It does not apply to police reports unless they contain protected health information.
- Texas Public Information Act (TPIA) is a Texas-specific law that governs access to state and local records, including law enforcement reports.

In Texas, TPIA allows access to police reports, complaints, bodycam footage, 911 calls, and any governmental employee records. To obtain handlebys, defense investigators should submit open records requests across jurisdictions where the CW or the defendant previously lived.

Key details required for a TPIA request include:

- The individual's full legal name and any known aliases.
- Date of birth.
- Known past addresses or jurisdictions where they have lived or an incident may have taken place.
- Any known prior case numbers or legal interactions.

Attorneys outside Texas should refer to their respective state's equivalent open records laws.

In this case, our request was intentionally broad, encompassing everything from police reports to any extraneous allegations in the CW's past across every jurisdiction she had lived in. By casting a wide net, we aimed to uncover any information that may be relevant to our case. It's not uncommon to encounter resistance to records requests; patience and diligence are critical to obtaining the information you're seeking.

Some common hurdles in obtaining information and how to overcome them:

- Denials based on lack of specificity – Requests should be carefully worded to comply with open records statutes and must reference existing records.
- Jurisdictions refusing to release information – Persistence and legal intervention (e.g., motions to

compel disclosure) may be necessary.
- Delayed responses – Follow-up requests and appeals are sometimes required to ensure compliance from government agencies.

Analyzing the Findings

When the records arrived, the findings were startling. Over 35 past incidents involving the CW revealed a consistent narrative—similar accusations against multiple individuals, often with significant discrepancies. These allegations followed a distinct pattern: reports of violent confrontations, claims of physical abuse, and later inconsistencies in her statements.

With this information, we began interviewing individuals named in the reports. Several former partners recounted eerily similar experiences—allegations that did not hold up under scrutiny. These interviews were crucial in constructing a credible alternative narrative that introduced reasonable doubt.

Avoiding Victim-Bashing While Strengthening Defense

A critical distinction must be made between attacking a CW personally and developing a fuller picture of their credibility and history.

Key principles for ethical investigation:

- Stick to objective facts – Focus on documented inconsistencies rather than personal opinions about the CW.
- Use corroborated evidence – Rely on official records and multiple sources, not speculation.
- Avoid inflammatory language – The defense's role is to introduce reasonable doubt, not to denigrate a CW.

In this case, the handlebys revealed a pattern of unverified allegations, shifting the defense strategy. The attorney successfully filed a motion for unredacted reports and later used the evidence to challenge the CW's credibility. Once confronted with the extensive history of inconsistent allegations, the prosecution offered a favorable plea deal, sparing my client any prison time.

Why Handlebys Matter in Criminal Defense

Handlebys are a powerful tool in defense investigations that can reveal behavioral patterns that may undermine a witness's credibility. Whether it's uncovering a history of false accusations, revealing potential motives for a false confession, or identifying discrepancies in statements, handlebys can change the entire trajectory of a case. For any defense attorney, requesting these records isn't just a helpful step—it's a necessary one.

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Texas Criminal Defense Lawyers Association

Champions of the Month!

Shout out to Dean Watts! He secured a dismissal of a third-degree felony assault family violence case in Nacogdoches County thanks to outstanding investigative work by investigator Brayden Brucias and the integrity of the assigned prosecutor. The case had been pending for three years and involved serious allegations, including photographs of alleged injuries and supposed eyewitness testimony. However, Brayden's investigation revealed that the eyewitnesses had not actually seen the incident occur. Further, the injuries were determined to be unrelated to the alleged offense and videos were uncovered showing the complainant threatening the defendant with a knife. All in all, everyone did a great job. **Bravo!**

A warm salute to Robert Williams! He secured two Not Guilty verdicts in separate sexual assault cases—both delivered in the same week—in the 208th and 351st District Courts of Harris County. **Keep it up!**

Kudos to Gerry Goldstein, John Hunter, Thomas Lane, and Lexie Biedrzycki for their outstanding work in a capital murder trial. JJohn delivered a masterful performance, securing a Not Guilty verdict on the capital charge—the original goal and offer—even while preserving the record for an inevitable appeal. This was no easy task, given the challenging facts, including a prior murder conviction and damaging rap lyrics introduced at punishment. Thomas and Lexie provided crucial support throughout the trial, keeping the team focused, prepared, and sharp. **Great work!**

Texas Administrative License Revocation Hearings in a Nutshell

ALRs for New and Non-DWI Lawyers

CHRISTOPHER M. MCKINNEY
Member of the DWI Committee

Introduction

Every Driving While Intoxicated (DWI) arrest in Texas triggers two legal tracks: a criminal case and a driver's license suspension hearing called an Administrative License Revocation (ALR) hearing. Most clients understandably focus on the criminal charge. But this is not the most immediate threat—the ALR process is often the first and fastest moving. The client's license will be automatically suspended if no hearing is requested.

If you're new to criminal defense—or don't regularly handle DWI cases—this article will guide you through what an ALR hearing is, why it matters, and how to advocate effectively for your client.

What is an ALR Hearing?

An ALR hearing is a civil, administrative proceeding triggered by an arrest for a DWI or related intoxication offense. The ALR process is how the Texas Department of Public Safety seeks to suspend your client's driver's license for refusing to provide a specimen[1], failing a breath or blood test[2], or, if your client is a minor, having any detectable amount of alcohol in their system[3]. These suspension mechanisms are found in Texas Transportation Code Chapters 524 (failure cases) and 724 (refusal cases) and mandate that an officer inform a person both orally and in writing of the consequences of voluntarily submitting to a test and the consequences of refusing to provide a voluntary specimen after being arrested for an intoxication offense under Chapter 49 Penal Code. [4]

Practice Pointer: ALR hearings are exceedingly procedural, and mastering the applicable Administrative and Transportation Code rules is necessary for success.

Deadline to Request a Hearing

Contrary to the public's popular belief, a person's license is not automatically suspended upon an arrest for DWI. A person's driving privileges remain intact so long as the ALR hearing is timely requested. That clock starts ticking quickly.

For refusals or breath test failures, you must request an ALR hearing no later than 5:00 p.m. on the 15th day after your client was presumed to have been served with the DIC-25 (Notice of Suspension).[5]

For blood test consent cases, results are not immediately available. The arresting agency forwards the sample for analysis. DPS will mail a Notice of Suspension to the client's driver's license address if the result is at or above the per se legal limit.[6] The client then has 20 calendar days from the date on the DPS's letter to request a hearing.[7] Calendar days include weekends and holidays.[8]

In both situations, failure to request a hearing within the deadline will automatically suspend the client's driver's license on the 40th day after the DIC-25 was served or was presumed to have been served on the client.[9]

How to Request the Hearing

To even get a shot at contesting the license suspension, drivers or their attorneys must properly request the ALR Hearing through DPS.[10] This request for a hearing can be made via:

- DPS Website[11]
- Fax[12]
- Mail[13]
- Telephone[14]

The request for a hearing in any of these forms should include the following:

- Client's Full Name, DOB, DL Number, Address, and Issuing State
- Date and County of Arrest
- Arresting Officer's Name and Agency
- Whether the case involves a refusal or a test failure
- Hearing Preference (live or telephonic)[15]

Practice Pointer: Always keep a copy of the Request for Hearing. Sometimes, DPS forgets to send you or your client a Notice of Hearing, and DPS suspends your client's driving privilege without a hearing. A fax confirmation or email receipt can be your safety net to unwind an erroneous suspension.

SOAH Jurisdiction

The State Office of Administrative Hearings (SOAH) is a separate, independent state agency that conducts administrative hearings for more than 50 state agencies in Texas—including DPS. It is not part of DPS and does not initiate ALR cases. Instead, SOAH acquires jurisdiction over an ALR hearing only after DPS receives a timely and complete hearing request and provides sufficient information to schedule a hearing.[16]

Once SOAH acquires jurisdiction, DPS issues a Notice of Hearing. This document includes the hearing date, time, and location (ZOOM Meeting Room and Password) and outlines the statutory basis that DPS relies on for the suspension. The Notice of Hearing can be likened to the information or indictment in a criminal case and your first opportunity to review the case framework and prepare your defense.

Requesting Discovery

Once the hearing is set, send a separate written discovery request electronically to DPS—not SOAH—clearly labeled as a request for discovery.[17] This discovery request should include a request for the following:

- DIC-23 (Peace Officer's Sworn Report), DIC-24 (Statutory Warnings), and DIC-25 (Notice of Suspension)
- For Breath Tests: Breath Test Slip (showing the purported alcohol result), DIC-56 (Breath Test Technical Supervisor's Affidavit), Breath Test Machine Records (inspection, maintenance, and repair records)
- For Blood Tests: Lab Report and Certificate of Analysis
- Any exhibits DPS intends to introduce

The discovery produced for the ALR hearing is significantly less comprehensive than what would be provided in the criminal case. While the rules provide that discovery responses must be sent to the requesting party within five days,[18] in practice, this is rarely, if ever, followed.

The rules have changed for those who practiced before August 4, 2024. The discovery request must be made once SOAH has acquired jurisdiction and scheduled the hearing, versus the old rule of simply a separate request for discovery after the request for a hearing was made.

