

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

# VOICE

FOR THE DEFENSE

VOLUME 54 NO. 8 • OCTOBER 2025

EVIDENCE

Case No. \_\_\_\_\_

Date \_\_\_\_\_

Time \_\_\_\_\_

Description

**MICHAEL  
MORTON**

**Michael Morton Act**  
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**Conduct-Based Immigration Grounds Endanger Noncitizen Youth in Texas**  
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**Marijuana DWIs**  
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**Humanizing the Accused**  
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**Misdemeanor Plea in Absentia for an Indigent Incarcerated Client**  
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**Texas Criminal Defense Lawyers Association**

# 21ST ANNUAL STUART KINARD ADVANCED DWI SEMINAR

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## **THURSDAY, NOVEMBER 6, 2025**

Case Law Updates .....	Hon. David Newell & Hon. Bert Richardson
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

## **FRIDAY, NOVEMBER 7, 2025**

Voir Dire .....	David Burrows
Creative Motions, Motions to Suppress, & Strategies at Suppression Hearings .....	David Frank
DWI Manslaughter/Felony Strategies .....	Don Flanary
Creating Reasonable Doubt with Blood Test/Analysis .....	Amber Spurlock
Demo & Lecture: Cross of the Blood Expert .....	Tyler Flood & Expert

**NOVEMBER 6-7, 2025  
MENGER HOTEL • SAN ANTONIO, TX**

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FOR THE DEFENSE  
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Available online at [www.tcdla.com](http://www.tcdla.com)  
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**October 2-4**  
TCDLA | FIDL 5.0 Returner 2/4  
Austin, TX

**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 | 31<sup>st</sup> Annual Judge David C. Guaderrama El Paso Criminal Law Ruidoso, NM

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

**October 16-17**  
CDLP | 22<sup>nd</sup> Annual Forensics  
Austin, TX

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

**October 23-24**  
CDLP | Capital Voir Dire Training: Theory & Intense Practice  
Austin, TX

**October 24**  
CDLP | Guardians of Sacred Justice  
Laredo, TX

**November**

**November 6-7**  
TCDLA | 21<sup>st</sup> Annual Stuart Kinard Memorial Advanced DWI  
San Antonio, TX

**November 14**  
CDLP | Nuts & Bolts w/ SACDLA  
San Antonio TX

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

**November 17**  
CDLP | Mindful Monday – Substance Abuse and Different Avenues  
Webinar

**December**

**December 4-5**  
TCDLA | The Defense Never Rests: A Full-Spectrum CLE on Sex Crimes  
Round Rock, TX

**December 5**  
TCDLA Executive & Legislative Committee Meetings  
Round Rock, TX

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

**December 12**  
CDLP | 18<sup>th</sup> Annual Hal Jackson Memorial Jolly Roger Criminal Law w/ DCDLA  
Denton, TX

**December 15**  
CDLP | Mindful Monday – Coping with the Holidays  
Webinar

**January**

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

**January 8-9**  
TCDLA | 45<sup>th</sup> 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 29**  
TCDLA | Family Violence  
Webinar

**January 29-30**  
CDLP | Mitigation Bootcamp  
Dallas, TX

**February**

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

**February 6**  
TCDLA | Drug Crimes  
Webinar

**February 12**  
CDLP | Setting Up the Appeal  
Houston, TX

**February 13**  
CDLP | Capital  
Houston, TX

**February 18**  
TCDLA | New Lawyer – State to Federal  
Webinar

**February 19**  
CDLP | Veterans  
Dallas, TX

**February 19-20**  
TCDLA | Federal Law  
New Orleans, LA

**February 19-20**  
TCDLA | Criminal Law  
New Orleans, LA

**February 19-20**  
CDLP | MAC Training  
Austin, TX

**February 20**  
CDLP | Indigent Defense  
Dallas, TX

**February 26**  
TCDLEI Board Meeting  
Zoom

**February 27**  
CDLP | Career Pathways  
Webinar

**March**

**March 5-6**  
TCDLA | Evidence  
Dallas, TX

**March 6**  
TCDLA Executive & Legislative Committee Meetings  
Dallas, TX

**March 7**  
TCDLA Board & CDLP Committee Meetings  
Dallas, TX

**2026**

*March Continued*

**March 20**  
TCDLA | Financial Friday - Retirement Planning by a Solo Practitioner  
Webinar

**March 22-27**  
CDLP | 49th Annual Tim Evans Texas Criminal Trial College  
Huntsville, TX

**March 26-27**  
TCDLA | 32nd Annual Mastering Scientific Evidence DUI/DWI w/ NCDD  
New Orleans, LA

**April**

**April 9**  
TCDLA | White Collar  
Webinar

**April 10**  
CDLP | Guardians of Sacred Justice  
Longview, TX

**April 15**  
TCDLA | New Lawyer – HR Basics  
Webinar

**April 17**  
CDLP | Juvenile  
Webinar

**April 22-25**  
TCDLA | FIDL 5.0 Returner 3/4  
Austin, TX

**May**

**May 1**  
TCDLA | DWI Defense  
Dallas, TX

**May 11**  
CDLP | Mindful Monday  
Webinar

**June**

**June 16**  
CDLP | Public Defense Leaders  
San Antonio, TX

**June 17**  
CDLP | Capital  
San Antonio, TX

**June 17**  
CDLP | Indigent Defense  
San Antonio, TX

**June 17**  
CDLP | Mental Health  
San Antonio, TX

**June 18**  
CDLP | Women Defenders  
San Antonio, TX

**June 18-20**  
TCDLA | 39th Annual Rusty Duncan Criminal Law Course  
San Antonio, TX

**June 19**  
TCDLEI Board, TCDLA Executive & CDLP Committee Meetings  
San Antonio, TX

**June 20**  
TCDLA: 54<sup>th</sup> Annual Members' Board Meeting  
San Antonio, TX

**Scholarship Information:**

*Texas Criminal Defense Lawyers Educational Institute (TCDLEI) offers scholarships to seminars for those with financial needs. Visit [TCDLA.com](http://TCDLA.com) or contact [scholarship@tcdla.com](mailto:scholarship@tcdla.com) for more information.*

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

# Article TCDLA October

**NICOLE DEBORDE HOCHGLAUBE**



The Texas Criminal Defense Lawyers Association is unique on many fronts. We are the largest state bar group of Criminal Defense Lawyers in the country. Despite our size and substantial differences in the types of practices our members enjoy, we share an incredible bond with our sisters and brothers in this fight we call Criminal Defense. We are also fortunate enough to have an incredible depth of talent, many unique focuses and perspectives and a willingness to share our resources and knowledge. Our members, ranging from rural practitioners to big city lawyers; solo practitioners to members belonging to large, heavily resourced firms, old hats and new faces – all willing to share their knowledge sets and experiences with one another for the betterment of the bar as a whole. What a wonderful thing in a time where differences often seem to create an uncrossable chasm for many with different views of how things should be or used to be or could have been. Not you. You come as you are and are gratefully welcomed by sisters and brothers looking for the strength and camaraderie that TCDLA membership brings. Many of you may be competing for the very same business in your communities, but that does not stop you from being there in full for your brothers and sisters. It brings me a surge of energy for my own work and pride in my TCDLA community when I think about what you do and how you show up for all of us and for your clients at the same time.

As you read this, our legislative team will no doubt have wrapped up not one, but two special sessions. Our legislative team consists of amazing lawyers who are in the criminal defense trenches with us. Allen Place, Shea Place and David Gonzalez are constantly vigilant for the bills that might potentially impact our clients rights and the way the criminal justice system functions. With the help of our brilliant Legislative Committee, these amazing human beings go down to the Capitol to share our voice and to monitor the making of what will be our justice system in its next iteration. While the idea of lobbying is not foreign or unique, what strikes me as incredible is the fact that you, our members, want to be apprised of and be heard on these bills not only to educate yourselves or about what is to come so that you can defend the constitution at your best, but because you care about justice, fairness and the constitution. I sometimes wonder how many other interest groups or organization operate like we do. I cannot imagine there are many. You care not about your pocketbooks or making your tasks easier. You are not spending your precious time and energy on following this developing legislation and providing input because you are trying to guard some self-interest, but because you care about what is right under the law. You care about the people caught up in the criminal justice system, fairness and justice itself. You care about our legislature

getting it right even if that means inconvenience or less money or even less cases for you. This strikes me as exceptional in a time when desperation and fear beget a clawing for self-preservation. You have risen above such tendencies as long as I have had the gift of being one of you, and you continue to do so even in times of broader discord. Maybe you do it because you cannot stand the thought of bearing witness to one more miscarriage of justice. We have all seen at least one. Maybe you do it because that is just how you are. I am grateful for the strength in our numbers because you make it possible to stand up for what is right. Your unique talents and perspectives give TCDLA the right things to say in the face of what sometimes feels like overwhelming power. You make it possible to turn the tide when public sentiment has turned to rage without the facts and the truth. You make it possible for us to hang on to justice for just a little bit longer no matter how hard it may feel to maintain a grip on what sometimes feels like it is slipping away. What you are doing now to be a part of this amazing band of brothers and sisters will likely save a human being who does not now even know he is in the crosshairs of fate's plan for a meetup with our justice system. Thank you for your constant vigilance, your brilliance and willingness to share the gift of your time with TCDLA to make this a better place to fight this daily battle.

A handwritten signature in black ink, appearing to read 'NDH', written in a cursive style.

 **Texas Criminal Defense Lawyers Association**  
**Hear It Straight from Our President**

**Podcast + Video**  
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# Stronger Together: Education and Collaboration

MELISSA J. SCHANK

*"WISDOM IS NOT A PRODUCT OF SCHOOLING BUT OF THE LIFELONG ATTEMPT TO ACQUIRE IT."*

— Albert Einstein

At TCDLA, we believe professional growth begins with investing in our people. This August, our annual staff development focused on building skills that matter both in the office and at seminars. Sessions covered topics such as overcoming burnout and wellness, constructive criticism, professional etiquette, and collaboration across different styles and generations. We also explored tools for problem-solving, negotiation, project management, and time management, while refining our communication and customer service strategies.

Alongside the training, staff participated in team-building activities. These exercises encouraged collaboration, creativity, and a stronger workplace culture. By combining professional development with interactive learning, staff development reinforced our commitment to building a resilient, communicative, and high-performing team – reenergized and ready to take on the year ahead.

The same principles apply to you and your practice. What are some easy ways to keep your skills sharp and your team motivated? Tap into the member benefits designed specifically for criminal defense lawyers:

- Federal Law
- Sexual Assault/Family Violence
- Public Defenders
- Attorney Outreach
- Rural
- Tech Tuesdays
- Crimmigration

Continuing education isn't just about checking a CLE requirement box. It's about sharpening your advocacy, learning from peers, and building a stronger defense community. The law evolves, strategies shift, and no one benefits from practicing in isolation. Roundtables and trainings provide the space to connect, collaborate, and prepare yourself to fight the next battle in court.

Now is the time to invest in yourself and your practice. Join us this fall, take advantage of your member benefits, and stay energized for the year ahead.

**How to sign up:** email [register@tcdla.com](mailto:register@tcdla.com).

## Federal Defense Boot Camp

A premier training ground for lawyers new to federal practice or those seeking to sharpen their foundations. From indictment through sentencing, this program offers tactical knowledge, courtroom strategies, and expert guidance. Webinars: Federal Bootcamp

## Office Hours

Modeled after the popular sessions at Rusty Duncan, these upcoming virtual office hours connect you directly with experienced TCDLA leaders. Bring your questions, share challenges, and walk away with practical advice at no cost. Sign up: [register@tcdla.com](mailto:register@tcdla.com)

## Capital Series & Brainstorming

If you've ever considered handling capital cases or want to strengthen your skills, this series of webinars provides essential tools and resources. For one-on-one case assistance or brainstorming, reach out to TCDLA's capital defense expert, Rick Wardroup, at [rwardroup@tcdla.com](mailto:rwardroup@tcdla.com). Webinars: Capital Series

## Roundtables – Free & Interactive

Roundtables are one of the most dynamic ways to engage. Each session features a subject-matter expert followed by open Q&A and brainstorming with peers. These are free to members and a powerful way to share strategies across the defense community. Current offerings include:



Texas Criminal Defense Lawyers Association

# Upcoming Webinars

## AI – Powered Body-Cam Review for Criminal Defense Attorneys

October 28, 2025 | 12:30 pm

The average criminal case today includes hours of body-worn camera footage, interrogation videos, jail calls, and courtroom proceedings. Digital discovery can be a powerful tool for accountability, but it is not humanly possible to manually sift through all this data. JusticeText is changing that.



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# UPCOMING Roundtables

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For Members & Non-Members

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*Roundtable discussions are for informational and networking purposes only. No Continuing Legal Education (CLE) credits will be provided for these roundtable sessions*

## Federal Roundtable: New Sentencing Guidelines



**Date:** Wednesday  
October 8, 2025  
**Time:** 4 - 5 pm

## Federal Roundtable: Trends



**Date:** Wednesday  
November 12, 2025  
**Time:** 12 - 1 pm

## TCDLA NEW Member Benefit!



# TCDLA + justicetext

### JusticeText: AI-Powered Body Cam Review Built for Defense Attorneys

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# MICHAEL MORTON ACT

**JEEP DARNELL**

Back in June of 2024, our friend Mitch Adams wrote an article for *The Voice* that cautioned us about how to ethically handle situations where a prosecutor has not timely produced certain evidence in a soon-to-be-tried case. Unfortunately, that article has been skewed by some prosecutors and some legislators in an attempt to destroy our clients' right to the production of evidence in a criminal case pursuant to the Michael Morton Act. (Tex. Code Crim. Proc. art. 39.14, *et. seq.*). While I agree with everything that Mitch wrote, I believe much of what he wrote has been taken out of context in an attempt to vilify our brothers and sisters in their daily fight to make sure we have the evidence in our cases. So, because of that vilification, I wanted to write on the topic to provide a bit of a refresher to all of us on how we need to handle making sure we get the evidence to which we are entitled.

First, what Mitch's article seems to overlook is that the onus is on each of us in every case to file a Morton request, pursuant to Article 39.14(a). I don't believe this should be a simple email or generic filing that says give me everything. Instead, I have found the best practice to be to make a detailed request for all types of potential evidence in a certain type of case. Only then, pursuant to the statute, do we move the burden of production to the State. The recent *Heath* litigation gives us some insight into what not to do in the future. In *Heath*, "... on March 23, 2017, counsel for Heath emailed a request to the State that stated in its entirety: 'Can I get discovery on this client? Cause #2017-241-C2.'" *State v. Heath*, 582 S.W.3d 495, 496 (Tex. App.—Waco 2018), *rev'd, dism'd in part*, 2019 Tex. Crim. App. Unpub. LEXIS 774 (Tex. Crim. App. 2019). When the State produced a 911 recording just days before trial, "[t]he trial court excluded the recording based on the prosecutor's failure to produce the recording 'as soon as practicable' pursuant to article 39.14(a) of the Code of Criminal Procedure and Heath's objection to a continuance." *Id.*, at 496.

Thereafter, the State appealed in what I'll call *Heath I*, (*State v. Heath*, No. PD-0012-19, 2019 Tex. Crim. App. Unpub. LEXIS 774 (Crim. App. Dec. 18, 2019)), and the case ended up in front of the Court of Criminal Appeals after the Court of Appeals reversed the trial court's exclusion of evidence "under a theory that the State did not raise at trial or on appeal," *Heath I*, No. PD-0012-19, 2019 Tex. Crim. App. Unpub. LEXIS 774, at \*1, namely that the sufficiency of the request. According to the Waco Court of Appeals:

*The request in this proceeding did not even reference article 39.14 and did not designate any items sought to be produced. We do not find that this is sufficient to give the State notice of what is requested to be produced pursuant to article 39.14(a). Therefore, the prosecutor was not under a duty to produce the recording pursuant to article 39.14(a). Because there was no duty to produce the recording pursuant to article 39.14(a), the trial court abused its discretion by excluding the recording on this basis.*

*Heath*, 582 S.W.3d at 497 (Tex. App.—Waco 2018). Because the State failed to preserve that issue, a unanimous Court of Criminal Appeals reversed. *See Heath I*. Thereafter, once the case went back to the Court of Appeals who affirmed the trial court's decision to exclude the evidence, but were limited in their analysis because they were required to "assume for purposes of [the] opinion that there was a proper request for the recording." *State v. Heath*, 642 S.W.3d 591, 593-94 (Tex. App.—Waco 2022), *aff'd*, 2024 Tex. Crim. App. LEXIS 446 (Tex. Crim. App. 2024). The case then returned to the Court of Criminal Appeals who affirmed that decision in *Heath II*. *See State v. Heath*, 696 S.W.3d 677 (Tex. Crim. App. 2024).

Although the proverbial sky has been falling ever since that decision, I believe that had the State preserved the issue of the sufficiency of the request, we may not have the same case law that has been handed down as a result. I'm not disparaging any of the criminal defense lawyers in this State, but I think we got lucky that the State didn't preserve that issue. Accordingly, although I still agree with Mitch's article, I think we have to make sure that we file proper, detailed Morton requests in our cases in order to preserve the right we have to discovery. We cannot shirk or short-shrift our duty under 39.14(a), and I think we need to go so far as to file supplemental requests when we become aware of potentially more evidence. We have to assume that unless we specifically request even specific categories of evidence, like 911 calls, then the State through its District Attorneys offices, will not fail to preserve that issue again. I think the Court of Criminal Appeals got it right in both *Heath I* and *Heath II* because the issue was narrowly tailored. However, if we specifically request production of certain items of discovery, or specific categories, only then do we get to the crux of Mitch's article where we can then move to exclude the evidence.

