

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

VOICE

FOR THE DEFENSE

VOLUME 55 NO. 5 • JUNE 2026

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Still Matters**

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Clay Steadman





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VOICE

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Members!

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June 19

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June 20

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July 2

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July 13

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July 22-25

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CDLP | 4th Annual Floyd Jennings Mental Health Symposium Corpus Christi, TX

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TCDLA Board & CDLP Committee Meetings The Woodlands, TX

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September 23-26

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CDLP | 14th Annual Harris County PDO 10-Hour CLE w/ *HCPDO* Houston, TX

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October 14

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October 15-16

CDLP | 23rd Annual Forensics Austin, TX

October 22

CDLP | Capital Training Austin, TX

October 23

CDLP | Full Court Defense: Winning Criminal Defense Strategies TBD

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November 4

TCDLA | Roundtable – Public Defender Hand Down Meeting (Public Defender Committee) Zoom

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TCDLA | 22nd Stuart Kinard Advanced DWI San Antonio, TX

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November 16

CDLP | North Texas Mental Health Symposium w/ *NAMI* Plano, TX

November 18

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PRESIDENT'S MESSAGE

Rooted In Tradition – Ready for Tomorrow

CLAY STEADMAN



When I joined TCDLA in 1995, one of my mentors told me that if I was serious about building a career in criminal defense, I needed to be part of this organization. I took that advice to heart. The next summer, I attended my first Rusty Duncan Seminar, and it changed the way I thought about my work. I came away with a clearer understanding of how much I still had to learn and a renewed commitment to keep improving every day.

What has stayed with me most over the years is not just the education, though TCDLA has always provided that in abundance. It is the people. The conversations, encouragement, generosity, and friendships I found through this organization shaped me in ways I could not have expected. TCDLA has given me knowledge, perspective, and, just as importantly, a community.

Over the years, I have been fortunate enough to form friendships with some of the great trial lawyers in TCDLA. It is remarkable that a group of criminal defense lawyers came together in 1971 and made it their mission to establish a premier criminal defense attorneys' association. As we look to the future, we should remember that we are walking in the shadow of giants. Our organization exists, and is stronger today, because of our past members' sacrifices and their efforts to build something bigger than themselves. Early in my career, I was fortunate that some of the people I looked up to in the organization took the time to get to know me and offer advice along the way. Their willingness to do that meant more than they probably realized. It gave me confidence and helped me become a better advocate for my clients.

I distinctly remember a lunch at Trial College many years ago, when I sat down with Tim Evans and discussed trial tactics. It was a simple conversation, but it stayed with me. Moments like that are part of what makes this organization special. TCDLA is built on relationships, shared purpose, and a deep belief in the work we do for the accused. In criminal defense, relationships matter. They help us seek advice, find experts, and discuss strategy. They also remind us that we are part of something larger than ourselves.

As president, I am honored to serve this organization and grateful for the opportunity to listen, learn, and connect with members across the state. I want to spend time with our members wherever that may be: at seminars, committee meetings, social events, or board meetings. Those personal connections matter, especially for younger lawyers who are growing into confident and experienced advocates. I encourage every member to get involved and attend a seminar when you can. Melissa Schank and the staff are exceptional and always ready to help.

One of my top priorities is making sure TCDLA continues to provide the very best continuing legal education for our members. We have long been a leader in that area, and I want us to remain the gold standard for criminal defense CLE in Texas and beyond. We must also continue reaching lawyers in rural and underserved communities, where access to training and resources can make an enormous difference.

TCDLA is developing resources to help our members prepare for the future. That includes practical education on artificial intelligence and other emerging technologies so lawyers can use those tools responsibly and effectively. When used wisely, technology can help us work more efficiently and better serve the people who depend on us.

I am no longer a young lawyer, but I have grown in this profession thanks to the knowledge and opportunities TCDLA provided me with along the way. I want to pay that forward to every member of this organization; to young lawyers, experienced lawyers, and those who are new to criminal defense but ready to build a meaningful practice.

TCDLA is a big tent, and there is room for everyone. Our goal of reaching 4,000 members is very important. Still, it is only the next step in our efforts to continue growing the organization and keeping it strong, relevant, and welcoming for the next generation of criminal defense attorneys. If we continue to support one another and share what we have learned, that goal will become our reality in the future.

We are stronger today because of those who fought and made a difference, so that we can pick up that mantle and continue to be a resonant voice for the accused. To continue being a great organization, it will take all of us, because a great organization is the sum of all of its parts. I invite every member to join me in serving TCDLA this year as we grow, strengthen our community, and expand our message statewide.

A stylized, handwritten signature in black ink, appearing to read 'C. Steadman'.



Changing of the Guard and Celebrating Leadership

MELISSA J. SCHANK

"THE STRENGTH OF AN ORGANIZATION IS BUILT NOT ONLY BY THOSE WHO LEAD TODAY, BUT BY THOSE THEY INSPIRE FOR TOMORROW."

— Unknown

As we enter a new year, we also mark a meaningful change of the guard within TCDLA. Leadership transitions always give us a moment to reflect, appreciate, and look forward with excitement.

First, I want to thank our President, Nicole DeBorde Hochglaube, for her unwavering leadership which she has done with class, integrity, and empowering everyone around her. She leads with grace, confidence, and a deep sense of purpose in her vision, and ability to bring people together have made a lasting impact on this organization. It has been inspiring to watch her guide TCDLA this year. We are grateful for her dedication and the example she sets for all of us.

I am also looking forward to working with Clay Steadman as our incoming President. I have enjoyed working with Clay and really got to know him during our COVID committee, where he led the committee to work endless hours to fight for members to defend their clients during this time. I also got to know him in the past amongst other projects and committees and am excited for the opportunity to collaborate closely again. Clay brings thoughtful leadership, steady guidance, and a deep commitment to our mission. The year ahead is in great hands, and I am excited for what we will accomplish together.

I also want to recognize Jeep Darnell, our *Voice* editor. Through working together, I have gained not only a trusted colleague but also a special friendship. While we will miss his leadership at the helm of the *Voice*, I am grateful that I will continue working with him in his role as Secretary and eventually president. I am equally excited to welcome another strong and brilliant leader, Amanda Hernandez, whose attention to detail and dedication will continue the excellence of our publication.

A special thank you also goes to CDLP Chair Patty Tress. Patty truly went out of her way this year to ensure all programs were efficient and successful. She focused not only on execution but also on mentoring new speakers. Because of her leadership and commitment, every speaker turned in a paper, which is an incredible accomplishment and a tremendous benefit to our membership.

Our committees have also been hard at work throughout the year. If you want to see the full impact of their efforts and what they did for our membership, be sure to read the July article highlighting all they accomplished.

What else happens in July? The reading of the Declaration!

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

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

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

TCDLA's statewide readings continue to grow every year. It is fun, meaningful, and a chance to connect with your community in a visible and impactful way. If you have not participated yet, this is your year. Dust off the Declaration, find your nearest courthouse, and help us keep the spirit of independence alive.

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

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

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TCDLA Member

EDITOR'S COMMENT

Who I Am and What I Hope Voice Can Be

AMANDA I. HERNANDEZ



As a little girl, my dad would tell me stories about the lessons he learned as a young cowboy from the older “vaqueros” he worked beside. They taught him the importance of sharing wisdom from one generation to the next, from one cowboy or cowgirl to another. Looking back, I realize those stories helped shape the way I view this profession and the importance of community within it.

Like with the vaqueros, there is power in sharing knowledge in our profession. None of us become a good trial lawyer on our own. I truly believe that defense lawyers, especially public defenders, are doing the Lord’s work, which isn’t always easy. We lean on and learn from one another through mentorship, shared experiences, late-night trial preparation calls, CLE presentations, courthouse conversations, and the pages of Voice for the Defense. Some of the most valuable lessons I have learned as a lawyer came from attorneys willing to share their knowledge, strategies, successes, and even their mistakes.

So that you know a little about me, I am a proud wife, stepmom, sister, dog mom, and member of this defense community. I care deeply about my family and friends and love nothing more than spending time surrounded by people I love. I work hard, and I believe in justice, equality, and mercy. I believe that being a good person matters and that life is too short to choose hate over love. And I believe in service to others.

As I step into this role, I have spent a great deal of time

thinking about what makes Voice so valuable. To me, it has always been more than a publication. It is a place where criminal defense lawyers across Texas can learn from one another, exchange practical wisdom, and strengthen the sense of community that makes this difficult work sustainable. My hope is that Voice for the Defense continues to be practical, thoughtful, welcoming, and grounded in the real experiences of lawyers in the trenches.

I also hope every lawyer knows there is a place for them here, both experienced and new. Some of the best ideas and most helpful articles come from new lawyers who are actively handling difficult cases and are willing to share what they learned along the way. Others come from seasoned lawyers who selflessly continue passing down the wisdom they have gained through years of advocacy, trial work, and service to this profession.

Thank you for allowing me to be part of this tradition, and a huge thank you to our past editor Jeep Darnell. I look forward to learning from all of you and helping continue the conversations that make this community so strong.

Keep up the good fight.

Amanda I. Hernandez

See Your Name in Print!



Write an article for the *Voice for the Defense* & see your name in print! Submit work to voice@tcdla.com. Not sure how to start? Scan the QR Code to check out our TCDLA Guidelines for Voice Articles!





250 Years Later: Why the Declaration Still Matters

ROBB FICKMAN

Organizer of TCDLA Declaration Readings & Member of Strike Force Committee

Dear Friends,

I hope y'all are as well as you can be. I am writing regarding this year's Declaration of Independence readings. My co-state organizer, Chuck Lanehart of Lubbock, is taking a well-deserved break. Thanks to Chuck for all the years he has taken the lead in organizing the State Declaration readings.

We started the readings in Houston in 2010. It was Gary Trichter's suggestion that motivated me to take the readings statewide. In the early days, David Moore helped me spread the word. Thank you Gary and David.

There is a Chinese curse which warns, "May you live in interesting times." Well, I guess we can all agree these are interesting times. We all know that our country is going through a divisive period.

Like most, I have strong feelings about current affairs. I am setting those aside for a moment. I know feelings are running extremely high. Some people have indicated to me that they don't want to read this year because of all the divisiveness.

Here is my suggestion on why it's perhaps more important to read this year than any year in the past.

First, this is the 250th Anniversary of our country. This is a historic time, and it merits recognition. In reading the Declaration we honor all those who have sacrificed to protect and advance our liberty. We all have family members who were part of the Greatest Generation. When we read, we are honoring the memory of the "Greatest Generation."

My great uncle was part of the Greatest Generation. He was killed in France in November 1944. When I read, I think of my great uncle.

I think it's important to read during this divisive period because the Declaration of Independence is a document that reminds us of who we are. The Declaration eloquently reminds us of our shared values. Reading the Declaration has a healing effect. It brings us back together under one flag.

Perhaps a few of us will live to celebrate the 300th anniversary of the Declaration of Independence, but for most of us, this is our last chance to celebrate a significant birthday of what John Adams said should be celebrated as the "great anniversary Festival" with

"Pomp and Parade" and "Bonfires and Illuminations." (It was never confirmed, but I think Thomas Jefferson said, "Criminal defense lawyers should read the Declaration on July 4th at the courthouse every year.") Jefferson and Adams died on the same day: July 4, 1826.

The Declaration reunites us and reminds us of the noble goals our Founding Fathers set forth. In reading the Declaration of Independence, we reaffirm our shared dedication to fulfilling the promises of the Declaration.

This year's readings will be on Thursday, July 2nd. We are suggesting Thursday because we believe many people will take off Friday to make a long weekend of the celebration.

To keep this simple, please email me back at **rfickman@gmail.com**. We ask for this so we can attempt to have readings in as many Texas counties (and elsewhere) as is possible.

Please cut, paste and complete the section below. Please just email me the completed section below:

LEADERS NAME :

LEADERS EMAIL ADDRESS:

COUNTY:

CITY/ TOWN WHERE READING WILL BE HELD:

DATE OF READING:

Thank you all and God Bless America!

Robb Fickman

Check out the readings from previous years:
https://www.tcdla.com/TCDLA/July_4th_Readings.aspx?WebsiteKey=c8dd4525-29ae-437f-b2e1-7e6eed2575b5



Robert Fickman is a Houston Criminal Defense lawyer who has been in practice for 42 years. He practices in State and Federal court. He initiated the first reading of the Declaration of Independence in Houston in 2010.

Suppression Wins in the Fifth Circuit

KRISTIN KIMMELMAN

Member of the Federal Assistance Committee



To us, the exclusionary rule is an important check on officer misbehavior, safeguarding our Fourth Amendment rights and providing a way to exclude evidence against our clients. To the Fifth Circuit, the exclusionary rule is “a disfavored judge-made remedy, which should be used only as a ‘last resort.’” *United States v. Leonard*, 167 F.4th 284, 287 (5th Cir. 2026) (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)).

Nevertheless, the Fifth Circuit, occasionally applies it and reaffirms “the enduring strength of the Fourth Amendment’s safeguard against unreasonable searches.” *United States v. Johnson*, 163 F.4th 933, 943 (5th Cir. 2026).

This Federal Corner highlights two defense wins, hoping to inspire others.

Bare-bones Warrants Exist: *U.S. v. Wilson*

In *United States v. Wilson*, the Fifth Circuit affirmed a district court’s grant of a motion to suppress, holding that the warrant was bare bones. 153 F.4th 478, 489 (5th Cir. 2025). Here, the good faith exception did not apply, and therefore the warrant lacked probable cause. Suppression jackpot!

Wilson involved the search of a home for evidence of an alleged assault with a firearm that took place at a Waffle House. The warrant affidavit described the assault and firearm and arguably provided probable cause to arrest Wilson. The affidavit also arguably established that Wilson lived at the residence to be searched, describing it as “Wilson’s apartment” and noting that Wilson had been seen there.

What was missing? The nexus between the Waffle House assault evidence and the apartment.

The affidavit “leapt from residence to contraband with nothing more than the bald assertion that items ‘related to’ the Waffle House investigation were ‘believed to be located’ there.” *Id.* at 485. There was no evidence that linked the Waffle House incident to the home to be searched, other than that Wilson lived there. “But probable cause to arrest [Wilson] is not probable cause to search” his home for evidence of a crime. *Id.*

The majority distinguished the en banc case, *United States v. Morton*, 46 F.4th 331(5th Cir. 2022), which held that a warrant affidavit, to support the search of cell phones, was not bare bones. The “meat on the bones” there was (1) details regarding the discovery of personal-use drugs near the cell phones, (2) “affiant’s knowledge that cellphones are used for receipt and delivery of

illegal narcotics,” and (3) a boilerplate statement that the affiant “‘knows through training and experience that criminals often take photographs of co-conspirators as well as illicit drugs and currency derived the sale of illicit drugs.’” *Morton*, 46 F.4th at 337 (quoting affidavit). So, the *Morton* affidavit at least explained why phones often contain drug evidence, albeit in boilerplate claims based on experience and training.

By contrast, the *Wilson* affidavit “never explained why evidence from Waffle House would likely be found at” the house. *Id.* Suppression grant affirmed.

Contemporaneous Facts Must Justify Safety Concerns for Protective Sweep: *U.S. v. Johnson*

In another RARE SUPPRESSION win, the Fifth Circuit reversed the district court’s denial of a motion to suppress, holding that the officer lacked reasonable suspicion to perform a protective sweep of Johnson’s car. *United States v. Johnson*, 163 F.4th 933, 943 (5th Cir. 2026).

Officers had a warrant for Johnson’s arrest related to a homicide investigation. After Johnson pulled out of his driveway with his girlfriend, Simmons, officers blocked the car. Johnson got out of the car, closed the door, and was arrested. Simmons was also removed from the car and detained nearby, although not in handcuffs. The officers had no reason to suspect Simmons was involved in the homicide, although they knew she had some type of previous felony conviction.

