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Seminars sponsored by CDLP are funded by the Court of Criminal Appeals of Texas.
Contents

**Features**

<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>18</td>
<td>Candidates for Board of Directors</td>
</tr>
<tr>
<td>19</td>
<td>Greg Westfall, Shutterbug</td>
</tr>
<tr>
<td>22</td>
<td>Unjust Courtroom Practices: Always Seating the Prosecution Closest to the Jury</td>
</tr>
<tr>
<td></td>
<td>By Mimi Coffey</td>
</tr>
<tr>
<td>30</td>
<td>The Outdoor Grillers Miracle</td>
</tr>
<tr>
<td>32</td>
<td>When Sex Becomes Addiction</td>
</tr>
<tr>
<td></td>
<td>By Dr. Robert Weinberger &amp; Dr. Brigitte Lank</td>
</tr>
<tr>
<td>36</td>
<td>The Trial College 2009 Yearbook</td>
</tr>
<tr>
<td>48</td>
<td>Catch of the Day: Motion to Seat Defendant Closest to the Jury</td>
</tr>
<tr>
<td></td>
<td>By Mimi Coffey</td>
</tr>
</tbody>
</table>

**Columns**

<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>President’s Message</td>
</tr>
<tr>
<td>10</td>
<td>Executive Director’s Perspective</td>
</tr>
<tr>
<td>11</td>
<td>Editor’s Comment</td>
</tr>
<tr>
<td>13</td>
<td>Federal Corner</td>
</tr>
<tr>
<td>16</td>
<td>Said &amp; Done</td>
</tr>
</tbody>
</table>

**Departments**

<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>TCDLA Member Benefits</td>
</tr>
<tr>
<td>6</td>
<td>Staff Directory</td>
</tr>
<tr>
<td>7</td>
<td>CLE Seminars and Events</td>
</tr>
<tr>
<td>40</td>
<td>Significant Decisions Report</td>
</tr>
</tbody>
</table>
Enterprise Car Rental
Ten percent discount for TCDLA members. Enterprise is the largest rental car company in North America in terms of locations and number of cars, while providing the highest level of customer service. The corporate account number for TCDLA members is 65TCDLA. You may contact your local office directly or visit www.enterprise.com. When booking online, enter your location, date, time, and the corporate account number. You will then be asked for your discount ID, which is the first three letters of TCDLA (TCD). Make your reservation at Enterprise Rent-a-Car.

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Membership Directory (printed and online)
Comprehensive listing of current TCDLA members, updated, reprinted, and mailed annually, and online directory of current TCDLA members.

Lawyer Locator
Online directory providing members an opportunity to list up to three areas of practice for public advertising.

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Extensive list of experts for all types of criminal cases, including investigation, mitigation, and forensics specialists.

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New members will receive a comprehensive CD of state forms and motions, including DWI, post-trial, pretrial, and sexual assault motions.

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Display your TCDLA membership with pride! New members will receive a personalized certificate by mail.

Brief/Motion Bank
**May**
May 7, 2009  
CDLP | Indigent Defense  | co-sponsored with Dallas Bar Association Criminal Law Section  
*Dallas, TX*

May 8, 2009  
TCDLA | David Burrows presents the DWI Defense Project  | co-sponsored with Dallas Bar Association Criminal Law Section  
*Dallas, TX*

May 15, 2009  
CDLP | Indigent Defense  | co-sponsored with Harris County Criminal Lawyers Association  
*Houston, TX*

**June**
June 3–4, 2009  
CDLP | Texas Public Defense Training  
*San Antonio, TX*

June 4–6, 2009  
TCDLA | 22nd Annual Rusty Duncan Advanced Criminal Law Course  
*San Antonio, TX*

June 5, 2009  
TCDLEI Board, TCDLA Executive, and CDLP Committee Meetings**  
*San Antonio, TX*

June 6, 2009  
TCDLA Annual Board Meeting**  
*San Antonio, TX*

**July**
July 9–10, 2009  
CDLP | The Ultimate Trial Notebook  
*South Padre Island, TX*

July 11, 2009  
TCDLA/TCDLEI Boards, TCDLA Executive, and CDLP Committee Orientation**  
*South Padre Island, TX*

July 22–26, 2009  
TCDLA Retreat Santa Fe  
*Santa Fe, New Mexico*

**August**
August 14, 2009  
CDLP | Evidence  
*Austin, TX*

August 14, 2009  
TCDLA | Top Gun DWI: A Blood Test Trial from Start to Finish  
*Houston, Texas*

August 28, 2009  
CDLP | TBD  | co-sponsored with San Antonio Criminal Lawyers Association  
*San Antonio, TX*

**September**
September 24, 2009  
TCDLA | Juvenile Law  
*Dallas, TX*

September 25, 2009  
TCDLA | Drug Seminar  
*Dallas, TX*

September 26, 2009  
TCDLA/TCDLEI Boards, TCDLA Executive, and CDLP Committee Meetings**  
*Dallas, TX*

**October**
October 22–23, 2009  
CDLP | 7th Annual Forensics  
*Houston, TX*

**November**
November 12–13, 2009  
TCDLA | Stuart Kinard Memorial Advanced DWI Seminar  
*San Antonio, TX*

**December**
December 3–4, 2009  
TCDLA | Sexual Assault  
*Houston, TX*

December 5, 2009  
TCDLA/TCDLEI Boards, TCDLA Executive, and CDLP Committee Meetings**  
*Houston, TX*

Seminars sponsored by CDLP are funded by the Court of Criminal Appeals of Texas.

*Unless otherwise noted, seminars are open only to criminal defense attorneys, mitigation specialists, defense investigators, or other professionals who support the defense of criminal cases. Law enforcement personnel and prosecutors are not eligible to attend.

** Open to all members

Note: Schedule and dates subject to change. Visit our website at www.tcdla.com for the most up-to-date information.
Texas Rule of Professional Conduct 3.06(d) provides that after a jury is discharged a lawyer shall not make any statement to a juror calculated to influence his actions in future jury service. After deliberations, jurors are often told about prior convictions, extraneous offenses, and other evidence not admitted during the trial on the merits. Statements made to jurors after deliberation about inadmissible evidence forever taints their ability to serve in the future and is prohibited by the Rules of Professional Conduct.

When statements regarding inadmissible evidence are made to convicting jurors, the statements tend to validate beliefs that jurors often have that the person on trial had done something else. When these same statements are made to jurors who did not convict, those jurors often feel remorseful about their decision. In either circumstance, telling jurors after deliberation about inadmissible evidence serves no purpose and is prohibited by the Rules of Professional Conduct.

When jurors are contaminated with information that was inadmissible, it results in jurors who, when summoned again, resent the integrity of the process. It results in jurors who are more likely to convict and results in jurors who are likely to believe that procedural safeguards are nothing but a farce. The constitutional guarantee of the presumption of innocence is forever destroyed in their minds.

In Brandborg v. Lucas, 891 F.Supp. 352, 356 (E.D. Texas 1995), the Court noted that “the search for an impartial juror is a balancing effort by the court between the competing parties, the public, and the potential juror. Without proper consideration of the rights of each of these interests, the jury will not be the solid cornerstone of our trial system that it must be.” Trial judges have a duty to ensure the impartiality of prospective jurors is never compromised. This duty extends to statements made to jurors after deliberations.