Be diligent, do your jobs better than they do, and let's not act like we can move to exclude evidence without a proper request and sufficient time for the State to comply.

Be safe,

Jeep Darnell



Texas Criminal Defense  
Lawyers Association

## TEXAS CRIMINAL DEFENSE CLE IN

# BIG SKY, MT

## Nicole DeBorde Hochglaube President's Trip

### FEBRUARY 4-8, 2026

6.00 CLE, INCLUDING 1.00 ETHICS

#### Don't miss out—Montana is calling!

Get ready for an unforgettable adventure as we head to the breathtaking mountains of Big Sky for the 2026 President's Trip. Whether you're hitting the slopes, relaxing fireside, or soaking in the epic views, this trip promises great company, high spirits, and nonstop fun.

### REGISTRATION & SOCIALS

- CLE & Continental Breakfast (Thurs, Fri, Sat)- \$50
- Wed. 5:30 ~ Dinner at The Cabin - \$82: **Qty**\_\_  
Thurs. ~ Open morning\*
- Thurs. 12:30 pm ~ Lunch at Moonlight Tavern: **Qty**\_\_
- Thurs. ~ Sleigh Ride/Dinner  4:30pm  7:30 pm - \$298: **Qty**\_\_
- Fri. 6:30 am ~ Yellowstone - \$353: **Qty**\_\_  
Travel on a private snow coach tour to Old Faithful with lunch.  
Stopping for BBQ Dinner (not included).  
Sat. ~ Open Day \*
- Sat. 7 pm ~ Dinner at Horn & Cattle - \$180: **Qty**\_\_
- Sun. 9 am ~ Hotel Breakfast (Paying on own): **Qty**\_\_

#### \*Open Day Suggestions:

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Name: \_\_\_\_\_

Cell Phone: \_\_\_\_\_

Partner/Spouse: \_\_\_\_\_

Cell Phone: \_\_\_\_\_

CC #: \_\_\_\_\_

EXP: \_\_\_\_\_ CVC: \_\_\_\_\_

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# Federal Methamphetamine Sentencing

SARAH DUNCAN JACOBS

Member of the Federal Assistance Committee



Like the disparity between cocaine and crack cocaine sentencing guidelines, different forms of methamphetamine [hereinafter meth] are penalized differently in the federal criminal system.<sup>1</sup> Meth penalties in federal statutes and Sentencing Guidelines increase substantially based on purity, as well as weight. Practitioners and Judges have wrestled with this disparity for decades. In 2024 the U.S. Sentencing Commission released a report<sup>2</sup> highlighting how prolific the drug has become and acknowledging the purity disparity. The data in this report and upcoming changes in the Guidelines can be used to argue for potentially lower sentences.

Methamphetamine is a synthetic stimulant listed as a Schedule II controlled substance. It increases activity in the central nervous system by triggering the release of dopamine, serotonin, and norepinephrine that overwhelm the pleasure center of the brain and provide a sensation of euphoria, or a “high,” which can last for up to 15 hours. It has both short term (rapid heartbeat, high blood pressure, anxiety, agitation) and long-term adverse effects (brain and neurological damage manifesting in paranoia, violent behavior, insomnia, and hallucinations). Overdosing can result in death from heart attack, stroke, and/or organ failure from overheating.

There is only one FDA approved prescription methamphetamine drug, Desoxyn, used to treat obesity and attention deficit hyperactivity disorder (ADHD). Illegal meth can come in liquid, powder, pill, or crystal form. It can be ingested orally, snorted, injected, or smoked. It is often shipped in liquid form and extracted into crystals or pills for sale.

Chemically, meth has as two isomers: dextro-methamphetamine (d-methamphetamine), the schedule II controlled substance, and levo-methamphetamine (l-methamphetamine), used in over-the-counter inhalers. Potency is the quantity required to produce the desired high. d-meth is much more potent than l-meth or dl-meth. This is not the same as purity, which is amount of a substance in a mixture.

The terms used in federal sentencing can be confusing. Pure meth is ‘methamphetamine’ in the statute and ‘methamphetamine (actual)’ in the guidelines.<sup>3</sup> Meth mixed with a dilutant is ‘a substance or mixture containing methamphetamine’ in the statute and ‘methamphetamine’ in the guidelines. ‘Ice’ is in the guidelines but not the statutes. ‘Ice’ is defined as a mixture or

substance containing d-methamphetamine hydrochloride of at least 80% purity and is treated like ‘methamphetamine (actual).’<sup>4,5</sup>

Statutorily, it takes 500 grams of a ‘substance or mixture containing methamphetamine’ to get a 10 year mandatory minimum sentence, while it applies at only 50 grams of ‘methamphetamine.’<sup>6</sup> Likewise, the Guidelines weigh ‘methamphetamine (actual)’ ten times more heavily than ‘methamphetamine’ when calculating a defendant’s base offense level.<sup>7</sup> The maximum offense level of 38 is the same for 45kg of ‘methamphetamine’ and 4.5kg of ‘methamphetamine (actual).’ The guidelines also include specific offense characteristics that further enhance sentencing for meth offenses.<sup>8</sup>

This results in more severe meth sentences than those for crack cocaine, heroin, and fentanyl. In 2022, the average meth sentence was 91 months, crack cocaine 70 months, heroin 60 months, and fentanyl 65 months.

Lawmakers justify this by correlating the purity of the substance with the prominence of the role in the criminal enterprise. These penalties were set in 1988 when seized meth rarely tested at more than 50% pure. Since then, meth has exploded from a small problem in a few western states into the most prevalent drug in the federal system. Meth is now highly and uniformly pure, with an average purity of 93.2% and a median purity of 98.0%, due to industrial scale production by criminal organizations in Mexico.

Meth sentences are further disparate because they are not subjected to uniform testing requirements. In some cases, the substance is weighed and tested to detect if there is meth in it. While in other cases, testing also determines purity, usually increasing the sentence.

This year’s round of guideline amendment proposals released in December of 2024 included a drastic lowering of base offense levels for controlled substances across the board. Years of data show U.S.S.G. § 2D1.1 overly relies on drug type and quantity as a measure of offense culpability, resulting in sentences greater than necessary to accomplish the statutory purposes of sentencing.<sup>9</sup> The changes would have eliminated the 1:10 discrepancy based on purity and eliminated the “ice” distinction. These changes did not pass.

4 U.S.S.G. § 2D1.1\* Notes to Drug Quantity Table (C).

5 U.S.S.G. § 2D1.1(c) Drug Quantity Table.

6 21 USC 841(b)(1)(A)(vii).

7 See USSG 2D1.1 Ap. Note 8(D). Drug Conversion Tables: 1g “Ice” = 20kg, 1g methamphetamine = 2kg; 1g methamphetamine (actual) = 20kg.

8 U.S.S.G. § 2D1.1(b)(5) and (14).

9 18 U.S.C. § 3553.

1 PCP and Amphetamine also have purity distinctions, but cases involving those substances are much less common.

2 *Methamphetamine Trafficking Offenses in the Federal Criminal Justice System*, June 2024. Referenced throughout. <https://www.ussc.gov/research/research-reports/methamphetamine-trafficking-offenses-federal-criminal-justice-system>

3 18 U.S.C. § 841; U.S.S.G. § 2D1.1\* Notes to Drug Quantity Table (B).

What did pass is the expansion of the definition and scope of the minimal participant role reduction.<sup>10</sup> The mitigating role cap provision in U.S.S.G. § 2D1.1(a)(5) is simplified. New language at U.S.S.G. 2D1.1(e) adds instructions explicitly applying the U.S.S.G. § 3B1.2 minor/minimal participant reductions to low level trafficking functions. These changes will become law on November 1, 2025 unless Congress intervenes.

In August of 2025 the Sentencing Commission held public hearings on methamphetamine, including its chemical structure, pharmacological effects, trafficking patterns, and community impact, and the differences, if any, between methamphetamine of varying purity levels.<sup>11</sup> This indicates they are open to future changes to these guidelines.

Additionally, a growing body of case law suggests the distinction between actual methamphetamine and methamphetamine mixture is no longer appropriate because it is not based on empirical data, does not serve as an accurate proxy for culpability, and creates unwarranted sentencing disparities between methamphetamine and other drugs.<sup>12</sup> This ongoing

evolution in meth and the law provide a strong basis for requests for a downward variance in many cases.

**Sarah Duncan Jacobs** is an Assistant Federal Public Defender for the Eastern District of Texas. Prior to this she practiced state, federal, and juvenile criminal defense in the Dallas area for over a decade. She taught Texas Criminal Procedure at UNT College of Law for two semesters. She graduated from Thurgood Marshall School of Law and received her Bachelor of Fine Arts in Theatre from Webster University.

<sup>10</sup> <https://www.uscc.gov/guidelines/amendments>.

<sup>11</sup> <https://www.uscc.gov/policymaking/meetings-hearings/public-hearing-august-5-2025>.

<sup>12</sup> *United States v. Robinson*, No. 3:21-CR-14-CWR-FKB-2, 2022 WL 17904534,

at \*2 (S.D. Miss. Dec. 23, 2022); Judge Carlton W. Reeves (current chair of the US Sentencing Commission); *United States v. Celestin*, No. CR 21-125, 2023 WL 2018004, at \*2 (E.D. La. Feb. 15, 2023); *United States v. Bean*, 371 F. Supp. 3d 46, 48 (D.N.H. 2019); *United States v. Nawanna*, 321 F. Supp. 3d 943 (N.D. Iowa 2018); *United States v. Hartle*, No. 4:16-CV-233-BLW, 2017 WL 2608221, at \*2 (D. Idaho June 15, 2017); *United States v. Johnson*, 379 F. Supp. 3d 1213, 1223-24 (M.D. Ala. 2019); *United States v. Carrillo*, 440 F. Supp. 3d 1148, 1157 (E.D. Cal. 2020); *United States v. Diaz*, No. 11-CR-821-2(JG), 2013 WL 322243, at \*16 (E.D.N.Y. Jan. 28, 2013); *United States v. Ibarra-Sandoval*, 265 F. Supp. 3d 1249, 1255 (D.N.M. 2017); *United States v. Cabrera*, 567 F. Supp. 2d 271, 271 (D. Mass. 2008).

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# I Want a New Drug (Court)

**MARCI MORRIS**



I was studying for the February 2025 Texas Bar Exam when fellow Rural Committee member Paul Harrell told me he had volunteered me to write an article for the *Voice*. I was not yet a licensed, practicing attorney. However, while I was in school, I worked in my husband's law firm that mostly practiced criminal defense. So, it wasn't like I had zero experience in the criminal defense world. It was just slightly above zero. In April of this year, I became an officially licensed attorney and quickly threw myself on any rural county appointment list that would take me.

The entire four months I have practiced criminal defense work this article has been lingering in the back of my mind. Imposter syndrome is one thing, but being freshly licensed, the mental rhetoric has been: "What could I possibly have to say about practicing law to a bunch of seasoned criminal defense attorneys?" Frankly, I still do not know if I can offer up much of anything. When I tried to pick my husband/law partner's brain, he told me: "write what you know."

For the most part, my case load has consisted of drug/alcohol related offenses. So, let's talk drugs (or really, let's talk resolving felony drug cases as a baby attorney).

## The Problem

Many rural counties in Texas do not have the resources or the array of programs to aid in resolving our clients' drug cases in a manner that most effectively benefits not only the client, but also the communities. Generally speaking in the areas I practice, defendants with any criminal history that are charged with drug based offenses are given two choices: 1) TDCJ time or 2) Probation with SAFPF as a condition.

SAFPF as a condition of a lengthy probation is the most popular and frequent alternative to incarceration offer from district attorneys (hereinafter DAs) for defendants facing drug charges in my area. DAs (and district judges that are former district attorneys) love the SAFPF condition and frankly, I do not really know why. I have not heard great things regarding rehabilitation from our clients who have been to SAFPF. A quick glance at the statistics on post-SAFPf recidivism rates support my skepticism.

In 2021, the Texas Criminal Justice Coalition noted that the recidivism rate (incarceration/re-incarceration) for those that go through the SAFPF program was 42.2 percent.<sup>1</sup> That same

publication noted that the recidivism rates for felony community supervision and parole supervision were only 27.6% and 20.2% respectively.<sup>2</sup> So, at nearly double the recidivism rate, why is SAFPF framed as such an attractive option by district attorneys for defendants facing subsequent drug charges? Problematically, SAFPF may seem like a path to freedom for an incarcerated individual with substance abuse issues. When in fact, the underlining issue is not addressed, thus setting the individual up for failure and likely a motion to revoke/adjudicate in the future. If the goal is to *help* defendants with substance abuse problems, then SAFPF is not always the best option.

However, in rural counties, it is one of the only specialized options for these types of cases. As defense attorneys, we can advocate to have our clients participate in private substance abuse treatment. Of course, that has geographical limitations as well as fiscal barriers to entry. Rural counties are therefore left with a significant lack of resources to provide *actual* help to clients with substance abuse problems.

## A Specialty Court (or two) would be nice

Specialty courts, which include Adult Drug Courts (ADC), are statutorily required under Texas law for counties with a population above 200,000.<sup>3</sup> Congratulations, big counties. You did it. Not only are your restaurant options more bountiful, but you've got ADCs. But it's not just big counties, is it? I practice right down the road from Burnet County. A county with a population of just under 50k as of 2020,<sup>4</sup> far lower than the statutorily mandated counties noted above, but with a successful ADC program.

Participants that successfully complete ADC have a 3.4% recidivism (incarceration) rate after three years.<sup>5</sup> Travis County's re-arrest rate for ADC participants was only 24.5%.<sup>6</sup> If the lower rates of recidivism and re-arrest are not enough be excited about, the consideration that participants are not incarcerated during ADC should be enough. Participants can physically be around their support systems all the while working at gainful employment during the process.

2021.pdf.

2 *Id.*

3 Tex. GOV'T Code §§ 123.006, 125.005, and 126.007.

4 U.S. Census, <https://www.census.gov/search-results.html?searchType=web&cssp=SERP&q=Burnet%20County,%20Texas>. (last visited Aug. 31, 2025).

5 MARC LEVIN, TEXAS PUBLIC POLICY FOUNDATION, DRUG COURTS: THE RIGHT PRESCRIPTION FOR TEXAS, at 1 (2006), <https://www.texaspolicy.com/wp-content/uploads/2018/08/2006-02-PP-drugcourts-ml.pdf>.

6 *Id.* at 2.

1 THERESA LAUMANN ET AL., TEX. CRIM. JUST. COAL., LAYERS OF TRAUMA, LAYERS OF TREATMENT: USING PARTICIPANT EXPERIENCES TO REFORM TEXAS' IN-PRISON SUBSTANCE USE TREATMENT PROGRAM, at 1 (2021), <https://texascje.org/system/files/publications/Layers%20of%20Trauma,%20Layers%20of%20Treatment%20-%20TCJC,%20April%20>

“But what about the element of punishment for committing crimes!” they (DAs) might shout. To which I’d ask: “do you know anybody that went through ADC and said it was easy?” It’s not. It is the most ideal compromise for DAs and defense attorneys. ADC can last 12-24 months and participants must remain sober, not get arrested, take part in treatment, and regularly attend court review hearings.<sup>7</sup> Unfortunately, for many of us in smaller counties (minus Burnet County), specialty courts like ADC are not an option for case resolution.

### Finding Love in a Hopeless Place: Good relationships with prosecutors (in rural counties)

The best that most of us rurally can do is maintain a good relationship with our colleagues on the prosecutorial side and get creative. My mentor/husband (Zac Morris) who I mentioned previously, has shown me that relationships, in criminal defense practice especially, can save you and your client a lot of time and heartache. (He is also the source for the resolution techniques to be discussed in this section.)

The end goal when working with the State in these situations should be mutually beneficial within the adversarial process. What better mutually beneficial outcome is there than a person receiving individualized assistance, based on their own personal needs, and then continuing as a productive member not only of society, but of their own community? So, how do we get there without the options readily available through the court? The answer is through countering the State with pragmatic solutions based on our clients’ individual needs and abilities to succeed.

For example, if a client has no desire to address rehabilitation but desperately wants to avoid incarceration (or further incarceration), it’s time to have the serious conversation that probation may just be delaying the inevitable and a short time offer is much more attainable on the front end rather than after revocation or adjudication. In the alternative, if a client wants help in addressing substance abuse issues, wants to change for the better and wants to work but cannot find employment, then let’s

talk about ISF with a work program or hybrid facilities that allow for off-site employment as the program progresses. Furthermore, regional charitable on-campus facilities can be a great alternative to SAFPF, but it is our responsibility as defense attorneys to be knowledgeable regarding these options and which facilities work best for the personalized needs of our clients, balanced with the State’s objective.

For my clients on bond, mitigation is the name of the game. I recommend AA/NA, drug & alcohol evaluations, Intensive Outpatient treatment with aftercare, private rehab when available, regular drug testing through private centers to establish a track record of sobriety (including follicle testing once sobriety has been maintained) to name a few options.

Though rural counties generally don’t have the buffet of resources, or the options larger jurisdictions tend to offer, hope is not lost my friends. As rural practitioners, we are required to pivot daily between areas of practice or jurisdictions – casting a wide net, so to say. In the arena of drug offenses and treatment, it is all about alternative options, personalized knowledge of our clients’ individual needs, and local knowledge of prosecutorial intent coupled with judicial preferences. By having readily available options in our bag of counter offers, personalized knowledge of all actors involved in the process, and a little creativity, we can combat the incarceration cycle we often see with resolutions involving SAFPF.