Officers’ suspicions were aroused when Johnson told Simmons to pull the vehicle back into the yard and told officers that he did not consent to a search of the car. An officer searched the car, conducting a “cursory sweep” that revealed a loaded handgun.

The government argued the sweep was lawful because the officer reasonably believed that Simmons was potentially dangerous and had access to a weapon. The district court denied the motion to suppress.

The Fifth Circuit reversed. The majority held that, even though the officer reasonably believed there was a firearm in the car, there was not reasonable suspicion that Simmons was dangerous. Her unspecified felony, intimate relationship with Johnson, and presence at arrest was not sufficient. Nor was the officer’s belief that she might “react emotionally and unpredictably” to her boyfriend’s arrest.

“The officer must point to some fact contemporaneous with or arising out of the police encounter that gives rise to” the belief that the person is potentially dangerous. *Id.* at 940. Here, Simmons had not acted suspiciously or dangerously during the stop and detention. The officer “may have had a hunch that Simmons would act rashly after seeing her lover handcuffed, but this was not supported by individualized, reasonable suspicion,” so the protective sweep was unconstitutional. *Id.* at 943.

* * *

Both suppression wins had dissents.

In *Wilson*, Judge Ho thought that police officers executing search warrants “may rely on [the] basic intuition” that “[m]ost people keep their personal possessions at home.” 153 F.4th at 490 (Ho, J., dissenting). He argued that basic intuition does not need to be expressly stated in the affidavit. *Id.* at 492. Because affiants are “cops, not copy editors,” Judge Ho would interpret the warrant in a “commonsense” manner and reverse the district court. *Id.* at 492.

In *Johnson*, Judge Haynes disagreed with the majority’s conclusion that the officers needed some additional fact contemporaneous with the search before having reasonable belief that their safety was in danger. 163 F.4th at 943–47 (Haynes, J., dissenting).

But the mandates have issued, and these decisions are final. (The government sought rehearing en banc in *Wilson*, but the Fifth Circuit declined.)

So, add *Wilson* and *Johnson* to your Fourth Amendment toolkit. I look forward to reading your suppression wins soon.

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



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Judicial Clemency: An Optional Perk for a Defendant or a Mandatory Option Judges Must Review? (but probably don't)

DEAN WATTS

Member of the Rural Practice Committee



If you ever want to befuddle a rural prosecutor or judge, ask them about their position regarding judicial clemency for defendants placed on straight probation. Even though this law has been around for a while, there will usually be one of three reactions: 1) a dumb look, 2) an irritated argument where they claim that it's not possible, or 3) that it's a matter to be brought up with the governor. I have been the recipient of all three!

However, this is not a trick question that is reserved for the board certification exam. On the contrary, judicial clemency for many straight probation cases is something that Judges *have to* review, whether they're asked to or not.

But let's start from the beginning. As stated before, Judicial Clemency has been around for a while. It used to be under Texas Code of Criminal Procedure, Article 12, § 20. In fact, an excellent article regarding the previous provision was written in 2013 for the Voice for the Defense listed below.¹

However, now judicial clemency is found under Texas Code of Criminal Procedure, article 42A.701. In a nutshell, judicial clemency is a roundabout way of mitigating the damage done to a Defendant's record when they are placed on straight probation with a conviction. With that said, not all straight probation cases are eligible for judicial clemency. DWI cases, Intoxication Assault, Intoxication Manslaughter, 3G cases, and sex offenses are all excluded. However, that leaves a lot of cases where a defendant can be eligible for judicial clemency.

When Judicial Clemency is granted, the wording of Texas Code of Criminal Procedure article 42A.701 almost sounds good to be true. It says when granted, the judge shall "dismiss the accusation, complaint, information, or indictment against the defendant." *Id.* In addition, "[a] defendant who receives a discharge and dismissal under this section is released from all penalties and disabilities resulting from the offense of which the defendant has been convicted or to which the defendant has pleaded guilty except that: (1) it can be used against them if they are convicted of a subsequent offense and (2) to deny a license under Chapter 42 Human Resources Code." *Id.*

All of this is great. Judicial Clemency is a fantastic tool that can really help our clients. But read on. Article 42A.701 also contains a requirement that judges must review straight probation cases to see if they will be granted. The law reads:

"(b) On completion of one-half of the original community supervision period or two years of community

supervision, whichever is more, the judge shall review the defendant's record and consider whether to reduce or terminate the period of community supervision, unless the defendant:

- (1) is delinquent in paying required restitution that the defendant has the ability to pay; or
- (2) has not completed court-ordered counseling or treatment."

Id.

In my experience, this is rarely – if ever – done.

So, if a Defendant has completed half of their straight probation (for an eligible offense), is current on their fees, and has completed their counseling/treatment obligations, the Court at the very least must consider judicial clemency.

Why is this so important? Because, there is a serious ticking clock with judicial clemency that most people miss.

Unlike a petition for non-disclosure, which not only has no time limitation, judicial clemency can only be done either as a part of early release from probation or generally within 30 days after discharge. If you don't ask during these time frames, you can't ever ask for it again.

This means that a lot of Defendants who are eligible for relief are not getting it because no one is utilizing this law.

So, the next time you have a defendant who pleads to a straight conviction probation case, you may want to tell them (and remind your judge), that after half of their term or two years (whichever is more), they must be reviewed to see if the court will grant them judicial clemency. Special thanks to Judge Malcolm Bales, 420th District Court Judge, for his assistance with this article.

By the way, instructions and forms for judicial clemency can be found at <https://www.txcourts.gov/forms/>.

As always, I wish you good luck and have fun!

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

¹ Michael Gross and Jeffrey Weatherford, THE VOICE FOR THE DEFENSE, *Early Termination of Probation with Judicial Clemency under TCCP Article 42.12*.



So, Your Retained Client Just Cannot Afford the Needed Expert: Ethical Considerations and Practical Guidance in Handling the Expert Funding Gap in Retained Criminal Cases.

JOHN WRIGHT*Member of the Ethics Committee*

If an accused has retained counsel and needs an expert witness but does not have funds to pay the expert, does the accused just go to trial and hope for the best? This article will address the uncomfortable dilemma that arises when a retained client cannot afford the expert necessary to properly defend the case, and practical guidance on how to assert the client's Sixth Amendment right to effective assistance of counsel and obtain the expert assistance needed.

The United States Supreme Court's decision in *Ake v. Oklahoma* acknowledged and addressed the fact that, in some circumstances, meaningful access to justice requires more than simply the appointment of counsel. In *Ake*, the Court held that when an indigent defendant's mental condition is likely to be a significant factor at trial, due process requires the state to provide access to a competent psychiatrist to assist in the evaluation, preparation, and presentation of the defense. In so holding, the *Ake* Court said that "[W]e hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." *Ake v. Oklahoma*, 470 U.S. 68 (1986). *Ake* was a first-degree murder case where the State sought the death penalty. The defendant was charged with two counts of murder and two counts of shooting with intent to kill. When Mr. Ake was first brought to court for arraignment, his behavior was so bizarre that the trial judge ordered him to be evaluated for competence. The court appointed psychiatrist found him to be incompetent. Ake's competency was restored at a state hospital, and he was set for trial. During his stay at the state hospital, no inquiry was made into his sanity at the time of the commission of the offense. When he was rearraigned, court-appointed defense counsel sought funds for an expert to help determine Ake's sanity at the time of the offense, arguing that he was entitled to the funding on due process grounds. The request was denied.

At trial Ake's only defense was insanity. Counsel called the State's psychiatrists who had worked with Ake to restore his competency but neither had the opinion that Ake was insane at the time of the offense. The jury was instructed to presume Ake competent unless he offered evidence of insanity and only if he presented such evidence, the burden would shift to the State

to prove his sanity beyond a reasonable doubt. Ake was unable to produce expert evidence of insanity, and the jury returned a verdict of guilty. At the punishment phase of Ake's trial, the State relied on the testimony of psychiatrists who had examined Ake and opined that he was a danger to society and that he was likely to continue to be a danger in the future. As Ake had no expert to rebut this testimony, the jury assessed death sentences on both murder counts and 500 years' confinement on the two counts of shooting with the intent to kill.

In reversing the conviction, the Supreme Court held that the facts of this case lead "inexorably to the conclusion that, without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high." *Id.* at 82.

Although *Ake v. Oklahoma* itself addressed the need for psychiatric assistance, courts since have recognized that the logic of *Ake* can apply when specialized knowledge is necessary for a fair defense. See e.g., *Rey v. State*, 897 S.W.2d 333 (Tex. Crim. App. 1995) (applying *Ake* to accused's need for expert pathologist). While there is no longer any question about whether an indigent defendant is entitled to experts other than psychiatrists, the Supreme Court has not specifically decided whether an accused who had the capacity to retain counsel had the right to an appointed expert if they have since run out of funds. For this situation, we look at the Texas Court of Criminal Appeals decision in *Ex parte Briggs*, 187 S.W.3d 458 (Tex. Crim. App. 2005).

In *Ex parte Briggs*, an injury to a child case which resulted in the death of the child, the defendant retained counsel. Brandy Del Briggs was able to make a substantial down payment on the fee, \$10,400 of a \$15,000 fee, but couldn't pay the balance of the fee or the projected fees for experts needed for an effective defense. She had given birth to a very sick child who died at the age of two months. During the child's short life, he saw doctors often and, in hindsight, was misdiagnosed many times before emergency room doctors inserted an oxygen tube into his stomach rather than his lungs such that he was deprived of oxygen for thirty minutes.

Ms. Briggs was charged with first-degree injury to a child. After her retained trial counsel threatened to withdraw from

her case if she didn't pay the balance of his fee and deposit funds for payment of an expert witness, she entered an open plea of guilty to a lesser offense and was sentenced to seventeen years imprisonment. Her direct appeal was denied, and a post-conviction writ of habeas was filed on her behalf.

Ms. Briggs sought habeas relief on actual innocence grounds and claimed ineffective assistance by her trial lawyer. The trial court recommended that her application be denied, focusing primarily on her plea of guilty. The Court of Criminal Appeals denied relief on her actual innocence claim but granted relief, determining that trial counsel's representation fell below the *Strickland* standard and that the subpar representation caused harm.

The Court of Criminal Appeals envisioned three processes for retained counsel to pursue when his client did not have the resources to pay for services of an expert. First, it suggested that trial counsel could subpoena the physicians (or presumably any expert in whatever field), introduce the records and elicit their expert opinions. The Court's second proposal was that retained counsel withdraw from the case and notify the court that his client was now indigent and prove indigence. Finally, the Court suggested that counsel accept a reduced fee (this proposal was tied factually to the *Briggs* case only), explain to the court that his client was now indigent, and request that the court pay for investigatory and expert fees.

It is a variation of the third proposal that this author

recommends. Whether the client has paid trial counsel's total fee or not, counsel should go to the court, *ex parte*, and show the court that the client does not have the "present ability to pay" the expert's reasonable and necessary fee. This suggestion is based on Code of Criminal Procedure Art. 1.053 which specifies when an accused's indigence is to be determined and that the determination is fluid.

The claim on which *Briggs's* prevailed arose from her trial counsel's decision not to fully investigate her deceased child's medical records or consult with experts until the trial lawyer had been paid his full fee and an additional \$2,500-\$7,500 for expert fees. The *Briggs* Court held that this was not a "strategic" decision, but an economic one. The record in *Briggs's* case was devoid of anything suggesting that counsel's failure to investigate was based on a strategic legal decision that such an investigation was unnecessary or likely to be fruitless or counterproductive. The *Briggs* Court held that counsel has an absolute duty "to conduct a prompt investigation of the circumstances of the case and to explore all avenues likely to lead to facts relevant to the merits of the case." *Id.* *Briggs's* trial lawyer's decision was made because he had not been paid the balance of his fee and a deposit for expert fees. The *Briggs* Court held that trial counsel is not required to pay expert witness fees or the costs of investigation out of his own pocket. However, a reasonably competent attorney—regardless of whether he is retained or appointed—must seek to advance his client's best defense in a reasonably competent manner, hence the



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three suggestions as to how to do that in this setting.

Returning to this author's suggestion that retained counsel notify the court that his client no longer has the present ability to retain experts (or, for that matter, complete paying his attorney's fee), the showing to be made is a straight-forward burden that is well known. One must be able to articulate the reasons the expert assistance is necessary. The *Briggs* opinion gives a fulsome explanation why Briggs needed the expert assistance. Specifically, habeas counsel was able to obtain affidavits from two doctors, the Director of the Nebraska Medical Services and a partner in the Chicago Neuroscience Medical Group, who rejected the child abuse cause of death and opined that the child died of "multiorgan/system failure resulting from sepsis which was complicated by disseminated intravascular coagulation, multiple bleeding diathesis and bilateral acute bronchopneumonia and hypoxic encephalopathy with associated multiple brain infarcts."

A robust Motion for Expert Assistance for Indigent Client must be made *ex parte*. The reason for this requirement is clear as counsel should present to the court, in affidavit form, what investigation has been done to make the need for the expert known, whether and which experts counsel has consulted about assisting, the likely expense involved and the time when a report can reasonably be expected from the expert. Obviously, if the State became aware of the information shared with the Court and counsel chose not to have the expert witness testify, the prosecutor would probably surmise that the expert's opinion was not favorable and might subpoena the witness as the State's witness at trial. Having the records of the *ex parte* request sealed immediately protects against this sort of disclosure.

Defense counsel should also consider requesting the expert assistance of a consulting expert. Since a consulting expert will not be called to testify, there will not be a need to disclose either the witness's name or any of his opinions. The consulting expert can often direct counsel to a testifying expert whose expertise is particularly suited for the case at hand and to give an affidavit in support of retaining the proposed expert.

Well ahead of trial, Texas defense counsel must demand needed court funding under *Ake v. Oklahoma*, Tex. Code Crim.

Proc. art. 26.05 and *ex parte Briggs*. Upon *timely* request, the State must provide a defendant with the "basic tools" to present a defense, but it is not required to purchase for an indigent defendant all the assistance that their "wealthier counterparts might buy." *Rey v. State*, 897 S.W.2d 333, 337 (Tex. Crim. App. 1995) (citing *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985)).

The burden rests on the defendant to show how the expert at issue would assist in his defense to be entitled to funding for the expert. *Griffith v. State*, 983 S.W.2d 282, 286-87 (Tex. Crim. App. 1998). In order to make this showing, the defendant must be prepared to provide the trial court with information about what evidence will likely be presented against the defendant and how the requested expert will assist the defendant in rebutting such evidence. *Rey v. State*, 897 S.W.2d 333, 341 (Tex. Crim. App. 1995); see *Cameron v. State*, 630 S.W.3d 579, 597 (Tex. Crim. App. 2021). Defense counsel may also argue *Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197 (1977) for the proposition that the defendant is entitled to fairly rebut the State's punishment evidence and that the only way that this right may be insured is by providing the reasonable and necessary expert assistance.

Practice tip: Transcripts of 1) the State's expert's prior testimony in other similar cases may persuade the trial court of the defense's need to rebut such testimony; and 2) the proposed defense expert's prior testimony may also demonstrate the need for the defense expert.

The defendant must offer more than vague, conclusory, or undeveloped assertions that the requested assistance would be beneficial. In *Cameron v. State*, 630 S.W.3d 597, the Fourth Court of Appeals reviewed the evidence on factors articulated by the Supreme Court in *Ake* for the appointment of an expert. The Court said that "[T]he third factor, which is the weightiest, places the burden on the defendant to show how the expert at issue would assist in her defense before being entitled to the appointment of the expert. *Griffith*, 983 S.W.2d at 286-87. In order to make this showing, the defendant must provide the trial court with information about what evidence will be presented against the defendant and how the expert will assist the defendant in rebutting such evidence. *Rey*, 897 S.W.2d at 341. . . ." The defendant must show the failure to fund the requested expert would create a high risk of an incorrect verdict. *Busby v. State*, 990 S.W.2d 263, 271 (Tex. Crim. App. 1999). In general, courts have concluded a defendant did not make such a showing if the defendant failed to (1) support the funding motion with affidavits or other evidence in support of their defensive theory, (2) explain the theory, (3) show why expert assistance would be helpful in establishing it, and/or (4) show there was a reason to question the State's expert and proof. *Rey*, 897 S.W.2d at 341; *Cameron*, 630 S.W.3d at 597. Transcripts of the proposed expert's prior testimony in similar cases will often furnish the trial court with a detailed description of the expert testimony the client's needs to present in the case. The proposed expert will often have access to transcripts of her typical expert testimony in a case like yours.