Practice Pointer: Sometimes, the documents provided by DPS are silent as to the reason for the stop or signs of intoxication. Sometimes, the paperwork isn't for your client! Don't just collect the documents—evaluate them like you would in a criminal case. Are there specific and articulable facts, or are there conclusory statements?

Subpoenaing Witnesses

One of the most beneficial aspects of the ALR Hearing is that it provides your first opportunity to cross-examine the stopping and arresting officer. ALR hearings are depositions in disguise. The testimony gleaned at these hearings can take

a dog of a case and turn it into a winner. ALR hearings are opportunities to:

- Lock in testimony
- Evaluate an officer's credibility and knowledge
- Discover additional facts before the DA does
- Solidify legal issues that can result in dismissals or reduced charges

Attorneys can issue up to two subpoenas for police officer witnesses to appear at a hearing—the officer who conducted the stop and the officer who made the arrest decision.[19] These subpoenas must be issued using the forms provided on SOAH's website.[20]

Suppose an attorney wishes to call more or other witnesses, e.g., an Evidence Technician, the Breath Test Operator, or the Breath Test Technical Supervisor. In that case, the attorney must file a subpoena request with SOAH that demonstrates good cause.[21] This is known as a "Judge-Issued Subpoena."

Once a subpoena is issued, follow these service steps carefully:

- File the subpoena electronically with SOAH on the same day
- Serve a copy on the regional DPS ALR office on the same day
- Use a process server to personally serve the witness[22] at least five days before the hearing[23]
- After service, file the completed Return of Service with SOAH and send a copy to DPS at least three days before the hearing[24]

Skipping any of these steps could result in the subpoena being quashed or not honored.

Practice Pointer: Double-check that the hearing information on the subpoena is accurate. An error here can void the enforcement of an otherwise valid subpoena. As a backup, SOAH subpoena forms contain instructions for the witness to contact DPS if they have any questions regarding the subpoena, but these should not be relied upon to fix your mistake.

Continuances

Under SOAH rules, you have an automatic right to a continuance if the request is made more than five business days before the hearing and there have been no prior continuances.[25] All other continuances require a written motion establishing good cause and a Certificate of Conference.

What DPS Must Prove at the Hearing

DPS bears the burden of proof in an ALR Hearing. Because these hearings are civil administrative proceedings, DPS must only prove each statutory element by a preponderance of the evidence, a significantly lower burden than the underlying criminal case.

In a breath or blood test failure case (Chapter 524), DPS must prove by the preponderance of the evidence that:

- the Defendant had an alcohol concentration of 0.08 or greater while operating a motor vehicle in a public place or while operating a watercraft
- reasonable suspicion to stop or probable cause to arrest the Defendant existed[26]

In a breath or blood test refusal case (Chapter 724), DPS must prove by the preponderance of the evidence that:

- reasonable suspicion to stop or probable cause to arrest the Defendant existed
- probable cause existed to believe that the Defendant was operating a motor vehicle in a public place while intoxicated or while operating a watercraft powered with an engine having a manufacturer's rating of 50 horsepower or above while intoxicated
- The Defendant was placed under arrest by the officer and was requested to submit to the taking of a specimen
- The Defendant refused to submit to the taking of a specimen on request of the officer[27]

Conducting the Hearing

ALR hearings follow a structured flow, but knowing how to navigate them gives you room for advocacy. The SOAH Administrative Law Judge (ALJ) assigned to the case will host

the ZOOM proceeding. Attending at the scheduled time is imperative, as each ALJ's preferences dictate how the cases will be called. This can be done in:

- Docket order
- Attorney appearance on their screen
- Cases with witnesses who are present
- Cases that only involve documents and arguments from counsel ("paper cases")
- Cases that have preliminary matters

Failure by a party to attend the hearing will result in a Default Judgment, suspending your client's license without a fight.[28]

Since the burden of proof lies with DPS, they begin with their appearance (introduction) and announcement (ready or that they are raising a preliminary matter). The most typical preliminary matters from DPS are:

- Motion to Quash defense subpoenas for improper service or incorrect hearing information
- Motion for Continuance for missing or untimely discovery
- Motion to Dismiss for missing discovery or for a witness who has been properly subpoenaed but has failed to appear for the hearing

Judges typically allow 15 minutes for a subpoenaed witness to appear before asking DPS if they wish to dismiss based upon the non-appearance of the witness.

Once DPS has made its appearance and announcement, the hearing proceeds to the defense, who also makes their appearance and announcement. The most common preliminary matter from the defense is a Motion for Continuance to allow time to issue or serve a subpoena. Outside of these two reasons, ALJs hesitate to consider other preliminary matters.

If the parties announce ready, DPS will then proceed with its case. In most hearings, DPS introduces and offers its pre-filed documentary evidence first. This usually includes:

- DIC-23—Police Officer's Sworn Report
- DIC-24—Statutory Warning
- DIC-25—Notice of Suspension
- Breath or Blood Test Results with Affidavits or Refusal Documentation
- Any supporting documentation that was created or obtained by law enforcement and was incorporated by reference

DPS must have pre-filed these exhibits and served them on the defense at least two business days before the hearing. DPS's failure to timely pre-file exhibits could lead to their inadmissibility.

The officer's sworn report (DIC-23) is admissible as a public record, but if you have properly subpoenaed the police officer witness(es) in this case who stopped and arrested the client, and they have not appeared and not demonstrated good cause, any report authored by them is inadmissible and must be objected to.

Once DPS rests, you have several options:

- Cross-examine any witnesses called by DPS
- Call your witnesses
- Introduce and offer your pre-filed exhibits
- Rest and argue

Practice Pointer: Effective cross-examination in an ALR hearing can turn a terrible case into a dismissal or Not Guilty verdict. Cross-examination at the ALR hearing provides the purest answers from officers as they have not yet had an opportunity to be woodshedded by a prosecutor who has a grasp on the legal issues.

Winning and Losing

If the ALJ determines that DPS has met its burden, the ALJ will authorize DPS to suspend the Defendant's license. If not, the ALJ will enter a negative finding, and no suspension will be imposed.

Suspension Periods:

First failure: 90 days[29]

First refusal: 180 days[30]

First-time Minors: 60 days[31]

Drivers who have had their driving privileges previously suspended for alcohol or drug-related issues within 10 years prior to the current ALR proceeding incur higher penalties. Failure cases are subject to a one-year suspension[32], while refusal cases are subject to a two-year suspension[33]. Similarly, minors previously convicted once are subject to a 120-day suspension, and those convicted twice or more are subject to a 180-day suspension.[34]

Conclusion

ALR hearings protect more than licenses—they build the record. They let you test the State's case early, cross-examine key witnesses, and find leverage for the criminal case. Request the hearing. Be prepared. Fight hard. Your client's situation can only improve.

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Endnotes

1 Tex. Transp. Code Ann. § 724.015(a)(2).
2 Tex. Transp. Code Ann. § 724.015(a)(4).
3 Tex. Transp. Code Ann. § 724.015(a)(5).
4 Tex. Transp. Code Ann. § 724.015.
5 37 Tex. Admin. Code. § 17.8.
6 Tex. Transp. Code Ann. § 524.013.
7 Tex. Transp. Code Ann. §521.344 (g-1).
8 1 Tex. Admin. Code § 155.7(c).
9 Tex. Transp. Code Ann. § 524.021(a).
10 Tex. Transp. Code Ann. § 524.031.
11 Online Submission - https://www.dps.texas.gov/section/driver-license/administrative-license-revocation-alr-program.
12 Fax - 512-424-2650.
13 Mailing Address - Texas Department of Public Safety, Enforcement and Compliance Service at P.O. Box 4040, Austin, Texas 78765-4040.
14 Phone - 800-394-9913.
15 Online Submission - https://www.dps.texas.gov/section/driver-license/administrative-license-revocation-alr-program.
16 1 Tex. Admin. Code § 159.51(a).
17 1 Tex. Admin. Code §§ 159.151(a), (b), (e), (f).
18 1 Tex. Admin. Code §§ 159.151(g), (h).
19 1 Tex. Admin. Code § 159.101(b).
20 1 Tex. Admin. Code § 159.101(a)(2).
21 1 Tex. Admin. Code § 159.101(c).
22 1 Tex. Admin. Code § 159.103(a).
23 1 Tex. Admin. Code § 159.103(b).
24 1 Tex. Admin. Code § 159.103(d).
25 Tex. Transp. Code Ann. § 524.032(b).
26 Tex. Transp. Code Ann. § 524.035(a).
27 Tex. Transp. Code Ann. § 724.042.
28 *See* Tex. Transp. Code Ann. § 524.036.
29 Tex. Transp. Code Ann. § 524.022(a)(1).
30 Tex. Transp. Code Ann. § 724.035(a)(1).
31 Tex. Transp. Code Ann. § 524.022(b)(1).
32 Tex. Transp. Code Ann. § 524.022(a)(2).
33 Tex. Transp. Code Ann. § 724.
34 Tex. Transp. Code Ann. §§ 524.022(b)(2-3).

Kyles v. Whitley: The Best Case We're Not Using

ROBERT DANIEL AND STACIE B. LIEBERMAN

Everyone is at least passingly familiar with the holding in *Brady v. Maryland*, 373 U.S. 83 (1963): the State is required to disclose exculpatory, impeachment, and mitigating information to the defense if it is material to the case. In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Court expanded the *Brady* doctrine in two important ways.