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**Marcella “Marci” Morris** is a partner at Morris Law P.C. in Lampasas, Texas. She graduated from the University of Dayton School of Law’s Hybrid program in January of 2025 and became licensed in April 2025. Her current caseload consists primarily of appointed clients in rural counties around the Hill Country. She can be reached at [marcipectus@gmail.com](mailto:marcipectus@gmail.com) or 512-556-3639.

7 TEX. JUD. BRANCH, <https://www.txcourts.gov/about-texas-courts/specialty-courts/> (last visited Aug. 31, 2025).

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Tell The Client's Story, Edward Monahan and James Clark, eds. American Bar Association. 2017. Page 202.

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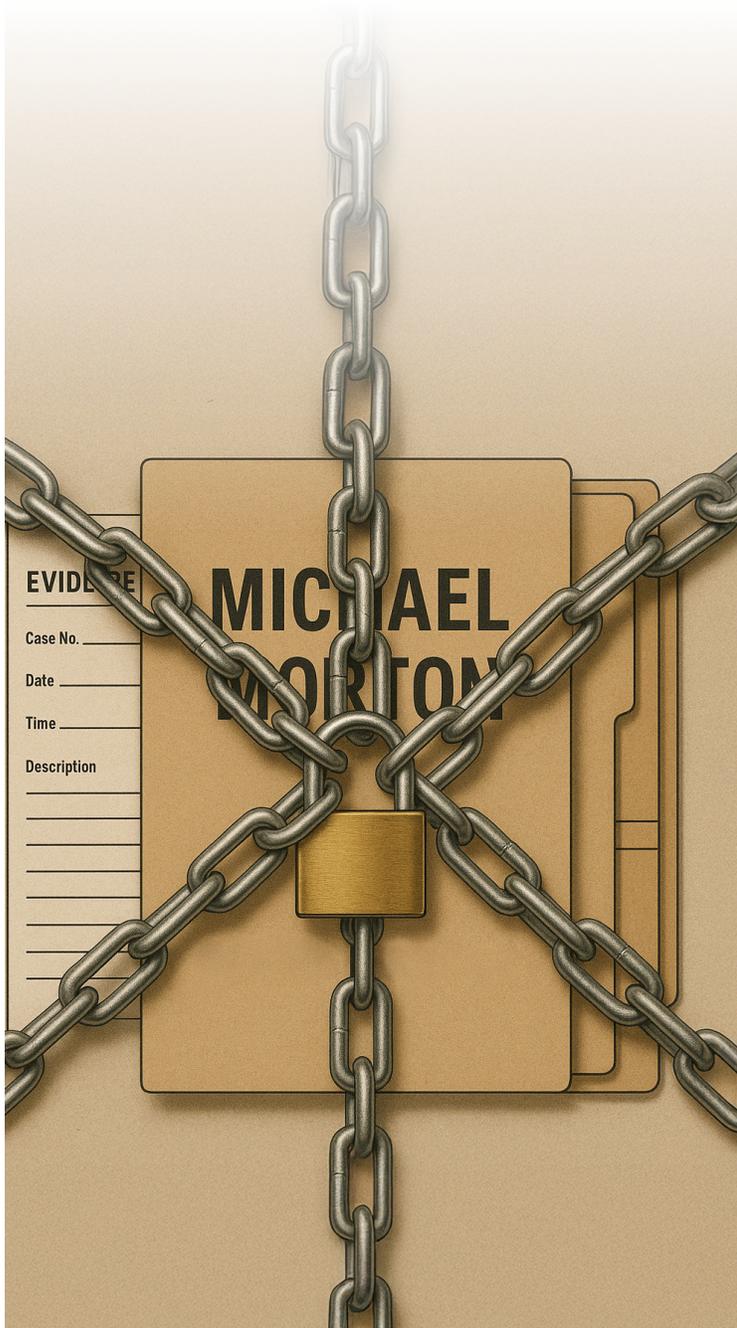
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# What is the Michael Morton Act and Why Should You Care

## The Michael Morton Case – A Perspective

SAM BASSETT

*TCDLA Board Member & Past President*



It was the Summer of 1986. I was twenty-three and a new clerk for Austin's White & Allison, P.C. This was my first job in criminal defense. I loved the foundational ideals criminal defense. My first contact was Bill Allison, a stoic and scholarly personality who graded your paper sharply. Every week, Court of Criminal Appeals slip opinions were delivered to the office. Bill would read and highlight them. He was a teacher. Bill White, the other partner, was flamboyant and magnetic. He was brilliant in the courtroom and a true extrovert. White was a procrastinator and a quick study. He drove a black turbo Porsche 944, loved to sail Lake Travis and enjoyed the bachelor life in 1980's Austin. He never lost a trial as an Assistant District Attorney. "A prosecutor's job is easy. In most cases, you can just say 'I am the State' and get a conviction," he once told me. Both of the Bills had a history of military service. Bill White would say, "I enjoy living in a country where there aren't troops walking around with machine guns. I'd like to think criminal defense lawyers have something to do with that."

It was August of 1986 and the partners were meeting with an unassuming Safeway produce manager charged with murdering his wife, Christine. She had been bludgeoned to death in their home, located a few hundred yards over the Travis/Williamson County line. **The potential client was Michael Morton.**

I remember Michael walking into 1306 Nueces. He was white and clean cut, with a mustache and slight build. He was polite and mild mannered. However, he was emphatic about his innocence. Michael was a new Dad with a mortgage, living in a middle-class neighborhood in the Austin suburbs. I had a hard time believing he was a cold-blooded killer. I knew this case would generate publicity. The terrible murder was the news of the day in Central Texas. Though I didn't participate in Michael's initial interview, you could tell there was excitement that the we might get the case. Michael's family didn't have a lot of money and there was discussion about an appropriate fee. Ultimately, a modest fee was set as Bill and Bill had interest in the case. They were hoping for a big win. Bill Allison said he thought Michael was innocent. Bill White was more guarded. I was cautious about my feelings as I had no experience. I would learn that opinions didn't matter. It was time to fight for Michael.

Williamson County (aka Wilco) was the conservative neighbor north of Travis County. The key players in the county were tough on crime. The County's law and order mentality was well known. Prosecutors and judges took pride telling everyone that they were "not Austin." People feared being charged with serious crime in "Wilco." I observed an arrogance and swagger among Wilco prosecutors as they looked with derision toward Travis County lawyers. Bill Allison told me a story about a long-haired Legal Aid lawyer getting assaulted in the courthouse restroom in Wilco. The sheriff of Wilco, Jim Boutwell, personified their law enforcement attitude. He had investigated the Henry Lee Lucas case and was a legend. Ken Anderson, the smart, sarcastic and relatively new District Attorney was proud to carry the torch. After all, Wilco was a place with a low crime rate and rarely were the words not guilty uttered by a Wilco jury.

When news came that the firm was hired to represent Michael, I was excited and interested in participating. I didn't understand what my role might be but I paid close attention. The case was slated to move toward a trial within a year. In fact, the

trial date was set only six (6) months after the murder. Michael was out of custody on bond and normally the case might move more slowly. I suspect Ken Anderson wanted a trophy on his new District Attorney shelf. After all, he was early in his tenure. This wasn't a typical Defendant with a court appointed or local lawyer. At that time, discovery wasn't plentiful and prosecutors could play close to the vest for sure. There was limited access to case reports, notes and law enforcement files. Bill Allison did a good job of filing discovery motions that were the standard of practice at the time. Judge Bill Lott ordered the District Attorney's Office to produce all Brady material to the defense. I later learned that the District Attorney held back key pieces of evidence from the defense despite Judge Lott's order. This evidence included credit card charges on Christine Morton's card shortly after the murder, a statement that neighbors noticed a mysterious van in the neighborhood around the time of the murder and a statement by Eric Morton (Christine and Michael's young son) that a strange man was in the house at the time of the murder. Forensic DNA testing was in its infancy and not yet admissible in trials. At the time we had no idea what developments in DNA testing would reveal years later. The defense knew about the mysterious bandana but no testing was considered or ordered.

Prior to the trial, I was asked to go to the City Grill and order the same meal that Christine had ordered the night before the murder. Michael and Christine went to restaurant to celebrate Michael's birthday. I was sent was to actually weigh the food because it was rumored the State's expert was relying upon stomach content analysis to establish time of death. I remember going to the District Attorney's Office to pick up the crime scene photos in my old Volkswagen Rabbit. I opened the envelope to look at the crime scene photos. It was shocking. I'd never seen crime scene photos before and these were especially grotesque. I gathered myself and drove back to the office. Christine had been beaten and left in her bed with sheets and a suitcase on top of her body. Part of her skull was missing. Later I was asked to review the movie that Michael and Christine viewed the night before her murder. It was an adult film and the prosecution argued for its admissibility because the ruse plot was that a burglar broke into a home and was caught by the female homeowner, later seducing her to distract her from calling the police. The State

argued Michael got the idea to stage the crime scene after he killed Christine, also staging a burglary. Unbelievably, the judge allowed a portion of the movie to be admitted. I also remember going the house two times. A sliding glass door in the living room had been left unlocked and it opened to an austere looking backyard with a vacant area over the privacy fence. We discussed how an intruder could have entered through the sliding glass door and left through the backyard.

In February of 1987, State v. Michael Morton commenced at the old Williamson County Courthouse District Courtroom. The courtroom was large, antiquated and set a scene like a courtroom in A Time to Kill or similar movies. I was watching my first jury trial. Judge William Lott was nearing retirement. He spoke with a wavering voice. He seemed mostly fair but definitely aligned more with the prosecution. Bill White did a great job at voir dire and Ken Anderson prosecuted the case with an assistant, Mike Davis. I remember Bill Allison telling me, "No one wants to believe that a random stranger committed this murder but I believe that's what happened." I was shocked when the main case investigator, Sgt. Don Wood, was not called to the stand. Instead, Ken Anderson called Sheriff Jim Boutwell as the State's main law enforcement witness. Bill White delivered a cross examination expressing amazement that Sheriff Boutwell did not write a single report nor take a single note during the investigation of the case. Later, I learned the State was only required to turn over Don Wood's investigative reports (so they thought) if he took the stand. The trial was emotional and there were hotly contested evidentiary rulings about the adult film and other issues. Michael testified and denied knowing anything about Christine's killing. He was stoic in his testimony which I believe hurt him with the jury. The State called Travis County Medical Examiner Roberto Bayardo who opined that Christine's death occurred before Michael left for work. His opinion relied upon a debunked methodology, "stomach content analysis." Bill Allison called Vincent Demaio, a renowned medical examiner from Bexar County to tell the jury that this method not unaccepted in the scientific community and should not be relied upon. Judge Lott allowed the evidence to be presented. Decades later, Bayardo's work and testimony as a medical examiner caused a few trials to be overturned because of his questionable methodologies. I believed there was a lot of

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reasonable doubt in the case. However, I was worried about the nagging question, “If Michael didn’t do it, then who did?” No one who we knew about had any motive to harm Christine and there was no physical evidence (at the time) of anyone else being at the crime scene. It was gut wrenching to watch it unfold. I recall Bill and Bill having conversations about the fact that “*something seems to be missing here.*”

I remember the emotional and personal closing arguments. Anderson loved attacking the Austin lawyers coming into Wilco with their high dollar defense. He would sarcastically reference Bill Allison being a professor at the law school. The innuendo was that Michael was a rich white man who killed his wife and the jury should not let him get away with it, not even with these fancy Austin lawyers working for him. One of the most offensive arguments was about the stain on the bedsheet where Christine had been found. Anderson argued that after Michael killed Christine, he masturbated over her dead body. Bill White delivered a strong closing for the defense and emphasized the lack of any real evidence that Michael had done this, his lack of any violent history, the lack of any violent history in the marriage and the fact that his own son was left at the crime scene. I didn’t know what to expect the jury to do. I believed there was at least reasonable doubt and Michael should be acquitted. The jury delivered the verdict and I recall Michael standing between Bill and Bill when asked to rise. I was seated right behind them. As the verdict of GUILTY was pronounced, Michael’s knees buckled and Bill Allison had his arm around him to hold him up. Although a stoic, Michael was stunned. He knew he was innocent. Sheriff Boutwell proudly stepped up to take him into custody before the sentencing hearing the next day. Michael was given a life sentence. As he was loaded into the Sheriff’s car, the media taunted him for a comment to which he replied, “I DID NOT DO THIS!” It was February, 1987.

Bill and Bill handled the direct appeal. Though they were both devastated by the outcome, Bill Allison was particularly affected. It was a dark 2-3 months for the law firm following the trial. There was other work to catch up on and in a small law practice you never stop working. I was able to work on part of the appellate brief dealing with the adult movie’s admission into evidence. The direct appeal process didn’t last long and the conviction was affirmed by the Third Court in Austin. Of course, many exculpatory things remained a secret for several years to come. Bill Allison continued to try avenues to get Michael’s conviction set aside, mostly focusing on DNA testing of the bedsheet stain, hoping it belonged to the actual killer. Bill also contacted Centurion Ministries, a group much like today’s Innocence Project to put the case on their radar. He also contacted the newly formed Innocence Project in New York. As time passed, the firm’s involvement in Michael’s efforts to have his conviction set aside faded. I recall after the conviction I visited the District Attorney’s Office and spoke with Ken Anderson. He and one of his assistants jokingly quipped, “Why does he want a new trial? He only got a \$5,000 fine. If there’s another trial it will be \$10,000.” I smiled politely and went about my business. As time went on, I would reflect upon the smugness of that joking comment. Though I have become used to dark humor in my work that comment sticks with me as a particularly revealing window into the character of Ken Anderson. Michael was sentenced to life in prison in February

of 1987. In January of 1988, Debra Baker was beaten to death in her home, about 10 miles from the location of the Morton home in North Austin. It would later be proven that the same killer of Christine murdered Debra Baker.

After the Morton trial and direct appeals, I moved on with my career, working as an associate for White and Allison for several years followed by a few years as Bill Allison’s partner. The Morton case was on the shelf in my mind, seemingly concluded never to be revisited. In 2000, I became a partner at Minton, Burton, Foster & Collins, P.C. I was appointed by Governor Perry to the newly formed Texas Forensic Science Commission in 2005 and later was named Chair of the Commission. Governor Perry terminated my service as Chair in 2009 along with several other commission members as a means of stopping the TFSC investigation into the Cameron Todd Willingham case. This case involved a capital murder conviction and execution based upon flawed arson junk science used at the trial. The Governor and his staff took the position we should not investigate the case. I disagreed. Interestingly, the person appointed to replace me was Williamson County District Attorney John Bradley, who was a protégé of Ken Anderson. John Bradley stalled the Willingham investigation. In the end, John didn’t last very long as the Chairman for other reasons as well. These years were busy for me with family and in my practice, distracting me from the details of John Raley’s tenacious work in tandem with the Innocence Project seeking justice through a full examination of all the evidence from the original investigation. Raley and the Innocence Project along with the Goldstein firm engaged fully in the battle. John Bradley fought tooth and nail to keep the bandana from DNA testing, often sarcastically stating that Michael’s team

was “grasping at straws.” John Raley (a civil attorney working pro bono) was relentless and persisted in his work for Michael. Little did I know what was about to happen in 2011, when the Third Court of Appeals overruled Judge Billy Ray Stubblefield’s 2006 ruling denying that the request to test the bandana discovered near the Morton home.

In June of 2011, DNA testing confirmed that biological material on the bandana belonged to Christine Morton and another person, not Michael Morton. In August, 2011, a DNA match was found, Mark Alan Norwood. Michael’s team fought for his immediate release after it was also revealed that

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*This image was created by a family member at my request. I am a Native American member of the Lake Superior Band of Ojibwe, and I wanted to celebrate and honor my heritage in my role as CDLP Chair for TCDLA this year.*

*- Patty Tress*

*The seminar is sponsored by CDLP, a project of TCDLA, funded by the Texas Court of Criminal Appeals.*

Norwood's DNA was tested to be on hair found at the Debra Baker murder scene. After a few weeks of resistance, John Bradley agreed for Michael to be released. Michael walked free in October of 2011. Shortly thereafter, the Court of Criminal Appeals declared Michael actually innocent. Earlier, before the fight over the bandana and its testing, it was discovered that the entire investigative file of Sgt. Don Wood had been secreted away from access by any defense team in the District Attorney's Office. Depositions were taken of Ken Anderson, his first assistant at time of trial (Mike Davis) as well as Sgt. Wood. It became clear that not only did Ken Anderson fail to disclose exculpatory evidence, he actively fought any post-conviction review of such evidence or any DNA testing. John Bradley, upon becoming Williamson County District Attorney, followed in Anderson's footsteps, often mocking the efforts of Michael's attorneys to prove that the Williamson County District Attorney had engaged in the suppression of exculpatory evidence.

In 2013, Mark Alan Norwood was convicted of the murder of Christine Morton. Norwood was later also convicted in Travis County for the murder of Debra Baker. Norwood was sentenced to life in prison in both cases. For several months, I worked with the Baker family as their advocates through the process of the Norwood case in Travis County. One of the family members who was particularly memorable was Caitlin Baker, who was a young child at the time of her Mom's murder and grew up without a mother. She would later become a paralegal. There was a groundswell of publicity regarding all of the findings in the Morton post-conviction investigation. Ken Anderson resigned his law license after plea bargain negotiations with the Special Prosecutor and State Bar attorneys. He was sentenced to 10 days in jail. John Bradley was defeated in his re-election attempt after the Morton exoneration largely due to his role in fighting the testing of the bandana and causing further delays in the process.

In 2013, a group of lawyers from TCDLA, headed by President Bobby Mims, worked with other stakeholders at the Legislature to codify changes to discovery in Texas through Article 39.14 of the Code of Criminal Procedure. Though it's never easy to pass

ground-breaking legislation in Texas, the changes to Article 39.14 were almost unanimously supported at the end and the new Article 39.14, known as the MICHAEL MORTON ACT was signed into law by Governor Perry in May of 2013. This law was transformative in requiring the State to release almost all information in their files to the defense well in advance of trial. The days of limited discovery to defense counsel had come to an end. Michael Morton was at the forefront of the efforts and politicians finally listened.