Trial counsel must show a Constitutional need for funding.

To ensure that a court's failure to provide funding is preserved for later appellate review, trial counsel should prepare, file, present and secure an adverse ruling on a written, sworn, Code of Criminal Procedure art 29-compliant Motion for Continuance.

This motion must be detailed as to the need for the expert's assistance and establishing that the expert would be available for the trial if retained with court funding. Further, the motion should assert that the performance of defense counsel must meet the minimum demands of the Sixth and Fourteenth Amendment (right to effective counsel, due process of law) and that failure to provide the expert assistance will force her to provide ineffective assistance. The Motion for Continuance should assert that for those reasons, defense counsel cannot announce ready or go to trial. Alternatively, counsel may rest her case during trial without the expert's expected testimony, which should be described in detail in the motion and assert under oath that, if funded, the expert can appear in court within a reasonable period of time.

If the defense proceeds to trial, counsel should consider repeating her previously-denied funding request and securing additional adverse rulings even as the evidence unfolds during the trial, the developing record of which may reveal other and further reasons why the defense should have its own expert to counter the state's position.

A defendant with retained counsel is entitled to court assistance for obtaining expert witnesses before and during trial the same as an indigent defendant is if or when he no longer has the present ability to pay for the required expert assistance. The Court's responsibility is to consider an *ex parte* request for expert assistance and to appoint and authorize payment for such experts as are shown to be necessary for a fair determination of the facts of a case. If the court fails to provide resources for necessary experts, counsel must develop a record of the harm that is and

will be done the defendant by having to go to trial without the expert's assistance. The beginning of making this record begins in the *ex parte* motion which is supported by affidavits and other evidence and may be further developed during the presentation of evidence as the harm manifests.

Conclusion:

The key takeaway is this: even in retained cases, when specialized expertise is necessary to defend the case, the constitutional principles underlying *Ake* remain relevant. So, if an accused has retained counsel and needs an expert witness but does not have funds to pay the expert, does she just go to trial and hope for the best? No – the defense should ask the court for the tools necessary to provide an effective defense.

John E. Wright was born in Houston, Texas, in 1949. After graduating high school in 1967, he earned a degree in Economics from the University of Texas at Austin and completed his Doctor of Jurisprudence at the University of Texas Law School in 1973, passing the Texas bar exam the same year. John pursued post-graduate studies in accounting, worked with a CPA firm, and passed the CPA exam before joining a Huntsville civil law firm in 1976. Initially focused on real estate, tax, and civil litigation, John eventually transitioned into criminal law, becoming a prominent attorney in landmark cases. He spent 28 years on the *Penry v. State* case.

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Lessons from Death-Penalty Voir Dire Transcripts

GRETCHEN SWEEN, PH.D., J.D.

Death is different.¹ For starters, the death penalty is the only example of a state-sanctioned criminal punishment that involves the potential for a *literal* eye-for-an-eye. (The Government does not ask for permission to rape rapists or to torch the property of arsonists). “Death is different” has also been a core legal principle informing the U.S. Supreme Court’s efforts for decades to make implementation of the death penalty consistent with various constitutional mandates.² The focus here is on how a decision by a District Attorney’s Office to seek a death sentence in a capital murder case will mean a very different jury selection process. Voir dire in a death-penalty case has four phases: (1) an extensive questionnaire; (2) general voir dire to address core legal principles and field disqualifications and exemptions; (3) individual voir dire to identify “death qualified” jurors; and (4) the exercise of peremptory strikes. Having spent considerable time reading voluminous death-penalty voir dire transcripts, I want to offer some insights for improving the odds of selecting jurors less likely to condemn our clients to extreme sentences.

Lesson 1: Recognize the Fundamental Purpose

A recurrent issue I see in voir dire transcripts is lawyers losing sight of what they are trying to accomplish. Worse still, many defense lawyers adopt the questioning mode of prosecutors as if everyone has the same goal in mind. The jurors our clients need are antithetical to what the prosecution will see as ideal. In fact, the primary goal should be to get rid of the most prosecution-friendly veniremembers.

Importantly, most predictions about how jurors will decide a case that are based on presumptions about demographics—race, religion, gender—are often dead wrong. What really matters is a veniremember’s personal *moral* worldview. And a far better way to unearth those views is by asking scaled questions that have nothing to do with your case but rather are designed to expose attitudes that tend to correspond with a pro-prosecution bias and preference for extreme punishments.

Here is one example:

“On a scale of 1 (entirely agree) to 5 (entirely disagree) how do you react to this statement: ‘A person who goes over 70 MPH when that is the speed limit is a lawbreaker, pure and simple?’”

Those who “entirely agree” with a statement of this nature tend to see the world in black and white. Yet what we need are jurors who see shades of gray, who appreciate nuance and complexity, who believe that a host of factors shape people and explain why they might stumble. In short, the fundamental purpose of voir dire needs to be to smoke out people who are inclined toward a rigid understanding of human nature, who believe every action reflects a “personal choice,” and who are convinced that a stable society demands rigid adherence to order and harsh consequences for

1 See *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (“In capital proceedings generally, th[e] Court has demanded that factfinding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.”) (cleaned up).

2 But see Anna VanCleave, *The Illusion of Heightened Standards in Capital Cases*, 2023 Univ. of Illinois L. Rev. 1289 (describing a decades-long failure to apply the heightened reliability standards adopted by the U.S. Supreme Court to lend legitimacy to the death penalty).

rule-breakers.

Scary research has revealed that most capital jurors do not respect the presumption of innocence, *especially* when someone has been indicted for capital murder; they assume they are *supposed* to assess a death sentence once they find our clients guilty; and they tend to believe that “mitigation” is limited to evidence that “excuses” the commission of the crime. Our voir dire needs to stay laser-focused on identifying folks with these beliefs, working to get them to disqualify themselves, and, if that fails, prepare to use our peremptory strikes to eliminate as many of them as possible.³

Lesson 2: Think Hard about the Questionnaire

In counties where death-penalty trials are fairly common (like Harris County), attorneys for both sides tend to agree on a questionnaire that has been used before. In small counties where no one involved may have ever litigated a death-penalty case before, the State is inclined to get a questionnaire from some friends in another DA’s Office and foist it on the court. But a questionnaire is not a good idea simply because it has been used before.

What should be going on? What is the point of these questionnaires that are generally many pages long and take a great deal of time to complete, review, and utilize?

One point of a questionnaire is to ascertain, in advance, what potential jurors feel about the death penalty itself. This process is required because anyone who absolutely cannot follow the law is supposed to be struck for cause; it is, however, unconstitutional to strike someone for cause simply for having qualms about the death penalty.⁴ In *Riley v. State*, 889 S.W.2d 290 (Tex. Crim. App. 1993), the Court of Criminal Appeals examined the application of the *Witherspoon-Witt* standard to Texas’s death-penalty scheme, and held that unless a veniremember “is so irrevocably opposed to capital punishment that he could not follow the law or obey the instructions of the trial court, he is not disqualified from jury service.” *Id.* at 295. The dispositive question is whether a potential juror *can follow the law*. *Id.* at 300 (opinion on rehearing). Accordingly, a veniremember *cannot* be excused if he “steadfastly maintains he will not consciously distort his answer to the special issues [and] he has shown no inability to follow the law[.]” *Clark v. State*, 929 S.W.2d 5, 8 (Tex. Crim. App. 1996).

A defense team should absolutely resist attempts to strike veniremembers for cause who merely express discomfort with, or disinclination toward, the death penalty. Doing so is error.⁵

In an ideal world, *both* parties in a death-penalty case should use juror questionnaires to eliminate potential jurors who fall at either end of a spectrum—(1) those who believe the death penalty should be automatic for those found guilty of capital murder and (2) those who have a moral objection to even considering the death penalty in any case. But transcripts show that plenty of prosecutors are more than happy to do everything they can to keep the “killers” in the pool.

For instance, in a recent death-penalty case, the elected DA in that jurisdiction knew from the questionnaire that a potential juror not only had already formed an opinion about the defendant’s guilt based on following the case in the media, but that this potential juror was also close to one of the victim’s friends. Yet these facts were not brought out during questioning by the DA. Instead, the DA asked a few pro forma questions of the potential juror about whether she could be “fair and impartial” and “follow the law,” seemingly hoping the defense might have failed to read the answers to the lengthy questionnaire with care. Then, after the clear proof of bias came out, the DA was allowed to engage in a lengthy attempt at “rehabilitation,” during which the DA led the objectionable veniremember to the answers needed to insulate them from a challenge for cause.

Also, we must be mindful that, with the vast majority of potential jurors, being asked how they feel about the death penalty, in the abstract, is not going to produce especially illuminating answers. Most people have never given it much thought. And most potential jurors have no idea how rarely and arbitrarily the modern death penalty is sought. And virtually no one knows that each elected DA has unbridled discretion to determine how to charge a murder case so that it is capital-qualifying and then whether to seek a death sentence. Research has shown that veniremembers’ disembodied notion about how they view the punishment does not necessarily predict whether they will have the stomach to impose it. For instance, being a dutiful, life-long Catholic does not at all preclude the ability to embrace a death sentence with zeal if the facts of a given case trigger a blinding retributive impulse in that person because of other features of their personal psychology.

Aside from using questionnaires to identify people occupying the extremes, ideally, a questionnaire would have something to help root out rigid, authoritarian inclinations and people who don’t believe in mitigation because they believe “everyone is free, despite their environment and genes, to make a choice” and tend to reject that “we are, in large part, a product of our genes and environment.” The problem is: death-penalty transcripts reveal that prosecutors tend to be skilled at using questionnaires to identify potential jurors who seem most open-minded and/or nuanced in their thinking—and then poke at them until they say something disqualifying, thereby further skewing a “death qualified” jury pool toward the most extreme punishment the law permits.

In short, we have to be thoughtful about the contents of the questionnaire—weighing what it can actually reveal that is helpful to getting someone on the jury whose psychological profile makes them open to an acquittal or at least mitigation, while carefully

disqualifying any juror who would not swear “that the mandatory penalty of death or imprisonment for life would not affect his deliberations on any issue of fact”).

3 For an excellent defense of this approach, I recommend the terrific article on voir dire by Ed Stapleton, Sara Stapleton-Barrera, and Muhammad Jalal Hussai that was published in *The Voice* in May of 2024. Their thesis was based in part on research by The Capital Jury Project that, among other things, revealed that jurors don’t trust most experts, are not “race blind,” and don’t understand or simply disregard most jury instructions.

4 Striking someone based on their principled views about the death penalty offends the Constitution, *unless* those views “would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968) (rejecting practice where prosecution had succeeded at striking nearly half the jury pool based on hesitation about the death penalty).

5 See *Adams v. Texas*, 448 U.S. 38, 42, 49 (1980) (invalidating Texas statute

weighing the risks of simply revealing to the State which jurors it should try to get struck for cause or at least target when it is time to exercise peremptory strikes. Then we must litigate the right to get a questionnaire that is worth the time it will take for all concerned to administer and process the results.

Lesson 3: Ensure Accurate Characterization of the Law

General voir dire in death-penalty cases involves the judge defining statutory disqualifications and exemptions.⁶ Next, the judge is supposed to apply those rules to potential jurors, many of whom are eager to be cut. Interpretation of some disqualifications is not usually a matter of much controversy.⁷ Yet I have read transcripts where it was quite obvious that a potential juror had very little English proficiency but the prosecution worked fervently to prevent that juror from being disqualified because the particular citizen had expressed considerable enthusiasm about the death penalty. That meant the defense had to later expend a valuable peremptory strike to get a person off who should have been disqualified.

The TCCP *requires* the court in every case in which the State seeks the death penalty to “propound to the entire panel of prospective jurors questions concerning the principles, as applicable to the case on trial, of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion.”⁸ Yet reading voir dire transcripts reveals that this does not always happen. Why is that?

For one thing, jury trials—and death-penalty jury trials in particular—are increasingly rare. Therefore, the odds are that any given district court judge will be presiding over his or her first one ever or at least the first one in a long time. From reading transcripts, judges often (inadvertently) misrepresent the law in significant ways. This misinformation then becomes the lens through which those who are ultimately seated see the evidence. Defense teams must take time to brief and argue the law that “shall” be “propounded” to potential jurors during the general voir dire.

Regrettably, this mandatory task of “propounding” core legal concepts is often outsourced to the prosecution. That is an outrage.

Prosecutors will have their PowerPoint slides with some key statutory text but often take many liberties in providing their own spin on the law so that, for instance, potential jurors come to believe that “mitigating evidence” is a very narrow concept, as opposed to the wide-open notion defined in U.S. Supreme Court case law.

Another recurrent issue when prosecutors are allowed to “propound” the law is that they go to great lengths to undermine the “beyond a reasonable doubt” standard. For instance,

transcripts reveal that some DAs are fond of suggesting that “beyond a reasonable doubt” could mean whatever an individual juror wants it to mean since it is not defined in a statute. They insist that the standard is a far cry from 100% certainty. And they urge that it is appropriate for each juror to be prepared to make inferential leaps—analagizing to the gameshow *Wheel of Fortune*. This analogy is profoundly bad for us. It allows the prosecution to suggest that smart jurors are those who can most quickly rush to a conclusion upon viewing very few clues (aka evidence). Indeed, it suggests that jurors are slow-witted losers if they must wait until all of the evidence is presented before making up their mind.

We need to work hard to preempt these mischaracterizations of core legal concepts that exist to *protect* those accused of crimes from governmental overreach. Instead of having to object to how the law is being misrepresented throughout voir dire, it is better to have these fights before voir dire begins—and backed up by briefing. And this briefing is possible because the prosecution’s bag of tricks is quite predictable.

Lesson 4: Engage, Do Not Lecture Like a Prosecutor

Transcripts reveal that prosecutors all seem to have gone to the same trainings or at least studied the same playbook. And they do a much better job of protecting from disqualification the veniremembers they want on their juries.

Whenever the prosecution asks nothing but meaningless leading questions inviting a potential juror to agree that he or she can indeed “follow the law,” that is a huge red flag that the prosecution has identified information, thanks to the questionnaire or other research, that this will be a very prosecution-friendly witness. Take heed.

That is, prosecutors are disciplined about *not* asking open-ended questions when they have already decided that they have identified a death-penalty enthusiast. Defense teams who mimic this approach accomplish nothing. That is, the worst use of individual voir dire, from a defense perspective, involves attorneys giving long speeches ending with leading, rhetorical, or commitment questions.⁹

The defense needs to be using individual voir dire to get the *veniremember* talking. Yammering on and on and then pausing to ask, “Does that make sense?” is wholly counterproductive. As is eliciting nothing more than one-word responses such as “yes” or “no.” Indeed, a noncommittal “okay” is the worst!

In short, the defense approach to individual voir dire should be the complete opposite of what prosecutors do. The defense needs to get veniremembers who have a peculiarly punitive mindset to say something to enable striking them for cause. Or, where there is doubt about whether a particular veniremember has an unhelpfully judgmental mindset, we need to get inside their head to expose their authoritarian views.

Reading numerous transcripts also supports the conclusion that veniremembers who really want to be on the jury should trigger suspicion. Someone who wants to “do their civic duty” in a way that involves exercising the power to condemn someone to

6 See Tex. Gov’t Code § 62.106 for the list of exemptions from jury service that applies to otherwise qualified veniremembers.