The Sixth Amendment guarantees “the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” The selection of an impartial jury entails the theoretical selection of persons free of bias or prejudice to either party. Courts have longed recognized
that “it is certainly much to be desired that jurors should enter upon their duties with minds entirely free from every prejudice.” *Queen v. Hepburn*, 3 L.Ed. 348 (1813). Trial judges must not allow conduct interjecting bias and prejudice into the minds of prospective jurors.

When lawyers, judges, or other court personnel inform jurors after trial of inadmissible evidence—especially in the form of prior convictions or extraneous offenses—they are directly imposing a bias and prejudice in the minds of those jurors as it relates to future jury service. These statements are directly prohibited by Rule 3.06(d) of the Rules of Professional Conduct. Trial judges should instruct prosecutors, defense counsel, and court personnel that they are prohibited from providing jurors with information that was not admitted at trial. If jurors ask about what was excluded, the proper response is that the law does not allow the question to be answered.

The Constitution guarantees that all accused persons shall enjoy the right to trial by an impartial jury. Rule of Professional Conduct Rule 3.06(d) prohibits a lawyer from making any statement to a juror calculated to influence his actions in future jury service. The rule is not limited to statements made before or during trial and encompasses statements made to jurors after deliberations. The Constitutional guarantee of trials by fair and impartial jurors depends on the enforcement of this rule.

Feeling the squeeze these days?
There are still scholarships available for Rusty Duncan:
The Texas Court of Criminal Appeals is providing scholarships for judges and public defenders …

TCDLEI offers 42 scholarships for attorneys in financial need, and the State Bar of Texas is providing another ten …

Go to www.tcdla.com for more information

Become a Fellow or Super Fellow
Texas Criminal Defense Lawyers Educational Institute

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TCDLEI has created an endowment program to ensure continuing legal education for tomorrow’s criminal defense lawyer.

☒ Your money will be deposited into a special endowment fund.
☒ Your contribution will be used to build a fund for future Texas lawyers.

What you can do? Contribute $1,500 and become a Fellow. Contribute $3,000 and become a Super Fellow (form available on our website).

Help support TCDLEI in its efforts to make funds available for future criminal defense lawyers in Texas. For more information, contact Joseph Martinez at 512-478-2514 extension 26.

Make YOUR contribution TODAY!
Our Move

The TCDLA home office is moving! As of April 27, our address will be 1717 W. 6th St., Ste. 315, Austin, TX 78703. We have installed a new digital phone system, and in addition to the main phone line, you can now call directly to each staff member, as listed on page 6 of the Voice.

We are sad to announce Thomas Gilbert Sharpe Jr., past president of TCDLA, passed away on April 6, 2009. Thomas, a charter member, was 73 years young. A memorial service was held on Saturday, April 11, at Church of the Advent Episcopal in Brownsville. A private burial followed. You can sign a guest book and extend your condolences to the Sharpe family at www.darlingmouser.com.

Very special thanks to Randy Wilson, Nicole DeBorde, and Emily DeToto, our course directors for “Voir Dire: You Asked for It! Here it is . . .” seminar held in Houston April 2–3. The seminar had five voir dire demonstrations including a mock trial. We had close to 175 participants. We want to thank our speakers and, in particular, our judge, the Honorable Vanessa Velasquez, 183rd District Court. You can purchase a DVD of the entire seminar for the membership price of $125.

TCDLA members should start making plans for next year’s TCDLA Retreat with President-Elect Stan Schneider to beautiful Santa Fe, July 23–26, 2009. Come join us for a night in the foothills of the Sangre de Cristo Mountains of northern New Mexico at the Santa Fe Opera, Friday, July 24, for Puccini’s La Traviata. There will be a pre-opera Texas Tailgate dinner. Please call the home office for more information.

We have a new legislative listserve. All current TCLDA members have been added. Members cannot post or reply to this listserve; only the legislative team and staff will post updates. Members may unsubscribe by logging into the members-only section.

All local criminal defense associations are invited to the Annual TCDLA Affiliates Breakfast to be held on Friday, June 5, at 7:30 a.m. in the Henry B. Gonzalez Convention Center in San Antonio. If you are trying to start a local criminal defense bar, please come to the breakfast and learn how to start and sustain one. Seating is limited so we ask that you limit the number of representatives to three from each local defense bar or city. RSVP by May 29 to Joseph Martinez at (512)646-2726 or jmartinez@tcdla.com.

We have over 50 scholarships for the 22nd Annual Rusty Duncan Advanced Criminal Law Course in San Antonio, June 3–6, thanks to TCDLEI and the State Bar Criminal Justice Section. We also have funds from the Court of Criminal Appeals for both judges and public defenders for travel stipends and Rusty Duncan registrations. In addition, we have received funds from the CCA for public defenders to attend an NLADA training June 3–4 in San Antonio. Please go to our website for application forms or call our home office at (512)478-2514.
In the fall of 1770, John Adams went to trial representing basically all the British soldiers involved in the Boston Massacre. After the shooting in early March, Adams (who did not live in Boston) was recruited to represent the accused after every attorney in Boston had refused. During the run-up to trial, Adams had become convinced that his clients were innocent, having acted against the mob in self-defense. Can you imagine his position? Can you imagine, in the context of the public sentiment at the time, in the midst of the anonymous handbills being circulated stoking the hatred for his clients, that Adams comes to the conclusion that his clients—these clients—are innocent?

After the trials that followed, six of the soldiers and their commanding officer were acquitted outright. Two of the soldiers were convicted of murder, but the charges were reduced. Two were convicted of manslaughter. An amazing result.

During his jury argument he actually argued to the jury that it is far better to let ten guilty men go free than to send one innocent man to prison. His reasoning was that it is more important for a community to protect innocence than it is to punish the guilty.

Fast forward to the spring of 1999. I am in individual voir dire in a death penalty case, and we have in front of us as a potential juror a middle-aged professional woman. Her questionnaire is horrible, but I can't get her to say anything. So just for the hell of it, I ask her if she had ever heard the saying that it is better to let ten guilty men go free than to send one innocent man to the penitentiary. She issued sort of a hissing chuckle. The conversation continued.

“So what do you think of that saying?”
“Tell me more. What do you think about the concept?”
“OK, I'll answer it this way. I would rather have my only son wrongfully accused, imprisoned, and executed than to have one guilty man get out of prison and hurt somebody.”

I asked this same question again in a mock voir dire within the year and got a very similar response. I then just kind of pitched the concept, believing that in our society, this quaint sentiment had just kind of gone out of style. After all, in our relatively new “victim-centered” culture, “protecting the innocent” is never used in connection with those who are actually...
charged with criminal offenses. I could not imagine ever using this in a closing argument like Adams had done. After all, we need to maintain our credibility with the jury, right?

But something happened last year that has caused me to re-think that position. I watched a local lawyer named Joetta Keene voir dire a jury panel in a non-death capital murder case. She quoted the phrase as “It is better to let one hundred guilty men go free than to send one innocent man to prison.” She then asked the panel what they thought of that. There were some snorts and guffaws, but the majority of those who spoke were willing to agree with the concept.

At the end of this trial her client, like most of Adams’ Boston Massacre clients, was acquitted of all charges. Not guilty. Capital murder.

This 10-to-1 ratio is generally known as “Blackstone’s Formulation.” See http://en.wikipedia.org/wiki/Blackstone’s formulation. In reality, it is nothing more than another way of saying “presumption of innocence.”