In 2025, the Legislature considered changes to the Michael Morton Act at the urging of some prosecutors and Senator Joan Huffman of Houston. They wanted to restore more prosecutorial discretion on what was to be disclosed in discovery, wanted to insert a bad faith requirement to sanctions for failure to disclose discovery and wanted to limit the definition of who was required to produce discovery. I was asked to attend as a witness at both the Senate and House committees considering amendments to the Michael Morton Act. I was joined by numerous colleagues in opposition to the amendments. Other witnesses in opposition included: Caitlin Baker, John Raley, Richard Miles (exoneree), Allen Place, Troy McKinney, Nichole Deborde Hochglaube, multiple public defenders, David Gonzales, and many more. Perhaps most importantly, Michael personally opposed the amendments. Though the amendments didn't pass, it is anticipated there may be renewed efforts to water down the Texas discovery law in criminal cases.

As I testified at the hearings this past year, it was an emotional moment. The room was packed with prosecutors, exonerees, brilliant lawyers and friends of Michael. My entire career had spanned Michael's journey. I was a baby law clerk when he was arrested. His jury trial was the first trial I watched. I saw Michael almost collapse upon being pronounced guilty. While Michael was in prison, I started a law career, raised a family and enjoyed my freedom in ways he could only imagine. I waded into some of the politics of criminal justice through being the chair of the Texas Forensic Science Commission. I saw from a distance the incredible work of John Raley, the Innocence Project and so many

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others in securing his exoneration. After Michael's release, I agreed to represent some of Debra Baker's family members through the process of Norwood's trial. I remember seeing Michael for the first time at Ruth Chris Steakhouse following his release. Our eyes met and I wondered how he would react. I smiled and gave him a hug. He graciously told me, "I hear you've been doing some real good things." I was almost speechless and told him I was so happy for him. I'll never forget the Michael Morton story and what he has done to influence criminal justice in Texas. I'll also not forget how his experience impacted my life.



**Samuel E. Bassett**

*Partner | Minton, Bassett, Flores & Carsey, P.C. Sam Bassett has extensive trial experience. He graduated from the University of Texas School of Law in 1988. He is Board Certified in Criminal Law. In 2014, 2016, 2018, 2020, 2024*

*and 2025 Best Lawyers in America designated Sam as "Lawyer of the Year" for Austin in criminal defense. He is former Chair of the Texas Forensic Science Commission. Sam served on the Grievance Committee for 4 years and is a Past President of Texas Criminal Defense Lawyers Association.*

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# No Conviction Required: How Conduct-Based Immigration Grounds Endanger Noncitizen Youth in Texas

MANUELA “MIMI” ALCO CER

*Managing Attorney at Alcocer Law Firm | Member of the Crimmigration Committee*

## Abstract

This article explores the dangers of conduct-based grounds of inadmissibility and deportability for noncitizen youth in Texas. It outlines key Immigration and Nationality Act (hereinafter INA) provisions, practical strategies for defenders, and emerging federal and state legislative threats, including the TXGANG database and the recently enacted Laken Riley Act.

## When the System Fails Our Youth

In a legal landscape increasingly defined by strict enforcement, rather than empathy, juvenile defenders in Texas face a sobering truth: a young person can be permanently banished from the United States without ever being convicted of a crime. Immigration law permits the deportation, or exclusion, of noncitizens based solely on conduct, with that conduct often described, alleged, or inferred within a system that is supposed to rehabilitate, not condemn. In the delicate space where immigration and juvenile law meet, our advocacy must be not only zealous, but strategic and fully informed.

## Conduct-Based Immigration Grounds: What the INA Says

The Immigration and Nationality Act (INA) contains numerous grounds of inadmissibility and deportability that are not tied to convictions. For noncitizen youth, these provisions are uniquely dangerous. In the juvenile context, conduct findings, even absent formal charges or adjudications, can trigger removal or render a youth ineligible for immigration relief.

One of the most common triggers is a controlled substance violation. Under INA §

212(a)(2)(A)(i)(II), a juvenile who admits to using or possessing a federally controlled substance, including marijuana, may be found inadmissible, even if the substance is legal under state law. While juvenile adjudications are not convictions, DHS may rely on voluntary admissions made in school settings, probation interviews, or therapy sessions to support a finding of inadmissibility, especially when such statements are corroborated by additional evidence. Immigration case law has long held that a noncitizen's own statements, if made knowingly and voluntarily,

may satisfy the evidentiary standard for inadmissibility under this provision. Importantly, as explained in *Matter of G-M-*, the statement must be made with full knowledge of the nature of the offense and its elements, and the noncitizen must admit to each element in clear and unequivocal terms, making the context and setting of such admissions critical to any admissibility determination. This principle is further supported by *Matter of K-* and *Matter of Seda*, which affirm that such admissions, when clear, knowing, and voluntary can establish inadmissibility even in the absence of a conviction.<sup>1</sup>

Even more alarming is the “reason to believe” drug trafficking provision under INA § 212(a)(2)(C). Immigration authorities do not require an arrest or adjudication, only a subjective belief, supported by evidence, that the youth has engaged in trafficking. A juvenile associated with older peers under investigation or caught delivering substances at school may be deemed inadmissible without any criminal process. Notably, the Fifth Circuit held that the government needs to present “reasonable, substantial, and probative” evidence to satisfy the “reason to believe” standard.<sup>2</sup> In practice, defenders should exercise caution when DHS relies on proximity-based or circumstantial evidence in juvenile contexts, as these claims may lack the individualized reliability required to justify inadmissibility.

INA § 212(a)(2)(D) includes prostitution and commercialized vice as grounds of inadmissibility. This provision does not require a criminal conviction and may be triggered by credible evidence that a person has engaged in such conduct. The Board of Immigration Appeals held that even in the absence of a conviction, reliable admissions or documented participation in prostitution may suffice to establish inadmissibility under this ground. The evidentiary standard is relatively low. In practice, this means that youth who have been coerced into trafficking or survival-based sex work may face inadmissibility based solely on circumstantial evidence or their name appearing in law enforcement records. This makes it even more vital for defenders to challenge such designations and contextualize the circumstances in immigration proceedings.<sup>3</sup>

INA § 212(a)(1)(A)(iv) renders a non-citizen inadmissible if drug addiction or abuse is current (within the last year), and

INA § 237(a)(2)(B)(ii) renders a non-citizen deportable if the addiction or abuse occurred at any time after admission into the United States, even if they have overcome the problem. While this provision can technically apply to juveniles, immigration law does not account for the rehabilitative aims of the juvenile justice system. In practice, DHS may attempt to rely on school records, behavioral reports, or statements made in counseling settings to support removal. However, the Board of Immigration Appeals has clarified that the government must present substantial, probative evidence of habitual drug use that meets regulatory definitions, not merely isolated incidents or informal remarks.<sup>4</sup>

INA § 212(a)(6)(E) makes inadmissible any individual who assists others in entering the United States unlawfully. This provision has ensnared youth who transport relatives or provide incidental support, such as translation or lodging, even if motivated by familial loyalty or duress. Importantly, this federal inadmissibility ground does not require a conviction, and DHS may base its determination on conduct inferred from records or statements.

Unlike Texas Penal Code § 20.05, which requires prosecutorial action and proof beyond a reasonable doubt, the federal INA § 212(a)(6)(E)(i) smuggling ground is conduct-based and does not require a criminal conviction. The Board of Immigration Appeals has confirmed that DHS may establish inadmissibility through circumstantial evidence, even absent formal charges. For juvenile defenders, this distinction is critical: a youth may face no charges under state law yet still be labeled inadmissible at the federal level based on vague or circumstantial evidence of “assisting” in unlawful entry.<sup>5</sup>

Juvenile defenders should be aware that any reference to assisting others across the border, especially when mentioned during probation interviews, school reports, or DHS screenings, can raise red flags in immigration proceedings, even in the absence of formal charges or adjudication.<sup>6</sup>

## Texas-Specific Risks: TXGANG Database and State Legislation

The TXGANG database, authorized under Tex. Code Crim. Proc. Art. 67.054, allows law enforcement to classify individuals as gang members based on associations, attire, tattoos, or social media content. No conviction is required. Once labeled, removal from the database is procedurally difficult and substantively rare. For immigrant youth, TXGANG designation has devastating consequences: DHS routinely uses gang affiliations to deny immigration relief, argue dangerousness, and justify detention or expedited removal.<sup>7 8</sup>

## The Laken Riley Act and Expanded Enforcement

The Laken Riley Act, signed into law on January 29, 2025, represents a significant shift toward criminalizing immigrant presence in the United States. The legislation mandates that the Department of Homeland Security detain undocumented immigrants who are arrested for specific offenses, including burglary, theft, larceny, shoplifting, assaulting a law enforcement officer, or crimes resulting in death or serious bodily injury. Additionally, it authorizes states to sue the federal government for alleged failures in immigration enforcement.

While the Act primarily targets adults, its broad provisions may inadvertently affect juveniles.

Youth involved in conduct-based incidents, such as school altercations, suspected gang activity, or minor infractions, could now be subject to ICE detainers or expedited proceedings under the new enforcement framework. This underscores the need for juvenile defenders in Texas to be vigilant in assessing the immigration consequences of their clients’ cases and to advocate accordingly.<sup>9</sup>

## Collateral Damage: Barriers to Immigration Relief

The downstream consequences of conduct-based allegations are far reaching. A Special Immigrant Juvenile Status (SIJS) applicant must be admissible to adjust their status. Any conduct involving controlled substances, smuggling, or other disqualifying behavior may require a discretionary waiver under INA § 245(h) (2)(B). Some bars, such as a false claim to U.S. citizenship under INA § 212(a)(6)(C)(ii), are not waivable.<sup>10</sup>

Asylum and withholding of removal, while offering broad protections, are discretionary forms of relief. Under INA § 208(b) (2)(A)(ii) and § 241(b)(3), applicants can be denied if deemed a danger to the community or found to have engaged in serious criminal conduct. Youth who appear in juvenile court records as repeat offenders or who are labeled as “associated with gangs” may be denied relief, even in the absence of adjudication.<sup>11</sup>

Similarly, U and T visa applicants may be denied relief based on the exercise of discretion under 8 C.F.R. § 214.14(c)(1)(i) and § 214.11(d)(2)(i), particularly where DHS identifies any adverse conduct or questions about the applicant’s moral character.<sup>12</sup>

## Defender Strategies: Practical Tools for Immigration-Sensitive Advocacy

Defenders in Texas must recognize that immigration consequences flow from conduct, not just convictions. Begin by screening for immigration status at intake. If your client is

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undocumented or holds a temporary status, flag any potential risks tied to the conduct in question.

When negotiating resolutions, avoid admissions that mirror INA language, such as “knowingly possessed,” “distributed,” or “trafficked.” Instead, seek alternative language or informal resolutions that avoid factual stipulations.

Engage with Padilla-informed counsel early in the case. Seek dismissals, deferred prosecution, or diversion programs. Challenge TXGANG designations proactively by gathering school records, mental health evaluations, and letters from mentors to counter allegations. Emphasize rehabilitation through school attendance, therapy compliance, and community involvement. If DHS later challenges a youth’s eligibility based on prior statements, defenders can also raise the standard set forth in *Matter of G-M-*, where the Board required that an admission to conduct be made with full knowledge of the offense and its consequences. In practice, this means that casual or ambiguous comments made in counseling, school, or intake settings, especially without legal representation or advisement, should not meet the threshold for a valid admission under immigration law. Documentation of positive progress can shape immigration outcomes and build discretionary equities.

### Advocacy Beyond Adjudication

In today’s climate, the juvenile courtroom is just one venue in which your client’s fate is decided. Immigration law reaches far beyond the bench, and DHS increasingly relies on conduct-based assessments to detain, deny, and deport youth. By thinking across these systems, tailoring your advocacy, and protecting the record, you become the last firewall between your young client and life-altering consequences. In doing so, you preserve not only liberty, but home.

### Endnotes

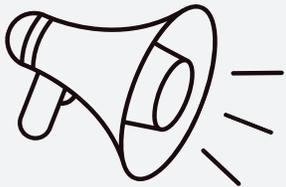
- 1 INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II); Controlled Substances Act, 21 U.S.C. § 802; *See Matter of G-M-*, 7 I. & N. Dec. 40 (B.I.A. 1956); *Matter of K-*, 7 I. & N. Dec. 594 (B.I.A. 1957); *Matter of Seda*, 17 I. & N. Dec. 550 (B.I.A. 1980).
- 2 INA § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C); *Cuevas v. Holder*. 737 F.3d 972 (5th Cir. 2013).
- 3 INA § 212(a)(2)(D), 8 U.S.C. § 1182(a)(2)(D); *Matter of T-*, 6 I&N Dec. 474 (BIA 1955).
- 4 8 INA § 212(a)(1)(A)(iii) (inadmissibility ground); INA § 237(a)(2)(B)(ii) (deportation ground); *See Matter of Sanchez-Cornejo*, 25 I. & N. Dec. 273 (B.I.A. 2010); *Matter of Torres-Varela*, 23 I. & N. Dec. 78 (B.I.A. 2001) (Although *Matter of Sanchez-Cornejo* and *Matter of Torres-Varela* involved adult respondents, their reasoning concerning evidentiary thresholds and behavior-based findings of drug abuse can still guide defenders in challenging removal allegations for youth, particularly where adjudicatory safeguards are lacking).
- 5 *See Matter of Martinez-Serrano*, 25 I&N Dec. 151 (BIA 2009); *Matter of Farias*, 21 I&N Dec. 269 (BIA 1996).
- 6 INA § 212(a)(6)(E), 8 U.S.C. § 1182(a)(6)(E); *Matter of P-*, 20 I. & N. Dec. 911 (B.I.A. 1994).
- 7 Tex. Code Crim. Proc. art. 67.054.
- 8 TXGANG Operating Policies and Procedures, Tex. Dep’t of Pub. Safety, <https://www.dps.texas.gov/tgang/gangOPP.pdf>.
- 9 Laken Riley Act, H.R. 7511, 118th Cong. (2024).
- 10 INA § 245(h)(2)(B), 8 U.S.C. § 1255(h)(2)(B); INA § 212(a)(6)(C)(ii), 8 U.S.C. § 1182(a)(6)(C)(ii)
- 11 INA § 208(b)(2), 8 U.S.C. § 1158(b)(2); INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).
- 12 8 C.F.R. § 214.14(c)(1)(i) and § 214.11(d)(2)(i).



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# Marijuana DWIs: Using the State's Own Science Against It

HAROLD DANFORD AND JONATHAN O'HARA

*Members of the DWI Committee*

In an alcohol-related DWI case, no allies serve the prosecutor better than NHTSA and DPS, as they often form the foundation of the State's evidence. Marijuana DWIs, on the other hand, make strange bedfellows. DPS lab reports prove problematic for prosecutors, and NHTSA provides us with ample ammunition to use in defending our clients. In multiple publications, NHTSA makes clear that the presence of THC does not prove impairment, even when combined with a BAC below the legal limit. Nor does it necessarily indicate recent marijuana use. Some lab reports even help argue the contrary.

As we all know, the Texas DWI statute has a *per se* limit for blood alcohol concentration. It states that "intoxicated" means "having an alcohol concentration of 0.08 or more."<sup>1</sup> Some states have *per se* blood limits for delta-9-tetrahydrocannabinol (THC, the psychoactive ingredient in marijuana). But Texas does not and should not. As NHTSA explained, "[w]hile alcohol concentration (BAC or BrAC) is an accurate measurement of alcohol impairment of driving, the presence of THC in the driver's body has not been shown to be a reliable measure of marijuana impairment of driving."<sup>2</sup> THC *per se* limits appear to be "based on something other than scientific evidence."<sup>3</sup>

Because Texas has no magic number for marijuana DWIs, there is no THC concentration that proves *per se* intoxication. Prosecutors must therefore rely on § 49.01(2)(A) and prove that our clients did not have "the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body."<sup>4</sup>

It is "difficult to establish a relationship between a person's [THC blood concentration] and performance impairing effects."<sup>5</sup> "The psychoactive ingredient in marijuana, [THC],

does not correlate well with impairment."<sup>6</sup> The "poor correlation of THC level in the blood or oral fluid with impairment *precludes* using THC blood or oral fluid levels as an indicator of driver impairment."<sup>7</sup> For these reasons, "[t]oxicologists are not able to provide expert testimony that a specific amount of THC present in a suspect's blood (or other specimen) is definitively associated with being impaired by marijuana and render the driver unable to drive safely."<sup>8</sup>

To be clear, the problem is not that everyone is different. The problem is that "the level of THC in the blood and the degree of impairment do not appear to be closely related."<sup>9</sup> Although it may stand to reason that an individual would be most impaired when his or her blood THC concentration is highest, that is not true. "Peak impairment does not occur when THC concentration in the blood is at or near peak levels. Peak THC level can occur when low impairment is measured, and high impairment can be measured when THC level is low."<sup>10</sup>

The presence of THC does not prove impairment even when combined with alcohol below the legal limit. Research of THC-positive drivers showed that, when appropriately controlling for variables such as age, gender, and the presence of alcohol, "there was no increased risk of crash involvement found over alcohol or drug free drivers."<sup>11</sup> Subjects dosed with marijuana showed "reduced mean speeds, increased time driving below the speed limit and increased following distance."<sup>12</sup> When marijuana and alcohol were combined, there was "no difference in crash risk for marijuana (THC)-positive drivers who were also positive for alcohol than for marijuana (THC)-positive drivers with no alcohol, beyond the risk attributable to alcohol."<sup>13</sup> In fact, it "appeared that marijuana mitigated some of the effects found with alcohol by reducing the time spent driving above the speed limit."<sup>14</sup>

1 Tex. Penal Code § 49.01(2)(B).

2 Richard P. Compton, NHTSA, *Marijuana-Impaired Driving, A Report to Congress*, 13-14 (July 2017), <https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf> [hereinafter *Marijuana-Impaired Driving*].