7 But see Tex. Code Crim. Proc. Art. 35.16(a) (identifying only three grounds of challenge for cause as categorical bars: “[t]hat the juror has been convicted of misdemeanor theft or a felony; “[t]hat the juror is under indictment or other legal accusation for misdemeanor theft or a felony;” and “[t]hat the juror is insane[.]” All other grounds may be waived.).

8 Tex. Code Crim. Proc. art. 35.17(2).

9 See, by contrast, <https://www.americanbar.org/news/abanews/publications/youraba/2019/march-2019/11-tips-for-effectively-conducting-voir-dire/> (emphasizing the importance of open-ended questions to get insights into how potential jurors think).



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death is likely harboring unhelpful authoritarian tendencies.

Similarly, veniremembers who express, *e.g.*, unwavering faith in law enforcement or a belief that any crime that involves injury to a child should result in a public hanging but then agree with the prosecution that they are in fact moderate at heart must be exposed.

Prosecutorial approach: You know we have the presumption of innocence. That is the law. You can accept that, right? You are able to follow the law?

Preferable defense approach: Should there be a presumption of innocence? Why is that?

The most pointless question: Can you be fair and impartial when it comes to the defendant's right to be presumed innocent?¹⁰

The knee-jerk answer to the latter will be "Sure." A veniremember who will say "Well, no, I recognize that everyone is governed by unconscious biases and has a world view informed by our own unique experiences" is rare. But that insightful, soul-searching type is the very person we do *not* want to see struck.

Bonus Lessons

Engage your client in the process. I had a young African American client in a post-conviction posture who described with great pain how he had been completely ignored during a long, grueling death-penalty voir dire. He told a story about watching an African American grandmother who seemed way too eager to get on the jury. He felt she was looking for entertainment and seemed to be internally shouting "Amen" whenever the lead prosecutor shared an anecdote. He begged his defense counsel to use a strike to keep this woman off his jury. Counsel disregarded his request. Meanwhile, the State ended up striking every *other* black person from the pool—clearly having recognized that seating this particular black person as the sole representative of her race (in a very diverse county) would be a boon for the State.

Speak in plain English. Inquiring whether someone has "engaged in independent research" about the case is not going to compute as well as asking "Did you look up anything on the Internet or see anything in your social media feed about this case?"¹¹

Don't telegraph your hostility. Telling a veniremember "You're kind of a scary juror for our side" does nothing but put that juror on the defensive. Most veniremembers want to please—the prosecution. We need to honor that and tease out information that will support moving to strike them for cause. If they are predisposed to dislike us, our client, or the criminal defense bar generally, we are not going to be able to bully them into doing us the favor of exposing their bias. Scolding them just reinforces to them that they are doing what is necessary to stay on the jury and condemn your client whom they have prejudged as Scum Incarnate. Veniremembers who are able and willing to mask their judgmental tendencies to stay in the pool should scare the hell out of you. But to get them to let their guard down and, for instance, admit that they do not really believe in the presumption of innocence, requires disarming/charming, not attacking, them.

Listen carefully. You will alienate even those who are neutral by asking questions that the potential juror has already answered.

Understand what "commitment questions" really are. "Commitment questions are those that commit a prospective juror to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact." *Standefer v. State*, 59 S.W.3d 177, 179-80 (Tex. Crim. App. 2001). Whereas a "proper voir dire question attempts to discover a venireman's preexisting bias or prejudice[.]" "[a]n improper commitment question attempts to create a bias or prejudice in the venireman before he has heard the evidence[.]" *Sanchez v. State*, 165 S.W.3d 707, 714 (Tex. Crim. App. 2005). For instance, "the State cannot require a prospective juror to commit to the proposition that potential rehabilitation is irrelevant to a determination of future dangerousness; rehabilitation is in fact a proper consideration under that special issue." *Standefer*, 59 S.W.3d at 182. But a question is not improper because it "inquire[s] . . . into a prospective juror's general philosophical outlook on the justice system (such as whether the retribution, deterrence, or rehabilitation is the prime goal of the criminal justice system). The parties are given broader latitude to ask such general background and philosophy questions." *Sells v. State*, 121 S.W.3d 748, 756 n.2 (Tex. Crim. App. 2003) (en banc).

Study and practice the Colorado Method. Simply explaining this method would require many, many more pages. And this

10 Far too often, transcripts reveal defense lawyers referring to their own client as "the defendant," a dehumanizing tactic employed by the prosecution.

11 Shockingly, reviewing transcripts from recent death-penalty voir dire shows that some judges do not inquire about whether potential jurors have done Internet

research on the case, something that should happen at the outset in any death-penalty case that tend, in this day and age, to be high profile matters.

article is already too long. Therefore, all I can do here is direct you elsewhere.¹² But believe me: too few capital defense lawyers in Texas are learning from our comrades in Colorado who figured out how to save clients from death sentences with their approach to jury selection.

Cite the reasons to challenge for cause, chapter and verse. We need to have the substance of Article 35.16(a) at our fingertips—ready to cite the specific statutory text when objecting that someone is “incapable or unfit to serve on the jury.” Subsection (a) lists the following reasons for either the state or the defense to challenge a potential juror for cause:

1. That the juror is not a qualified voter in the state and county under the Constitution and laws of the state; provided, however, the failure to register to vote shall not be a disqualification;
2. That the juror has been convicted of misdemeanor theft or a felony;
3. That the juror is under indictment or other legal accusation for misdemeanor theft or a felony;
4. That the juror is insane;
5. That the juror has such defect in the organs of feeling or hearing, or such bodily or mental defect or disease as to render the juror unfit for jury service, or that the juror is legally blind and the court in its discretion is not satisfied that the juror is fit for jury service in that particular case;
6. That the juror is a witness in the case;
7. That the juror served on the grand jury which found the indictment;
8. That the juror served on a petit jury in a former trial of the same case;
9. That the juror has a bias or prejudice in favor of or against the defendant;
10. That from hearsay, or otherwise, there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as would influence the juror in finding a verdict. To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in the juror’s opinion, the conclusion so established will influence the juror’s verdict. If the juror answers in the affirmative, the juror shall be discharged without further interrogation by either party or the court. If the juror answers in the negative, the juror shall be further examined as to how the juror’s conclusion was formed, and the extent to which it will affect the juror’s action; and, if it appears to have been formed from reading newspaper accounts, communications, statements or reports or mere rumor or hearsay, and if the juror states that the juror feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that the juror is impartial and will render such verdict, may, in its discretion, admit the juror as competent to serve in such case. If the court, in its discretion, is not satisfied that the juror is impartial, the juror shall be



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discharged;

11. That the juror cannot read or write.

Subsection (b) then lists additional bases for challenges that can be brought, severally, both by the prosecution or the defense. Remarkably, I have yet to read a voir dire transcript in which counsel cites specific statutory text and where to find it when making a challenge for cause. Yet we all know that the easiest way to earn the court’s respect (and raise the specter of the potential of reversible error) is to show command of the governing law.



Gretchen Sween is a solo practitioner based in Austin, Texas. She earned a Ph.D. in Humanities before obtaining a J.D. at the University of Texas School of Law. After years laboring on the civil side, a pro bono representation in a death-penalty appeal for a person with a pending execution date prompted her to make a big change. Since 2015, her practice has been devoted full time to representing indigent individuals facing the death penalty in Texas.

12 See, e.g., Sophie E. Honeyman, *Escaping Death: The Colorado Method of Capital Jury Selection*, 54 UIC J. Marshall L. Rev. 247 (2021).

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QUICK TIP #3:

ALWAYS READ THE FINE PRINT

- Savannah Luna

Not every case turns on dramatic testimony. Sometimes the most powerful evidence in a case is hidden in the fine print. For example, we obtained military records for a complainant that simply stated he had been "discharged." On its face, this appeared neutral. However, at the bottom of the page was a small code that, once researched, revealed the discharge was related to drug abuse. That detail directly undermined the prosecution's theory that our client introduced the complainant to drugs and was the sole cause of his addiction. Instead, this fine print showed that the complainant's history of substance abuse predated our client's involvement with the complainant. Those tiny numbers significantly strengthened our cross-examination and reframed the narrative at trial. Never stop at the headline. Investigate the small numbers, footnotes, and abbreviations, because the fine print can make or break your case.

TCDLA New Lawyers Committee

Voting Rights in Texas: Jail, Detention and Felony Convictions

ALENE LINDLEY



The issues involving voting rights of individuals within the Texas Department of Criminal Justice, and in county jails, are complex. In Texas, a person's ability to vote depends on their legal status, and not simply whether they are physically in jail. This is not intuitive. There are many volunteer networks that exist to inform individuals involved in the criminal justice system of their voting rights. This article aims to inform the reader of these issues and resources to become more informed about voting rights.

If a person is awaiting trial, or charged but not convicted, they still retain their right to vote. This applies for both misdemeanor and felony charges. If a person is detained in jail awaiting a resolution of a felony charge, or serving a sentence for a misdemeanor in county jail, they can vote by requesting and casting a ballot by mail. Under Texas Election Code §82.004, a person confined in jail may be eligible to vote by mail if:

- They are serving a misdemeanor sentence that extends through election day;
- They are pending trial after denial of bail;
- They are without bail pending appeal of a felony conviction; or
- They are pending trial or appeal on a bailable offense for which release before election day is unlikely.

Access to voting by mail requires an individual to be eligible to vote (US Citizen, over 18, not considered mentally incapacitated, registered to vote in their county of residence, etc.), despite whether they are in custody. These eligible voters must complete the *Application to Vote by Mail* and submit to the county elections office at least eleven days prior to the election. After receiving the mail ballot, the voter completes and returns the ballot to the county elections office by the end of the election day, or have it postmarked by 7PM on election day to be received in the elections office by the next business day by 5PM.

Article VI, Section 1, (a) of the Texas Constitution details the classes of persons not allowed to vote. These classes include "persons convicted of any felony, subject to such exceptions as the Legislature may make." *Id.* Over the years, the Texas Legislature made exceptions to this constitutional provision. In 1983, the 68th Texas legislature passed HB718, which abolished the life-time voting ban on those with felony convictions after they had completed their sentences, but included a 5-year waiting period before they could again become eligible to vote. On September 1, 1997, the 75th Texas legislature passed HB1001 eliminated the 5-year waiting period.

People convicted of a felony lose the right to vote during their sentence, including any period of incarceration and community

supervision (probation, parole or mandatory supervision). The right to vote, however, is automatically restored if a sentence has been fully discharged.

After the completion of a sentence, a person must register to vote, and the registration must be received 30 days before an election in order to vote in that election. The voter registration application asks applicants to affirm that "*I have not been finally convicted of a felony, or if a felon, I have completed all of my punishment, including any term of incarceration, parole, supervision, period of probation or I have been pardoned.*" Texas Election Code §11.002(a)(4) and §13.001(a)(4). Voter registration applicants do not have to disclose any felony history on the application. Individuals are responsible for understanding when their sentence is complete and for updating their voter registration.

Volunteers across Texas work together to inform voters of their rights. For example, volunteers from the League of Women Voters of the San Antonio Area (LWVSA) participate in conversations with voters who do not realize their right to vote is generally restored once their felony sentence is completed, or those who are detained do not realize they can exercise their right to vote. Additionally, the LWVSA has developed educational resources, funded through a grant from the Texas Bar Foundation to distribute in Bexar County, to increase the awareness of everyone working with those that are incarcerated or who have a felony conviction. The League has partnered with other community organizations, including the NAACP and Radical Registrars, to reach these individuals.

The mission of LWVSA is to encourage informed and active participation of citizens in government, to increase understanding of major public policy issues, and to influence public policy through education and advocacy. To learn more about the issues the LWVSA seeks to address, their website can be found at: LWVSA.org

Alene Lindley
Vice President for Community Outreach
League of Women Voters of the San Antonio Area



Alene Lindley retired from public education after 40 years of service. She has been involved with the League of Women Voters of the San Antonio Area since moving to San Antonio in 2020. She currently serves as the Vice President of Community Outreach. Alene can be reached at communityoutreach@lwvsa.org.



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Networking!



Texas Criminal Defense
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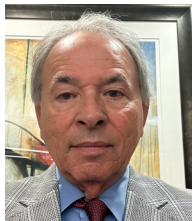


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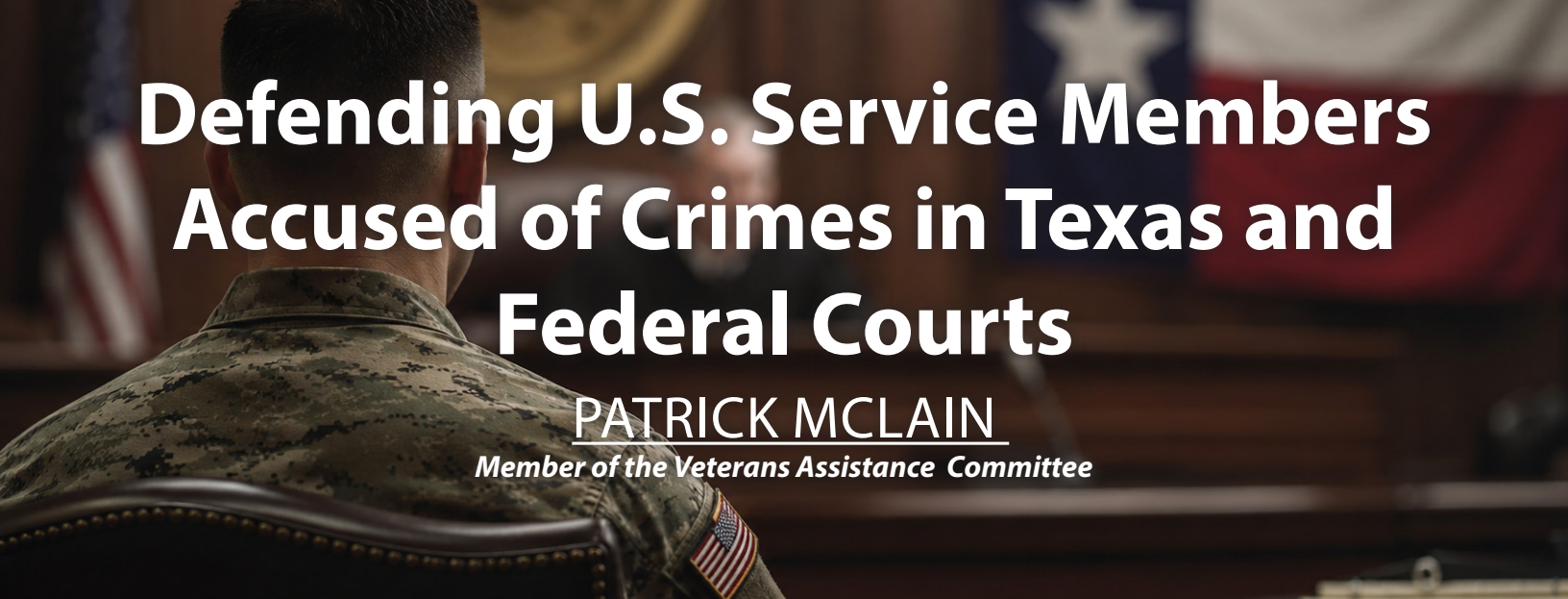
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Defending U.S. Service Members Accused of Crimes in Texas and Federal Courts

PATRICK MCLAIN

Member of the Veterans Assistance Committee

The Uniform Code of Military Justice (UCMJ) is a criminal code, codified at Chapter 47 of Title 10 of the United States Code, applicable to U.S. service members. Similar codes apply to National Guard members. Unlike most criminal codes, its jurisdiction is personal, not geographic.

The UCMJ applies across the entire globe (and probably space, though that is a subject for a different article). Moreover, a service member's conduct in the civilian community can have a significant impact on his or her military status and benefits, even if it does not result in criminal liability under the UCMJ. As such, a criminal defense lawyer with a military-affiliated (active duty, reserve, guard, and even retired) client must always consider how the client's military status may impact advice to the client and the best course of action in a criminal case.