I once heard a prosecutor during voir dire refer to the presumption of innocence as a “legal fiction.” Over time, I wonder if we don’t buy into the notion just a little bit. There have been times when I have. The presumption of innocence is not just a legal technicality that has no application in today’s “real world.” Quite to the contrary, it is vitally important to our society and way of life. That point is emphatically made every time we have another DNA exoneration. After this recent trial, I resolved to start—once again—talking about the presumption of innocence like I really believe in it.

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ARTICLE VI
BOARD OF DIRECTORS

Sec. 2. Executive Committee.

The Executive Committee shall consist of the officers of the Association, as set forth in Article VII, sec. 1, infra, the editor of the Voice for the Defense, and two members of the Board of Directors Association appointed by the President. Of the appointed members of the Association, at least half shall be members of the Board of Directors. Each membership area designated in Section 11 of Article III shall be represented on the Executive Committee. The Executive Committee shall have such powers and duties as are provided in these bylaws and as may be prescribed by the Board of Directors. The Executive Director is a non-voting member of the Executive Committee.

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Scholarships available!
Call 512-478-2514 for details or visit www.tcdla.com

You’ll be singin’ the blues and cryin’ if you miss the Rusty Duncan Rodeo...

Hyatt Regency 210-222-1224 (Host hotel: $175)
Menger 210-223-4361 ($129)
Hampton Inn 210-225-8500 ($85)
Shuttle to convention center provided from all three hotels.
We’ve probably all been aware of at least one of them: The United States District Judge who could care less about what his or her court of appeals writes or orders. These are the judges who say, by their actions, “Damn the torpedoes. Full speed ahead. Reverse me if you want, but I’m going to do it the same way next time. Remand the case back to a different judge, but don’t expect me to change my ways.”

One of those judges sits in the District of Columbia; however, the United States Court of Appeals for the D.C. Circuit is so protective of its district judges that they have refused to name him or her in the four opinions that they have written about this judge’s inappropriate method of conducting the voir dire examination of the jury panelists.

The latest of these cases is United States v. Mouling, ___ F.3d ___, 2009 WL 564304 (C.A.D.C 2009). A panel of the Circuit (Chief Judge Sentelle and Circuit Judge Tatel and Senior Circuit Judge Williams) affirmed Mouling’s conviction for various drug and firearm offenses and the 228-month sentence that the unnamed judge imposed. Judge Tatel authored the opinion of the Court which reads, in part, as follows:

[The Judge’s Use of Compound Questions]
We begin with Mouling’s challenge to the district court’s use of compound voir dire questions. Because we have reviewed this particular district court’s voir dire questioning multiple times, we offer only a brief description of the practice. As we explained in United States v. West, 458 F.3d 1 (D.C.Cir.2006), United States v. Littlejohn, 489 F.3d 1335 (D.C.Cir.2007), and United States v. Harris, 515 F.3d 1307 (D.C.Cir.2008), the district court’s practice was to ask potential jurors several two-part questions, instructing them to listen to both parts of the question before responding. The first part of the question asked whether jurors had a certain background characteristic or experience, and the second part asked whether in light of that characteristic or experience they thought they would have trouble being impartial. Only if a potential juror would answer “yes” to both parts of the question was she to raise her hand in response. If the answer to either part of the question was “no,” the potential juror wasn’t to respond at all. For example, the first part of one question asked whether any potential juror or any close family member or friend was “currently or previously employed by any law enforcement agency.” Trial Tr. at 58 (Sept. 21, 2004). The district court then
listed various organizations that he said qualify as law enforcement agencies, warned the potential jurors not to raise their hands until he asked the second part of the question, and then asked: “As a result of that experience, do you believe that you, you personally, would be unable to be fair and impartial to both sides if selected as a juror in this case?” Id. at 58–59. In addition to the law enforcement employment question, the district court posed compound questions on seven other topics: whether any prospective jurors knew each other or had been involved in criminal defense, studied law, served on a grand jury, served on a petit criminal jury, participated in a crime-prevention group, or had been the victim of any crime.

[The Circuit Court Had Earlier Warned the Judge] We have previously expressed “deep reservations about [the district court’s] compound questions.” Littlejohn, 489 F.3d at 1343. As we explained in West, the problem with compound questions is that they “prevent[] the parties from learning the factual premise of the first part of the question, relying instead upon the juror’s self-assessment of his or her impartiality.” 458 F.3d at 10–11. Here, for example, if a potential juror had actually been employed by a law enforcement agency but thought she could nonetheless be impartial, the question format would prevent the parties from learning about and inquiring into the juror’s law enforcement background altogether.

[The Standard of Review When the Lawyers Objected] In all three of our prior cases, because defense counsel timely objected to the compound questions, we reviewed the conduct of voir dire for abuse of discretion, explaining that reversal was warranted if the court abused its discretion and there was substantial prejudice to the accused. See, e.g., Littlejohn, 489 F.3d at 1342. In West and Harris, although we found the compound questions “troubling” and cautioned against their use, Harris, 515 F.3d at 1311, we nonetheless saw no abuse of discretion because the defendants had other means to learn the necessary information about potential jurors, because their cases did not turn on police officer credibility, and because the evidence against them was otherwise strong. Id. at 1313; West, 458 F.3d at 8–9. By contrast, in Littlejohn, where police officer credibility was central to conviction and the evidence of guilt was otherwise not overwhelming, we concluded that the compound questions violated the defendant’s Sixth Amendment right to an impartial jury and vacated the conviction. 489 F.3d at 1346.

[The Standard of Review in Mouling] Unlike in Harris, West, and Littlejohn, Mouling’s trial lawyer failed to object at voir dire to the compound questions, so our review is far more limited. See United States v. Caldwell, 543 F.2d 1333, 1345 (D.C.Cir.1975); Fed.R.Crim.P. 52(b). Under plain error review, we may reverse only if: “(1) there is error (2) that is plain and (3) that affects substantial rights, and (4) we find that the error ‘seriously affects the fairness, integrity or public reputation of judicial proceedings.’” United States v. Baugham, 449 F.3d 167, 183 (2006) (quoting United States v. Olano, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)).

[Mouling’s Argument Versus the Government’s Argument] Mouling argues that his case resembles Littlejohn, where we held that the compound questions posed in that case violated the Sixth Amendment. According to Mouling, the law is therefore crystal clear, and the court committed plain error when it employed such questions in empaneling his jury. As the government points out, however, Littlejohn had not been decided at the time of Mouling’s trial. According to the government, any error in using compound questions could therefore not have been “plain.”

[No Plain Error—Mouling Loses] Because at the time of Mouling’s trial, no clear circuit precedent established the impropriety of compound voir dire questions in circumstances similar to Mouling’s case, any error in employing such questions cannot have been plain. See United States v. Perry, 479 F.3d 885, 893 n. 8 (D.C.Cir.2007) (noting that “absent precedent from either the Supreme Court or this court, [an] asserted error falls far short of plain error” unless it violates a legal norm that is “absolutely clear (for example because of the clarity of a statutory provision or court rule)” (internal quotation marks and ellipses omitted)). We therefore have no need to reach the plain error test’s remaining two elements: whether the voir dire affected Mouling’s substantial rights or “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.” Olano, 507 U.S. at 732, 113 S.Ct. 1770 (internal quotation marks omitted).
The Obvious Lesson from Mouling

We have all heard Justice Kerry Fitzgerald, Bryan Wice, and Stan Schneider say (repeatedly), “If you do not object, you will preserve nothing for appellate review.” When a prosecutor asks a compound question, we stand and object more quickly than Pavlov’s dog could salivate after hearing the bell ring.