3 *Id.* at 28.

4 Tex. Penal Code § 49.01(2)(A).

5 Fiona Couper, Ph.D., et al., NHTSA, *Drugs and Human Performance Fact Sheets: 2024*, 81 (December 2024), <https://rosap.nhtsa.gov/view/full/78924> [hereinafter *Drugs and Human Performance*].

6 *Marijuana-Impaired Driving*, *supra* note 2, at 13.

7 *Id.* at 27 (emphasis added).

8 *Marijuana-Impaired Driving*, *supra* note 2, at 28.

9 *Id.* at 7.

10 *Id.*

11 *Id.* at 26.

12 *Id.* at 11.

13 Richard P. Compton, et. al, NHTSA, Traffic Safety Facts Research Note, *Drug and Alcohol Crash Risk*, 5 (February 2015), [https://www.nhtsa.gov/sites/nhtsa.gov/files/812117-drug\\_and\\_alcohol\\_crash\\_risk.pdf](https://www.nhtsa.gov/sites/nhtsa.gov/files/812117-drug_and_alcohol_crash_risk.pdf).

14 *Marijuana-Impaired Driving*, *supra* note 2, at 11.

# Texas Annotated Criminal Codebook

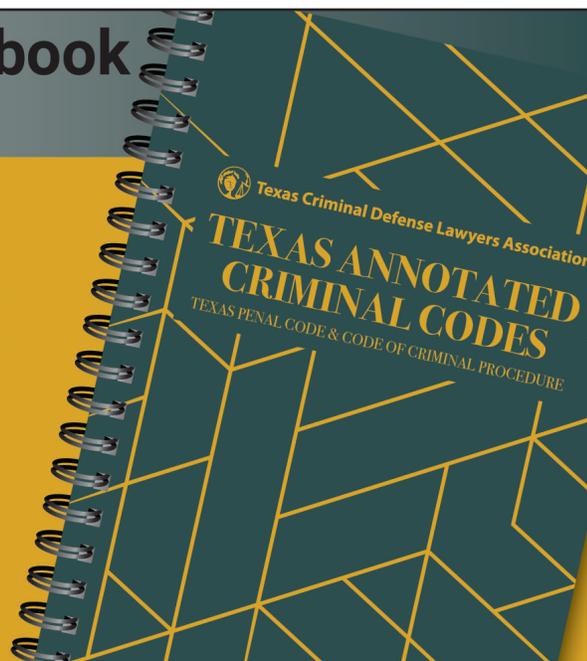
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Importantly, the presence of THC does not “necessarily indicate recent marijuana use (when the THC levels are low).”<sup>15</sup> THC levels are often low because THC levels decrease rapidly in blood.<sup>16</sup> Meanwhile, blood sample collection “almost always occurs hours after ingestion.”<sup>17</sup> “Some studies have detected THC in the blood at 30 days post ingestion” although “the acute psychoactive effects of marijuana ingestion last for mere hours, not days or weeks.”<sup>18</sup> “Low THC levels of a few nanograms per milliliter (ng/ml) in blood can result from relatively recent use (e.g., smoking within 1-3 hours) when some slight or even moderate impairment is likely to be present, or it can result from chronic use where *no recent ingestion* has occurred and no impairment is present.”<sup>19</sup>

Finally, some lab results suggest that an individual was not impaired at the time of driving, and that marijuana use significantly predated sample collection. THC is “primarily metabolized in the liver to 11-hydroxy-tetrahydrocannabinol (11-OH-THC)” and “11-OH-THC is further metabolized to 11-nor-9-carboxy-tetrahydrocannabinol (THC-COOH), which is not psychoactive.”<sup>20</sup> THC-COOH is a “downstream metabolic product and does not have known impairing effects.”<sup>21</sup>

When only THC-COOH is detected in blood, it indicates the person used the drug at some time in the past, but it does not provide evidence that the active drug was in the person’s blood at the time of driving as “it is not possible to conclude from the presence of an inactive metabolite when the corresponding drug was active.”<sup>22</sup> The presence of only THC-COO “could be an

indicator of recent use” but “for heavy users the compound can remain in a person’s system for several days or even weeks.”<sup>23</sup> In at least one study, “4 of 5 participants remained THC-COOH positive ... after 30 days.”<sup>24</sup>

In marijuana DWIs, the lack of a *per se* limit often leads prosecutors to view any amount of THC in blood as effectively “over the limit.” But they could not be more wrong. The State’s own science says so. The presence of THC does not prove impairment, even when combined with alcohol below the legal limit, and does not necessarily indicate recent marijuana use. Some lab reports even help make the defense case for us. Marijuana DWIs present significant challenges for the State when it is held to its burden. As criminal defense attorneys, these challenges are our opportunities. The opportunity to turn the tables on the State with its own science is one we should not pass up.



**Harold J. Danford** is the lead attorney at Danford Law Firm in Kerrville. He has proudly represented the accused across the Texas Hill Country for almost 30 years. He is a former Director of the Texas Department of Public Safety’s DWI/ALR program, a former board member of TCDLA, and currently serves as Vice Chair of the organization’s DWI Resource Committee. He can be reached at (830) 257-4045 or [harold@danfordlaw.com](mailto:harold@danfordlaw.com).



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15 *Id.* at 14.

16 *See id.* at 6.

17 *Id.*

18 *Id.* at 4.

19 *Id.* at 7 (emphasis added).

20 *Drugs and Human Performance*, *supra* note 5, at 77.

21 See F.D. Thomas, et al., NHTSA, *Alcohol and Drug Prevalence Among Seriously or Fatally Injured Road Users*, 18 (December 2022), [https://www.nhtsa.gov/sites/nhtsa.gov/files/2022-12/Alcohol-Drug-Prevalence-Among-Road-Users-Report\\_112922-tag.pdf](https://www.nhtsa.gov/sites/nhtsa.gov/files/2022-12/Alcohol-Drug-Prevalence-Among-Road-Users-Report_112922-tag.pdf).

22 *Id.* at 22.

23 *Id.* at 18.

24 *Drugs and Human Performance*, *supra* note 5, at 78.



# Humanizing the Accused: What Mitigation Specialists Really Do

**JEFF WAX**

*Member of the Capital Assistance Committee*

“Mitigation isn’t a sidebar to defense — it’s the story behind the crime, and sometimes the difference between a life sentence and a second chance.”

Criminal defense is not just about rebutting the charge — it’s about telling the full story of the person who stands accused. And in today’s legal climate, where sentencing often matters more than trial, that story must be constructed with care, insight, and strategic purpose.

That’s where a skilled mitigation specialist comes in.

Many attorneys still feel unsure about what mitigation specialists do, when to include them, or how to work with them effectively. Some believe that a paralegal or private investigator can serve the same role. Others wait until sentencing is nearly before bringing in a mitigation specialist. While these choices are understandable, they often come with a high cost—potentially affecting the client’s liberty, future, or even their life.

As defenders, you cannot afford to approach mitigation haphazardly. The people you represent deserve more than a defense strategy based solely on what they did. They deserve one rooted in who they are — and how they got there.

To use mitigation effectively, we must first understand what mitigation specialists actually do — and why their work goes far beyond compiling a sympathetic backstory. In today’s legal landscape, where trauma, mental illness, and generational harm are often central to the narrative of criminal behavior, mitigation isn’t optional — it’s essential.

## **What Does a Mitigation Specialist Actually Do?**

At its core, mitigation involves constructing your client’s life story to humanize them, provide context for their actions, and present compelling reasons for leniency. This process is based on trauma-informed investigation, neuropsychological insights, and forensic storytelling. It requires a blend of clinical, investigative, and narrative skills that no single discipline can offer alone.

A qualified mitigation specialist:

- Compiles and analyzes voluminous records: CPS, medical, juvenile, school, mental health, institutional
- Conducts trauma-informed interviews with your client, their family, friends, teachers, and past caregivers
- Prepares social history chronologies and psychological

timelines

- Develops individualized mitigation themes tailored to the legal theory of the case
- Collaborates with experts and contextualizes diagnostic opinions

Mitigation is not about making excuses. It’s about telling the truth — the whole truth — about your client’s life in a way that makes decision-makers pause, reconsider, and, when possible, extend mercy.

But understanding what mitigation specialists do is only part of the equation — choosing the right one for your case requires equal care, judgment, and strategy.

## **Choosing the Right Mitigation Specialist: What to Ask, What to Avoid**

Just as you wouldn’t assign a capital murder case to a first-year associate, you shouldn’t hand off mitigation to an untrained intern or expect a PI to cover the same ground. The stakes are too high.

When choosing a mitigation specialist, these are important qualities to consider:

1. Clinical Competency
  - Background in social work, psychology, or counseling
  - Ability to identify trauma, cognitive impairment, neurodivergence, and developmental delays
2. Investigative Rigor
  - Experience acquiring and analyzing sealed or difficult-to-obtain records
  - Demonstrated ability to navigate complex systems (e.g., child welfare, healthcare, correctional, educational, and mental health systems)
3. Storytelling Ability
  - Strong writing skills
  - Writes with purpose, clarity, and emotional resonance to evoke empathy and humanize the client without sounding manipulative or sentimental
  - Insight into how to present facts in a narrative arc that aligns with your defense goals
4. Ethical Boundaries and Objectivity
  - Professionalism when interviewing clients and family members
  - Commitment to fact-based advocacy

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5. Collaborative Disposition
  - Demonstrates flexibility, humility, and respect for all members of the defense team
  - Proactively communicates with attorneys, experts, investigators, and the client to avoid duplication and ensure consistency
  - Understands their role in the broader case strategy and integrates feedback without defensiveness
  - Balances independence with alignment — knows when to lead and when to follow

Always request a sample mitigation report and review it as you would a key witness statement. Examine not only its structure but also its substance: Is the narrative cohesive? Does it highlight the client's voice? Is it supported by solid documentation and clinical input? Red flags include sloppy formatting, vague summaries, and flat storytelling — but also reports that read like a form letter. Look for accuracy, cultural insight, psychological nuance, and advocacy integrated into the writing. A good report doesn't just list facts but it also constructs a strong, persuasive case for why your client matters.

A skilled mitigation specialist is only as effective as the moment they are brought in.

### **Delay Is Strategy Lost — Bring Us in Early**

If you wait until trial prep or sentencing, you've already missed your best shot. Early mitigation can influence charging decisions, frame plea discussions, and reshape how your client is seen by the court. By the time the damage is done, it's too late for repair — and too late for strategy. Don't turn to mitigation as a last resort. Use it as your opening move.

Set clear expectations:

- Define goals in writing (e.g., plea posture, sentencing memo, capital review committee);
- Establish timelines and deliverables;
- Share discovery, client interviews, and any psychological reports already obtained; and
- Clarify the tone and audience of the final product — is it for a prosecutor, judge, or jury?

Effective mitigation is never one-size-fits-all — it's strategic, targeted, and timely.

These principles aren't just theoretical — they're tested daily in courtrooms, plea discussions, and pre-sentencing conferences across Texas. The true value of mitigation emerges when we apply these tools to real cases, real people, and real consequences. Below are three examples from my own practice — anonymized and composite — that reflect what happens when we lead with humanity instead of judgment.

### **Real-World Application: Case Studies from the Field**

#### **Case Study #1: A Mother's Break with Reality**

##### *Filicide and Psychotic Decompensation in Utah*

In one of the most devastating cases I've worked on, a young mother in Utah was charged with capital murder after taking the life of her infant son and then attempting to take her own. The initial facts appeared unforgivable. But the mitigation investigation revealed a profoundly different story — one defined by untreated psychosis, intergenerational trauma, and systemwide failure.

She had no prior criminal history and was widely viewed as a devoted mother. Yet in the months leading up to the offense, she was gripped by a rapid psychological decline. Her symptoms were consistent with first-onset schizophrenia, likely triggered and intensified by postpartum hormonal shifts and her recent history of hormone replacement therapy. She became consumed by delusions, including spiritual paranoia and beliefs that her child was in danger from invisible forces. Despite warning signs — erratic behavior, extreme withdrawal, and fragmented speech — her condition was repeatedly misread by those around her as situational stress or anxiety.

My work revealed a long history of maternal rejection, early childhood medical trauma, and identity fragmentation. Psychological evaluations later confirmed severe schizophrenia, marked by disorganized thinking, auditory hallucinations, and a complete break from reality at the time of the offense. Rather than receiving psychiatric intervention, she had been left to deteriorate silently. Her drive to appear stable — especially under the weight of cultural and familial expectations of motherly perfection — only masked how deeply she was unraveling.

The final report presented these findings alongside forensic psychiatric evaluations, ACEs data, and clinical insight.

Ultimately, the prosecution withdrew its intent to seek the death penalty and agreed to long-term inpatient psychiatric treatment. This case reminded me that sometimes, the greatest contribution a mitigation specialist can make is to reintroduce humanity to someone already written off — and to speak for them when they've lost the ability to speak for themselves.

#### Reflection:

This case is a reminder that beneath even the most tragic acts often lies a history of untreated illness and invisible suffering. When we lead with compassion and clinical rigor, we give the system a chance to respond with care instead of condemnation.

#### Case Study #2: The Coerced Conspirator

*Federal RICO Case, Coercive Control & Spiritual Abuse*

In a federal capital case brought under RICO statutes, I represented a Latina woman accused of orchestrating a homicide. She had a prior criminal record involving nonviolent offenses — fraud, tampering, and DWI — but no history of interpersonal violence. On paper, she appeared to be a central conspirator. The government claimed she played a leadership role in a multi-state criminal enterprise involving robbery, drug trafficking, and murder.

But the mitigation narrative revealed a far more harrowing — and truthful — story.

Her childhood was marked by abandonment, instability, and physical abuse. As a teenager, she became involved with a much older man who quickly isolated her from her children and family. She referred to him as a “prophet.” He dictated every part of her life — finances, movement, identity, even her sense of reality. What prosecutors misinterpreted as leadership was, in truth, trauma-bonded captivity. Her actions were shaped by coercion, spiritual manipulation, and a lifelong pattern of learned submission.

Through clinical evaluations, family interviews, and cultural analysis, we documented her history of coercive control and gendered violence. The narrative was rooted in Adverse Childhood Experiences (ACEs), spiritual abuse, and cultural expectations of silence and self-sacrifice. She had not been leading — she had been surviving.

In the final phase of the case, I worked closely with her to prepare for allocution. These sessions were not rehearsals — they were emotional excavations. Together, we explored the harm she caused, the conditions that shaped her decisions, and the language of sincere remorse. She spoke in her own words about living “a lie” to survive, about shielding her children from violence, and about the deep regret she carried. Her allocution became the emotional cornerstone of her sentencing — not because it asked for pity, but because it told the unvarnished truth. It was her voice, but it was a voice she had never been allowed — or helped — to find until then.

We submitted a comprehensive mitigation packet reframing her role not as a conspirator, but as a woman coerced into criminality through years of exploitation. The prosecution withdrew its notice to seek the death penalty. She ultimately entered a plea. Her life was spared — not through sympathy, but through strategic, credible, and evidence-based advocacy.

#### Reflection:

Mitigation can reshape how we see a defendant both legally and morally — revealing how coercion, abuse, and cultural norms



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can strip away a person's agency long before the justice system gets involved. It also creates space for accountability rooted in truth, not performance. Without this lens, we risk punishing the most vulnerable for their own exploitation — and missing the full story of who they are, and how they got here.

### **Case Study #3: When Silence Is Survival**

#### *Cultural Suppression, Emotional Numbing, and Felony Murder*

In a felony murder case involving the death of a man during what was framed as a planned robbery, I represented a young Vietnamese American woman charged alongside her boyfriend. The victim was a stranger who had agreed to let them test-drive his car. The boyfriend committed the murder. She did not act — but she did not stop it either. She was charged as a principal.

Her life history revealed a quiet but steady erosion of voice and agency. Raised in a conservative immigrant household, she was conditioned to suppress emotion, avoid conflict, and prioritize obedience over personal expression. While her exterior reflected high academic achievement and social compliance, her inner world was marked by untreated anxiety, disordered eating, a fragmented identity, and a deep, unspoken loneliness.

Her boyfriend became her emotional nucleus. He isolated her from friends, manipulated her decisions, and took control of her daily life. She had no real sense of personal boundary — only a learned instinct to conform, obey, and avoid rejection. When the offense occurred, she dissociated. She was neither armed nor dominant — but she was silent. What appeared to be indifference was, in fact, emotional paralysis driven by fear and learned

helplessness.

The mitigation investigation drew on cultural experts, family interviews, and psychological assessments. These sources revealed how her upbringing involved not just strict expectations, but also humiliation, neglect, and a consistent invalidation of her emotional needs. She was taught that love was expressed through sacrifice, not tenderness — that emotional needs were shameful, and that selfhood was something to be hidden. Her stepmother was described as manipulative and controlling, while her father — emotionally distant and ill-equipped to parent — delegated discipline and offered little warmth.

From a cultural lens, she had been navigating conflicting demands: American norms encouraging assertiveness and independence, and Vietnamese expectations insisting on obedience, modesty, and silence — particularly for daughters. Her perceived passivity was the predictable outcome of years spent trying to reconcile these impossible scripts.