Separate Sovereigns, Double Jeopardy, and Ceding Jurisdiction

The UCMJ criminalizes many military-specific offenses which have no civilian analogue, but it also criminalizes much of the same conduct as the Texas Penal Code. For instance, if a soldier stationed at Fort Leavenworth, Kansas, is arrested for DWI while visiting family in Dallas, she may face criminal charges under both Chapter 49 of the Texas Penal Code and Article 113 of the UCMJ. Double jeopardy does not protect her from prosecution by these separate sovereigns.

In most cases, however, civilian officials either cede jurisdiction to the military or the military refrains from criminal prosecution under the UCMJ. This can cause uncertainty and anxiety in the days and weeks following an arrest by civilian authorities, because the service member does not know whether he will be prosecuted by the State of Texas, her military unit, or (though uncommon) both. He must prepare for both, as well as nearly inevitable collateral consequences imposed by the military.

Administrative Collateral Consequences

Regardless of which sovereign exercises criminal jurisdiction, the impact of an arrest, prosecution, and conviction can extend well beyond immediate criminal consequences for military-affiliated clients. Here are just a few of the most common examples which could result from a garden variety DWI conviction:

- Security clearance revocation. Most service members need a security clearance as a prerequisite to perform their duties. The Defense Counterintelligence and Security Agency adjudicates all security clearances, and indications of criminal behavior or substance abuse may cause the agency to revoke a service member's clearance. This can further result in involuntary separation from the service (see below). Depending on the member's area of expertise, it can also impact future earning potential.
- Loss of rank. Any member who has been selected for promotion but not yet promoted can lose their promotion. Enlisted members can also be demoted in rank. If the higher rank was required for retention, this can also result in involuntary separation (see below).
- Retirement at reduced rank. Even up to a decade after conviction, officers can be retired at a rank lower than the highest they held, resulting in lower pension payments for the rest of their lives.
- Involuntary separation. This is similar to being fired for cause by a civilian employer, but usually involves more lasting impacts. A service member could be involuntarily separated as a direct result of conviction, for pleading guilty pursuant to a deferred adjudication, or for related reasons, such as loss of a security clearance or rank. Involuntary separation often comes with a less-than-honorable service characterization, which can deprive the member of substantial benefits (for instance, educational benefits like the G.I. Bill) that otherwise had vested.

Most collateral consequences involve some, if limited, due process rights, and have the potential to be much more devastating than the criminal conviction itself. Here is a relatively extreme, but not uncommon, manifestation:

A 33-year-old senior enlisted service member has served 15 years and is on track to retire from the service in five years at age 38. He pleads guilty to a DWI with a child passenger in the State of Texas and then is involuntarily separated from the service under other-than-honorable conditions. As compared to serving an additional five

years and retiring, that service member would likely lose out on between \$1 and \$2 million in retirement benefits depending on a variety of specific factors.

Conclusion

A military-affiliated client facing civilian criminal charges must be advised of the potential consequences to their military career. Decisions such as how to plead and whether to testify can have far-reaching implications extending many years (even generations) beyond the decisions themselves. Texas criminal defense attorneys should be prepared to advise or refer military-affiliated clients to military law practitioners regarding the second- and third-order effects of civilian criminal liability.



Patrick J. McLain is the owner and leader of The Law Office of Patrick J. McLain, PLLC, a firm of five criminal defense attorneys and ten support personnel. Patrick J. McLain is recognized as AV (pre-eminent) by Martindale-Hubbell, as an AVVO Client's Choice attorney by his client and peer reviews, and as a SuperLawyer since 2009 by Thomson Reuters' lawyer rating service. Patrick has tried hundreds of cases in federal, state, and military courts and administrative proceedings all over the world. He started his legal career during the last twelve of his twenty years' service in the U.S. Marine Corps, and he tried his first contested case, a rape trial, in a tent on the sands of Manifa Bay, Saudi Arabia. Formerly a prosecutor in military and federal courts and a trial judge in courts-martial, his true passion has been defending the citizen accused of crimes – whether civilian or in uniform. Patrick is the former President of the F Warriors, the alumni of the Trial Lawyers College (TLC). He can be reached at patrick@patrickjmcclain.com.



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Texas Criminal Defense Lawyers Association 2026–2027

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



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Last name		First name	
Law school		Years in practice	
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Email the completed form with a brief resume. The form may include a personal statement describing your interest in serving on a committee to monet@tcdla.com by **July 1, but accepted year-round.**



Proper Objections Regarding a Jury Charge's Abstract Paragraphs

JOHN BENNETT

So many trial lawyers fail to object to the jury charges that don't limit culpable mental states in abstract instructions. This is unfortunate, because a lack of objection means that on appeal, the case will not be reversed unless "egregious harm" is shown, which is next to impossible. Yet when timely objection is made, only "some harm" is necessary, which is often achievable.

Texas law not only divides offenses into felonies and misdemeanors, it breaks down offenses into those in which the main thing the jury must consider is the *result* of a defendant's action, those that turn on the *nature* of that action, those that depend on the *circumstances surrounding* the action, and a few that have elements of two or more of those of these categories – what are here called hybrid offenses.

Offenses that focus on the *result* of conduct (also called "result-oriented" offenses) require that the defendant's action caused a particular result. Murder, for example, is a result-of-conduct offense, so a guilty verdict absolutely requires proof the complainant died. How the defendant caused the death is, strictly speaking, irrelevant. The indictment will allege how the defendant supposedly did it – which the State must then prove – but it doesn't really matter whether the defendant shot, stabbed or poisoned the complainant. The important part is that the defendant committed, if not a murderous act, at least an act of aggravated assault clearly dangerous to human life that resulted in a death (or for felony murder, attempted such an aggravated assault clearly dangerous to human life). See Tex. Penal Code Section 19.02(b). If a charge tells the jury to decide guilt or not guilty based on the belief the defendant just did something very bad (the *nature* of the offense), it's incorrect.

Offenses that focus on the *nature* of what the defendant did (also called "conduct-oriented" offenses) are prohibited simply because they are inherently bad; the act's result doesn't matter in deciding guilt or innocence. Theft, for instance, is a *nature-of-conduct* offense, so if the defendant stole money, even if he then used that money to buy medication for his ill child, it's still theft – the jury has to decide only whether he stole it (although using it for something decent may have an effect on the sentence). If the trial court instructs the jury to decide whether he's guilty or not based on the *result*, such as that the loss of the money left the complainant penniless, it's incorrect.

Other offenses depend on the particular *circumstances* in which the act was done. For example, a person may never have

gone to the sheriff's office or the police station in his city, but by itself that's not an offense. If he's legally required to register as a sex offender, though, not reporting his current address and other information to law enforcement is an offense, a *circumstances-surrounding-the-conduct* one. If a charge instructs the jury to decide guilt or not guilty on whether it's simply wrong for him not to register (the *nature* of the conduct) or that people living near him weren't aware he's a sex-offender so children were put in danger (the *result* of that conduct), it's incorrect.

The courts most often, but not always, have definitively placed offenses in one of the categories – *result-of-conduct* offenses, *nature-of-conduct* offenses, *circumstances-surrounding-the-conduct* offenses, or hybrid ones. A list is attached. If the particular offense your client is charged with isn't listed there, the courts may not have yet decided which of those categories the offense falls into, or since this article was written other courts have decided differently. This search on Lexis or Westlaw will bring up relevant cases on this question:

("result-of-conduct" or "nature-of-conduct" or "result of the conduct" or "nature of the conduct" or "circumstances-surrounding-the-conduct" or "result oriented" or "conduct oriented") /s [the offense in question, in quotation marks if it's more than one word, such as "intoxication manslaughter]

Then you'll have to look at the cases that come up to find out the right category. If the courts haven't yet ruled on it, there may be no "right" category. You might look up the proper unit of prosecution for the offense in question, though; this often gives a clue to what future rulings will say on the subject. Reading the statute and considering the particular offense rests on the result, nature or circumstances surrounding the conduct, and objecting on that basis, may result in you making new law.

To complicate matters, each of the vast majority of offenses must be committed with a particular state of mind, called a "culpable mental state" – such as that the defendant did the act intentionally or knowingly (*i.e.*, intended to do something illegal or knowing perfectly well what he was doing was illegal and did it anyway); or recklessly or with criminal negligence (such as while babysitting the defendant was watching TV so intently she didn't notice the child had wandered outside and into traffic).

The Penal Code describes each of the culpable mental states with categories of offenses, as quoted below. These definitions

are put into jury charges. Culpable mental states (intentional, knowing, reckless and with criminal negligence) are in **boldface** and categories of offenses (*result-of-conduct*, *nature of conduct*, or *circumstances surrounding the conduct*) are in **italics**. But notice that each culpable mental state speaks to two different categories. The language of categories that don't apply to the offense your client is tried for must be individually removed before the final version is read to the jury.

(a) A person acts **intentionally**, or with intent, with respect to the *nature of his conduct* or to a *result of his conduct* when it is his conscious objective or desire to engage in the conduct or cause the result.

(b) A person acts **knowingly**, or with knowledge, with respect to the *nature of his conduct* or to *circumstances surrounding his conduct* when he is aware of the *nature of his conduct* or that the *circumstances exist*. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(c) A person acts **recklessly**, or is reckless, with respect to *circumstances surrounding his conduct* or the *result of his conduct* when he is aware of but consciously disregards a substantial and unjustifiable risk that *the circumstances exist or the result will occur*. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(d) A person acts with **criminal negligence**, or is criminally negligent, with respect to *circumstances surrounding his conduct* or the *result of his conduct* when he ought to be aware of a substantial and unjustifiable risk that *the circumstances exist or the result will occur*. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(See Texas Penal Code § 6.03). Notice also that under these definitions, a *nature-of-conduct* crime cannot be committed **recklessly** or with **criminal negligence**. Also, a *circumstances-surrounding-the-conduct* offense cannot be committed **intentionally**, although it can be committed **knowingly**. The difference between the two is very slim, though.

The abstract part of a correct jury charge gives the applicable culpable mental state (**intentional**, **knowing**, **reckless** or with **criminal negligence**) joined with the right category (*result-of-conduct*, *nature-of-conduct*, or *circumstances-surrounding-the-conduct*). Unless the offense the client is charged with is one of the few hybrid offenses, there are seven possibilities for this, and a correct jury charge contains an abstract instruction on one of the seven.

1. A *result-of-conduct* offense that must be committed **intentionally or knowingly**;
2. A *result-of-conduct* offense that may be committed **recklessly**;
3. A *result-of-conduct* offense that may be committed with **criminal negligence**;
4. A *nature-of-conduct* offense that must be committed **intentionally or knowingly**;
5. A *circumstances-surrounding-the-conduct* offense that must be committed **knowingly**;
6. A *circumstances-surrounding-the-conduct* offense that may be committed **recklessly**;
7. A *circumstances-surrounding-the-conduct* offense that may be committed with **criminal negligence**.

Finding the right one requires a little investigation. Whether an offense must be committed **intentionally** or **knowingly**, **recklessly**, or with **criminal negligence**, is usually stated in the statute describing that offense. If a statute doesn't mention this, then the offense must generally be done intentionally or knowingly. As noted above, a list is attached here showing the category of most offenses (either *result-of-conduct*, *nature-of-conduct*, or *circumstances-surrounding-the-conduct*), but the category of any may change without notice as different courts weigh in on the question. If your client is charged with an offense not listed there, the Lexis or Westlaw search mentioned earlier may bring up recent cases saying what category the courts have decided on.

Constructing a correct abstract jury charge requires, in this regard, first, copying the language of whichever of the four states of mind § 6.03 above - (a), **intentional**; (b), **knowing**; (c) **reckless**; or (d) **criminal negligence** - the one that applies to the offense your client is charged with. Each of these has language that applies to two particular culpable mental states. The language for the category that applies (*result-of-conduct*, *nature-of-conduct* and *circumstances-surrounding-the-conduct*) is kept, and the language that concerns the other two other categories is properly deleted. These are set out below.

Intentional or knowing: For an offense that must be committed **intentionally** or **knowingly**, the states of mind (culpable mental states) must first be copied into the proposed charge from (a) and (b), above. The basic language of § 6.03(a)&(b) that must be edited:

A person acts **intentionally**, or with intent, with respect to the *nature of his conduct* or to a *result of his conduct* when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts **knowingly**, or with knowledge, with respect to the *nature of his conduct* or to *circumstances surrounding his conduct* when he is aware of the *nature of his conduct* or that the *circumstances exist*. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is



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reasonably certain to cause the result.

Then, if the offense is a *result-of-conduct* one that must be committed **intentionally** or **knowingly**, the words that apply to a *nature-of-conduct* offense must be deleted, so a **correct** charge will say:

A person acts **intentionally**, or with intent, with respect to the *result of his conduct* when it is his conscious objective to *cause the result*.

A person acts **knowingly**, or with knowledge, with respect to a *result of his conduct* when he is aware that his conduct is reasonably certain to *cause the result*.

Similarly, if your client is charged with a *nature-of-conduct* offense that must be committed **knowingly**, the language related to result-of-conduct offenses is to be deleted, making a **correct** charge say:

A person acts **knowingly**, or with knowledge, with respect to the *nature of his conduct* when he is aware of the *nature of his conduct*.

If the offense is a *circumstances-surrounding-the-conduct* one that must be committed **knowingly**, a **correct** charge deletes the *result-of-conduct* and *nature-of-conduct* language. So, it says:

A person acts **knowingly**, or with knowledge, with respect to the circumstances surrounding his conduct when he is aware that the circumstances exist.

Recklessness: If a statute says an offense may be committed **recklessly**, the full language from §6.03(c) that must initially be copied into the charge contains *result-of-conduct* and *circumstances-surrounding-the-conduct* language:

A person acts **recklessly**, or is reckless, with respect to *circumstances surrounding his conduct* or *the result of his conduct* when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that

its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Only the first sentence requires deletions, though. If the offense is a *result-of-conduct* one that can be committed **recklessly**, the language regarding a *circumstances-surrounding-the-conduct* offense must be deleted, so a **correct** charge will say:

A person acts **recklessly**, or is reckless, with respect to the *result of his conduct* when he is aware of but consciously disregards a substantial and unjustifiable risk *that the result will occur*. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

If the offense is a *circumstances-surrounding-the-conduct* one that can be committed **recklessly**, a **correct** charge will delete all references to the result of the conduct:

A person acts **recklessly**, or is reckless, with respect to *circumstances surrounding his conduct* when he is aware of but consciously disregards a substantial and unjustifiable risk *that the circumstances exist*. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Criminal Negligence: If an offense is a *result-of-conduct* one that may be committed with **criminal negligence**, the statute listed as § 6.03(d), above, is initially copied into the proposed charge:

A person acts with **criminal negligence**, or is criminally negligent, with respect to *circumstances surrounding his conduct* or *the result of his conduct* when he ought to be aware of a substantial and unjustifiable risk that *the circumstances exist or the result will occur*. The risk must

be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Then a **correct** charge for a *result-of-conduct* offense that can be committed with **criminal negligence** has the *circumstances-surrounding-the-conduct* language deleted, but the second sentence needs no editing. The **correct** charge will therefore say:

A person acts with **criminal negligence**, or is criminally negligent, with respect to the *result of his conduct* when he ought to be aware of a substantial and unjustifiable risk *that the result will occur*. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

And if the offense is a *circumstances-surrounding-the-conduct* one that can be committed with **criminal negligence**, a **correct** charge will delete all references necessary for a *result of conduct* offense and say:

A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Sometimes an offense can be committed either intentionally or knowingly *and* recklessly, such as any degree of assault. Assault is a result-of-conduct offense, so a correct charge in an assault includes **both** the correct instruction for a result-of-conduct offense that can be committed intentionally or knowingly, above, **and** the one for a result-of-conduct offense that can be committed recklessly. Leaving either one out is incorrect, but such an omission will be detrimental to the State's case.