We all understand the power of a federal judge to shape the outcome of a criminal case by his or her questioning of the witnesses and his or her comments to the jurors. Because of this, lawyers understandably have a hesitancy to object to the conduct of federal judges. Such a hesitancy can cost a client a fair trial and an issue on appeal. Mouling’s lawyer hesitated—and Mouling lost.

Note: The United States Court of Appeals for the Fifth Circuit has had, on only one occasion, the issue of the judicial compound question during the voir dire examination of the jury panel. In United States v. Okoronkwo, 46 F.3d 426 (5th Cir. 1995), a panel of the Circuit (Circuit Judges Davis, Barksdale, and Stewart) concluded that United States District Judge Lee H. Rosenthal did not abuse his discretion in his conduct of the voir dire examination of the jury panel. Judge Stewart’s opinion includes the following footnote:

FN3. The second inquiry posed by the judge is actually a compound question: the judge asked if the jurors had been exposed to media coverage of the case, the effect of which would affect their judgment or impartiality. It would have been preferable for the judge to have asked first whether any of the venire had been exposed to any media coverage. Then, if any had responded affirmatively, the judge could have questioned them individually about the effect the publicity might have had. However, we conclude that the second question, as posed, was an adequate attempt to identify jurors who had been affected by pretrial publicity.)
Send your letters, pictures, gripes, bonehead gaffes, or what-have-you to champton@tcdla.com or chattersley@tcdla.com.

Rudos

Congratulations to Jaime Aleman and Roy Garza and their entire defense team for getting an LWOP plea for their client, Alfredo Valdez, after a Hidalgo County jury took only 40 minutes to find him guilty of capital murder. This plea demonstrates that—as John Niland and Philip Wischkaemper relentlessly preach—it’s never too late to get death off the table. Norma Villanueva was the mitigation specialist in this case. Great work!

Danny Easterling of Houston got a 45-minute “not guilty” in a case where wife filed on husband for assault and filed for divorce the next day. She had photos of bruises and medical records and her doctor testified for the State. The husband claimed self-defense because she had kicked him in the shin and he had to push her away. Congratulations, Danny!

Brad Urrutia of Austin got a “not guilty” verdict in his murder trial in the 167th Judicial District of Travis County. Way to go, Brad!

Congratulations to Houston attorney Jim E. Lavine, who was elected First Vice President of the National Association of Criminal Defense Lawyers (NACDL). He also serves as Chair of the Steering Committee for NACDL’s Capital Campaign and on the Executive Committee as Parliamentarian. He previously served on the NACDL Board of Directors. Jim has extensive trial and appellate-

Congratulations to the following members who were in the most recent “Rising Star” version of Texas Monthly’s SuperLawyers

Criminal Defense:
Heath E. Allen, Stephenville
Kerissa Chełkowski, San Antonio
Nicole DeBorde, Houston
Emily Detoto, Houston
Shawn W. Dick, Georgetown
David M. Gonzalez, Austin
Craig M. Greaves, Bryan
J. Brett Harrison, Tyler
Phillip Hayes, Dallas
Nancy Kennedy, Dallas
Adam L. Kobs, San Antonio
Christopher W. Lewis, Dallas
Sam H. Lock, San Antonio
Joanne M. Musick, Houston

Heath C. Poole, College Station
Abelino “Abel” Reyna, Waco
Brian J. Roark, Austin
Kyle R. Sampson, Houston
Josh B. Schaffer, Houston
Todd Shapiro, Plano
Coby C. Waddill, Denton
Deric King Walpole, McKinney
Michael F. Westbrook III, Houston

Criminal Defense: DUI/DWI Defense
Doug Murphy, Houston

Criminal Defense: White Collar:
Sarah Q. Wirskye, Dallas
level experience. In 2007, he received the Robert C. Heeney Memorial Award, NACDL’s most prestigious honor, given annually to the one criminal defense lawyer who best exemplifies the goals and values of the Association and the legal profession. In 2006, Jim received the Percy Foreman Lawyer of the Year Award by the Texas Criminal Defense Lawyers Association, as well as the Harris County Criminal Lawyers Association 2006 Attorney of the Year Award. He graduated from Williams College and the Illinois Institute of Technology, Chicago Kent College of Law. Jim is admitted to practice in both Texas and Illinois.

Congratulations to Ken Nash of Huntsville on two successful battles. In February, Ken tried a two-count case in Walker County for aggravated assault on a public servant (deadly weapon) and possession of a deadly weapon in a penal institution. The jury acquitted on the assault and the client received three years on count two. Then, in March, Ken tried a capital murder case in Jefferson County. Due to his legal wrangling, the DA only went forward on murder, and the jury convicted the client of manslaughter. Good work, Ken!

Former member and longtime defense attorney Leon Grizzard of Austin was sworn in as the new Criminal District Courts Magistrate for Travis County on March 13, 2009, and started his new job on Monday, March 16. Congratulations, Judge Grizzard! We know you will be a great asset to the bench and bar of Travis County.

Congratulations to Jim Huggler of Tyler, who just got his first big appellate win. Actually the win came last year, but the CCA recently denied the state’s PDR, which means his win sticks. Jim got a reversal of a life sentence in an indecency case from the 114th (former Judge Kent) for unobjected to jury charge error allowing a less than unanimous verdict. *Hines v. State*, 269 S.W.3d 209 (Tex. App.—Texarkana 2008, pet. ref’d). Way to go, Jim!

James Volberding of Tyler got a reversal in an appeal from an aggravated assault against a public servant conviction. *Juarez v. State*, No. 12-08-00009-CR (Tex. App.—Tyler, March 25, 2009) (unpublished). The COA held the trial court erred in refusing to submit to the jury the defendant’s request for an instruction on the statutory defense of necessity. You guys in Tyler are really rockin’! Congratulations!

Michael Gross and Joseph Esparza of San Antonio got a “not guilty” from the jury in a non-death capital murder trial in Frio County. Their client, Robert Moreno Jr., was accused of a double homicide. Although he made a couple of potentially incriminating remarks to law enforcement, fled the county before being captured, and had two alleged eyewitnesses testify against him, the defense was able to show through vigorous cross-examination that the witnesses were not credible, and that a shoddy law enforcement investigation was conducted. The client did not testify and the defense rested immediately after the State. The jury unanimously voted to acquit in about two hours.

Congratulations to Scrappy Holmes and Greg Waldron of Longview, who got a not guilty verdict on a murder trial in Smith County. The issues were self-defense and the castle doctrine. Bobby Mims and legal assistant Melinda Carroll helped with jury selection. Y’all rock!

Once and possibly future gubernatorial candidate Kinky Friedman came by the offices to tape a birthday greeting for Scrappy Holmes, who helped on Kinky’s campaign. (As the Kinkster noted, they won that race in every place but Texas.) He said he looked up to Scrappy for wisdom and advice, being a mere 64 years old himself (“too young for Medicare but too old for women to care”). In his inimitable style he signed off with a few choice one-liners: “Let me just say that where there’s a will, there’s a lawyer. And may all of your juries be well hung. And of course my favorite Irish toast, may the best of the past be the worst of the future.”
Slate of Candidates
TCDLA Board of Directors, 2009–10
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Paralegal Member
Dawn Nobles, The Woodlands
Meet the new Voice editor. You may know him as partner in Westfall, Platt, Cutrer, & Paschall in Fort Worth. Or you may know him as the guy leading the hootenanny in the Hostility Room at Trial College. But did you know he also is a camera nut with an eye for composition? Meet . . .