The final report told the story of a young woman who had never learned how to say no, never been taught that her feelings mattered, and never had the tools to escape emotional control. The court, after reviewing the mitigation, declined to impose a life sentence. The resolution reflected a deeper understanding: that while she was accountable, she was not irredeemable.

### **Reflection:**

Silence is not the absence of pain — it often signals it. In communities where emotional repression is normal, young women like this learn to survive by shrinking themselves. When

those unspoken traumas finally surface, the consequences can be devastating. As mitigation specialists, our job is to bring those invisible histories into the light — not to excuse, but to explain. And sometimes, to restore a voice that’s long been buried.

While the human impact of mitigation work is immeasurable, it’s equally important to understand the practical realities of appointing and managing a mitigation specialist. Quality has a cost — and understanding what to expect in billing, documentation, and professional accountability can help ensure that both you and your client get the most value from the process.

### Cost and Professional Standards

Good mitigation isn’t cheap, but poor mitigation can be far more costly. When requesting court-approved funds, defense attorneys must file a motion with a specific estimate. If that amount falls short, a second motion for supplemental funding may be required — creating delays and raising red flags. That’s why early and open communication with the mitigation specialist is essential. With enough details about the client and the scope of the case, a qualified specialist can provide a realistic estimate that includes projected hours, travel, records collection, and narrative writing. Clarify the billing structure (typically hourly), confirm what’s included or billed separately, and always demand itemized invoices and justifications for expenses. Transparent planning prevents costly surprises later. Discuss anticipated costs

with the specialist before filing your motion. Underestimating the budget can delay your case and draw scrutiny if you later seek supplemental funds.

Every case is unique. Each client carries a story shaped by trauma, adversity, or invisible wounds. Mitigation doesn’t excuse conduct — it explains it. It uncovers context that is often buried beneath criminal allegations and helps the decision-maker consider mercy, justice, and proportionality. It is about understanding, not absolution.

Ultimately, mitigation is about restoration: giving voice to the silenced, humanizing the condemned, and offering context where judgment has already been passed. The financial and procedural considerations matter — but this work, at its best, is about dignity.

Qualified mitigation specialists often adhere to ethical standards established by national organizations like the *National Alliance of Sentencing Advocates and Mitigation Specialists* (NASAMS). They may also be licensed professionals regulated by state boards of social work, psychology, or counseling. These standards focus on cultural responsiveness, accuracy, confidentiality, and client-centered advocacy. In capital cases, the *ABA Guidelines for the Appointment and Performance of Defense Counsel* specify that a trained mitigation specialist must be involved — confirming the field’s legitimacy and legal importance. When hiring, it’s not only appropriate but crucial to inquire about a specialist’s training, licensure, and ethical commitments. Ensuring your specialist follows these standards adds an important level of accountability and professionalism to the defense team.

Before appointing a mitigation specialist, ask the right questions. Here’s where to start:

### 10 Questions Every Defense Attorney Should Ask a Mitigation Specialist

1. What is your experience working on felony or capital cases, and how has your practice evolved based on what you’ve learned?
  - *Looks beyond resume credentials to see whether the specialist has grown through practice, reflection, and exposure to challenging cases.*
2. How do you identify and develop compelling mitigation themes from complex or incomplete life histories?
  - *Assesses their ability to extract meaning — not just data — from records and interviews.*
3. Can you walk me through your process for building trust with clients who are mistrustful, traumatized, or disengaged?
  - *Trust is everything in mitigation. This question reveals whether they lead with empathy and technique.*
4. What systems or agencies do you regularly obtain records from, and how do you make sure nothing important gets missed?
  - *Evaluates their competence with CPS, medical, educational, correctional, and mental health systems.*
5. How do you coordinate with attorneys, experts, and investigators -- especially when strategies shift or timelines tighten?
  - *Looks for flexibility, communication skills, and*

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*understanding of legal strategy boundaries.*

6. What is your typical timeline for a complete mitigation packet, and how do you handle urgent deadlines?
  - *Important for managing expectations in fast-moving cases.*
7. Have you worked with clients experiencing serious mental illness, intellectual disability, or neurodevelopmental disorders?
  - *Highlights experience with vulnerable populations where mitigation is most critical.*
8. What professional standards or guidelines shape your work (e.g., NASAMS, ABA Guidelines), and how do you stay grounded when working under pressure?
  - *Signals professionalism and accountability.*
9. Can you provide redacted work samples that show how you craft life history narratives – and how you integrated clinical or cultural insights?
  - *Written work matters. Ask to see their voice in action.*
10. Have you testified in court or supported sentencing advocacy? If so, how do you prepare for that role?
  - *Good mitigation specialists are courtroom-ready if the case demands it.*

Note: These questions are not exhaustive but offer a strong foundation for vetting potential mitigation professionals.

### **Elevating the Standard of Defense: What This Work Demands From Us**

Mitigation specialists are not optional add-ons — they are vital members of any serious defense team. In a system that reduces people to their worst acts, our job is to restore their full humanity. A skilled mitigation specialist has the tools, training, and persistence to do just that — gathering the scattered threads of a client's life and weaving them into a narrative that can change outcomes and perceptions.

The impact of this work isn't measured solely in reduced sentences or altered charges. It's rooted in something deeper: the understanding that every person, regardless of their past, deserves to be heard before being judged. For many clients, mitigation is the first time someone has genuinely listened to their story — not to excuse, but to understand.

Choose wisely. Collaborate fully. And never forget: when we tell a client's story with compassion, accuracy, and insight, we don't just defend them — **we restore the dignity the system tried to erase.**



**Jeff Wax** is a nationally recognized mitigation specialist with over twenty years of experience in capital and serious felony defense. Based in Houston, Texas, he works closely with public defenders and private attorneys across the country to develop life history investigations that humanize defendants and offer context for their behavior. His approach is trauma-informed, culturally responsive, and grounded in narrative justice. Jeff regularly trains legal teams on mitigation strategies and advocates for sentencing reform based on compassion, science, and systemic accountability. He can be reached at (207) 838-7260 or [texaslegalinvestigations@gmail.com](mailto:texaslegalinvestigations@gmail.com).

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# How to do a Misdemeanor Plea in Absentia for an Indigent Incarcerated Client

**SUZANNE SPENCER**

*Member of the TCDLA Board*



## *Accessing Additional Documents*

*To access the various documents mentioned throughout this article, scan this QR code that links to the supporting exhibits and resources. To view them:*

1. **Open your phone's Camera app.** (On some Android devices, you may need to use Google Lens or a free QR scanner app.)
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3. **Tap the link to instantly open the exhibit or document on your phone.**

*Tip: If nothing appears, adjust the distance, ensure good lighting, or try a QR scanner app.*

## **I. Introduction**

Ever been appointed to a client with a pending misdemeanor who was in the custody of TDCJ, Bureau of Prisons (BOP) (Federal), or an OOS (Out of State) correctional facility? The client wants this misdemeanor handled asap while she is in TDCJ, or elsewhere, without the need for a bench warrant. The client, vehemently, opposes transfer to the county of the pending misdemeanor to resolve the case. Most of us have heard of the concept of a Plea in Absentia. It is not a Plea in "Abstentia," (as some have mistakenly called it). It is a Plea in "Absentia" (hereinafter PIA). A PIA is a plea and sentence in a court without the client being present. See "Tex Crim Proc Art 42.14 In Absence of Defendant" section (a). The scope of this article is how PIAs are accomplished in Travis County where the majority of my practice lies. Therefore, if you want to attempt a PIA in another county, I would ask that county if they have a PIA procedure in place. If so, follow it. If not, I would advise you to ascertain whether the court in that jurisdiction is amenable to allowing PIAs. Once you have obtained permission from the presiding judge to allow such a plea, I recommend getting the blessing of the court staff. They may be unfamiliar with a PIA, the procedures, and paperwork. Because it may be uncommon, it is best to give them a heads-up.

## **II. No Felony Plea in Absentia...Except**

I've never witnessed a PIA in a felony case. A plea of guilty or nolo contendere in a felony case must be made in open court by the defendant in person. See *Tex. Crim. Proc. Art. 27.13. Plea of Guilty or Nolo Contendere in Felony*. Notice that the statute uses

the word "must" and not "shall." It may be best to leave well enough alone or so I thought...See "Tex Crim Proc Art 42.12 In Absence of Defendant" section (b): a felony judgment and sentence may be rendered in the absence of the defendant if: (1) defendant is confined in a penal institution; and (2) is not charged with an Article 42A.054(a) offense, nor an offense which alleges that a deadly weapon was used or exhibited during the commission or immediate flight from the offense and the defendant did not use or exhibit the deadly weapon, nor was a party to the offense and knew that a deadly weapon would be used or exhibited, etc. See sections (c) to (e) of Article 42.14 and subsections (3) to (5) of Article 42.14(b) for further requirements for felony PIAs.

## **III. Avoid a PIA with a Dismissal**

Before I go any further, I have to say that a Plea In Absentia case is a "PIA," no pun intended. These cases are tedious and time-consuming as you will glean by the end of this article, which includes 2 client letters exhibits and 6 court document exhibits. Pending misdemeanors, and non-violent felonies, for that matter, are easy to get dismissed outright in these situations. Before attempting a PIA, ask the State if they are willing to dismiss any charges in exchange for time-served in the current placement of incarceration and/or the time-served in the county, parish, etc., of the convicting court. Of course, you will need to obtain actual proof of time-served. Regardless, you will need proof of time-served to present to the court at the time of sentencing in the PIA procedure. Most of in-custody time accrued information can be found online.

## IV. How to Locate Documentation of In-Custody Time Accrued

For clients in the BOP, set up an email account through CorrLinks to communicate with clients in the BOP. Be aware that BOP monitors these communications. Ask the client if they have official documentation of time-served in the BOP and to send it to you. If not, utilize the BOP inmate locator tool at [https://www.bop.gov/mobile/find\\_inmate/byname.jsp](https://www.bop.gov/mobile/find_inmate/byname.jsp). You will have to make a written request to the prison for time-served records. You may be able to ascertain this information through PACER ([pacer.uscourts.gov](http://pacer.uscourts.gov)) if you have access. Look up the federal case that landed the client in the BOP. Find the sentencing information and time credits. I recommend going through the records department of the BOP.

The link for clients in TDCJ custody is <https://inmate.tdcj.texas.gov/InmateSearch/search.action>. This link will give you enough information to prove time accrued including the name of the county of the convicting court.

For clients in out-of-state custody, you will have to search for the department of corrections in the state holding the client and the convicting county, parish, etc. Do an online search to verify if the information is available on their website. If not, contact their respective department of records for documentation of in-custody time accrued.

## V. Preparing the Plea in Absentia Packet

### A. Write an Introductory Letter to Client

1. After you have located your client, verified the address for correspondence, and requested or searched online for official documentation with your client's time-served, write a short introductory letter to the client.
  - a. Send a copy of the Information and PC affidavit with the letter.
  - b. Include a request for your client to respond with his/her version of the facts of the arrest.
  - c. Mention the range of punishment and collateral consequences of the offense.

**Pro-tip:** Instruct client to write the following on the lower left side of the envelope used to mail her letter to you:

#### Do Not Open Legal Mail

**Pro-tip:** Include a self-addressed stamped envelope for the client.

- Scan QR Code to See LETTER Exhibit A

### B. Work the Case Up

1. Complete the discovery process and necessary investigation. Meet with the State.

**Pro-tip:** Ask the State for a dismissal in exchange for time-served and any mitigation evidence that you have prepared. If dismissal is denied, plea bargain the case but leave the possibility of dismissal open. You may discover additional mitigation information and prosecutors can be persuaded to change their mind.

### C. Write a Very Detailed Letter to the Client

1. Draft a detailed letter explaining the PIA process, relevant law, recitation of constitutional rights, plea bargain offer, plea options, consequences of conviction, where to sign and fingerprint and how to fingerprint, etc.
2. In this letter you will explain each of the six (6) required court documents that the client will need to sign, date, or fingerprint. Always use the specific documents that the

court requires for a plea and sentence.

3. The template attached is for a BOP inmate with a DWI 1<sup>st</sup> = > .15 pending in Travis County. Modify the template to fit your specific case.

**Pro-tip:** If an inkpad is hard to come by, tell the client that dark ink from a ball point pen covering the upper portion of the thumb is acceptable.

**Pro-tip:** Don't forget to send a self-addressed stamped envelope.

- Scan QR Code to See LETTER Exhibit B

### D. Draft and Attach the Six (6) Court Documents Required to Accomplish the PIA

1. "Discovery Compliance Statement Pursuant To Art. 39.14(J) TCCP"

a. This is the Michael Morton Form.

b. In Travis County, the State will generate this document for your case.

**Pro-tip:** Paginate this 2-page document.

**Pro-tip:** Use "Sign Here" stickies to instruct client where to sign.

- Scan QR Code to See DOCUMENT Exhibit C

2. "Waiver of Personal Appearance to Enter Plea and Waiver of Appearance for Sentencing" and "Affidavit Verifying Waiver of Personal Appearance Made in Lieu of Notary Pursuant to §132.001 Tx Civ Practice Remedies Code"

a. This document can be used in any jurisdiction assuming the court allows you to do a PIA in a misdemeanor case.

b. §132.001 Tex. Civ. Practice Remedies Code allows a person in custody to swear to an affidavit without the need for a notary.

**Pro-tip:** Paginate this 3-page document.

**Pro-tip:** Use "Sign Here" stickies to instruct the client where to sign.

- Scan QR Code to See DOCUMENT Exhibit D

3. Plea of Guilty or No Contest, Admonishments, Voluntary Statements, Waivers and Stipulations

a. Use the Court's actual plea form.

b. Re: § IV. Page 2 of the Travis County form (non-English speaking clients), the PIA procedure is not recommended.

**Pro-tip:** Paginate this 2-page document.

**Pro-tip:** Use "Sign Here" stickies.

-Scan QR Code to See DOCUMENT Exhibit E

4. Judgment of Conviction by Court – Waiver of Jury Trial

a. Use the Court's actual Judgment and Sentence document.

b. In Travis County, the fingerprint is placed on page 2.

**Pro-tip:** Don't forget to paginate this 2-page document.

- Scan QR Code to See DOCUMENT Exhibit F

5. Trial Court's Certification of Defendant's Right of Appeal

a. The client will sign where indicated.

**Pro-tip:** Be sure to use "Sign Here" stickies.

-Scan QR Code to See DOCUMENT Exhibit G

6. Notification Pursuant to T.C.C.P. 38.50

a. Travis County requires this form re: destruction of the toxicological specimen in Chapter 49 Penal Code cases.

**Pro-tip:** Do not forget the "Sign Here" stickies.

-Scan QR Code to See DOCUMENT Exhibit H

## E. Final Letter to Client

1. Draft your own final letter to the client explaining final resolution of the pending case.
  - a. Send file-marked copies of all documentation to the client.
  - b. Include an explanation of any collateral consequences.

## VI. Conclusion

As I stated above, avoid a PIA by getting the pending misdemeanor case dismissed. PIAs are indeed tedious, time consuming not to mention managing all the documents. However, a Plea in Absentia is a process that can resolve a pesky pending misdemeanor that keeps rearing its head. In some prison systems, a pending case can cause the client to be denied access to certain beneficial programs and/or privileges. Therefore, the pending case should be settled as soon as possible. Of course, the dismissal outcome would be the quickest way to resolve a case. So, get out there, do your due diligence, and get that pending case dismissed!

Should this "how to" article seem overwhelming, feel free to contact me or my assistant, Kaitlyn Padron. Our contact information is 512-476-5677, [sms@egmlaw.com](mailto:sms@egmlaw.com) and [kap@egmlaw.com](mailto:kap@egmlaw.com). We will gladly take your calls and are happy to help.



**Suzanne Spencer** is a bilingual (Spanish) Criminal Defense Lawyer. Ms. Spencer is the owner of the Law Office of Suzanne M. Spencer in Austin, Texas and is Of Counsel to the Law Office of E.G. Morris. Suzanne is a former Assistant City Attorney for the City of Austin. She prosecuted Class C offenses and City Code Violations in the Austin Municipal Court. Ms. Spencer is a former Social Worker and holds a Master of Social Work Degree. Her law practice focuses on representing indigent persons accused of criminal offenses who have Mental Health issues and/or Immigration issues. Ms. Spencer represents clients in Expunction, Non-disclosure, ALR and ODL matters as well. She is a current Board Member of TCDLA and served as a course director in the 2020 TCDLA Sexual Assault Seminar. She received a TCDLA Presidential Award in 2021. Suzanne is also a member of the National Association of Criminal Defense Lawyers and serves on the Membership Committee. Additionally, Ms. Spencer is a long-time member of the College of the State Bar. Suzanne can be reached at [sms@egmlaw.com](mailto:sms@egmlaw.com) or at 512-476-5677.

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Photos courtesy of Honorable Bert Richardson



Left to Right: Amanda Knox, Anna Vasquez, & Mike Ware



Amanda Knox



Anna Vasquez

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These seminars are sponsored by CDLP, a project of TCDLA, funded by the Texas Court of Criminal Appeals.

# 49<sup>TH</sup> ANNUAL

## Tim Evans Texas Criminal Trial College Registration • March 22-27, 2026

**Completed Applications must be received by 5:00 pm on Monday, December 29, 2025**

Male  Female Name: \_\_\_\_\_ Bar Number: \_\_\_\_\_

Address: \_\_\_\_\_ City: \_\_\_\_\_

State: \_\_\_\_\_ Zip: \_\_\_\_\_ Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

Cell phone: \_\_\_\_\_ Email: \_\_\_\_\_

### **Must be a licensed Texas attorney - Complete the entire application**

**I would like to attend this training and have enclosed:**

\$150 registration. Registration price includes breakfast and lunch each day, dinner two nights, and hotel double occupancy. (refunds, less 10% processing fee, only for cancellations made before **February 27, 2026**).