First, the *Kyles* court held that materiality must be assessed cumulatively by considering the effect of all the suppressed evidence favorable to the defendant, rather than considering each piece individually. Imagine the State fails to turn over a witness's inconsistent statement and the witness's history of committing violent offenses until after your client's jury trial. If you file a motion for new trial based on suppression of evidence, a judge must determine whether there is a reasonable probability that the jury would have reached a different result based on the combined force of *both* items. "Materiality" fundamentally is how much the suppressed information – cumulatively considered – changes the case as a whole.

Second, and maybe most importantly, the Court held that federal constitutional due process requires that prosecutors are responsible for determining whether other government agencies (usually law enforcement) have *Brady* material in their possession, are responsible for acquiring that material, and are responsible for disclosing that material. *Kyles*, 514 U.S. at 437-38. This responsibility is not delegable: *the prosecutor* must seek the material and cannot simply rely on law enforcement to provide it. *Id.; see also Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (per curiam). Importantly, defense counsel is not required to ask the prosecution to look for evidence that favors the defendant; the prosecution has a duty to seek out and disclose *Brady* material regardless of a request for it by the defense. *United States v. Bagley*, 473 U.S. 667 (1985).

The *Kyles* court specifically rejected the State of Louisiana's argument that prosecutors should not be responsible for disclosing *Brady* material if they did not know it existed at the time of trial. *Kyles*, 514 U.S. at 438. The *Kyles* majority acknowledged that sometimes the police fail to relay information to prosecutors, but nevertheless it is the prosecution's sole responsibility to ensure that does not happen. *Id.* at 438 (quoting *Giglio v. United States*, 504 U.S. 150, 154 (1972)).

The principle enshrined by *Kyles* – that the prosecution has a non-delegable duty to seek *Brady* material in the possession, custody, or control of law enforcement and disclose it to the defense regardless of request – has been crystal clear for nearly 30 years. The Supreme Court has reaffirmed its 1995 holding in *Kyles* many times. For example, in *Youngblood v. West Virginia*, the Court addressed a *Brady* claim affecting Youngblood's sexual assault convictions after his investigator learned post-trial that a state trooper was shown evidence indicating that the sexual activity was consensual and then told the person who showed it to him to destroy it. The existence of that evidence was never relayed to the prosecutors. 547 U.S. at 869. In granting, vacating, and remanding Youngblood's case, the Court was resolute: "*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to the police investigators and not the prosecutor[.]'" *Id.* at 869-70 (citing *Kyles*, 514 U.S. at 438). In Wearry v. Cain, the State of Louisiana once again attempted to argue that due process was not violated because prosecutors likely did not know about impeachment evidence obtained by the police until after the trial was over. 577 U.S. 385, 393 n. 8 (2016). The Court was once again unwavering that the prosecution's lack of knowledge does not negate its *Brady* obligations. *Id.* (citing *Youngblood*, 547 U.S. at 869-70 and *Kyles*, 514 U.S. at 438).

The law is unambiguous and unequivocal. If the prosecution fails to rise to its duty to protect the fairness of a defendant's trial and ensure his due process obligations are honored, then the courts – as the final arbiters of the government's obligation to ensure a fair trial – must use their power to provide that protection by levying an appropriate

remedy. *Kyles*, 514 U.S. at 438.

In most cases, court-levied remedies will come after conviction via a successful motion for new trial or post-conviction application for writ of habeas corpus. As a result, *Kyles* is probably better known to appellate attorneys than trial attorneys. But criminal trial litigators should cite *Kyles* in discovery requests and discuss *Kyles* during plea bargain negotiations and pretrial hearings. Recurrent citation to *Kyles* helps to educate prosecutors, some of whom may be unfamiliar with its holding, that their duty is not merely to be a middleman for any discovery they receive from police. *Kyles* makes it clear that prosecutors are the captain of the "prosecution team," and they have a non-delegable duty to coordinate with law enforcement (and other government agencies) to ensure all favorable evidence winds up in the hands of the defense attorney before trial. If the defense attorney, the trial court judge, and the prosecutor discuss this duty prior to trial, it may lead to improved discovery disclosure. Improved discovery disclosure is good for everyone involved: no prosecutor wants to be accused of a *Brady* violation, no defense attorney wants to tell their client that the State suppressed favorable evidence (especially when the State also asserts the evidence was not material), and most judges prefer to avoid multiple trials for a single case. There is significant benefit and no drawback to incorporating *Kyles* into pretrial and trial practice. It is the best case we're not using.

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Texas Criminal Defense Lawyers Association
2025–2026

TCDLA Committee Expression of Interest

TCDLA is seeking enthusiastic and motivated individuals for upcoming openings to its 2025–2026 committees. Committee descriptions and mission statements are listed on the website. Complete the form below and check one or more of the committees that you would be interested in serving on.

Responsibilities of a TCDLA Committee Member:

1. Member of TCDLA.
2. Committees will provide advice, guidance and recommendations to the TCDLA President and/or Board of Directors on relevant matters related to their particular committee.
3. Committees will have assigned responsibilities associated with TCDLA's strategic plan and objectives.
4. Meet throughout the year via zoom call and/or at quarterly board meetings.
5. Members are expected to review and respond to email requests in a timely fashion.
6. Committee Chairs are expected to prepare written reports for inclusion in the board packets for each board meeting. Any items requiring a decision of the Board should be included on agenda. Committee members will assist chairs in the preparation of reports.
7. Visit TCDLA website for committee mission statements and procedures.

Your information

Last name		First name	
Law school		Years in practice	
Primary areas of practice			

Contact Information

Work phone		Cell phone	
Email			

Committee preference: Select committees you would like to serve on or scan the QR code to complete the online form.

- ❑ Amicus (Brief) Curiae
- ❑ Attorney Outreach and Engagement
- ❑ Bylaws
- ❑ Cannabis
- ❑ Capital Assistance
- ❑ Client Mental Health
- ❑ Corrections & Parole
- ❑ Crimmigration
- ❑ Defense Team: Non-Attorney
- ❑ DWI Resources
- ❑ Ethics
- ❑ Federal Law
- ❑ Health & Wellness
- ❑ Judicial Conduct
- ❑ Juvenile Justice
- ❑ Law School Students
- ❑ Listserv
- ❑ Long-Range Planning
- ❑ Managed Assigned Counsel
- ❑ Media Relations
- ❑ Membership
- ❑ Memo Bank
- ❑ New Lawyers
- ❑ Nexus (Seminars)
- ❑ Prosecutorial Conduct
- ❑ Public Defender
- ❑ Rural Practice
- ❑ Sexual Assault/Family Violence
- ❑ Social Media
- ❑ Strike Force
- ❑ Technology & Communications
- ❑ Transcript
- ❑ Veterans Assistance
- ❑ Women's Caucus

Email the completed form with a brief resume. The form may include a personal statement describing your interest in serving on a committee to mschank@tcdla.com by July 1, 2025, but accepted year-round.

Using your Juvenile Defense Skills to Seek Education Justice for your Clients

SARAH BEEBE

Did you know students can be disciplined by their school districts for their juvenile offense even if it didn't happen at or near school? It's true. The Texas Code of Criminal Procedure Section 15.27 requires law enforcement agencies to notify the school district the student was attending at the time of arrest of the charge within 24 hours. This notice constitutes a reasonable belief that the student has engaged in an offense punishable under Chapter 37 of the Texas Education Code, the discipline chapter.[1] Once school districts have a reasonable belief that a student has engaged in a punishable offense, they can discipline the student even if the charge is pending, or the youth has been placed on deferred adjudication or in a diversion program.[2]

In these circumstances, school districts typically propose to place students in the district's disciplinary alternative education program (DAEP), or for very serious offenses, specifically Title 5 felonies and aggravated robberies, in the county's juvenile justice alternative education program (JJAEP).[3] Before the school can place a student in an alternative education program, the student is entitled to certain due process rights.[4] Those rights include notice of the reason for the proposed discipline, the nature of the discipline, and information about the right to appeal.[5] Notice should be provided to the student's parent the day the action is taken, but if the school administrator is not able to reach the parent that day, the administrator can mail written notice to the parent's last known address.[6]

Once a parent receives notice of the proposed discipline, they have the right to participate in a conference with the school administrator.[7] This is an opportunity to present evidence of mitigating factors to the administrator in an effort to persuade them to forego the proposed discipline. In Texas, a school administrator should consider any mitigating factors presented, but *must* consider the following six factors whether the discipline is mandatory or discretionary:

1. self-defense, if relevant;
2. intent or lack thereof;
3. a disability that impairs the student's ability to understand the wrongfulness of their behavior;
4. the student's disciplinary history;
5. status within the foster care system; and/or
6. status as a homeless student.[8]

Parents are often unaware of their right to have a conference with the school administrator so they skip this step, but this is a valuable opportunity to change the administrator's mind and halt the disciplinary process so it's critical that parents do not unintentionally waive their right to a conference.