Greg WESTFALL

Shutterbug
Save the Dates!

September 24
Juvenile Law
Dallas, Texas
CDR Kameron Johnson

September 25
Drug Seminar
Dallas, Texas
CDR Craig Jett
How can a criminal defense attorney make the jury feel anything for his client when the accused is seated halfway across the room at an uncomfortable proximity? In courtrooms across America, it is well established that the prosecution always sits at the table closest to the jury. There are no laws mandating this practice, but it has become an unwritten, uncodified rule of implicit understanding. Whenever a defense lawyer challenges this custom, the judge or prosecution typically replies that the state or government carries the burden of proof and is therefore entitled to an added advantage. This article seeks to bring to light the illegality of such practice. The fact that the prosecutor always sits at the table nearest to the jury proves this is indeed beneficial. Our laws are designed for fairness for all parties in litigation. In civil suits where the plaintiff carries a burden, no such entitlement of tables exists. The custom of seating arrangements is determined by which party arrives in the courtroom first to claim the table. So the notion that “carrying a burden” requires special treatment carries no legal weight. If anything at all, our law points to the defendant in a criminal case as being granted special privileges: the right to a lawyer where he cannot afford one, the privilege to not testify, and compulsory process for obtaining witnesses in his favor, which do not exist for a party in a civil suit. The Sixth Amendment to the United States Constitution states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

The Fifth Amendment guarantees “due process of law” to all persons. Our Constitution is clear that those accused of crimes are entitled to due process of law by an impartial jury. So, simply put, any added benefit to the state violates due process. The next question is: “Does seating the prosecution nearest to
the jury create in any way a jury not impartial?” The clear and unequivocal answer to that question is yes. This conclusion is based not just on the prosecution’s act of doing it every time, but on the vast body of social science literature. Between 1964 and 2003, more than 1200 papers on personal space were recorded in the PsycInfo database, with two thirds (67.6%) published before 1983 proving the study of personal space in the socio-environmental context is highly relevant to the understanding of processes in social psychology.2

Intangible and immeasurable factors do influence judgments of law because it has been said, “Law is neither all reason nor all emotion; it is neither all explicit rules nor intuitively assessed principles of justice; it is a composite.”3 Major theorists of psychology over the past century have argued that physical distance cues have adaptive significance.4 People communicate their feelings and intentions by regulating the distance they maintain between themselves and others.5 Construal level theorists purport that temporal, social, and spatial distance fall under the umbrella of “psychological distance” (Liberman, Trope, & Stephan 2003); however, William Bagh, in a 2008 study, determined that it was the other way around.6 A primitive understanding of distance develops in infants at 3–4 months of age (Leslie 1982), and it is this foundation of psychological distance that gives humans the pervasive tendency to conceptualize the mental world by analogy to the physical world, as opposed to the other way around (Mandler 1992).7

A 2008 Yale study proved that perceptual and motor representations of spatial distance could influence people’s phenomenal experience. In this study, participants were asked to plot points on a Cartesian plane.8 The greater the distance plotted by participants, the less emotional attachment they felt towards others, family, and even their own hometowns.9 Greater distances were also associated with more enjoyment of violence and embarrassments.10 There is overwhelming evidence that people with a positive attitude toward others stand or sit closer to each other than those who do not.11 From a basic sociological perspective, lay people understand that physical proximity is a reflection of our basic instincts of others. We tend to physically distance ourselves from those we do not harbor positive feelings for. An isolated defendant from the jury box sends the message he is distanced for a reason. This is highly dangerous in that people often look to their environment for clues on how they should feel, as a natural part of the situational appraisal process (eg, Lazarus 1991, Trope 1986).12

The study of interpersonal distance (IPD) of human beings is known as proxemics. Interpersonal distance is defined as the distance individuals characteristically keep, or desire to keep, between themselves and others. It is related to such variables as liking, acquaintance, personality characteristics, and social attitudes.13 Interpersonal distance is a very salient cue to both young and old, given its ethological significance thereby, making it a particularly effective nonverbal signal for the attainment of various goals.14 The interest in proxemics received its impetus from ethological studies dealing with territoriality among non-human species.15 Hediger (1950) noted consistent patterns of distance maintenance by animals and introduced the concept of a number of zones surrounding the organism in which specific types of interactions occur. This eventually led to Halls’ work with proxemics.16 Hall described an individual’s personal space as a series of concentric circles within which interactions of varying levels of intimacy take place.17 The equilibrium theory suggests that interpersonal distance, eye contact, smiling, and other affiliative behaviors serve to express “intimacy” towards others in social interactions. Once a comfortable or appropriate level of intimacy between people is achieved, there is pressure to maintain that level in that setting. Subsequent changes in one or more of the intimacy components produces compensatory reactions, restoring equilibrium.18 Not only are proximity and interpersonal distance social dynamics integral in human relationships, but also once a level of social intimacy is established, it takes on a life of its own in the maintenance of those relationships.

Concomitant with proximity is attachment theory. Attachment theory is the presumption of a biologically based drive for proximity with potential caregivers amongst humans and other primates, developed through natural selection.19 Bowlby’s models of attachment are working cognitive models that detail the structure of attachment experiences, which guide individuals’ perceptions regarding themselves, others, and close relationships.20 These models are presumed to play a significant role in motivating people to seek or avoid emotional proximity to others and promote the show of behaviors or behavioral strategies that further these attachment goals.21

At the root of attachment is genuine likeability. The principle of propinquity is that, other things being equal, people are most likely to be attracted to those in closest contact with them.22 Closer interaction distances are related to less directly confronting orientations and minimized conflict.23 This comports with one of the most productive research foci in contemporary social psychology, which is the investigation of factors influencing attraction.24 Among such factors, the major determinants are attitude, similarity, personality, physical proximity, and frequency of exposure.25

Physical proximity can affect one subconsciously. A 1978 University of Miami study showed that relationships were seen as significantly less positive with increased distance.26 The less distance an individual maintains from another person, the more positive her attitude is towards that person.27 A 1981 study of
Harvard students proved that people who are in closer proximity to others are rated as more sincere, natural, likeable, and loving than others; these folks are also perceived to be less dominant by peers. The inverse distance-liking relationship is a well-established social schema proven in children as young as 8 years old. Interpersonal distance is curvilinearly related to similarity. This explains why interpersonal mimicry heightens one’s perception of interpersonal closeness with others and decreases his physical proximity to others. The message of similarity also equates with friendliness. A number of investigators have found a social or friendly orientation results in a decrease in interpersonal distance between people. The study of interpersonal distancing has also been empirically verified in illuminating other social behaviors such as the locus of control, aggression, and dislike. It is not surprising that perceived intimacy varies inversely with distance. In a study of nursery-age children, the most frequent type of social participation involved parallel activity, where children played in physical proximity to each other with little interaction. This demonstrates an instinctual need for closeness identification that transcends words. Ideally, in addition to close physical proximity, people prefer face-to-face seating for communication. Females prefer even closer proximity standing or seated compared to their male counterparts. Race can also have an effect on proximity. One study, which recorded space preferences varying with race, found that African Americans prefer smaller interaction distances than Caucasians.