Requested Roommate: \_\_\_\_\_

This application plus a letter of intent telling us your level of trial experience. Additionally, tell us why you want to attend.

A letter of recommendation from a Texas Judge (District, County, or Federal).

A letter of recommendation from a criminal defense attorney.

A professional headshot for directory. (If not uploaded to TCDLA profile already)

Single Room Option — TCDLA will provide info for off-site partner hotel (I will book my own room at my own expense)

*This course is designed for all ranges of criminal defense trial experience—from new to veterans to former prosecutors and to the attorney who wants to continue improving trial skills. The College is committed to responsible racial and gender balance. You must be prepared to devote your entire week to this course.*

You will be notified by January 23, 2026. Only complete applications will be considered. No onsite registration.

\*If you have special needs or are financially unable to pay, please contact TCDLA.\*

**(Required)**

Credit card number: \_\_\_\_\_ Expiration date: \_\_\_\_\_

Signature: \_\_\_\_\_ CVC: \_\_\_\_\_

I applied last year  I attended Criminal Trial College in: \_\_\_\_\_

I accept court appointments:  Yes  No

**Trial Experience:** Please be candid about your trial experience, and do not exaggerate

**Number of Trials (as first chair only):**

# \_\_\_\_\_ Felony Jury # \_\_\_\_\_ Felony Bench # \_\_\_\_\_ Misdemeanor Jury # \_\_\_\_\_ Misdemeanor Bench # \_\_\_\_\_ Civil Jury

**Number of Trials (as second chair):** \*\*On a separate sheet explain your involvement

# \_\_\_\_\_ 2nd Chair Felony Jury\*\* # \_\_\_\_\_ 2nd Chair Misdemeanor Jury\*\*

Type of practice and years in practice (general description): \_\_\_\_\_

### **Other Training or Experience:**

Law school: \_\_\_\_\_ Date graduated: \_\_\_\_\_

Other trial training courses taken: \_\_\_\_\_

**Former Prosecutor:**  Yes  No

If yes, how long, when did you leave, and what experience did you have?: \_\_\_\_\_

**Public Defender:**  Yes  No

If yes, what office?: \_\_\_\_\_

**Special Needs?:** \_\_\_\_\_

Vegetarian Lunch

Email: [smartinez@tccla.com](mailto:smartinez@tccla.com) | Fax: 512-469-0512 | Mail to 6808 Hill Meadow Drive, Austin, TX 78736

The Tim Evans Texas Criminal Trial College is sponsored by CDLP, a project of TCDLA, funded by the Texas Court of Criminal Appeals.

# Welcome New TCDLA Members!

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# Significant Decisions Report

KYLE THERRIAN

It's a decent amount of work reviewing cases and writing summaries. My law partner recently started interrupting that work by showing me how AI has turned his police reports into a podcast. If you know me, you know exactly the tone that goes with my "cool, Jeremy" response. But then I drove to Galveston for TCDLA's Beat the Rap Trial & Motion Practice seminar during prime tell-it-like-it-is summarizin' time. So, I plugged my cases into Jeremy's thingamajig and listened to the robots tell me about the case law "aaaand it was pretty interesting." (\*uses fake AI inflection\*). To pay it forward, I've included with the Electronic Edition an AI-generated podcast of this SDR. If it works, promise not to tell anyone, lest you never want to read my snarky thoughts again.

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

Sincerely,

Kyle Therrian  
Editor, SDR

## 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

[State v. Newton, No. PD-0363-24 \(Tex. Crim. App. Jul. 30, 2025\)](#)

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

**Issue & Answer.** Is an exigency required for an officer to conduct a suspicious place arrest under Article 14.01? **No.**

**Facts.** The State convicted Newton of Driving While Intoxicated. Newton challenged the officer's authority to conduct a warrantless arrest under Article 14.01 of the Code of Criminal Procedure. Specifically, Newton argued that for an officer to conduct a warrantless arrest for an offense the officer did not observe, the officer must find the suspect in a suspicious place under exigent circumstances. The arresting officer testified that he was investigating a single-vehicle accident and followed skid marks back to a residence where he discovered Newton intoxicated. After performing field sobriety tests, the officer arrested Newton, took him to the hospital, and obtained a warrant for his blood. The trial court suppressed evidence linked to Newton's arrest because a home is not a suspicious place and because there were no exigent circumstances. The court of appeals reversed.

**Analysis.** There is no exigency requirement under Article 14.01's suspicious place arrest provision.

**Quoted.** To the extent that *Gallups, Swain*, and *McGuire* could be read as prescribing an exigent circumstances requirement to article 14.03(a)(1) arrests, Appellee is arguably correct that the court of appeals was bound to follow those opinions, regardless of the court of appeals's opinion of whether those opinions were wrongly decided.

\* \* \*

But the court of appeals was also correct, getting to the same conclusion we have just reached in *Armstrong v. State*, — S.W.3d —, No. PD-0409-22, 2025 WL 1517410 (Tex. Crim. App. May 28,

2025). In *Armstrong*, we explicitly held that article 14.03(a)(1) does not have an exigency requirement.

**Comment.** The Court makes sure to explain that “[t]he issue as to whether Appellee’s house was a suspicious place under article 14.03(A)(1) is not before us, and we therefore express no opinion . . . whether Appellee was found in a suspicious place.” This issue remains live in the *Armstrong* case, currently on remand to the Fifth Court of Appeals.

[Ex parte Kleinman, No. PD-0966-24 \(Tex. Crim. App. Jul. 30, 2025\)](#)

**Attorneys.** David Botsford (appellate)(trial), E.G. Morris (appellate)(trial)

**Issue & Answer.** Is being held to answer for a Class C infraction in municipal court sufficient restraint to invoke the right to habeas relief? **Yes.**

**Facts.** Kleinman owns Auspro Enterprises (parallel case with the same opinion). He operates CBD shops in several cities, including Cedar Park. The City of Cedar Park uses zoning ordinances to ban “head shops” from operating in any of the city’s zoning districts. Both Kleinman and his businesses were convicted of 15 separate Class C municipal offenses. Kleinman pursued his right to trial *de novo* and was required to post an appeal bond, which totaled \$65,000. Kleinman filed a pretrial application for habeas relief challenging the constitutionality of the ordinances on vagueness grounds. The trial court found Kleinman (and his businesses) were sufficiently restrained of liberty to warrant habeas jurisdiction but denied relief on the merits. Kleinman sought an interlocutory appeal but was poured out by the Austin Court of Appeals when it concluded that pretrial habeas relief is

not available to those charged with a fine-only offense.

**Analysis.** Habeas relief is appropriate even when restraint is less than formal custody or confinement. The court of appeals was wrong to conclude that “mere restraint” is a kind of restraint without remedy. Article 11’s definition of “restraint” is broad and has been construed accordingly over the years.

**Quoted.** Moreover, Article 11.23 (“Scope of the writ”) makes explicit that “[t]he writ of habeas corpus is intended to be applicable to *all such cases* of confinement and restraint,” not just those in which a reviewing court has concluded that the restraint is onerous *enough* to merit consideration. Here, Kleinman’s restraint is of “the kind of control which one person exercises over another . . . to subject [him] to the general authority and power” of the State.

**Comment.** Most municipal courts I’ve been in operate as sophisticated collection agencies staffed with people who violate Kyle’s golden rule of practicing law: you can be mean, or you can be dumb, but you can’t be both.

[Ex parte Carter, No. WR-70,722-03 \(Tex. Crim. App. Jul. 30, 2025\)](#)

**Attorneys.** Michael Ware (writ), Raoul Schonemann (writ)

**Facts.** The State convicted Carter of capital murder and has been trying to kill him since 2009. The instant case involves his first subsequent postconviction writ of habeas corpus in which the Court of Criminal Appeals remanded to the court of conviction to review two claims: (1) whether the medical examiner gave false or misleading testimony that the victim “had been intentionally smothered,” and (2) whether new scientific evidence establishes that Carter would not have been convicted with the benefit of

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new evidence at trial. On remand, however, Carter presented significant evidence in several areas, some purporting to exceed the scope of these two issues.

**Analysis.** The habeas court recommends relief based, in part, on claims not remanded for consideration. Much of the evidence presented was a relitigation of matters previously resolved or known. Some of it involved legal theories not pleaded by Carter in his application. The Court will disregard these matters and focus on “the facts germane to the claims as pleaded in his application.”

Carter’s false evidence claim amounts to a disagreement among competing experts. Even if the State’s expert had testified falsely about the manner of killing, Carter still intentionally killed his victim. Thus, in addition to failing to establish false testimony, Carter fails to show materiality. Carter’s new evidence claim rests upon the purported changed opinion of the State’s expert. In the habeas hearing below, the State’s expert was willing to concede more than he had at trial, but he did not change his opinion. A new evidence claim can rest on an expert’s changed opinion, but that is not what occurred here.

**Quoted.** The habeas system of review is frustrated when the habeas record contains evidence that is not pertinent to the claims for which this Court remanded. Our review becomes even more complex when the findings of fact and conclusions of law

integrate facts and claims this Court previously considered and rejected. At that point, new claims and facts blend with old claims and facts, defeating the purpose of our remand order and the subsequent writ bar.

**Dissenting (Walker, J.).** The evidence excluded by the majority is relevant to Carter’s claims.

**Comment.** It’s funny because when reviewing a record for sufficiency of evidence, “a reviewing court must consider all evidence which the jury was permitted, whether rightly or wrongly, to consider.” *Curlee v. State*, 620 S.W.3d 767, 787 (Tex. Crim. App. 2021). It would be a tragedy if we turned a blind eye to erroneously considered evidence that helped convict a man. But erroneously admitted evidence sparing a man from execution? Somehow, it becomes a different story.

[Ex parte Charette, No. PD-0524-21 \(Tex. Crim. App. Aug. 20, 2025\)](#)

**Attorneys.** Lewis Thomas (appeal)(trial)

**Issue & Answer.** The Election Code gives the Texas Ethics Commission authority to investigate and punish civilly certain Election Code violations that are also criminal offenses. Should the Texas Ethics Commission deem it appropriate, they can also make referrals for criminal prosecution. Is a Texas Ethics

## BOARD MEMBER SPOTLIGHT



**Joseph Esparza**  
TCDLA Member Since 2000

**Favorite Seminar:** South Padre Island Seminar

**Law School:** University of Texas at Austin

**Length of Practice:** 31 years

**Favorite TV Show:** Game of Thrones

**Advice for people to get more involved:** Volunteer, get face time with people. Too often we substitute screen time for face time.

**Primary Cases:** 100% criminal practice – all offenses; but last few years mainly Capital murder, murder, violent offenses, and sex crimes at State and Federal (Military courts-martial); post-conviction work too (appeals and writs of habeas corpus)

**Free Time Activities:** Traveling, reading, playing chess, avid movie watcher (especially horror movies!)

**Favorite Food:** Pizza, popcorn, Enchiladas Verdes, Peach cobbler

**Most successful case and why:** In three DP trials, I’ve beaten the State twice when they’ve gone for the death penalty; in many other capital cases, I persuaded the State to drop the DP and we plead to an LIO, but one capital case stands out in my memory. I took over as the 7th or 8th attorney for a difficult client and won a hard fought MTS that gutted the State’s case. The State was then forced to dismiss this client’s capital murder and 3 agg robbery cases because their case imploded a couple of weeks before trial. It seemed like an impossible win, but we got it done. Out of all my trials regardless of offense level or jurisdiction, the capitals tend to stay with me the most.

**Way to Relax:** Do naps count? Probably travel and reading (sci/fi, horror, thrillers), whatever takes my mind off the law

**Place to Travel:** I went to Japan recently with my family for 2 weeks and we loved it there. Highly recommend Japan.

**Life motto:** Enjoy life.

**Advice you wish you knew starting out as a lawyer:**

1. There is no one right way to do something or try a case, find out what works for you and stick with it.
2. Be curious and always be learning and always be genuine. People and juries respond to genuine.
3. A life spent trying to fill your brain with as much knowledge as you can is well lived.
4. Collect skill sets of all kinds, you never know when they will come in handy.

## BOARD MEMBER SPOTLIGHT



**Jose Ozuna**  
TCDLA Member Since 2018

**Favorite Seminar:** This is a tough one. Going to Rusty every year is a must—I always come home with a ton of tools. I’m a FIDL graduate. Core 101 was an absolute game changer for me. The same is true of Trial College and the three-day SFST seminar. I also get a ton of value from Round Top.

**Law School:** St. Mary’s University School of Law

**Length of Practice:** 11 years

**Favorite TV Show:** Also tough. For drama, either Succession or The Sopranos. For comedy, Peep Show, Klovn or It’s Always Sunny in Philadelphia.

**Advice for people to get more involved:** Every seminar I attend gives me something I can use to beat a case or get one dismissed. Come to as many CLEs as you can—it’s always worthwhile.

**Primary Cases:** I work for the Lone Star Defenders Office. Virtually all my cases are smugging of persons cases.

**Free Time Activities:** I’m really into bikes—especially mountain biking. I mountain bike several times a week. I also enjoy the occasional road and gravel ride. I occasionally race, but mainly for the camaraderie. I’m also a fan of the occasional social group ride. I also enjoy building bikes. I’ve built several bikes from the frame up. My girlfriend is my best friend. I try to spend as much quality time with her as I can. We have fun.

**Favorite Food:** That’s a hard one, but I never get tired of smoked salmon.

**Most successful case and why:** It’s hard for me to single out one case. I’m a career public defender. We represent people with the least power and the fewest resources, often facing a government that’s indifferent to their rights—and their humanity. Every case is important. It’s an honor to be in the fight.

**Way to Relax:** Spending time with my girlfriend, mountain biking, building mountain bike trails, riding my onewheel, hanging out at parks or other outdoor spaces. Ultimately, if I am outdoors, I am happy.

**Place to Travel:** I recently discovered Bentonville, Arkansas. I plan to go back as often as I can. If I ever win the lottery, I am moving there. Please forward my subscription of “The Voice” there.

**Dream car:** I wouldn’t mind a super capable SUV that can get you to backcountry camping spots or into remote areas of South Padre Island.

**Life motto:** Be a decent person. Give back when you can.

**Advice you wish you knew starting out as a lawyer:** Right away I learned that this was a privileged and challenging profession. But I wish I had better understood that this is a one-day-at-a-time kind of job. The work is constant and demanding. Take time to rest and give yourself some grace. Staying fresh and avoiding burnout takes intention and effort.

Texas Criminal Defense Lawyers Association

# Champions of the Month!

**Cheers to John A. Peralta!** He obtained a not guilty verdict in the bench trial of a habitual offender charged with possession of a controlled substance. The defendant was a passenger in a vehicle in which several baggies containing close to 4 grams of methamphetamine, along with a set of digital scales, were discovered during a traffic stop. **Way to go!**

**Congrats to Jason Parrish!** 2nd degree felony Possession of Methamphetamine drug charge. Smith County case. Solo occupant of vehicle and the meth was found in center console. Client potential punishment enhanced to 25-Life due to prior felony convictions. Busted two panels before he got a jury. Not Guilty. **Fantastic work!**

**Congratulations to Mark Hochglaube and his client** on winning a new trial after a hard-fought Motion for New Trial with extensive briefing and a contentious hearing. Mark came in as the lawyer on appeal after the defendant was sent to prison by a jury after a trial with another firm. After careful investigation, Mark learned that the accuser was recanting and carefully briefed this and other complex legal issues. Today, Mark's client went from a LIFE sentence on an aggravated sexual assault of a child conviction to a second chance at justice. **Bravo!**

**Kudos to Mark Thiessen and Ben Rose!** All charges dismissed against Aspen coach on the morning of trial. Big thank you to the DA for dismissing all charges in the interest of justice. No DUI, Felony Eluding or Contributing. Their client burst in tears as it was dismissed. He turned down every offer every single time. He had been vilified and presumed guilty, but he is finally vindicated. **Incredible!**

Commission Referral necessary to a criminal trial court's exercise of jurisdiction? **No.**

**Facts.** This case is a new opinion on rehearing involving purported campaign violations of a candidate for judge in Washington County. The State indicted Charette for (1) knowing misrepresentation of the true source of campaign communications, (2) falsely representing in campaign communications, with knowledge of the falsity, that she held a public office she in fact did not, (3) failing to timely file her personal financial statement, and (4) failing to maintain proper records of political expenditures. Because the Election Code assigns a role to the Texas Ethics Commission (TEC) to investigate and punish these infractions civilly or to make a referral for criminal prosecution, Charette argued that the TEC referral was necessary to vest the criminal court with jurisdiction. The Court of Criminal Appeals originally agreed and granted relief.

**Analysis.** The Texas Constitution can operate to preclude the exercise of authority by one branch or department when that authority is explicitly assigned elsewhere. When the Constitution is silent, the legislature may assign duties or assent to roles exercised by multiple entities. A district attorney is part of the judiciary, and the TEC exists as part of the legislative branch of our government. The Texas Constitution does not preclude either branch or entity from enforcing election laws in favor of the other. Nor has the legislature taken steps to limit authority or exclude one entity from involvement in punishing election law violations. This situation is analogous to a DWI in which a prosecutor prosecutes the crime of DWI and an administrative agency—DPS—punishes the offender by virtue of a license suspension. While it is true that the TEC is given authority to make a referral for prosecution, Charette conflates what is optional as a requirement or precondition.