You should examine the State's proposed charge carefully to see that it lists the correct instruction for the culpable mental state coupled with the offense category, before announcing you have no objections. This is crucial. The State virtually always prepares the jury charge. Unfortunately, most of the time the State's proposed charge leaves in all offense categories (*result, nature, or circumstances surrounding the conduct*), including the two that don't apply. This produces legally incorrect verdicts; if the culpable mental states are not limited, the jury will be authorized to convict the defendant on *any* state of mind.

A defendant charged with assault (a *result-of-conduct* offense), for example, can therefore be found guilty just because the jurors think what he did is something bad (the *nature* of the conduct), regardless of whether the complainant felt any pain suffered any bodily injury or was threatened with either. (See Texas Penal Code. § 22.01(a). The only exception is Class C assault, which cannot be committed recklessly but requires simply offensive touching. But for someone to be guilty of any more serious assault, the statute *requires* either pain, bodily injury, or the threat of either. A charge that tells the jury it can return an assault due

to the *nature* of the defendant's conduct (such as that he was being belligerent and insulting but never actually touched the complainant) contravenes the statute.

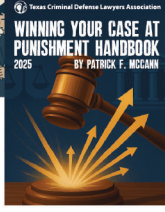
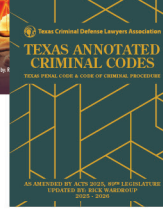
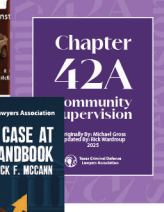
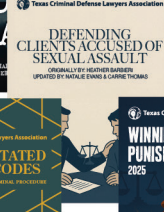
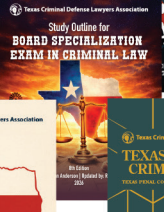
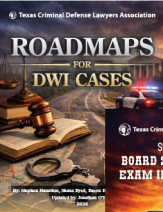
If no objection is made, the appellate courts will almost always say the charge is erroneous but the error is harmless. It's wise to submit a proposed instruction in writing beforehand with the correct language and then make an oral objection if the trial court doesn't make the prosecutor writing these paragraphs delete the inappropriate language.

If an offense is a hybrid one listed below— if it has one or more elements that has been found to be *result-of-conduct, nature-of-conduct, or circumstances-surrounding-the-conduct* **and** has *another* element in *another* of these categories, but the jury charge says all of them and no objection is made, the appellate courts will likely say there's no error at all.

One further matter deserves mention: one of my cases with all briefs filed and oral argument done is pending at the Court of Criminal Appeals in which the State has argued that limiting the culpable mental states is not error “when the jury charge otherwise leaves no doubt what the mental state requires.” *Jaimes v. State*, PD-0135-25 & PD-0136-25. This *might* be true, *if* the record truly reflects the lack of any such doubt. But in Ms. Jaimes' trial the State openly told the venire that it could return a conviction of indecency with a child (a *nature* of conduct offense) due to either the nature or the *circumstances surrounding* the alleged conduct

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and argued at closing that the jury should convict based on the *result* of the supposed conduct. Further bulletins on that case as events warrant.

Result-of-conduct offenses include:

All homicide offenses including criminally negligent homicide
Assaultive offenses causing bodily injury, serious or not
Intoxication assault
Injury to a child or disabled person
Child endangerment
Violation of a protective order
Hindering secured creditors
Tampering / obstruction / retaliation of a witness
Bail-jumping
Failure to appear
Barratry
Harassment
Compelling prostitution

Nature-of-conduct offenses include:

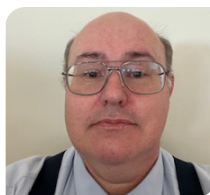
Possession of a controlled substance, with or without intent to deliver
Stalking
Violation of a protective order
Indecency with a child
Public lewdness
Abandoning a child
Terroristic threat
Prohibited sexual conduct
Criminal mischief
Theft / deception offenses
Credit / debit card abuse
Online solicitation of a minor
Bribery
Perjury
Resisting arrest (without a vehicle)
Improper sexual activity
Dog fighting
Cruelty to animals
Possession of child pornography
Gambling
DWI

Circumstances-surrounding-the-conduct offenses include:

Unlawful possession of a firearm
Deadly conduct
Evading arrest with a vehicle
Violating a civil commitment order
Failure to register as a sex offender
Deceptive business practices
Securities fraud and similar offenses
Interference with emergency request for services
Organized crime

Hybrid offenses – with elements of two or more states of mind – include:

Robbery / aggravated robbery (result-of-conduct, nature-of-conduct and circumstances-surrounding-the-conduct)
Assault of a peace officer (result-of-conduct and nature of the conduct)
Aggravated sexual assault of a child (result and nature of the conduct)
Continuous sexual abuse (nature-of-conduct and circumstances surrounding the conduct)
Continuous violence against the family (result-of-conduct and circumstances surrounding the conduct)
Burglary / aggravated burglary (result-of-conduct and circumstances surrounding the conduct)
UUMV (nature-of-conduct and circumstances-surrounding-the-conduct)
Money laundering (nature-of-conduct and circumstances surrounding the conduct)
DWI with child under 15 (nature and circumstances-surrounding-the-conduct)



John Bennett is an appellate attorney for the Panhandle Area Public Defender and has been doing criminal defense appeals for over 30 years. He holds a JD from Texas Tech, a PhD. in Anglican history from the University of Birmingham, an LLM in international criminal law from the University of Northampton and, most recently, an MLitt in British Studies from the University of the Highlands & Islands. He has also been elected a Fellow of the Royal Historical Society. His first scholarly book, *A History of Pew-Renting in the Church of England*, was published in 2024 by Palgrave MacMillan of New York City.

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Texas Criminal Defense Lawyers Association

Champions of the Month!



Congrats to the defense team of Angelica Cogliano, Addy Miro, and Deniz Kahirhan! They won a Motion to Exclude DNA based on discovery and *Brady* violations. The case was a 1997 Sexual Assault case and only evidence was a CODIS hit from 2020. **Great work!**

Cheers to Wade B. Smith and Matthew J. Hefti on a hard-earned dismissal in a felony case! On the eve of trial, the prosecution dropped the charges after Wade and Matthew uncovered key evidence that contradicted the allegations. Their thorough investigation—along with help from their client—revealed inconsistencies in witness accounts and exposed motives for false accusations. Ready to take the case to a jury, they stood firm until the dismissal came through the afternoon before trial. **Way to go!**

Hats off to Josh Graham! He got a Not Guilty the week after Round Top on a continuous sexual assault case that he worked on at Round Top! **Keep it up!**

Shout Out to Public Defenders Office for Hays County! They just got their 4th or 5th Not Guilty of the year. This one was big. Aggravated sexual assault from 2004, where they had stored DNA from the victim's underwear and used genealogical tracing to end up with the client. They conducted "covert DNA seizure" and grabbed a snack wrapper out of the trash at the courthouse while the client was on jury duty in Florida. Phone call to wife from jail contained a "confession," and during his interview, before he requested a lawyer, he just didn't act "emotionally appropriate," according to the detectives. The client was a 20-year army veteran, married 25 years, 4 daughters. He lost his civil service job and his home, but he is a free man. **What a wild ride.**

Kudos to Dustin Nimz and Bethany Hale! In Wichita County, the team received a jury verdict of not guilty in a 4-count indictment, 1 count of aggravated sexual assault and three counts of indecency. **Incredible!**

Congratulations Brent Ratekin and Shayna Oaks! The team got a not guilty in the 340th on failure to register as sex offender case. **Bravo!**

Let's give it up for Rebecca Yung, Lauren McCollum, and Caitlin Mendoza! Lesser included of assault (class A misdemeanor) on an aggravated assault deadly weapon - 180 day sentence (time served). Case was originally charged as murder in the 391st Judicial District Court. **Top notch!**

Do you want a shout out? Send in a few sentences about you or someone else to voice@tcdla.com for a chance to be recognized in print!



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Significant Decisions Report

KYLE THERRIAN

You're probably reading this at the Rusty Duncan seminar if I get my timing right. I'm always a little surprised when lawyers tell me they have never gone to Rusty or rarely do. Not that it's some sort of token pilgrimage that criminal lawyers must perform. Yes, you can learn more about defending the accused in three days than you can anywhere else in the State. Yes, you can update yourself in the dozens of ways the legislature has made our jobs more difficult. Yes, you can get a case law update, too (but true Sig-heads obviously don't need that). What gets me is the "nah, I'm good" sentiment. Are you? Because if you are in the trenches like the rest of us (*if*), defending people weighs heavy. So does the feeling of having opponents in every nook and cranny of the system. I've said before that misery loves company, but it also loves inspiration. I can't count how many times I've stood at the Hyatt Regency bar and had a conversation with a colleague where I've thought or even said "I can't believe they're doing that to you" or "that's actually a good/bold/interesting idea." Whether it's young lawyers full of piss and vinegar or legends who have defended at the highest levels, there are enough lawyers and stories to reinvigorate your practice at least until July. Maybe try it next year if you haven't or just haven't for a while. Your first drink is on me, if I remember I wrote this. (*if*).

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. The selection of summarized cases and all editorial comments reflect the editor's decisions and viewpoints alone.

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

Sincerely,

Kyle Therrian

Editor, SDR

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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

[Cuevas v. State, No. PD-0144-25 \(Tex. Crim. App. Apr. 2, 2026\)](#)

Attorneys. Stephen A. Doggett (appellate), Michael Elliot (trial), Annie Scott (trial)

Issue & Answer. Penal Code § 9.32 (Self-Defense) provides a presumption that a person [who committed a murder] acted reasonably in self-defense when the defendant reasonably believed the victim [was attempting to murder the defendant]. The *presumption* is not available to a defendant engaged in an offense greater than a Class C misdemeanor. When the trial court instructs the jury to acquit on self-defense only if the *presumption* applies and does not otherwise instruct the jury on self-defense, has the trial court committed reversible jury charge error? **Here, yes (because the prosecutor exacerbated the error in argument).**

Facts. Cuevas was charged with murder after a drug deal turned violent. In July 2017, Cuevas arranged to sell marijuana to Ose and brought a handgun for protection. During the transaction, Ose allegedly robbed Cuevas at gunpoint, choked him, and threatened to kill him. Cuevas responded by shooting Ose seven times, resulting in Ose's death. The jury convicted Cuevas of murder but found sudden passion at punishment. It was undisputed that Cuevas was engaged in criminal activity (drug dealing) at the time of the shooting.

Analysis. The trial court's charge did not instruct the jury to acquit unless they believed self-defense inapplicable beyond a reasonable doubt. The charge merely stated self-defense in the context of the presumption of reasonableness. In other words, the jury was instructed to acquit if they found the presumption applied, but not in any other context. The prosecutor exacerbated the trial court's error in argument by repeatedly stating that self-defense was inapplicable because Cuevas was engaged in criminal activity—a fact that destroys the presumption but not self-defense. Under the *Almanza* test for jury charge error (see legend below) the prosecutor's repeated misstatement that self-defense is inapplicable without the presumption created sufficient harm to render the trial court's jury charge error reversible.

Concurring (McClure, J.). The prosecutor twisted the law on self-defense and the jury's verdict is proof of the harm.

Dissenting (Yeary, J.). The jury charge was not improper. The prosecutor's arguments were, and the Court conflates the prosecutor's comments with jury charge error.

[Ex parte Jordan, No. WR-17,434-02 \(Tex. Crim. App. Apr. 9, 2026\)](#)

Attorneys. Guillermina Passa (writ), Benjamin Wolff (writ)

Issue & Answer. In a line of cases beginning with *Penry v. United States*, 492 U.S. 302 (1989), the Supreme Court

and the Texas Court of Criminal Appeals developed a list of considerations that must be presented to a jury in special issues to determine the appropriateness of the death sentence. Included in the list are: intellectual disability, physical disabilities resulting in behavioral and mental conditions, conditions of upbringing, low intelligence, mental illness [see case for full list]. In a pre-*Penry* case where the trial court did not submit *Penry* issues to a jury that returned a death verdict, is a defendant entitled to a new trial on punishment? **Yes.**

Facts. Clarence Curtis Jordan was convicted of capital murder in 1978 for the intentional killing of Joe Williams during a robbery. His conviction and sentence were vacated on direct appeal, and he was retried in 1983. At the punishment phase of the retrial, Jordan presented evidence of paranoid schizophrenia and possible Organic Brain Syndrome. The jury was instructed to answer two special issues: (1) whether the conduct causing the death was deliberate and (2) whether there was a probability of future dangerousness. Based on the jury's answers, Jordan was sentenced to death. In 1987, Jordan filed a habeas application asserting incompetence to be executed under *Ford v. Wainwright*. The court deemed him incompetent and stayed his execution. Over the next 35 years, Jordan remained incompetent to be executed. In 2025, Jordan filed a new habeas application raising two claims: (1) that the jury instructions at his 1983 trial violated the Eighth Amendment by failing to allow proper consideration of mitigating evidence (*Penry* claim), and (2) that he is intellectually disabled and categorically ineligible for execution under the Eighth and Fourteenth Amendments (*Atkins* claim).

Comment. Every once in a while, I feel like my sh*** doesn't stink. I've never walked someone off death row, though. These are badass lawyers. Ben Wolff. Sarah Brandon. Maro Robbins. Michelle Miciotto. Charell Arnold. Christina Ramirez. Kelsey Peregoy. Heather Richard. Torry Castellano. Guillermina Passa. Brooke Borkenhagen. Maria Chavez. Jack Mathie. Lauryn Renee Coleman. Seantyl Hardy. They do it for prosecutor pay.

[Smith v. State, No. PD-0993-25 \(Tex. Crim. App. Apr. 16, 2026\)](#)

Attorneys. James Russell Smith (appellate), Lauria Perrozo (trial)

Issue & Answer. If a pro se appellant is begging for a copy of the appellate record after his attorney files an *Anders* brief and certifies he mailed a USB with the record to TDCJ, may the court of appeals rule on the *Anders* brief without verifying the appellant truly has a copy of the record (in the face of his repeated requests)? **No.**

Facts. The State convicted Smith of robbery, and Smith appealed. Appellate counsel subsequently filed an *Anders* brief, asserting that there were no arguable grounds for appeal. Smith filed motions requesting access to the trial record, claiming he had not received it. Appellate counsel sent a USB containing the record via regular mail, but there was no confirmation that Smith, who was detained, had access to a computer to review the USB. Despite Smith's repeated claims of lacking access to the record, the court of appeals reviewed the *Anders* brief, Smith's pro se brief, and the record, and determined there were no arguable grounds for appeal. The court granted appellate counsel's motion

to withdraw and denied Smith's motion for rehearing. Smith filed a petition for discretionary review, reiterating his lack of access to the trial transcript.

Quoted. It is the duty of the court of appeals, after an appointed attorney has filed an Anders brief, to ensure that the indigent appellant has access to the appellate record in order to file a response. *Kelly v. State*, 436 S.W.3d 313, 320 (Tex. Crim. App. 2014). The Court has been explicit about the required process:

Once the appellant has filed his motion to make the appellate record available with the court of appeals, we think that the onus should shift to the court of appeals to ensure that, one way or another, this request is satisfied. Moreover, the appellate court may not rule on the motion to withdraw and the validity of the *Anders* brief until the appellant has been given access to, and an adequate opportunity to review, the appellate record. This, we think, is the optimal way to ensure that the indigent pro se appellant's right to review the appellate record in order to respond to appellate counsel's Anders briefs is honored.

Comment. Jimmy Fallon used to play a character named

Nick Burns: Your Company's Computer Guy on Saturday Night Live. The jingle went: "Nick Burns, your company's computer guy, he'll fix your computer, then he's going to make fun of you." His catch phrase was "Mooove [fixes the problem] was that so hard."