The most obvious perception of space proximity involves threats with the attachment system serving to protect people from physiological and emotional distress. Spatial distance and effect are inextricably linked due to the principle that “distance equals safety,” which is deeply ingrained in humans’ biological makeup. Greater distance is preferred in situations of relatively high tension. The experience of failure or high anxiety levels are regarded as negative, which correlate spatially with greater interpersonal distances. People prefer more distance when anticipating stressful situations. A study using 60 interviews with four psychiatrists showed patients displayed anxiety the farther they sat from therapists, proving highly anxious people stand farther away from others compared to less anxious people. In a study of 73 New Zealand prisoners, violent offenders clearly preferred a significantly larger interpersonal distance than non-violent offenders.

Forcing the citizen accused to sit farthest from the jury sends the message he or she is a threat to either the juror’s person or his peace of mind. It appears to shadow a predetermined uncomfortable verdict or, at the very least, a level of anxiety in the nature of being a juror. This feeling of discomfort is unconscious, as people unconsciously use information about space proximity within their environment to construct psychological frameworks of reference. The message of “keep a distance” from the defendant that is sent to jurors may exacerbate their insecurities and influence the potential of a first impression into becoming more, particularly since the table positioning never changes.

There are two ways of looking at space proximity in a courtroom and how it affects the citizen accused. First, one can view it from the perspective of the other person. For example, as mentioned earlier, if the courtroom is seating the defendant farthest away from the jury, what does that say about the defendant? Outside of sending the nonverbal message the citizen accused is a threat, jurors may also wrongly perceive the defendant feels he is guilty and desires space. It has been shown a more confident person can tolerate closer interpersonal distances. This suggests people choose an interpersonal conversational distance that aligns with how they feel about themselves versus how they feel about others. Distance has been shown to demonstrate how stressed an individual feels, with stress producing greater distances from the subject to others. However, just as important is what people subconsciously think and feel from their spatial proximity perspective. In this regard, distance perception has been linked with identity affirmation. In a study where 178 people were asked to estimate distances between points representing themselves and others that were already plotted, it was found using language such as “we-I” and “others-we” influenced distance. The study found that asymmetry from a group or self resulted in greater distance estimations. People’s social interactions decrease with greater distance. This is a natural outflow of the study that proved as the degree of liking of another increased, so too did the separation between the subject and the imagined person decrease. As evidence of the comfort zone people prefer, it has been shown people talk longer about personal topics at an intermediate distance of five feet (versus two or nine). This puts the state’s positioning at the closest table in the most ideal range for communication both verbally and nonverbally.

The party closest to the jury has the added advantage of picking up on more body-language signals communicating how the jury is both thinking and feeling. Unintended cues to emotion are present in people’s body posture and movement. It has been suggested that 80% of our decisions are influenced by nonverbal language, which includes body signals, gestures, mimicry, and actions. Nonverbal cues account for more message variance than verbal clues. Clearly, if a verbal message is ambiguous, nonverbal cues become critically important in interpreting what was said. Distance also amplifies the effect of space proximity in what is known as “the immediacy principle.” Mehrabian (1972) states that “more immediate postures

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and positions of a communicator are associated with his greater liking . . . and leads the addressee to infer that the communicator likes him more.”

Even in a therapist setting, it was proven patients felt closer to therapists with high immediacy, eye contact and closer distance, as opposed to a therapist with low immediacy. There is greater communication at closer distances in perceived responsivity. The incidence of head nods was found to be greater at four feet than ten feet. Ratings of responsivity are higher in high immediacy conditions as opposed to low immediacy conditions. Our body language influences the body language of others as people mirror or compliment each other. Nonconscious interpersonal mimicry engenders liking, affiliation, empathy, and other positive social results. It is poignant to note interpersonal mimicry heightens one’s perception of interpersonal closeness with others and decreases the physical proximity to them. This is why, ethologically, interpersonal distance is a very salient cue to young and old, which makes it a particularly significant nonverbal signal for the attainment of personal goals. It is unfair to give this advantage to a sole litigant in court.

Eye contact is critical in nonverbal communication. It has been said the “eyes reflect, mirror, speak—not infrequently—more strongly than words and body language combined.” It is very difficult to distinguish between eye contact and other forms of looking behavior as distance between two interactors increases from two to ten feet. Pupil signals are unconsciously sent and received between individuals. Studies have shown the pupils expand when something excites us, whether the stimulus evokes pleasure or fear. The lack of eye contact between the defendant and the jurors sends a devastating message. By not looking at a person, that person becomes designated as a “nonperson”: To not receive eye contact for an extended time span leaves one feeling uncomfortable, irritated, or rejected, and it becomes extremely difficult to counteract this nonverbal exclusion communication.

Not only does distance make it difficult to pick up on eye signals; but also sitting farthest from a jury makes other gestures difficult to ascertain. It is important to note that a smiling expression increases one’s perceived physical attractiveness, and people associate it with positive attributes. Laughter is also significantly greater at nearer distances. Great communicators read from people’s body language the desired communication style. It is said there are two styles one can read from looking at a person’s body language according to regulatory fit: eager and vigilant. Eagerness is characterized by movements forward, the use of gestures that involve animated, broad movements, and hand movements that openly project outward: forward-leaning body positions, fast body movement, and fast speech rates. Vigilance is characterized by gestures that show precision: “pushing” motions represent slowing down, slightly backward-leaning body positions, slower body movement, and a slower speech rate. Regulatory fit is equating the message delivery with the recipient’s preferred style of communication. Eager types want cognition, while vigilant types want closure. When tested, an eager nonverbal delivery style results in greater message effectiveness for promotion-focus recipients, while a vigilant nonverbal delivery style is more effective for prevention-focus recipients. Even unconsciously, there is ample research showing that individuals are able to influence social interactions with nonverbal behavior. This is underscored by the fact that subtle nonverbal cues people show in group interactions determine the social hierarchy of the group. Doctors understand the importance of body cues. Doctors who are good at reading and correctly interpreting people’s nonverbal languages have more satisfied patients. In analyzing patient satisfaction, it has been found that face plus voice encoding measures are slightly better predictors than voice only encoding measures. Greater patient satisfaction has been associated with expressive nonverbal behavior such as more gestures, forward leanings, closer interpersonal distance, and more gazing. This proves the ability to read and interpret body language is critical to effective communication. In a study of 80 undergraduates at American University asked to evaluate skill levels of counselors in training, it was found that inconsistent verbal and nonverbal messages from a counselor resulted in more interpersonal distance than that which occurs with consistent messages. The obvious conclusion to the importance of body behaviors is that the intensity and credibility of the verbal message is enhanced when nonverbal language is combined with the spoken word. It is grossly unfair to award the best advantage of this form of communication to the prosecution throughout the duration of an entire trial, when the Constitution gives every benefit to the defendant.

An increase in space hinders interpersonal communication as audible sound grows fainter with distance. The intensity of sound varies inversely with the square distance, for example: At nine feet one receives only one-ninth the volume of sound one hears at three feet. Successful communication requires high-level skills such as tacitly recognizing the fact that one must significantly increase her vocal intensity as interpersonal distance from speaker to listener changes from four to twelve feet. In one study, patients expressed they could not get their points across as well at nine feet, as opposed to three and six feet, due to the disruption of communication at this distance.