If the school administrator decides to move forward with the proposed discipline, a parent usually has the right to appeal the decision to the school district's superintendent or their designee.[9] If the parent disagrees with the decision made at the next level of review, they may be able to appeal the decision to the school board, or request a trial de novo by a county district court.[10] There are exceptions to the appealability of disciplinary placements for certain serious

1 *See* Tex. Ed. Code §§37.006 and 37.0081.
2 *Id.*
3 Tex. Ed. Code §37.0081.
4 *Goss v. Lopez,* 419 U.S. 565 (1975).
5 *Id.*
6 Tex. Ed. Code §37.0012(d) and (e).
7 *Goss v. Lopez,* 419 U.S. 565 (1975).
8 Tex. Ed. Code §37.001(a)(4).
9 Tex. Ed. Code §37.006(i).
10 Tex. Ed. Code §37.009(f).

offenses, though, including Title 5 felonies and aggravated robbery.[11] The student will typically be required to remain in the disciplinary setting during the pendency of any appeal. While I've cited state law throughout this article, the best source of information regarding the procedures for challenging school disciplinary placements is the specific school district's Code of Student Conduct, which can almost always be found online.

Step-by-Step Guide to Handling a School Discipline Case

Juvenile defense attorneys are well suited to handle school discipline cases, especially once it's been appealed to the superintendent or their designee. These appeal hearings are like informal trials where you have the opportunity to present evidence and examine witnesses. Start by obtaining the student's school records. Ask for any records you believe would help you prove innocence, or present mitigating factors that would make it more difficult for the district to reasonably proceed with the disciplinary placement. Let's use a case example:

Steven is a 15-year-old student in the 9th grade. He's had repeated verbal altercations with a few other students at school. Steven has told school administrators about the difficulty he's having with the other students, but they've told him to just ignore them. One day, a physical altercation breaks out between Steven and the other students in the hallway between classes. While in the midst of returning blows, Steven hits a teacher who was attempting to break up the fight. The School Resource Officer (SRO) witnesses the incident and arrests Steven for assault on a public servant. The school administrator notifies Steven's mother that this code of conduct violation requires mandatory placement at the DAEP for the rest of the school year. Steven's mother tells you, Steven's juvenile defense attorney, that she met with the school administrator to discuss the incident and the proposed disciplinary placement, but it felt more like she was being told what was going to happen than being given the opportunity to discuss whether the disciplinary placement was appropriate given the circumstances.

You offer to assist Steven's mother with an appeal of the disciplinary placement. You've got this! First, you request all relevant records you need from the school. In this case, you ask for:

1. A copy of the disciplinary notice detailing what code of conduct violation Steven's being disciplined for, what discipline is being proposed, and the length of the disciplinary placement;
2. A copy of the video of the incident. Since the incident happened in the hallway, there will most likely be video footage. The school may try to refuse to provide you with a copy so you may want to subpoena it as part of your juvenile defense representation of Steven. You can also request a time for the school to allow you to come to campus, or a school administrative building, to review the video;
3. A copy of the SRO's statement or charge;
4. A copy of any witness statements the school obtained from students or staff who observed the incident. These statements can and should be redacted to protect the identity of the students;
5. A copy of any documentation of Steven's complaints against the other students prior to the incident. Note that there may not be any formal documentation of Steven reporting the incident, especially if he only reported it verbally, but you're laying the foundation for a claim that the school district failed to take action to protect Steven from bullying;
6. A copy of Steven's disciplinary history. If he hasn't had many disciplinary incidents, you could make a claim that the punishment is excessive in light of this being his first serious code of conduct violation. Alternatively, if there's a record of other incidents involving the other students, you can make the case that they were bullying him and the school failed to take proper action to address it;
7. A copy of Steven's attendance record. Perhaps you can make a claim that he's been missing a lot of school due to the bullying.

You also look up the school district's code of conduct, which is available on the school's website. You look up the level violation (Level I, II, III, IV, or V based on the severity of the offense). You see from Steven's disciplinary notice that he's accused of a Level IV offense, which requires a mandatory removal to the DAEP. But you know the school administrator has to consider the factors listed in Chapter 37 of the Texas Education Code and the district's Code of Conduct, along with any other mitigating factors.

It's the day of the appeal hearing. You accompany Steven and his mother to the school district's administrative building, or login to the online meeting. The school district has designated an assistant superintendent to hear Steven's case. The school administrator is present, along with the SRO and the school district's attorney. You give your opening statement and make a compelling argument for why this is a case of self-defense. You present all documentation you received from the school supporting your argument. You allow Steven to make a statement (if appropriate). You question the school administrator about what was done in response to Steven's complaints that the other students involved in the altercation were bullying him to point out the school's failure to protect Steven from harassment in accordance with state law and school board policy. You ask the SRO if it appeared to him that Steven intended to hit the teacher, or if the teacher was just unlucky in putting themselves in between Steven and the other students at the wrong moment (if you feel confident about the answer based on the SRO's and teacher's reports).

11 Tex. Ed. Code §37.0081(b).

Once you've presented your evidence, the school district will have a chance to make arguments to the hearing officer about why their decision to issue disciplinary consequences is appropriate. They will present their own evidence and may attempt to question Steven. You can object to certain information being shared and certain questions being asked, but keep in mind, the hearing officer is not a judge with formal legal training. They're an educator. Try to keep the process relatively informal so as not to overwhelm them.

The hearing officer usually won't decide that day. In fact, they have 10 school days to determine whether or not to overturn the decision. They must issue the decision in writing and explain their conclusion. Steven will have to remain at the DAEP while the decision is pending.

While it's very possible to convince a school district hearing officer to overturn a disciplinary placement, it's important to keep in mind that they are not independent from the school district. They work for the school district and often feel beholden to their colleagues' decisions so choose to uphold even the most seemingly outrageous disciplinary placements.

Given the biased nature of these proceedings, you should keep your and your client's expectations in check. In other words, you have to recognize that victory in these situations sometimes doesn't involve a complete reversal of the disciplinary placement. Sometimes victory looks like a reduction in the number of days your client will have to attend the disciplinary placement. Sometimes victory is convincing the school district to allow your client to attend the DAEP instead of the county JJAEP. Sometimes victory involves obtaining transportation to the DAEP, even though it's not required by state law, so that your client doesn't dropout of school. Any of these outcomes is a win!

Special Disciplinary Protections for Students with Disabilities

The above applies to all students who attend public schools in Texas, including charter schools. Students with disabilities are entitled to enhanced disciplinary protections and have the opportunity for an additional proceeding when removal to DAEP or JJAEP is on the table. Following the initial decision of a school administrator to issue school disciplinary consequences and the conference to discuss the incident and proposed discipline, students with disabilities then have the right to a special disciplinary review process under both Section 504 and the Individuals with Disabilities Education Act (IDEA is the federal special education law).[12] This review process is called a Manifestation Determination Review (MDR) and it must be held within 10 days of the administrator's recommendation for disciplinary placement.[13] During this meeting, the school and the parent or guardian must answer two questions:

1. was the student's behavior "caused by or had a direct and substantial relationship to the child's disability;" **OR**
2. was the student's behavior "the direct result of the district's failure to implement the IEP" (Individualized Education Program)?[14]

If the committee answers *either* of these questions in the affirmative, the school district cannot send the student to the proposed disciplinary placement.[15] There are three exceptions to this rule, however. When an incident involves drugs, weapons, or serious bodily injury, the school district may still place a student at the DAEP or JJAEP for up to 45 school days even if they agree that the student's behavior was a manifestation of their disability, or that they failed to implement the student's IEP.[16]

If a parent disagrees with the outcome of an MDR, they can appeal the decision by filing a request for an expedited due process hearing that goes before an administrative law judge appointed by the state.[17] The hearing must occur within 20 school days of the date it was requested.[18] The hearing officer, or judge, will then have ten days to issue a decision as to whether the placement will stand or be overturned.[19] The student will remain in the disciplinary placement while the hearing and decision are pending.[20]

Education Advocacy is a Best Practice for Reducing Recidivism

If you find the additional procedures required for students with disabilities overwhelming, do not worry. Disability Rights Texas is the federally designated protection and advocacy agency for people with disabilities in the state. We provide free civil legal and advocacy services to individuals with disabilities who have experienced discrimination and/or rights violations, including in the area of education. We currently operate two education advocacy partnerships in Harris and Travis counties. By working exclusively with justice-involved youth and their families, we have found that education advocacy is a best practice for preventing recidivism of justice-involved youth. In fact, the Harris County Juvenile Probation Department found in 2021 that 94% of youth who received our direct services did not return to the justice system within a year of release from probation. If you are representing a youth who receives 504 or special education services at school, and you believe the school district is inappropriately removing them to a disciplinary

12 *See* 34 C.F.R. §104.35 and 34 C.F.R. §300.530(e) respectively.

13 34 C.F.R. §300.530(e).

14 *Id.*

15 34 C.F.R. §300.530(f)(2).

16 34 C.F.R. §300.530(g).

17 34 C.F.R. §300.532.

18 *Id.* at (c)(2).

19 *Id.*

20 34 C.F.R. §300.533.

program for behaviors they engaged in because of their disability, we can assist with the ensuring the school district honors the extra protections they're entitled to under federal law.