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The trial court could have done this. The appellate court could have done this. The clerk could have done this. Heck, the State could have done this.

[McDonald v. State, No. PD-0006-25 \(Tex. Crim. App. Apr. 16, 2026\)](#)

Attorneys. Nathan Morey (appellate)(trial), Clay S. Nelson (appellate)

Issue & Answer. Generally, the Sixth Amendment right to counsel ends upon dismissal, and officers can interrogate a former defendant without counsel present. The right will persist when the State dismisses strategically, to circumvent the right to counsel—known as the *Frye* exception. When a grand jury returns a no-bill and officers interrogate a former defendant 10 years later, can the re-indicted defendant invoke the *Frye* exception? **No.**

Facts. In 2007, the State charged McDonald with intoxication manslaughter and failure to stop and render aid. McDonald retained counsel immediately. In 2008, a grand jury no-billed the charges, and the case was dismissed. Ten years later, in 2018, Detective Sullivan independently reopened the investigation without direction from the prosecutor's office. Sullivan and Officer Goodwin questioned the defendant at her home. During the interview, the defendant repeatedly invoked her right to counsel, stating she could not speak without her attorney. Despite this, the officers continued the conversation. In 2020, based on the new investigation and interview, the State re-indicted McDonald for the same offenses. The trial court suppressed the statements made during the 2018 interview, finding that the Sixth Amendment right to counsel remained intact from 2007 to 2020.

Analysis. The Sixth Amendment right to counsel is tied to *active criminal proceedings* and terminates when a case is dismissed. The right is offense-specific and proceeding-specific. Dismissal in order to further an investigation and circumvent counsel is an exception to this rule. *State v. Frye*, 897 S.W.2d 324 (Tex. Crim. App. 1995). But, here, the dismissal resulted from a grand jury no-bill—not prosecutorial strategy. The ten-year gap between dismissal and subsequent investigation further distinguishes this case from *Frye* and its dismissal exception.

Comment. Seems like speedy trial might be the next step. If the right to investigate without counsel began immediately upon the grand jury's no-bill, the State delayed 10 years.

[State v. Barber, No. PD-0510-25 \(Tex. Crim. App. Apr. 16, 2026\)](#)

Attorneys. Mark W. Bennett (appellate), Chip B. Lewis (appellate)(trial)

Issue & Answer. Absent limited exceptions, Article 14 requires an officer to observe an offense within his or her "presence or view." Unlike Article 14, the constitutional standard for probable cause does not require that all probable cause supporting facts be within the arresting officer's personal knowledge. Some of



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the Court's precedents have put these two concepts into conflict. Can an officer piece together facts of vehicle operation he did not witness in order to conduct a warrantless arrest consistent with the requirements of Article 14 (or in this case obtain a blood warrant)? **No.**

Facts. The State charged Barber with intoxication manslaughter. Barber consumed alcohol at a bar in Liberty County and was involved in a motor vehicle crash that resulted in the death of another driver. Officer Ibarra arrived at the crash scene approximately 40 minutes after the incident. By the time of his arrival, Barber had already been transported to a hospital, and Ibarra did not observe Barber at the scene or conduct any field sobriety tests. Ibarra later obtained a blood search warrant, but the affidavit for the warrant explicitly struck through the word "observed," indicating that Ibarra had not personally witnessed the offense. The warrant was executed at a hospital in Harris County. The trial court suppressed the evidence obtained from the warrant, finding that the offense did not occur in Ibarra's presence or view—a requirement under Article 14 of the Code of Criminal Procedure (absent another exception).

Quoted. Given [the Legislature's specific and repeated use of the phrase "presence or view" in Article 14, and indications when it is and is not required for an arrest] it stands to reason that the Legislature specifically intended the "presence or view" language to add meaning beyond the standard probable-cause requirement (that a crime was committed in the past) that many of the Texas arrest statutes contain. And whatever else the "presence or view" language might mean, it plainly appears to exclude an officer who did not perceive the offense through one of his five senses and did not arrive at the scene until after the offense was complete and no longer being committed.

* * *

The court of appeals wrote the 'presence or view' requirement out of Article 14.03(d), contrary to the plain meaning of the text. The court relied upon [*State v. Woodard*, 341 S.W.3d 404 (Tex. Crim. App. App. 2011)(suggesting an officer could piece together non-observed vehicle operation from other observations)] to do so, and to the extent *Woodard* can be read to address the issue, [*Woodard's*] analysis was very obviously flawed and wrong and conflicted with over a century's worth of precedent.

Comment. In addition to reversing the court of appeals holding that an officer effectively observed the offense in his presence, *and* disavowing *Woodard*, the Court held that the blood warrant (or an arrest) could not be upheld under an alternate theory of public intoxication: "Does a public intoxication offense occur in the officer's presence or view if, when the officer arrives, the defendant is no longer at a place in which he poses a danger to himself or others due to his intoxication? The obvious answer to these two questions is 'no' . . ."

1st District Houston

[*Ortego v. State*, No. 01-24-00878-CR \(Tex. App.—Houston \[1st Dist.\] Apr. 14, 2026\)](#)

Attorneys. J. Paxton Adams (appellate)(trial)

Issue & Answer 1. Article 38.23 requires a trial court to

suppress evidence obtained by *any person* in violation of the law. The Fourth Amendment requires a trial court to suppress evidence obtained by law enforcement (or those working on their behalf) in violation of Fourth Amendment principles. Do either of these exclusionary rules require suppression when a wife finds incriminating evidence on a husband's cell phone she had explicit consent to search? **No.**

Issue & Answer 2. Does the combination of the right to present a full defense, the right to compulsory process, and the State's non-existent confrontation right mandate that a trial court permit a defendant to call witnesses to testify remotely when they are unable to appear in-person? **No.**

Facts. The State convicted Ortego of continuous sexual abuse and indecency with a minor—his daughter, Jane Doe. The case arose after the appellant's wife, Jennifer, discovered sexual text messages between the Ortego and Jane Doe on his phone in December 2021. Jennifer had previously required Ortego consent to her routinely searching his phone under a document titled "A Commitment to You." Ortego stipulated that the handwriting on the document was his. During one of Jennifer's routine spousal phone searches, she discovered the incriminating messages. She took screenshots of the messages and later returned the phone to the appellant.

During the trial, the appellant requested that two witnesses—a Louisiana RV park employee and a forensic expert—testify via Zoom. The trial court denied this request, citing the lack of statutory authorization for remote testimony in such circumstances.

Quoted 1. The Court of Criminal Appeals [has addressed Ortega's attempt to graft Fourth Amendment principles onto Article 38.23]: "We disavow the idea that Article 38.23 extends the Fourth Amendment to private citizens acting in a private capacity. We reaffirm that the Fourth Amendment is a restraint on government and that it does not apply to private individuals who are acting as such." *State v. Ruiz*, 577 S.W.3d 543, 546 (Tex. Crim. App. 2019).

Quoted 2. The concerns with live remote testimony and the virtues of in-person testimony are obvious enough that the objecting party and the trial court need not explain them on the record to justify the universal preference for in-person testimony. As with other exceptions to the in-person testimony requirement, the proponent of live remote testimony has the burden to show entitlement to present testimony in the requested manner.

* * *

In light of the Supreme Court's explicit refusal to recommend a rule allowing remote testimony, and the unregulated federal practice on remote testimony, we cannot declare that the "right to present a complete defense" requires trial courts always to allow defense witnesses to testify remotely in a criminal trial.

Comment. I want to be mad that Jennifer made her husband sign a document giving her permission to search his phone on the regular. But . . . it looks like she had a good reason.

3rd District Austin

[*Bradshaw v. State*, No. 03-23-356-CR \(Tex. App.—Austin,](#)

Attorneys. John G. Jasuta (appellate)

Issue & Answer 1. When a child victim identifies a period of abuse that is only 3 days in duration, does sufficient evidence support a conviction for continuous sexual abuse—an offense requiring abuse lasting at least 30 days in duration? **Yes. Thirty, schmirty.**

Issue & Answer 2. Texas Penal Code § 12.42(c)(4) requires a sentence of life without parole for a defendant convicted of continuous sexual abuse when that defendant has a prior conviction for the same offense. If the trial court notes in its judgment that the defendant's sentence is enhanced to life without parole but cites the general prior-conviction statute, does the defendant avoid his life without parole sentence? **No.**

Issue & Answer 3. When a trial court's charge in a continuous sexual abuse trial instructs a jury that it must find two or more acts of sexual abuse occurring during a period of 30 days or more, has it sufficiently indicated to the jury that at least two of the acts of abuse must be separated by 30 days? **Yes.**

Facts. The State convicted Bradshaw of continuous sexual abuse of his ten-year-old son, C.B., over a four-month period in 2018. Bradshaw lived with C.B. and other family members in a trailer, where he shared a room with C.B. and sometimes C.B.'s older brother. During this time, Bradshaw sexually abused C.B. and showed him pornography daily. C.B. testified that Bradshaw touched him "[m]aybe weekly" and engaged in other sexual conduct. Bradshaw had a prior Oklahoma conviction for lewd molestation of a fifteen-year-old, which was introduced as evidence at trial. The jury convicted Bradshaw, and the trial court sentenced him to life imprisonment without parole under Tex. Penal Code § 12.42.

At trial, C.B. testified that he was 10 years old when the first act of abuse occurred and 10 years old when the last act of abuse occurred. It was undisputed that: (1) Bradshaw was not living in the county (and did not have access to C.B.) until June 16, 2018, and (2) C.B. turned 11 on June 19, 2018.

Analysis 1. Bradshaw contends that C.B.'s testimony creates an impossibility under the continuous sexual abuse statute, requiring the abuse to occur for a period of 30 days or more. Bradshaw points to C.B.'s testimony indicating that abuse started and ended before he turned 11 years old, and evidence that Bradshaw only had access to C.B. for 3 days while he was 11 years old. Contrary to Bradshaw's interpretation of this testimony, C.B. testified that abuse occurred "maybe weekly," and the limiting testimony he points to seems to indicate a timeline for oral sex—only one of the various acts of sexual abuse involved.

Analysis 2. Appellate courts can modify a judgment to correct the court's statutory citation.

Analysis 3. Sister courts and commentators suggest that this specific instruction does not inform the jury that two acts must be separated by 30 days. The Third Court is fine with this.

Comment. The nuances of oral sex v. other acts of abuse, the court references in dismissing Bradshaw's sufficiency argument do not seem supported by the record. At this point, courts are upholding continuous sexual abuse cases based on the vibes of testimony. Or probably they always have.

[Lane v. State, No. 03-24-579-CR \(Tex. App.—Austin, Apr. 3, 2026\)](#)

Attorneys. Jessica S. Freud (appellate), Michael White (trial)

Issue & Answer. A trial court can admit evidence of other crimes and bad acts for specific purposes that *are not* probative of the defendant's propensity to commit the act for which he is being tried. Tex. Rule Evid. 404. On request, the trial court must issue a limiting instruction identifying the purpose for which the jury can use the evidence. Tex. Rule Evid. 105. When other crimes and bad acts that would fall under Rule 404 are admitted without objection, are they admitted for *all purposes* such that the trial court is absolved of giving a correct limiting instruction in the jury charge? **Yes.**

Facts. The State convicted Lane of aggravated assault with a deadly weapon after setting his wife, Nina Lane, on fire. During the

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trial, Nina testified about the charged offense and extensive prior domestic abuse, including choking, hitting, pouring gasoline on her, punching her, and attempting to shoot her. Defense counsel did not request contemporaneous limiting instructions when this extraneous offense evidence was admitted. The trial court included a sua sponte jury instruction regarding extraneous offenses, which listed permissible purposes for considering such evidence but did not explicitly prohibit its use for propensity purposes. Lane appealed, arguing that the omission constituted error.

Analysis. Lane did not object to the extraneous crimes and did not request a limiting instruction. The evidence was admitted for all purposes [including to show the defendant's propensity to commit those kinds of crimes]. The court was not under an obligation to instruct the jury on the prohibited use of propensity when it gave a less-than-complete limiting instruction in the jury charge.

Comment. Well, I don't like this. First off, allowing a jury to convict based on evidence of other acts showing a propensity to commit the alleged offense violates due process. Second, the trial court has an independent duty to correctly charge the jury on the law. The trial court did not do that—it gave examples of what the evidence could be used for, without limitation.

7th District Amarillo

[Skorich v. State, No. 07-25-00001-CR \(Tex. App.—Amarillo, Mar. 30, 2026\)](#)

Attorneys. Devon Johnston (appellate)(trial), Candace Norris (trial)

Issue & Answer. Can Texas acquire jurisdiction over injuries inflicted to a victim in another State? **Yes.**

Issue & Answer 2. When a child's injuries are inflicted by a co-defendant, can the State convict a primary defendant for injury to a child by omission (nourishment, care, and protection)? **Yes.**

Facts. The State convicted Skorich of injury to a child. Skorich was a long-haul trucker traveling through Texas with a child, A.T., in his care. A.T. exhibited signs of severe physical abuse and neglect, including dehydration and multiple injuries in various stages of healing. While traveling through Texas, A.T.'s condition deteriorated significantly, progressing from lethargy to unconsciousness. Upon reaching Hereford, Texas, A.T. was unresponsive and was taken to the emergency room, where medical staff observed extensive injuries and dehydration. Skorich and a co-defendant provided conflicting explanations for A.T.'s injuries, including claims of clumsiness, medical conditions, and self-inflicted harm. Evidence also revealed that Skorich's co-defendant disciplined A.T. using a belt, often leaving bruises. Skorich denied knowledge of the injuries.

Analysis 1 & 2. Evidence showed that A.T.'s conditions worsened as Skorich traveled through Texas. Texas Penal Code § 1.04 provides for jurisdiction when “conduct or a result that is an element of the offense occurs inside this state.” Evidence showed that Skorich's failure to provide nourishment and care while in Texas worsened A.T.'s injuries.

[Molinar v. State, No. 07-25-00201-CR \(Tex. App.—Amarillo, Apr. 2, 2026\)](#)

Attorneys. Allison Clayton (appellate), Linzy Hill (appellate), Jesse Mendez (trial), Isaias Solorzano (trial), Troy Nicholson (trial)

Issue & Answer. Is a defendant entitled to a lesser-included-offense instruction when he fails to identify for the trial court what evidence supports the theory that he only committed the lesser (and not the greater) offense? **No.**

Facts. The State convicted Molinar of aggravated kidnapping and aggravated sexual assault, receiving a 55-year sentence. The charges stemmed from an incident where Deborah Martinez alleged that Molinar physically and sexually assaulted her after dragging her into a back bedroom of his home. Martinez eventually escaped, and Molinar was apprehended after being found in a backyard bunker. At trial, Molinar requested a jury instruction on the lesser-included offense of unlawful restraint, which the trial court denied.

Analysis. A defendant is entitled to an instruction on a lesser-included offense when the offense is, in fact, a lesser-included offense, and the defendant can point to evidence in the record indicating he committed only the acts necessary to prove the lesser offense. Here, unlawful restraint is a lesser-included offense of aggravated kidnapping. However, when Molinar requested the lesser-included-offense instruction, Molinar did not identify the relevant evidence showing he might have only committed that offense.

13th District Corpus Christi/Edinburg

[Reyna v. State, No. 13-24-00207-CR \(Tex. App.—Corpus Christi, Mar. 26, 2026\)](#)

Attorneys. John W. Tinder (appellate), Dante E. Dominguez (trial)

Issue & Answer 1. Is an objection to the exclusion of defense evidence and an offer of proof sufficient to preserve error? **No.**

Issue & Answer 2. Is a contested motion for new trial with supporting affidavit sufficient to preserve error in its denial without a hearing? **No.**

Facts. The State convicted Reyna of assault on a public servant. During trial, the defense sought to introduce evidence of the complainant officer's prior disciplinary records, which included an incident where the officer allegedly assaulted a handcuffed individual. The defense argued that this evidence was relevant to show the officer's violent tendencies and to support Reyna's defense of others. The trial court granted the State's motion in limine, excluding the evidence, and later allowed the defense to make a formal bill of exception for appellate purposes.