Psychologically, communication takes on different meanings at different distances. One study showed a receiver of a positive abstract message perceives closer proximity to the speaker than a receiver of a positive concrete message. The receiver of an ab-
The basic concept of spatial distance has profound effects on the cognitive processes involved in appraisal and affect, effects that are beyond the purview of Construal Level Theory. Feelings of distance can moderate the emotional intensity of stimuli, and can be activated by physical cues without reference to the self. These effects reveal the fundamental importance of distance cues in the physical environment for shaping people’s judgments and affective experiences, and highlight the ease with which aspects of the physical environment (and the spatial relations therein) can activate feelings of closeness or distance without one’s awareness.”

In short, one need not be a social scientist to understand that interpersonal proximity is directly related to the nature of the evaluative feedback anticipated or perceived. It is time for judges to stop sending biased signals to juries regarding the citizen accused and his/her placement in the court theater, which indirectly comments on the weight of evidence. If the prosecution wants to argue it deserves an advantage in trial because it carries the burden of proof, it needs to reacquaint itself with the Bill of Rights. The citizen accused has been afforded every advantage in a criminal trial due to the principles of the Founding Fathers in recognizing that liberty is valued most of all, and before it is taken the government must satisfy its burden. It would not be in the spirit of the Founding Fathers and the principles they laid out in the Bill of Rights to suddenly place a citizen accused in the worst possible physical position in the courtroom—particularly where it places jurors in a disadvantageous position to fulfill their duties in administering justice. The Government cannot continue to claim this added advantage at the expense of the citizen accused, as envisioned by the Constitution. Jurors deserve proximity to the defendant when assessing the citizen’s fate. Much is lost in nonverbal communication essential to the fundamentals of justice deserved by citizens accused. They cannot be afforded optimal defense when their lawyer is shielded both visually and audibly from the jury. Even billion-dollar sports industries operate on the premise of changing sides to negate any added advantage of space proximity (eg, basketball, football, tennis, soccer). At a bare minimum, laws should be passed to address the disadvantage the defendant is being unduly burdened with despite the spirit of the law. No such automatic advantage applies to a plaintiff in a civil suit, and for the prosecutor to claim automatic title without question is manifestly unjust, particularly in light of the overwhelming proof from the social sciences that exists regarding the importance of space proximity in communication.

Notes


4. Lawrence E. Williams & John A. Bargh, Keeping One’s Distance: The Influence of Spatial Distance Cues on Affect and Evaluation, 19 Psychological Science 302, 303 (2008).


7. Id. at 302–303.

8. Id. at 307.

9. Id. at 307.

10. Id. at 307.


12. Lawrence E. Williams & John A. Bargh, Keeping One’s Distance: The Influence of Spatial Distance Cues on Affect and Evaluation, 19 Psychological Science 302 (2008).


16. Id. at 49.

17. Id. at 49.


20. Id. at 286.

21. Id. at 286–287.


25. Id. at 145.


40. Lawrence E. Williams & John A. Bargh, Keeping One’s Distance: The Influence of Spatial Distance Cues on Affect and Evaluation, 19 Psychological Science 302, 303 (2008).

41. Id. at 302–303.


Mimi Coffey is the founder of the Coffey Firm, which has offices in both Dallas and Fort Worth. She is a sustaining member of the Texas Criminal Defense Lawyers Association as well as a member of the Tarrant County Criminal Defense Lawyers Association, the Dallas County Criminal Defense Lawyers Association, and the Tarrant County Bar Association and State Bar College. Mimi obtained her BA from Baylor University and her Juris Doctorate from the Texas Tech School of Law. She has been published in the Champion and Voice for the Defense.
Contact Information

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Attending/Material

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*Note: After May 11th, books are limited—onsite registration only
**Attorneys practicing less than five years or more than 45 years and judges receive reduced registration fees.

Can’t Attend/Purchase Materials

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Cancellation Policy: To receive a full refund, cancellations must be made in writing two weeks prior to the seminar. Cancellations made within two weeks of the seminar will be assessed a 50% cancellation fee. Course materials will be sent after the seminar.

Social Events (check appropriate box and enter quantity)

Thursday, June 4, 2009

- Golf—$95 ($125 onsite) Quantity: _____
- TCDLA/Goldstein Pachanga—Free Quantity: _____
- Childcare at the Hyatt Regency—Free (6:00–11:00 pm) Quantity: _____

Friday, June 5, 2009

- Box Lunch/Hall of Fame Induction—$12 Quantity: _____
- Annual Membership Party—Free Quantity: _____
- Childcare at the Hyatt Regency—Free (7:00–11:00 pm) Quantity: _____

Payment (cash is NOT accepted)

Payment type
- Check Payable to TCDLA
- Credit Card

Credit Card Number Expiration Date

Name on Card

Signature
The Outdoor Grillers Miracle

To Victor Mellenger, Texas Tech University

The Lubbock Criminal Defense Lawyers Association and the Texas Criminal Defense Lawyers Association thank you for your help in avoiding a potential mega-disaster last Friday. (I have no actual authority to write on behalf of either organization, but I don’t think they will mind. If they do mind, then I say they are insensitive institutions, and this letter is just from me.)

As you undoubtedly remember, we were in the middle of a spectacularly successful seminar at the Texas Tech University School of Law, anticipating a special luncheon program featuring a speech by uber-alum Mark Lanier. Each of the past five years, we have obtained TTUSL Dean Walt Huffman’s permission to grill up a barbeque feast in the parking lot for our seminar participants to enjoy prior to our keynote speaker’s address. (We just assumed Walt owned the law school lot, I guess.) A lawyer/chef from Denton named Bill Trantham sort of adopted us. Each year, Bill has hauled in his huge tailgate cooker rig, providing a free meal to all who attend the seminar. This year, we hosted about 275 (hungry) lawyers from across the entire state.

About 8:00 Friday morning, the Texas Tech environmental police appeared in the law school parking lot and shut down Trantham’s operation, about seven guys strong, and ordered the dousing of the mesquite coals smoldering in the pits. The grilling had already gone on for a couple of hours, and it looked like 278 pounds of spare ribs, 50 pounds of shrimp and a case of cabbage were about to go to waste. The tension became as thick as the pungent mesquite smoke.

As you can imagine, with such a large and talented group of (hungry) criminal defense lawyers assembled, some interesting solutions to the problem were suggested: nonviolent civil disobedience (“Just write us a ticket!” Dwight McDonald cried, “We’ll let Judge Stratton decide!”), District Court injunctions, and even writs of habeas corpus (“Deliver the Body of the Pig!”)

The enemy was soon identified as the “Environmental Nazis,” of course, and Equal Protection arguments were forcefully advanced: “How can Tech shut us down but allow all those tailgaters at the football games without permits?” We wondered whether the presumption of innocence had been applied to our situation, and whether the Environmental Nazis had considered our lack of criminal intent. It was obvious from looking at the Outlaw Grillers, as they were immediately dubbed, that the “clean hands” doctrine might not be used to our advantage.