By working closely with juvenile probation and public defender offices, we have found that when a special education attorney is provided information about the juvenile case, especially a psychological evaluation that may link the youth's behavior to their disability, that information can be used at the MDR to advocate against DAEP or JJAEP placement. Once a special education attorney has obtained a favorable outcome at the MDR, the juvenile defense attorney can share that information with the court to make the case that the school has found the behavior to be a manifestation of the student's disability, and/or that it was caused by the school's failure to implement the student's special education plan (IEP) if the offense was due to a school-related incident. This kind of cooperation is one of the many reasons juvenile defense and special education attorneys make a great team!

For more information about Disability Rights Texas and the services we provide, visit www.drtx.org. We offer numerous resources on our website, including an Interactive Discipline Guide, which will take you through the disciplinary process for students with disabilities. You can also find more information about our education advocacy program for justice-involved youth. We're always interested in new partnerships so feel free to contact me if you're interested in discussing how we can work together to defend the rights of our clients.

Sarah Beebe *is a Supervising Attorney for the Juvenile Probation Education Advocacy Program at Disability Rights Texas and the Lead of the Harris County School Reentry Workgroup. She was appointed a voting member of the Harris County Racial and Ethnic Equities Committee (REE Committee) by the Harris County Criminal Justice Coordinating Council in December 2024. Sarah graduated from Tulane University in 2003 with a B.A. in History, the Tulane School of Social Work with a Masters in Social Work in 2004, and from William & Mary Law School with a J.D. in 2009. Sarah joined Disability Rights Texas as an Equal Justice Works Fellow in 2009 and became a Supervising Attorney in 2015. She and her husband have been married for 14 years and are the proud parents of two daughters and one son. Sarah can be reached at: sbeebe@drtx.org.*

Managing Your Life & Your Family & Your Practice – A FULL Plate!

LISA SHAPIRO STRAUSS
Member of the Women's Caucus Committee

Waking up at 5:30am to get in a workout before making the kids' lunches, waking them up, getting their breakfast and getting yourself showered and dressed all before 8:00am is an Olympic-level feat! Driving the kids to school and making it downtown for a 9:00am docket call and you've already had a full morning before your workday has started.

Sound exhausting to you? This is the way many female attorneys begin their days when they have young children. What happens when one child wakes up sick? How do you make sure you're done in court in time to get them picked up from school and shuttled to their after-school activities? What if you happen to be in trial? Just reading this scenario is enough to make anyone's blood pressure rise.

Many female attorneys (and some male attorneys) have the primary role of both taking care of their children and running their practice simultaneously. Some make it look "easy" as they make it to court on time, in clothes that match and are clean, even bringing homemade muffins for the Court staff. Others arrive a little bit late, sometimes wearing mismatching shoes, feeling like they're playing catch up all morning trying to get through their dockets. Many are ready to sink into their bed at night, worn out by all the different roles they are filling on any given day.

How can we manage these roles better, with more efficiency and with less stress so that we are still enjoying our legal practice and our families? Here are a few pointers that I learned over the last 25 years, while raising my children and managing a solo practice and have come out on the "other side" while loving being both an attorney and a mother.

My three "young children" are now 24, 21 and 20 years old. When my oldest, Joshua, was three months old, we relocated to Houston and I began a solo criminal defense practice knowing practically no one in Harris County (I had been an ADA in Dallas County a few years earlier). While I still experience those days in court with my phone buzzing from emergency messages from a child who has some dire emergency because they cannot find their wallet/phone/etc… most of my days have become a lot easier. Here are things I learned along the way, some lessons harder than others:

1. *You cannot be "the BEST lawyer, the BEST mother, the BEST wife, the BEST friend" or you will lose yourself.* No one is superhuman, nor should we put that expectation upon ourselves. You can be a "good lawyer" and a "good friend" and try to be the "BEST mother" you can be – but having realistic goals and expectations of yourself will allow you the ability to recover when you make mistakes, as we all do. It takes so much time and energy to be the best in your field, so especially when your children are still young, you must define what your priorities are so that you can *forgive yourself* when you cannot devote as much time to another part of your life.

Left to right: Ari (20), Noa (21), Joshua (24)

2. *Learn to set boundaries in all aspects of your life, especially your law practice.* Start with your clients by setting up systems that keep your clients out of your personal space. Using a program such as MyCase or Clio will help you to effectively communicate with clients on your time, not when they demand time from you. Let them know when you start a new client relationship what the expectations are – that you will respond to them when they send messages through the app, not by them calling you repeatedly or texting you on your cell phone. The way you begin the relationship will set the tone for their expectations.
3. *Say "yes" less!* Limit your commitments, especially when your children are young and need your attention more in the afternoons and evenings. You can always add more to your plate, but it's very difficult to cut back. You don't have to be the room mom every year, chair the school auction and attend every meeting. Learning to limit your added commitments will help you find more quality time to spend with your family, friends and for your own peace of mind.
4. *Delegate, delegate, delegate* – in all areas of your life. Learn to use services at your local grocery store to order online and go pick the groceries up to save the hour of grocery shopping. If one of your children has an activity that requires a lot of driving, find a carpool or see if you can hire someone to help take them there. Spending hours driving in the afternoons will diminish the time you have to handle other tasks that require your attention. Keep a meticulous calendar and find an app to share it with your spouse so that you are both aware of where everyone needs to be and when they need to get there. Find a part-time paralegal to help you with mundane tasks like watching police body cam videos (or even a college student looking to make some extra money). Find a new attorney who is looking for some experience and have them help write motions, transcribe videos or make court appearances for you.
5. *Rally the troops* – if you're feeling like you just cannot handle everything on your plate, talk to other moms in your community, whether at work or your kids' schools, to see how they're able to juggle their tasks. Maybe there's something you don't know about or you can find a new school carpool to join. Others in your similar situation are the best resource you can use, especially when you're feeling stuck.
6. *Find something to fill your cup!* Do you have a hobby or sport that you haven't tapped into in a while? Do you like to paint or play tennis/pickleball/golf? Maybe you love yoga but haven't had time to go to yoga classes. You must make time for yourself and even put it on your calendar. If you are only giving to the others in your life but not doing enough for yourself, you will burn out. Find a time in the afternoon or weekend to take care of your needs. It's like the airplane mask scenario, when the masks drop down, you put yours on first, then your child's. You have to take care of yourself or you will not be effective in parenting or your law practice.

There is no magic solution or answer that will fix all the issues you may encounter in your law practice and raising a family. However, if you take the time for yourself, ask others for assistance and try to stay organized, you can find a way to do it all. We're all searching for a balanced life, but we need to be strategic on how to accomplish that. When my youngest son, Ari, was starting his senior year of high school, I was given the advice to try to cut back on my work a little bit so that I didn't miss anything in his senior year. This was the best advice because that year went by so fast and I wanted to be present at every last football game and school activity that I could with him. Cut yourself slack and try to savor all the moments that you can't get back. The next case will always be there waiting for you at work after you become an "empty-nester" and you will have a lot more time to spend on your career at that point. Enjoy the ride, as children are only living in our homes for such a short time (the days feel long, but the years go by fast).

Lisa Shapiro Strauss *lives in Houston, with husband, 3 "adult" children & 2 beloved rescue dogs; started at Dallas County DA's Office after graduating SMU Law School, been in private solo practice in Harris County since 2001; on TCDLA Board; certified yoga instructor, highly involved in community organizations, such as UT Hillel Board, Houston Holocaust Museum's 3rd generation Board & Speaker's Bureau*

Significant Decisions Report

KYLE THERRIAN

There are times I lose my best asset as a professional. My enthusiasm and passion for practicing law. I assume this happens with other brethren and sistren who also like to consider themselves "true believers." While momentary losses of enthusiasm feel like vague lulls that I may not notice until long after I first started lulling, the swing back is always discernible. It usually has something to do with a prosecutor doing something unjust, and me finding myself deep in places of the Government Code nobody should know exist (or was it the Local Government Code?). There is one consistent de-lulling moment for me every year, and it's standing around a bar at the Hyatt Regency San Antonio, drinking a glass of Robert Mondavi, hearing the equivalent stories of epic little-guy-wins battles. I'd say I look forward to seeing folks this month, but you will likely read this after I've already seen you. So it was a pleasure, and thank you for my unlullification.

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

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

Sincerely,

United States Supreme Court

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

Fifth Circuit

The Fifth Circuit did not hand down any significant or published opinions since the last Significant Decisions report.

Texas Court of Criminal Appeals

Gutierrez v. State, No. PD-0480-24 (Tex. Crim. App. Apr. 16, 2025)

Attorneys. Joel Thomas (trial), Nathan Burkett (appellate), Mark Bennett (appellate)

Issue & Answer. Subsection (f) of Section 22.021 of the Penal Code provides a list of factors aggravating the offense of aggravated sexual assault of a child (super-aggravating factors). When the State tries to prosecute a super-aggravated sexual assault of a child but mashes together language of different super-aggravating factors, should the State's conviction for a super-aggravated sexual assault of a child stand? **Yes, at least here.**

Facts. The State convicted Gutierrez of *super* aggravated sexual assault of a child. Gutierrez challenged the sufficiency of his conviction, and the court of appeals reversed on a variation of his challenge—namely, that grammatical errors rendered the indictment indeterminate as to which aggravating element was being alleged. Given that the indictment still alleged a valid sexual assault of a child offense, the court of appeals modified the judgment and remanded for a new punishment hearing.