**Quoted.** We reject the categorical claim that no prosecution can be brought to enforce criminal laws concerning the conduct

of elections simply because their subject matter may overlap with civil jurisdiction conferred on the TEC. Neither do we find any basis in this record to conclude that permitting this prosecution would interfere with any authority assigned to the TEC.

**Concurring (Richardson, J.).** Concur only in result because the Legislature has amended the relevant statutes and made their application retroactive.

**Comment.** Lewis Thomas (Charette's attorney) bringing the fire briefing this case on rehearing. He lists (and cites where to find) Texas Ethics Commission infractions by the elected district attorneys who filed amicus briefs in this case. Unfortunately, we have institutions that help catch the stones thrown by some living comfortably in glass houses.

[Cockrell v. State, No. PD-0760-24 \(Tex. Crim. App. Aug. 20, 2025\)](#)

**Attorneys.** Troy Hornsby (appellate)

**Issue & Answer.** Injury to a child by omission requires the State to prove the defendant failed to perform a statutory duty. In literally every single appellate case on this provision, the duty arises in the Family Code. Can the State now, for the first time ever, import a duty from some other Code to support a conviction for an injury to a child? **Yes.**

**Facts.** The State convicted Cockrell of injury to a child by omission. The State's indictment alleged that Cockrell failed to restrain his dangerous dogs and thus failed to perform his duty under Health and Safety Code § 822.042(a)(restraint required after receiving dangerous dog notice).

Cockrell owned several pit bulls that he kept on his property. A fence enclosed his property, but it was not sufficient to contain his dogs. Cockrell's dogs frequently escaped and attacked people and animals alike. Eventually, a sheriff's deputy issued a written "DOGS DANGEROUS TO ANIMALS DOG OWNER'S NOTIFICATION" pursuant to Chapter 822 of the Texas Health and Safety Code. Notwithstanding this incident, Cockrell's dogs

continued to attack anything and everything. Eventually, the dogs attacked the victim in this case, causing serious injuries and hospitalization.

The State conceded in the court of appeals that its prosecution was the first instance of relying on a duty outside of the Family Code when prosecuting a person for injury to a child by omission. The court of appeals determined it was an error to import duties from other statutory schemes for purposes of an injury to child prosecution.

**Analysis.** Texas Penal Code § 22.04(a) criminalizes the failure to perform a statutory or legal duty when that failure results in serious bodily injury to a child. Chapter 822 of the Health and Safety Code provides that the owner of a dangerous dog “shall” restrain or secure the dog (among other things). The Texas Code Construction Act provides that the word “shall” imposes a duty. A duty under the Penal Code includes any duties that are created by the laws of this state. It is of no consequence that the duty to restrain the dog is owed to the public generally and not to the child specifically.

**Concurring (McClure, J.).** Writes to express concern that criminal liability could arise unexpectedly and unfairly.

**Dissenting (Finley, J.).** The duty should be owed specifically to the victim.

**Comment.** Legislatura aenigma intendit. Assuming Google translate hasn’t let me down: “the Legislature intends a puzzle.” I just made that rule of statutory construction up (it’s got to be in Latin if you want it to catch on). If a man wants to conform his behavior to avoid penal consequences, he can read the law. If a wise man wants to conform, he should know Legislatura aenigma intendit.

### 1st District Houston

#### [Rosales v. State, No. 01-23-00877-CR \(Tex. App.—Houston \[1st Dist.\] Jul. 31, 2025\)](#)

**Attorneys.** Jonathan Landers (appellate)(trial), William Jacoby “Coby” Dubose (trial)

**Issue & Answer.** Does an officer conduct an unlawful search when he views the contents of a person’s Dropbox provided to him by virtue of a cybertip? **No.**

**Facts.** Dropbox scans user files for child pornography. They detected child pornography in Rosales’s Dropbox account and provided a cybertip to the National Center for Missing and Exploited Children (NCMEC). NCMEC receives and forwards cybertips to appropriate law enforcement agencies. The Dropbox cybertip included two potential IP addresses. This allowed officers to use an administrative subpoena directed to Comcast and ultimately identify a subscriber. Using this information, law enforcement obtained a search warrant for electronic customer data—specifically Rosales—in Dropbox’s possession.

**Analysis.** The officer did not exceed the scope of what Dropbox had viewed.

**Quoted.** Under the “private-search doctrine,” if a non-governmental actor searches an item and gives it to police, later police conduct viewing the item is not a “search” for Fourth Amendment purposes unless it exceeds the scope of what the non-governmental actor viewed.

**Comment.** But for Dropbox’s possession of the child

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pornography, it would not have been discovered by law enforcement. If there is no privilege for Dropbox to possess child pornography, is there a 38.23 issue? Alternatively, if Dropbox is going to shoehorn itself into the closest applicable affirmative defense—one applicable to law enforcement—is Dropbox now sufficiently a State actor?

#### [Sotelo v. State, No. 01-24-00562-CR \(Tex. App.—Houston \[1st Dist.\] Aug. 12, 2025\)](#)

**Attorneys.** Fernanda Benavides (appellate), Jani Maselli Wood (appellate), Arthur Washington (trial)

**Issue & Answer.** Is an indictment invalid because the assistant foreman signed it? **No.**

**Analysis.** It is settled law that an indictment is not defective for lack of the foreman’s signature.

**Comment.** I learned there is a position of assistant foreman.

### 8th District El Paso

#### [Sanchez v. State, No. 08-24-00121-CR \(Tex. Crim. App.—El Paso, Jul. 31, 2025\)](#)

**Attorneys.** Parker W. Johnson (appellate)(trial)

**Issue & Answer.** Don’t say “no objection” when you have an objection. But if you do say “no objection” and still do a lot of other things to show that you actually didn’t mean it, did you waive your client’s objection for appeal? **No. Not here.**

**Facts.** The State convicted Sanchez of possession of a controlled substance. An officer discovered methamphetamine after stopping Sanchez for riding his bicycle on the wrong side

of the road. After seeing an open can of beer in Sanchez’s water bottle holder, the officer used the Fourth Amendment’s vehicle exception to search Sanchez’s backpack. Sanchez challenged the search.

**Analysis.** Despite stating he had no objection when the State ultimately introduced evidence, the Court of Criminal Appeals provides that waiver in this instance should not be applied mechanically. Whether “no-objection” constitutes a waiver is context-dependent. Here, Sanchez litigated a pretrial motion to suppress, moved for a directed verdict based on the unlawful search, and requested a jury instruction on the legality of the backpack search.

**Quoted.** Under these circumstances, the record as a whole plainly shows that Rosales did not intend his “no objection” statements to constitute an abandonment of the claim of error he had earlier preserved for appeal.

**Comment.** I think it’s error for the trial court to say, “any objection?” when I’ve made it very clear, I have an objection...

## 11th District Eastland

### [Jacobs v. State, No. 11-23-00269-CR \(Tex. App.—Eastland, Aug. 14, 2025\)](#)

**Attorneys.** Josh Norrell (appellate), Alex Tandy (trial)

**Facts.** Jacobs was on straight probation for a second-degree felony (2-20 years range of punishment) with an underlying sentence of 10 years. The trial court revoked his probation and sentenced him to 10 years. Jacobs believes the trial court did not consider the full range of punishment.

**Quoted.** In support of Appellant’s contention that the trial court arbitrarily refused to consider the full range of punishment, he cites (1) the absence of any express statement by the trial court indicating that the court, in fact, considered a sentence of less than ten years, and (2) the trial court’s post-sentencing remarks:

And you also have a right to appeal the sentence that I have imposed this morning. But the sentence itself is within the parameters of your original judgment of conviction. So I was limited to, in that regard, to 10 years. You have a retained attorney. So [defense counsel] will perfect that appeal, if that is what you desire to do.

On its face, we do not interpret these remarks as evidence that the trial court failed to consider the full range of punishment.

**Comment.** I wonder if this is a “everybody knows it to be true” appeal. What I mean by that is that sometimes lawyers raise claims because a judge consistently does something improper in all cases. Everyone knows it to be true and probably has done the improper thing more explicitly in other cases. Here, for instance, I would consider this an “everybody knows it to be true” appeal if the judge had a policy or had told several lawyers in that legal community that he is going to sentence anyone who violates probation to the full underlying sentence of incarceration. Even in scenarios where everyone knows something to be true, counsel has an obligation to put the thing that everyone knows on the record.

## 13th District Corpus Christi/Edinburg

### [Gutierrez v. State, No. 13-24-00208-CR \(Tex. App.—Corpus](#)

### [Christi, Aug. 19, 2025\)](#)

**Attorneys.** Billy Pavord (appellate), Valerie Torres (trial), Jamie Spencer (trial), Angelica Cogliano (trial)

**Issue & Answer.** Is the Texas smuggling of persons statute—as applied to people transporting migrants—impliedly preempted by federal immigration law? **No.**

**Facts.** The State convicted Gutierrez of smuggling persons following her arrest in Kinney County. Law enforcement stopped her for speeding and not signaling a lane change. During the traffic stop, the officer observed that the passengers were slouched down and not wearing their seatbelts. Gutierrez provided a driver’s license showing that she lived 350 miles away. The passengers provided Mexican identification cards. Gutierrez stated that she did not know who the passengers were, that she merely picked them up at a gas station.

**Analysis.** Implied preemption incorporates the concepts of field preemption and conflict preemption. Under field preemption, a state cannot regulate conduct in a field that Congress has determined must be regulated by its exclusive governance. Under conflict preemption, a State cannot enact a statute that conflicts with the purposes and objectives of a federal regulation. Here, the federal scheme of enforcing immigration laws is not in conflict (by field preemption or conflict preemption) with the Texas smuggling of persons statute as applied to Gutierrez. The relevant state and federal statutes are distinct criminal statutes enacted by different sovereigns, which criminalize different conduct with different punishments.

**Quoted.** It is a feature of our system of dual sovereignty that, in the area of criminal law, both the state and federal government may legislate, and it has long been settled that a person may be liable to punishment for the same act for both state and federal offenses. *See Bartkus v. Illinois*, 359 U.S. 121, 131– 32 (1959). The fact that state and federal criminal offenses may have different elements and different ranges of punishment does not create a conflict. *See id.*; *see also Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1049 (7th Cir. 2013) (“The fact that a state has more stringent regulations than a federal law does not constitute conflict preemption.”).

## 14th District Houston

### [Childers v. State, No. 14-23-00696-CR \(Tex. App.—Houston \[14th Dist.\] Jul. 31, 2025\)](#)

**Attorneys.** Nicholas Mensch (appellate), Adam Muldrow (trial)

**Issue & Answer.** If a trial court erroneously denies a motion to suppress, does the defendant’s defensive use at trial of the evidence he sought to suppress render the trial court’s ruling harmless? **Yes.**

**Facts.** The State convicted Childers of Aggravated Sexual Assault. When investigating, law enforcement obtained a buccal swab without Childers’ consent. The trial court denied Childers’ motion to suppress the resulting DNA evidence linking him to the assault of the victim in this case. Childers then defended himself by admitting that he physically assaulted the victim in order to explain the presence of his DNA on the victim’s neck and fingernails. He denied sexually assaulting her.

**Quoted.** Considering the entire record, we conclude beyond



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a reasonable doubt that any error did not contribute to the conviction or punishment because the presence of appellant's DNA on the complainant's neck and fingernails did not relate to a contested issue at trial—that is, the DNA evidence was consistent with appellant's defensive theory of a physical assault unaccompanied by sexual assault.

**Comment.** I'm not sure how the court squares its holding with the proposition that the defendant cannot waive or render harmless a trial court error by his defense to "meet, destroy, or explain" erroneously admitted evidence.

[T]he improper admission of evidence over objection is rendered harmless by the unobjected-to admission of other evidence of *substantially the same facts*; whereas, the introduction of evidence seeking to *meet, destroy, or explain* the erroneously admitted evidence does not render the error harmless.

*Nicholas v. State*, 502 S.W.2d 169, 174-75 (Tex. Crim. App. 1973).

[Kirkwood v. State, No. 14-24-00042-CR \(Tex. App.—Houston \[14th Dist.\] Jul. 31, 2025\)](#)

**Attorneys.** Dominic J. Merino (appellate), Greg Russell (trial)  
**Issue & Answer.** Does a trial court have to provide a stenographer if requested? **Yes, but not really.**

**Facts.** The State convicted Kirkwood of capital murder. Before trial, he asked for the record to be stenographically recorded. The trial court stated as follows:

Well, I mean, the whole reason we have a certified court recorder here is because of the court reporter shortage. And this court went three months without any hearings or trial whatsoever because I could not find a court reporter. So I have Mr. Gavon Cromika here who is a certified digital recorder, and I also have a local rule that allows for digital recording. So as far as having a certified court reporter in the courtroom, that's going to be denied because we're a rural county, I have a local rule. I've been nothing but pleased with the recording, the digital recording. We haven't had any issues whatsoever. We've already had at least one capital murder with over 800 exhibits, and that was done fine.

So as far as having a court reporter in the courtroom, I'm relying on my local rule that provides for a digital record.

The proceedings were digitally recorded over Kirkwood's objection.

**Quoted.** The Government Code requires that each judge of a court of record appoint an official court reporter—certified in some method of shorthand reporting, who "on request" is

## TCDLEI Memorializes, Fallen But Not Forgotten ...

Charles Baldwin  
Quinn Brackett  
Peter Bright  
Jack H. Bryant  
Phil Burleson  
Charlie Butts  
Ward Casey  
Byron Chappell  
Emmett Colvin  
Rusty Duncan  
C. David Evans  
Elaine Ferguson  
C. Anthony Friloux Jr.

Jim Greenfield  
Richard W. Harris  
Richard 'Race -  
Horse' Haynes  
David Hazlewood  
Odis Ray Hill  
Weldon Holcomb  
Floyd Holder  
Clifton "Scrappy" Holmes  
W. B. "Bennie" House  
David Isern  
Hal Jackson  
Knox Jones

Joe Kegans  
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Philip Wischkaemper

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required to appear and record hearings; it does not similarly require the appointment of a court recorder, official or otherwise. The Government Code also defines the certification requirements and duties for court reporters; but not for court recorders.

\* \* \*

The court recorder's record has been presented to our court in the manner prescribed by the Texas Rules of Appellate Procedure, and appellant points to no deficiencies. Having found no deficiencies upon our own review, we decline to find that the court's denial of a court reporter affected appellant's substantial rights. *Id.*; Tex. R. App. P. 44.2(b).

**Comment.** I like to laugh and have fun when rules get ignored because the error was harmless. But this is an extra special one, here. The trial court has a **local rule** to violate the law. If this isn't a case of someone being emboldened by harmless error review, I'm not sure what else is.

[Woolsey v. State, No. 14-23-00446-CR \(Tex. App.—Houston \[14th Dist.\] Aug. 21, 2025\)](#)

**Attorneys.** Stephen Aslett (appellate), Matthew Mahoney (trial), Jason Luong (trial)

**Issue & Answer 1.** When a trial court grants a motion for directed verdict, does it constitute a ruling on lesser included offenses as well (was the trial court's denial harmless because the jury later convicted on a lesser included offense)? **No.**

**Issue & Answer 2.** Can a defendant put on such a good defense that it renders trial court errors harmless? **Yes. According to the 14th Court, at least.**

**Facts.** The State charged Woolsey with murder, and a jury convicted her of manslaughter. The entire offense is captured on video. Woolsey and the victim were outside of the victim's mechanic shop doing methamphetamine, ecstasy, and each

other for the duration of the evening. Eventually, the victim fell asleep, and Woolsey became paranoid about intruders. She tried to confront whatever she believed was transpiring outside the mechanic shop. Eventually, in a state of drowsiness and hallucination, she accidentally shot and killed the victim. At the close of the State's case, she moved for a directed verdict. The trial court denied this motion, and the jury ultimately convicted her of the lesser offense of manslaughter. In punishment, the State argued that Woolsey refused to take responsibility. The trial court would not allow her to correct the record with testimony that she was willing to plead guilty to manslaughter (the lesser offense the jury convicted her of).

**Analysis 1.** There is no authority for the proposition that a directed verdict bars conviction for lesser-included offenses.

**Analysis 2.** Rule 410 prohibits the State from introducing against the defendant her statements made in the course of plea discussions. This rule does not prohibit the defendant's use of such evidence. The trial court erred by refusing to let Woolsey testify that she was willing to plead guilty to manslaughter. The State put on no aggravating evidence, but given the robust and substantial defense presented by Woolsey in punishment, her willingness to plead guilty was mostly insignificant. The trial court's error was harmless.

**Comment.** Bogus. The jury sentenced Woolsey to five years' imprisonment. They didn't give her four years, or three years, or two years, or probation. They decided against doing these things after hearing the prosecutor say she didn't accept responsibility and not hearing Woolsey say much about it in response (because the trial court wouldn't let her). I suppose acceptance of responsibility isn't a big deal . . . except it's the focal point of sentencing in the federal system and the first words out of any judge's mouth who wants to hammer a remorseless defendant.

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

- 2nd District Fort Worth
- 3rd District Austin
- 4th District San Antonio
- 5th District Dallas
- 6th District Texarkana
- 7th District Amarillo
- 9th District Beaumont
- 10th District Waco
- 12th District Tyler

## 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 Child & Outcry Witness – The Hearing .....	Ryan Kreck
Challenging the Forensics Interviewer .....	Amanda Hernandez
Why Kids Lie .....	Dr. Aaron Pierce
Punishment .....	Lisa Greenberg
Bring Your Case Workshop .....	Speakers

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Mitigation.....	Shannon Ross
Extraneous Direct of Client, Advising Client, .....	Molly Bagshaw
Preparing Client, & Story of the Client	
Delayed Outcry .....	Dr. Quincy Miller
Extraneous, Collateral Consequences, 42A & Registration .....	Michael Gross
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