Quoted 1. To preserve these evidentiary complaints for appellate review, Reyna was required not only to make an offer of proof or bill of exception and obtain a ruling, which he did, but also to state the grounds for the ruling he desired with sufficient specificity to make the trial court aware of the complaint.

Quoted 2. Allegations made in a motion for new trial or supporting affidavit are not self-proving and must be offered into evidence at a hearing. The appellate record contains no indication that the affidavit Reyna relies on—or any other evidence—was presented to and admitted by the trial court at the motion for new trial hearing. Moreover, we conclude that a reporter's record is necessary for review of Reyna's second issue concerning the trial

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court's denial of his motion for new trial.

Comment. Poor judicial system. Had the trial judge only known what Reyna was asking for with his objection, offer of proof, and insistence on using the evidence, we would have had a fairer trial. This is all Reyna's fault. So, he gets the Dennis Nedry "uh uh uh, didn't say the magic word" screen. The velociraptors rule the park again.

14th District Houston

[Joseph v. State, No. 14-25-00062-CR \(Tex. App.—Houston \[14th Dist.\], Mar. 24, 2026\)](#)

Attorneys. Carmen Roe (appellate), Ryan Fremuth (trial), Robert Huerta (trial)

Issue & Answer 1. Article 38.37 broadly allows the admission of extraneous bad acts committed against a child assault victim. The qualifying language of the statute states: "if committed against a child younger than 18 years of age." Does this qualifier apply to the age of the complainant when the bad act was committed? **No. It applies to the age of the complainant at the time of the offense being prosecuted.**

Issue & Answer 2. Is the trial court's concern that certain cross-examination questions of a complainant (with the witness's attorney present) might elicit incriminating testimony a basis to restrict a defendant's cross-examination. **Yes, in the Fourteenth Court of Appeals [ed: probably not]**

Facts. The State convicted Joseph of sexually assaulting a minor. The complainant testified that Joseph sexually assaulted him multiple times, including at a hotel and later at Joseph's house. The complainant eventually made an outcry to relatives, who contacted law enforcement. A sexual assault examination revealed physical evidence consistent with the complainant's allegations. During the trial, the State introduced evidence of extraneous sexual assaults involving the complainant when the complainant was an adult. Joseph objected, arguing that the evidence was overly prejudicial lacked sufficient probative value based on the complainant being an adult when the extraneous assaults occurred. Additionally, the Joseph sought to introduce evidence of the complainant's alleged involvement in an aggravated robbery and a shooting incident, arguing that such evidence was relevant to impeach the complainant's credibility. The trial court excluded this evidence.

Analysis 1. The state sought to admit the extraneous assaults committed against the complainant when he was an adult pursuant to Article 38.37. Joseph argued that Article 38.37 only applies to sexual assault allegations involving children. Article 38.37 allows for the admission of relevant extraneous offenses committed against the same complainant (notwithstanding Rules 404 and 405) in certain prosecutions. Here the relevant subsection (13) provides "if committed against a child younger than 18 years of age . . . [a prosecution under] Chapter 22 (assaultive offenses)" the modifier "if committed against a child younger than 18 years of age" refers to the prosecution in which the State seeks to admit the extraneous evidence. It does not refer to the age of the victim when the extraneous bad act occurred.

Analysis 2. Joseph wanted to cross-examine the complainant about his dismissed burglary charge, and specifically about his opinion regarding snitches. The trial court conducted a hearing

outside the presence of the jury in which the complainant had strong negative opinions about snitches. The trial court permitted cross-examination about the complainant's feelings about snitches generally, but when the complainant expressed ambivalent feelings about snitches in his testimony before the jury, the trial court would not allow Joseph to press further. Joseph contends that the restriction on cross examination violated his Sixth Amendment right to confront and his Fifth Amendment right to present a complete defense. "We construe this argument as a challenge to the trial court's exclusion of evidence, which we review for an abuse of discretion." There is no absolute right to cross examine a witness and "The trial court correctly recognized that, if the complainant were allowed to be questioned about the facts and circumstances surrounding the aggravated robbery . . . then the complainant might provide [testimony that incriminated himself]." "Given the risk of self-incrimination, the trial court did not abuse its discretion [in restricting cross-examination]."

Comment. Appellate courts love to take a constitutional argument and just construe it as something easier to deal with. This should be automatic grounds for a PDR grant. Additionally, I'm unfamiliar with the "the witness might incriminate himself" doctrine of evidentiary exclusion. Probably because it doesn't exist.

Howard v. State, No. 14-24-00283-CR (Tex. App.—Houston [14th Dist.], Mar. 31, 2026)

Attorneys. Mark Hochglaube (appellate), Brennan Dunn (trial)

Issue & Answer. After a jury returns a guilty verdict, does a trial court engage in vindictive punishment by expressing that it would have sentenced the defendant to 30 years before trial but then encourages the defendant to reach an agreement with the prosecutor for a sentence in the "40-50 range?" **No. Not here.**

Facts. The State convicted Howard of two counts of aggravated sexual assault and one count of aggravated robbery. The offenses involved gun violence, forced sexual acts, and threats against the complainant. The complainant suffered significant physical injuries, as confirmed by a forensic nurse. Another woman testified to a similar assault by Howard. Before trial, Howard was willing to accept a 20-year sentence, while the State proposed 40 years. The trial court indicated it would accept 30 years. After the jury's guilty verdict, the trial court suggested a sentencing range of 40 to 50 years during post-conviction negotiations. Ultimately, the court imposed a 50-year sentence. Howard did not file a motion for a new trial or raise objections to the voluntariness of the sentencing agreement before appealing.

Analysis. After the jury convicted Howard, the trial court engaged in pseudo-negotiation with Howard regarding an agreed punishment in lieu of a sentencing hearing before the court. The trial court expressed a motivation to spare witnesses from the trauma of testimony. The court reminded Howard that a 30-year sentence would have been accepted before trial, but given the fact that the court had now heard testimony, any agreement "should be in the 40 to 50 range." The court also indicated that it had not made up its mind on punishment and that its 40-50 range admonishment was without the benefit of hearing any punishment evidence. "The trial court should not have suggested

a punishment range to guide the parties' negotiations."

Howard invokes rules of sentencing vindictiveness applicable to new trials (greater punishment for having exercised a right to trial or appeal). This case is distinguishable because it is not a new trial and the trial court had not yet heard the punishment evidence. The Supreme Court has acknowledged that facts elicited during a trial may impact a judge's pre-trial judgment on an appropriate punishment. Moreover, the trial court's concern for potential witness trauma is indicative of his posture of leniency for accepting responsibility and alleviating witness hardship. The entirety of the record demonstrates that the trial court's sentence was not vindictive (was not meant as punishment for having exercised the right to trial).

Comment. I think a motion to recuse would have been proper when the judge involved himself in plea negotiation. The court of appeals dedicates two paragraphs to admonishing trial courts not to what the court did in this case. If they aren't going to reverse, they might as well be handing out noise-cancelling headphones.

Hawkins v. State, No. 14-23-00699-CR (Tex. App.—Houston [14th Dist.] Apr. 14, 2026)

Attorneys. Amy Martin (appellate), Douglas Brad Loper (trial), Robert Kent Loper (trial)

Issue & Answer 1. When a defendant commits a new offense while on bond and the State proves the new offense by placing the defendant at the scene of the crime using the defendant's location data acquired by a GPS ankle monitor he wore as a condition of bond in his pending case, can the Defendant complain for the first time in his new case that the GPS tracking violated his Fourth Amendment rights? **No.**

Issue & Answer 2. Is it reversible prosecutorial misconduct to elicit testimony that the apartment complex at which the defendant lives is associated with a specific gang? **No.**

Facts. The State convicted Hawkins of capital murder. On October 26, 2020, an 11-year-old boy, Samuel, and his stepfather, Menuell Solomon, were shot and killed at a townhome complex. Three masked gunmen approached the victims' car through a hole in a fence and opened fire. Hawkins, who was wearing a GPS ankle monitor as a bond condition for a separate murder charge, was placed at the scene by GPS data several hours before, during, and after the shooting. Surveillance footage showed a masked gunman with a bulge at the left ankle consistent with an ankle monitor, and Hawkins' social media posts depicted him wearing clothing similar to that of the gunman in the footage. No DNA, fingerprints, or eyewitness testimony directly tied Hawkins to the crime.

Analysis 1. Hawkins waived any Fourth Amendment challenge to the GPS monitoring by not objecting when that bond condition was imposed. Given that he did not object and accepted the condition, Hawkins was on notice that his movements were monitored. He did not have an objectively reasonable expectation of privacy he could assert against the police department ordering a single days' worth of his GPS location data.

Analysis 2. "The detective's testimony—that the apartment complex was 'associated with other Ralph gang members'—was not an unequivocal statement that appellant was in a gang." It was

a clear violation of the motion in limine granted by the trial court and the trial court correctly sustained the objection. Because the statement did not directly tie Hawkins to a gang, the trial court did not abuse its discretion in denying a motion for new trial.

Comment. Maybe there's a narrower issue here. If the bond condition was for probation to monitor compliance with a specific condition of bond, it would seem to exceed the scope of Hawkins' "consent" or "notice" when the police department ordered up a days' worth of his movements to solve a crime.

Vigil v. State, No. 14-24-00707-CR (Tex. App.—Houston [14th Dist.] Apr. 14, 2026)

Attorneys. Joel H. Bennett (appellate), Tyler Alley (trial), Katelyn Willis (trial)

Issue & Answer. Murder can be elevated to capital murder when a defendant commits the murder in the same transaction as committing burglary, or when the defendant murders two individuals in the same episode. When a defendant tries but fails to break down a door to confront another person, leaves but then engages in a separate altercation with an unrelated person who the defendant shoots and kills, has the State sufficiently proven one of these two elevating circumstances? **No.**

Facts. The State convicted Vigil of capital murder. Vigil went to an apartment complex in Galveston County with two friends, Gabriel Cantu and Josh Rojas. The group intended to confront Maldonado, a resident of the complex. They shot at Maldonado's apartment door but fled when they could not enter. During their flight, they stopped to shoot at vehicles they believed belonged to Maldonado. During this episode, one of the trio shot Rojas. Later, Vigil shot and killed Richard Rocco, when he attempted to intervene. Vigil refused to take Rojas to the hospital, and Rojas subsequently died. At trial, the State argued that Vigil knowingly caused Rojas's death by firing his rifle in the direction of Maldonado's vehicle, but evidence suggested the shooting was accidental. Vigil does contend that his killing of Rocco was intentional.

Analysis. "The State all but concedes the shooting of Rojas was accidental" but argues that the reasonable certainty that Rojas would be shot while shooting at a vehicle establishes the element of knowing or intentional. The State conflates intentional and knowing mens rea with recklessness. That Vigil recklessly shot Rojas is supported by the fact that he did not leave Rojas at the scene as he did Rocco. "The State's theory that appellant, while committing an inherently dangerous felony, accidentally shot and killed an accomplice, more accurately fits within the felony murder paradigm of Penal Code section 19.02(b)(3) . . ." The State cannot repackage felony murder as an offense aggravating murder to capital murder.

As it relates to the State's theory that Vigil killed Rocco in the course of committing burglary, no evidence shows that this killing occurred as part of the same transaction of a purported burglary or in flight therefrom. Undisputed evidence shows the trio abandoned their effort to break through the front door. Perhaps there was momentary flight when the trio started back toward their vehicle, but they turned their attention to engage in the distinct criminal act of shooting at a vehicle. Only then did Rocco intervene. Only then did Vigil commit murder.

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

- 2nd District Fort Worth
- 4th District San Antonio
- 5th District Dallas
- 6th District Texarkana
- 8th District El Paso
- 9th District Beaumont
- 10th District Waco
- 11th District Eastland
- 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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☐ **Thursday / Friday, July 23 -24: Guardians of Sacred Justice • 8 am –12 pm • \$40**

Breakfast \$5 Adults: # _____, Kids: # _____ = Total \$ _____

☐ **Saturday, July 25: TCDLA/TCDLEI/CDLP Orientation • 9:30 am • Free!**

Breakfast \$5 Adults: # _____, Kids: # _____ = Total \$ _____

Wednesday, July 22, 6:45 pm, Dinner at Sea Ranch:

Includes tea, appetizers, salad, & sinful seafood & steak platters with sides while enjoying the great company of your president-elect, Clay Steadman. Located on S. Padre Blvd.

\$72 Adults: # _____, \$36 Kids (under 10): # _____ = Total: \$ _____

Thursday, July 23, 12:30 pm, Beach Bar-B-Que: Bobby Lerma & the Boca Chica Beach Boys will barbecue a feast you don't want to miss. Food & beverages will all be included. Bring the entire family out to enjoy the day. Located at the DJ Lerma Pavillion. Cash parking only

Free! Adults: # _____, Kids: # _____

Thursday, July 23, 3:30 pm, Sand Castle Building with Sandyfeet Sand Castle: Looking to let your creativity shine? Join us for sand castle building on the beach, in front of the deck at Margaritaville! No experience needed, come for the fun & stay for the laughs.

\$25 Adults: # _____, Kids: # _____ = Total \$ _____

Thursday, July 23, 7:00 pm, Padre Island Brewing Company: Join us and enjoy some delicious starters! Whether you are in the mood for a handcrafted beer, an awesome burger, a great sandwich, a homemade pizza, or some of the best seafood on the island, Padre Island Brewing Company has what you want! 3400 Padre Boulevard, South Padre Island, TX, 78597

Free! Adults: # _____, Kids: # _____

Friday, July 24, 1:00-5:00 pm, Boating and Fishing: Experience SPI like never before aboard an exclusive boat & fishing tour. With limited space of 30 guests, be sure to reserve your spot early! 33256 State Park Rd 100

\$34 Adults: # _____, Kids: # _____ = Total \$ _____

Friday, July 24, 7:00 pm, Louie's Famous Seafood Buffet + Fireworks: Relax in the Sunset Lounge or on the private balcony overlooking the fireworks barge. Gourmet dining with seafood galore and slow-roasted prime rib. Louie's also features a live band from 7:00 to 10:00 pm, followed by a DJ until 2:00 am. 2305 Laguna Blvd, South Padre Island, TX 78597

\$42 Adults: # _____, \$18 Kids (under 10): # _____ = Total \$ _____

Saturday, July 25, 7:00 pm, Luau with the Steadman's: Join us for a beach Luau & watch the sunset

\$25 Adults: # _____, Kids: # _____ = Total \$ _____

Other Island Activities go to www.visitsouthpadreisland.com

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Thursday, September 3

- Law Office Management Using AI Sean Hightower
- Effective Storytelling: Using AI to Craft Rocky Ramirez
- Powerful Openings & Closings
- Pre-Trial Investigation: Leveraging AI to Set the Tone Cody Breunig
- & Tempo Before Trial Begins
- Voir Dire Strategy: Using AI to Identify Bias & Shape Jury Selection Jason Bloom
- AI Legal Research Kyle Therrian
- Direct Examination Done Right: Using AI to Structure a Conversation Grant Scheiner
- Worth Listening to & to Present Evidence in an Effective Manner
- How to Present Visual Evidence Clifford Duke

Friday, September 4

- Hands on How to Use AI Platforms..... Don Flanary
- Cross-Examination: Using AI to Dissect the Adversarial Witness Neal Davis
- The Expert Witness: Using AI to Prepare, Challenge, Eric Devlin
- & Litigate Rule 705 Experts
- How to Tell if It is Fake – Videos, Pictures, or AI Research? Blakely Mohr
- Ethics of AI..... Brent Mayr
- Attacking the State Usage & How Fight Cops or DA Using AI Chris Fredericks

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