Analysis. In *Oliva v. State*, 548 S.W.3d 518 (Tex. Crim. App. 2018), the CCA set forth considerations to determine whether a particular penal provision's subsection constitutes an element of an offence or an enhancement. Most relevant is the absence of prefatory language introducing the subsection as setting forth different grades of felony or enhancement. Additionally, the United States Supreme Court instructs that the Constitution requires courts to treat statutory factors increasing the maximum or minimum punishment as elements of the offense. Accordingly, it was incumbent on the State to prove the alleged super-aggravating element. Here, it appears the State mixed parts of different super-aggravating conditions under the statute. The court of appeals found the indictment failed to express whether the State believed

Gutierrez actually placed the victim in fear that a kidnapping would occur, or threatened a kidnapping in the victim's presence. Notwithstanding the grammatical mistakes, a person who reads Gutierrez's indictment and recognizes a mistake would know that language pertaining to threats was erroneously inserted (rather than language pertaining to actually placing the victim in fear). This is the only clause that can be struck without leaving the indictment unintelligible.

Quoted. The parties agree that Subsection (f) (listing super-aggravating factors) is an element of the offense of super-aggravated sexual assault of a child. We also agree.

* * *

Regarding Appellant's indictment, we agree with the State and conclude that the language, "the Defendant did then and there by acts and words threaten to cause, or place, the complainant in fear that kidnapping would be imminently inflicted on Kelly Cruz," was sufficient to allege an aggravating factor under Section 22.021(a)(2)(A)(ii) of the Penal Code.

Comment. I don't love cases that save prosecutors from errors that would be fatal if committed by a defense lawyer. The law should allocate to both parties the equal requirements of litigation competence.

Glover v. State, No. PD-0514-24 (Tex. Crim. App. Apr. 16, 2025)

Attorneys. Michael Ray Harris (trial), Livia Liu Francis (appellate)

Issue & Answer. When the owner of property tries to wrest it away from the thief, does the thief display a deadly weapon and convert his theft to a robbery merely by using a knife to cut the property free from the owner's grasp? **Yes.**

Facts. The State convicted Glover of using or exhibiting a deadly weapon to commit the offense of Robbery. Glover stole a duffel bag from Buc-ee's. A Buc-ee's employee apprehended him and tried to recover the duffel bag. There was a struggle, and Glover pulled out a pocketknife. Glover ultimately used the knife to cut the strap from the duffel bag, facilitating his escape with the cooler. Glover kept the knife close to his body while cutting, but the employee ultimately let go of the strap out of fear.

Analysis. A knife is not a deadly weapon per se. The deadly weapon inquiry requires a court to consider the words, attitude, and threatening actions of the defendant, his proximity to the victim, and the nature of the weapon. Here, a jury could have rationally concluded that Glover had both an intention to cut the strap and an intention to place the employee in fear that the knife could be used against him. The employee concluded that it was in his best interest to allow Glover to take the cooler and avoid getting cut, and this was a reasonable conclusion on his part. Sufficient evidence supported a jury's conclusion that this was Glover's purpose in displaying the knife.

Concurring (Walker, J.). Even if Glover only intended to cut the strap, the evidence supports the conclusion that he displayed a deadly weapon.

Ex parte Padron, No. WR-62,917-02 (Tex. Crim. App.—Apr. 16, 2025)

Attorneys. Jessic Freud (writ), Amber Vazquez (writ), Mike Ware (writ), Chase Baumgartner (writ)

Update. This case initially appeared in Vol. 39 No. 2 (2024). The case is a post-conviction writ of habeas corpus challenging a Padron's capital murder conviction that rested on false testimony from eyewitnesses and dubious eyewitness "science." In the trial court, the State agreed that the testimony was unreliable and that habeas relief should be granted. In 2024, the CCA sent the case back to the trial court to "order the eyewitnesses who identified Applicant in a photospread and a trial to give testimony regarding the veracity and reliability of the witness's identifications of Applicant." This appears to be what has now transpired (as alluded to by Judge Yeary's dissent). The Court now grants the recommended and agreed-upon relief.

Dissenting (Yeary, J.). Only one of the two snitches recanted their testimony. That is probably not enough. At best, Padron has shown that the eyewitness testimony might have been false. On the other hand, it might have been true.

Ex parte Causey, WR-94, 707-01 (Tex. Crim. App. Apr. 16, 2025)

Attorneys. Amber Vazquez (writ), Jessica Freud (writ), Michael Ware (writ), Chase Baumgartner (writ)

Summary. The State convicted Causey of murder in 1992. DNA evidence now implicates another suspect. The State and the trial court agreed that relief should be granted on the basis of false testimony and the suppression of favorable evidence at trial. The CCA grants relief on the single ground of false testimony.

Dissenting (Yeary, J.). The trial court prosecutor from 1992, who is also Judge Keel's brother, filed an amicus brief disputing Causey's claims on habeas. The Court should honor the adversarial system of justice and give him a fair consideration of his amicus brief. He also raises an important question about the application of laches.

Comment. I sometimes admire Judge Yeary's textualism and legislative deference. But the problem with *text*ualism is that there is so much of it. Some of the text the Legislature has given us speaks to the prosecutor's duty to "not to convict but to see that justice is done." Tex. Code Crim. Proc. art. 2A.101. So, I think we have an adversarial-ish system of justice.

Ex parte Hill, No. WR-83,074-06 (Tex. Crim. App. Apr. 23, 2025)

Attorneys. Madison McWithey (writ)

Issue & Answer. Hill successfully showed that two of his convictions were enhanced by a constitutionally deficient prior conviction. However, the CCA upheld one of the two so-enhanced convictions based on an alternate theory of enhancement using a different conviction. Following this ruling, Hill challenged the constitutionality of this

different conviction, but not until after the passing of both the prosecutor and his former defense lawyer. Should the doctrine of laches bar his habeas relief? **Yes.**

Facts. In the 90s, Hill had a couple of cases pending simultaneously in Dallas County: a felony theft probation revocation and a new charge for aggravated sexual assault. The trial court sentenced Hill in both cases simultaneously and concurrently according to a plea agreement whereby the State recommended a sentence of five years. In 2010, Hunt County prosecuted Hill for two new charges (sexual assault and indecency) and used Hill's 2000 Dallas County aggravated sexual assault conviction to enhance Hill's punishment and obtain a life sentence. In 2021, the CCA granted partial habeas relief in response to Hill's challenges to his Hunt County convictions. The CCA held that both convictions were illegally enhanced with Hill's 2000 Dallas County aggravated sexual assault conviction by virtue of a *Brady* violation in that case. However, the court held that the erroneous enhancement in Hill's indecency conviction was harmless, given the availability of another prior felony (the Dallas theft conviction) that could have served as a substitute for the enhancing conviction. Hill is now challenging the validity of his Dallas theft conviction, the existence of which came about as a "package deal" when he pleaded guilty to the infirm Dallas sexual assault.

Analysis. Delay in pursuing habeas relief can result in prejudice to the State; when it does, the equitable doctrine of laches bars relief. Hill learned of the basis for relief in 2018 during or prior to his filing of his habeas petition. He waited five years to file the instant writ after the litigation in his previous successful writ. Now his former defense lawyer has passed, and so has the former prosecutor. His "package deal" argument is hotly contested. The doctrine of laches requires the Court to reject his habeas petition as untimely filed.

Comment. It seems to me more like Hill was surprised by the advanced logic used by the CCA to save one of his Hunt County convictions using the until-then irrelevant theft charge and decided to litigate the validity of the theft charge only once it became relevant.

1st District Houston

Ragsdale v. State, No. 01-23-00250-CR (Tex. Crim. App.—Houston [1st Dist] Apr. 10, 2025)

Attorneys. Shannon B. Flanigan (trial), C. Patrick Meece (appellate), Margaret Meece (appellate)

Issue & Answer 1. When the defendant does not assert his right to a speedy trial but moves for dismissal 6.5 years after his arrest and one day before jury selection, has he demonstrated that he is entitled to speedy trial relief? **No.**

Issue & Answer 2. Was the use of a photo array of six black young black men, all with short-to-medium dreads, all wearing civilian clothing, unduly suggestive because, according to the defendant, none were close in weight or size to him? **No.**

Facts. The State convicted Ragsdale of aggravated robbery. The conviction rested largely on victim and eyewitness identifications. During a photo lineup interview, these witnesses identified Ragsdale with varying degrees of certainty: Witness 1 (100% certain), Witness 2 (50% certain), and Witness 3 (50% certain). Witness 1 expressed certainty that his in-court identification was based on his independent memory of a face he would never forget. Ragsdale contends that the in-court identification was tainted by an impermissibly suggestive lineup, which used photographs of individuals who did not closely resemble one another, and only one individual who closely resembled the descriptions given by the witnesses prior to their participation in the identification procedure.

Ragsdale also challenged his prosecution on speedy trial grounds. The State alleged an offense occurring in 2016, arrested Ragsdale in 2018, and tried him in 2023.

Analysis 1. Ragsdale's right to a speedy trial was not denied, primarily because he did not demand his right to a speedy trial. The *Barker v. Wingo* factors support the trial court's denial of his motion to dismiss: (1) 6.5 years of delay is enough to trigger the analysis and weighs against the State, (2) both parties persisted in efforts to get to trial, and the delay was due to the trial court's preference to hear older cases, (3) the Ragsdale did not assert his right until a day before jury selection, which weighs heavily against him, (4) Ragsdale only generally argued that his ability to present a defense was impaired without any specific articulation why.

Analysis 2. The photos selected by the detective for a lineup identification were all of young black men with short-to-medium black hair in dreadlocks, and they appear similar in age. Some of the photos were of men with facial hair. All the photos featured men wearing casual clothing. According to the court, they all appear similar.

Comment. Courts frequently mess up the "reason for delay" analysis. It is an analysis of whether the State is to blame for the delay, and in this context, the State includes the trial court. To say that the delay was neither party's fault, but rather the trial court's, is a conclusion that weighs in favor of granting a speedy trial dismissal. Moreover, the standard also proclaims that no single factor controls the analysis, but it sure seems that late or non-assertion of the right does.

Odeku v. State, No. 01-23-00263-CR (Tex. App.—Houston [1st Dist.] Apr. 17, 2025)

Attorneys. Thomas Martin (trial), Stephen Aslett (appellate)

Issue & Answer. Are statements about a sexual assault given by a patient seeking a SANE examination (medical treatment for a sexual assault) testimonial and subject to a confrontation objection? **No.**

Issue & Answer. When a few circumstances surrounding a prior sexual assault vary from the circumstances of the instant sexual assault, should the State be prohibited from using the prior sexual assault as evidence to rebut a defensive theory of mistake or lack of intent? **No, not when there are several similar circumstances.**

Facts. The State convicted Odeku of sexual assault. Odeku met the complainant on a dating website. Eventually, the two met. During their meet-up, the two made out, but the complainant disengaged. This is when Odeku sexually assaulted her. The State presented evidence of Odeku's commission of another sexual assault to counter his defense of mistake and absence of intent. They did so through hearsay testimony from a SANE nurse and a detective.

Analysis 1. Statements by a patient giving a verbal history to a SANE or other medical professional for purpose of receiving medical treatment is not considered testimonial. The Confrontation Clause only bars testimonial statements.

Analysis 2. Odeku contends that his prior sexual assault is not sufficiently similar to the instant sexual assault and should have been excluded on the basis of unfair prejudice under Rule 403 and not proper rebuttal evidence to a defensive theory under Rule 404(b). Namely, Odeku contends that the prior allegation of sexual assault involved drinking and drugs with a person with whom he was not previously acquainted. But the similarities were sufficient. Odeku used the same alias with both women. The assaults occurred late at night after Odeku and the victims met for the first time. Both women accused Odeku of penetrating their vaginas from behind and without a condom. Both women accuse Odeku of photographing them using an iPad after the assault.

3rd District Austin

***Jaquez v. State*, No. 03-23-00273-CR (Tex. App.—Austin, Apr. 10, 2025)**

Attorneys. Emily Detoto (trial), Susan Clouthier (appellate), Gage S. Fender (appellate)

Issue & Answer. Article 42A.102(b)(4) allows a trial judge to consider deferred adjudication community supervision when the defendant is a party to a murder who did not anticipate the taking of human life. Normally, a trial court's sentencing determination is unassailable on appeal. In this context, is the trial court entitled to the same amount of deference as it is in a typical sentencing determination? **Yes.**

Facts. The defendant entered a guilty plea to murder, and the State agreed to a 25-year cap on punishment. The parties agreed that the defendant's guilt was based on party liability and that he was eligible for deferred adjudication if the trial court found that he did not anticipate that a human life would be taken. The trial court rejected the defendant's request for deferred adjudication and explained "[t]he totality of the facts and circumstances make it not credible to the Court that the defendant did not anticipate a life would be taken," and noted that the offense could have been indicted as capital murder and that Appellant got a better deal than his codefendants in exchange for his cooperation.

Analysis. Jaquez contends that a trial court's determination of deferred eligibility in a murder case is reviewable to the extent of its ruling on whether the defendant anticipated there would be a loss of life (that it evades the normal unassailability of a trial court's punishment determination). Jaquez misinterprets the statute.

Quoted. The plain reading of Article 42A.102(b)(4) allows a trial judge to consider deferred adjudication community supervision in cases such as this, if the trial court makes three specific findings. Tex. Code Crim. Proc. art. 42A.102(b)(4). However, nothing in the statute requires the trial court to grant deferred adjudication community supervision even if the three factual prerequisites exist. Further, *Chavez* did not create an exception for an abuse of discretion review, but rather acknowledged that there could be cases in which the punishment decision was so "intrinsically factbound" that the general rule that a punishment "is unassailable on appeal" if it falls within the legislatively prescribed range did not apply. *See Chavez*, 213 S.W.3d at 323–24 (noting that generally, punishment falling within legislatively prescribed range and based on sentencer's informed normative judgment "is

unassailable on appeal"). We cannot conclude that either the discretionary language in Article 42A.102 or the relied-on Chavez reasoning requires us to conduct a legal sufficiency review of the trial court's punishment decision in this case. Jaquez acknowledged that his co-defendants were armed with military weapons and looking to kill someone. The record supports the trial court's determination.

***State ex rel Newell*, No. 03-25-00096-CV (Tex. App.—Austin, Apr. 25, 2025)**

Attorneys. Jessica Freud (Real Party in Interest), Zachary Lynn Boyd (Real Party in Interest).

Issue & Answer. Can the State get the jury instructions it wants through a mandamus proceeding? **Yes.**

Facts. The State indicted the defendant Mosley for Murder, alleging he committed the offense individually and as a party with an unknown individual (unknown name allegation). Ample evidence at trial showed this unknown individual was Demetrious Jones, whom the State also charged with murder. After the close of evidence, Mosley moved for a directed verdict and argued that the State had not shown the jury the offense was committed with an unknown person that was not known to the grand jury at the time of the indictment or that the grand jury used due diligence to ascertain or properly indict an unknown person. The trial court initially took the motion under advisement and then notified the parties it would be granting the motion *as to party liability* and issuing findings of fact and conclusions of law. The State filed the instant petition for mandamus.

Analysis. A party seeking mandamus must show no adequate remedy at law, and the act the party seeks to compel is ministerial rather than discretionary. The State has shown it has no adequate remedy at law, and the trial court had a ministerial duty to instruct the jury on party liability. The trial court erroneously relied on a "defunct" due diligence rule under which the state must support an unknown name allegation with proof it exercised due diligence to ascertain the name. In deciding whether to grant a motion for directed verdict, the trial court must evaluate the State's proof of elements as determined by a hypothetically correct jury charge. Under this standard, some variance is permitted between pleading and proof of non-statutory allegations (such as the identity of a party to a murder). "Whether this individual was unknown or known to the grand jury has nothing to do with the allowable unit of prosecution for murder." The variance did not result in the State proving an entirely different offense and was thus immaterial.

Comment. Great, we can now stop every trial with mandamus litigation over denied jury charges. Or the State can, because they can't appeal an acquittal. The defendant has an adequate remedy. Just look at all the reversals that are ordered based on jury charge error, where the trial court's wrong decision was not insulated by preservation rules and harm analysis.

7th District Amarillo

***State v. Castaneda*, No. 07-24-00244-CR (Tex. App—Amarillo, Apr. 25, 2025)**

Attorneys. David Guinn (trial)(appellate)

Issue & Answer. The State can appeal a ruling on a trial court motion if the ruling grants a motion to suppress evidence. Is a trial court's refusal to permit testimony by Zoom a ruling that constitutes a suppression of evidence and thus a ruling from which the State may take an appeal? **No.**

Quoted. [T]he State sought leave to present witness testimony by video conference. No one filed a motion to suppress or to otherwise exclude evidence from trial. Furthermore, the trial court "denied" the motions of the State to so present evidence. It granted no motion to suppress or exclude evidence. Given these circumstances, we do not have before us an appeal by the State from an order that "grants a motion to suppress" within the plain meaning of article 44.01(a)(5), as construed in *Cowsert*.

11th District Eastland

***Miller v. State*, No. 11-23-00022-CR (Tex. App.—Eastland, Apr. 17, 2025)**

Attorneys. Justin Sparks (appellate)(trial), Lindsay O. Williams (appellate)

Issue & Answer 1. In a joint trial where one defendant claims self-defense and the other claims defense of others, can a jury acquit the defendant claiming defense of others but convict the defendant claiming the primary self-defense? **Yes.**

Issue & Answer 2. Is a defendant who receives a self-defense instruction also entitled to a necessity instruction? **No.**

Facts. The State charged Miller and his son with murder; a jury convicted Miller but not his son. Miller and the victim were in an argument over a mattress. A witness filmed the culmination of the dispute. Miller and his son were holding guns without pointing them at the victim (initially). The victim persistently threatened to kill both Miller and his son. The victim refused to heed Miller's warnings not to come closer and stepped toward Miller multiple times. At some point during the victim's attempts to escalate, Miller's son took his shotgun off his shoulder. The witness filming the ordeal pointed her camera away, and then two shots can be heard. The witness resumed filming and captured the victim striking Miller with a baseball bat. Both Miller and his son raised their guns, and two more shots can be heard. Miller and his son elected a joint jury trial. The jury found Miller guilty of murder and assessed 14 years' imprisonment. The same jury acquitted Miller's son.

Analysis 1. There are scenarios under which Miller and his son's theories of acquittal are not as entangled as Miller suggests. The jury might have rationally believed that while Appellant was not reasonably acting in self-defense when he

first shot Howard, Appellant's son was reasonably acting in defense of his father when he shot Howard after Appellant fired; or (2) because both the shot to Howard's chest and the shot to Howard's head were independently fatal, and because Appellant shot first, his son's shot was "superfluous." Regardless, it is not the court's place to analyze the jury's rationale for doing something.

Analysis 2. To reject self-defense the jury was required to find that the State proved that Miller did not reasonably believe that he was in fear of serious bodily injury or death, or that Miller did not reasonably believe that the degree of his force was immediately necessary to protect himself against the victim's use of unlawful deadly force. Necessity is similar; the defendant must believe his conduct is necessary to avoid imminent harm, and the desirability of his conduct reasonably outweighs the harm he seeks to avoid. Here, because the jury rejected the defendant's self-defense claim, the jury would have also rejected the defendant's necessity claim.

Quoted. "[t]he rendering of inconsistent verdicts has always been an exclusive privilege and prerogative of the jury, and it is not our duty to unravel the ratiocinations of the jury's collective logic."

Comment. Appellate review is just silly most of the time. Here is the summary of the summary: "we reject Appellant's first claim because *we can't know* the jury's thoughts and it is *not our place* to inject ourselves; we reject Appellant's second claim because *we do know* exactly what the jury would have thought, and it *is our place* to inject ourselves."

14th District Houston

Stocker v. State, No. 14-21-00412-CR (Tex. App.—Houston [14th Dist.] Apr. 8, 2025)

Attorneys. Windi Akins Pastorini (appellate), R.P. Cornelius (trial), Bryan Savoy (trial)

Issue & Answer. Can a court assume that a cell phone will have evidence of a crime if a warrant affidavit establishes probable cause that its owner committed a crime? **Yes.**

Facts. Stocker shot at a homeless man from his apartment balcony. The victim survived and helped identify the balcony from where the shots originated. Months later, Stocker shot at the same homeless man from the same balcony and killed him. Using evidence linking Stocker to the shooting, officers obtained an arrest warrant and executed it at Stocker's place of business. Warrant executing officers knew detectives were looking for Stocker's cell phone. When they saw a cell phone near Stocker's workstation, they seized it.

Analysis 1. The plain view exception to the warrant requirement has two requirements: (1) the officer must be in a proper position to view the item, and (2) the item's status as evidence must be immediately apparent. The seizing officer does not need actual knowledge of the incriminating nature of the evidence; the collective knowledge of officers rising to the level of probable cause will suffice. Because detectives wanted to interview Stocker about the murder and search his phone, the seizure was fine (editorial: the court does not give a reason why there was probable cause, but it is assumed that it is the same probable cause contained in the affidavit seeking authority to search the cell phone).

Analysis 2. A probable cause affidavit seeking to search a cell phone must have more than conclusory language establishing a nexus between the cell phone and the murder. The affidavit in this case includes generic assertions about cell phone usage among criminals. This court previously held that such generic assertions were insufficient, but the CCA reversed. Although the affidavit contains boilerplate and generic language regarding cell phone usage, it also includes detailed descriptions of criminal conduct. A court is permitted to rely on the common knowledge that smartphones record and store location data sought by the detective and that is probative of the offenses under investigation.

Comment. It appears that the court did not wish to write the things it wrote in this opinion on remand. The CCA has held that judges may simply assume the probability that all cell phones will contain evidence of a crime if they belong to a person who is suspected of a crime, established by probable cause in a warrant affidavit.

Johnson v. State, No. 14-23-00638-CR (Tex. App.—Houston [14th Dist.] Apr. 22, 2025)

Attorneys. Ted Doebbler (trial), Jani Maselli Wood (appellate)

Issue & Answer. A defendant has the right to have the same jury that convicted serve as the jury assessing punishment (absent two exceptions). Is that right violated when the trial court replaces a disabled juror with an alternate juror during the punishment phase of trial? **No.**

Facts. A juror fell and injured herself after the jury convicted Johnson but before the jury began punishment deliberations. The trial court excused the juror based on her doctor's recommendation of 2-3 days of bed rest. The trial court replaced this juror with an alternate juror.

Analysis. A court has discretion to determine whether a juror has become disabled. Here evidence supported that determination. The juror's doctor's note was admitted into evidence and showed a soft tissue contusion. Johnson claims a right to be sentenced by the convicting jury – a right that has only two exceptions in the law: (1) the granting of a new trial based on a hung jury, and (2) reversal and remand for sentencing on appeal.

Quoted. Any alleged discrepancy between the provisions regarding when an alternate juror may replace a disabled juror and the provision providing the statutory right to have the same jury assess punishment as the one that assessed guilt can be reconciled without conflict. When a jury is selected, the jurors take an oath to render a true verdict according to the law and the evidence. Alternate jurors are drawn and selected in the same manner as the regular jurors, take the same oath, and have the same functions and powers as regular jurors. After it is charged, the jury retires to render its verdict, but there are circumstances where an alternate juror may replace a juror found to be unable or disqualified to

perform her duties. The Code of Criminal Procedure permits an alternate juror to replace a disabled juror prior to the time the jury renders a verdict on the guilt or innocence or the amount of punishment. Thus, the alternate juror provision contemplates when a defendant follows the procedural steps to have the jury assess punishment.

Our review of the Code of Criminal Procedure indicates that if a defendant elects to have punishment assessed by the jury, his statutory right to have the "same jury" assess punishment is not violated if an alternate juror replaces a disabled juror after the verdict but before punishment is assessed.

Comment. She had a bruise.

Geer v. State, No. 14-23-00136-CR (Tex. App.—Houston [14th Dist.] Apr. 24, 2025)

Attorneys. Daucie Schindler (appellate), Patti Sedita (trial), Staci Biggar (trial)

Issue & Answer 1. Does a trial court have a sua sponte duty to conduct a competence inquiry when a formerly declared incompetent defendant begins behaving irrationally during trial? **No.**

Issue & Answer 2. Does counsel violate *McCoy* (may not override client's refusal to concede guilt at trial) by conceding that very little evidence will be disputed? **No.**

Facts. Courts and doctors consistently determined Geer incompetent for a period of three years. Eventually, a state hospital determined that Geer could attain and maintain competence through medication. However, it did not seem that way during the trial. Geer became irate and yelled in pretrial hearings, he refused to change out of jail-issued clothing, he claimed he was framed, he was argumentative and insulting to the trial court, and he interjected when he disagreed with testimony. Geer asserted wild defensive theories, including that the man depicted in video evidence was his twin or triplet and the photographs of the victim were of a different man than who he admitted to striking and killing. On one occasion, defense counsel asked the trial court for a break to "calm him back down."

Analysis 1. The record shows that Geer understood the charges against him and the possible consequences. He discussed legal matters with the trial court and paid attention, responding with relevant questions when the judge explained the role of the jury. His obstinance reflects a familiarity with the jury trial process, as does the fact that he developed his own defenses.

Analysis 2. *McCoy* prohibits trial counsel from conceding guilt at trial when the defendant objects and does not wish to concede inculpatory facts. But a defendant himself must object to preserve *McCoy* error. To the contrary, Greer sought a lesser included offense consistent with counsel's concession and inconsistent with his claims of innocence. Because *McCoy* ultimately did not interject during counsel's arguments before the jury, he did not preserve his complaint.

Comment. It must suck to persistently interject throughout trial but miss the one interjection the court wants from you. If the standard is "you have to do what a lawyer does" to preserve your claim, we should recognize that one of the things lawyers do is get cases reversed due to their own incompetence (including in the area of error preservation).

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

- 2nd District Fort Worth
- 4th District San Antonio
- 5th District Dallas
- 6th District Texarkana
- 8th District El Paso
- 9th District Beaumont
- 10th District Waco
- 12th District Tyler
- 13th District Corpus Christi/Edinburg

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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Cross of an Officer for ALR & DWI Arrest ..... Gary Trichter & Expert
Expunctions, Non-Disclosures, & Collateral Consequences ..... Aaron White
Field Sobriety Testing ..... Lisa Martin
Demo & Lecture: Technical Supervisor Cross ..... Doug Murphy

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Voir Dire ..... David Burrows
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Cellebrite & CDR	Eric Devlin
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Client Management Strategies & Issues	Damon Parrish, David Price & Stephanie Stevens
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Extraneous & Bad Acts	Jani Maselli Wood
Understanding Discovery & Appropriate Demands	Michael Gross

FRIDAY, SEPTEMBER 5, 2025

Discovery Requests & How to Get What You Need	Mark Metzger
Untraditional Motions	Mark Stevens
Motions (new law & updates, discovery, 404b, motions to suppress)	Sara Smitherman
Game Changing Defense - 702, Chain of Custody, Predicate	Nicholas Hughes, Thuy Le, & Annie Scott
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