Then, there was that pesky Due Process problem. Without the required permit, our group was advised to apply for one. But the committee charged with issuing such permits could not hear our petition until the following Monday, well after our 275 (hungry) lawyers were to depart for the far-flung reaches of the state. It seemed that no law was available to remedy our peculiar problem. Panic seized those assembled. (The previous day, the group had survived a semi-serious fire threat with less concern.) Furious phone calls were directed to all the available local lunch caterers, but to no avail. Some contemplated a miracle: perhaps a group prayer for a West Texas version of loaves and fishes to feed the multitude. But then it was decided The Almighty might disapprove of prayers requesting pork ribs and Tabasco cabbage, particularly on a Friday.

All of these events happened before 8:45 a.m., when you were contacted as a last resort. And, it was indeed like a miracle when you arranged for our (hungry) group to receive something called a “Temporary Food Service Permit.”

A friendly truce was forged between The Outlaw Grillers and the Environmental Nazis. The fires were re-flamed, the ribs were readied, the cabbage was cooked, the multitude was fed once again, and Mr. Lanier delivered an inspirational address.

Thanks again for your assistance in this small miracle. I’ve attached a few photos of the drama associated with what will now forever be known as the “Outlaw Grillers Miracle.”

Chuck Lanehart
The Nefarious Nine: Natalio Hernandez, Will Boyles, Dwight McDonald, Course Director Laurie Key, Donnie Yandell, Dennis Reeves, Bill Trantham

I Fought the Law: Dwight McDonald faces off with the man.

Cabbages for the masses: Natalio Hernandez and Dennis Reeves

Justice is served, along with 278 pounds of ribs.

The gang resumes its illicit activities...
Your coworker reveals to you that he likes to hire call girls while at a Vegas trade show even though he’s been happily married for 30 years (remember, what happens in Vegas stays in Vegas). Your wife’s brother is fired from his job for violating his company’s electronic usage policy by downloading porn on his office computer.

Your email junk box is filled with solicitations and promises for everything from drugs that will guarantee genital enhancement to steamy liaisons with anonymous hotties. Your client’s ex accuses her of being an unfit mother because of the string of men she brought home yet another time, or your client’s soon-to-be ex is trying to limit visitation after his porn is discovered for the fourth time by the kids. The star of one of your favorite TV shows checks into a rehab center, but instead of drink or drugs, it’s for sex addiction.
The prevalence rates of sex addiction vary from 3 to 6 percent of population to 17 percent of population (Carnes 1991; Plante 1999; Cooper 2000). So is sex addiction a disease? And if so, do we view it in the same way we view other addictions, like alcoholism or opiate addiction?

Sex addiction is considered a “process addiction,” as is an addiction to food or gambling. As with alcohol or drugs, sex addiction fits into a well-understood four-component model of what comprises an addiction. This classic model includes: (1) preoccupation or obsession and compulsivity, the loss of control over a behavior, (2) a continuation of the behavior despite repeated attempts to stop, (3) continuation despite negative consequences, and (4) tolerance to more of the same behavior, or a progressive escalation of behaviors required to get the same “high” (Carnes, 1989). The National Council on Sexual Addiction and Compulsivity and Society for the Advancement of Sexual Health (SASH) has integrated these components defining the addiction as “any sexually-related, compulsive behavior which interferes with normal living and causes severe stress on one’s self, relationship with others, and on one’s living and work environment.”

The disease model of addiction (for the 10–15 percent of those who meddle and whose brain chemistry then lights the way) suggests a biological, psychological, and social etiology (Jellenek, 1960), with the cycle comprised of preoccupation, sexual compulsivity, and despair that lead to shame and guilt (Carnes, 1989).

Psychologically, anxiety, fear, and worry plague the sex addict. Thoughts of sex, sexuality, and/or sexual behavior are really the “wallpaper” around the sex addict’s internal world. Obsessions mediate the compulsion to act out in risky ways. Once in the anxious state, a person may lose the ability to make a decision at all. This “trance-like” almost “dissociative” state is the unconscious or semiconscious state of the disease at work.

Sex addiction, like any other, is primary, chronic, and progressive. It is also a disease of isolation and loneliness. These feelings may be in a “suppressed state,” often triggered by a felt sense of aloneness in one’s world. When a professional looks into it, it is almost universal that sexual addicts maintain secrets and that they have themselves suffered some form of abuse (Anderson & Coleman, 1991; Carnes, 1993; Schwartz, 1992; Tedesco & Bola, 1997).

The sex addict may have a great number of professional and social networks, yet be prone to feel a great deal of loneliness and aloneness. Because sex addiction is kept in its own “secret compartment,” other areas of the sex addict’s life appear robust and full, extroverted in connection. This is often an over-compensation for the extreme secret loneliness and behavior.

The secret behavior (often remaining disintegrated with other areas of one’s life) is justified as “privacy,” and the line between secrecy and privacy is blurred. This justification often maintains a denial or intellectual defense structure that distorts one’s thinking about the behavior. Not surprisingly, committed partnerships suffer and, often, partners of sex addicts feel betrayed by the sex addiction—even in the absence of an infidelity.

At a 2003 meeting of the American Academy of Matrimonial Lawyers, two thirds of the 350 divorce lawyers who attended said the internet played a significant role in the divorces in the past year, with excessive interest in online porn contributing to more than half such cases.

The social aspect of the disease of sex addiction is supported by the porn industry and one’s interaction with it. It is estimated that 25 million Americans visit cyber-sex sites 1–10 hours per week and another 4.7 million in excess of 11 hours per week (MSNBC/Stanford/Duquesne Study, Washington Times, 1/26/2000), with sex as the number-one searched topic on the internet (Robert Weiss, Sexual Recovery Institute, Washington Times, 1/26/2000).

So is it a reasonable defense and a treatable illness, and what is sobriety from sex addiction? The bottom line is an addiction is an addiction is an addiction, and with the proper diagnosis, treatment plan, and compliance, sex addiction is a treatable illness.

In other (abstinence-based) treatment modalities, recovery is clear—either you engage in the drinking or using behavior or you do not. While early abstinence (a refrain from masturbation, for instance) is suggested in a sex addict’s early recovery, 12-Step support groups such as SAA and SLAA (Sex Addicts Anonymous and Sex and Love Addicts Anonymous) assist sex addicts in the journey toward healthy sexuality. Sex addicts in recovery are asked to eliminate or abstain from maladaptive sexual behaviors. They are asked to develop an Abstinence List to concretely define
behaviors they will abstain from as part of their recovery. To act out one of these behaviors again means to slip/relapse/restart one's sobriety date.

Individuals are asked to create a Boundaries List, which includes self-imposed limits promoting health and safety. This may involve situations, circumstances, people, and/or behavior one is to avoid. Addicts are asked to define their own working definition of Healthy Sexuality. This includes developing and defining sexual and relationship goals, action plans, and resources available.

Positive treatment outcomes are probable and often increase with the addition of medication, psychotherapy, and a brief stay at a residential center specializing in the process addictions, and as with treatment for all the addictive disorders amenable to the spiritually based recovery system, It Works If You Work It!

References


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SUPREME COURT

United States v. Hayes, ___ U.S. __ (7-608, 2/24/09); Case below: 482 F.3d 749 (4th Cir. 2007)

Supreme Court held that a domestic relationship must be established beyond a reasonable doubt, according to the statute, but does not have to be the defining element of a predicate misdemeanor offense. In this statutory construction case, Supreme first looked to the text and structure of the applicable statutes and found the statutes to be unambiguous. After examination of legislative histories and practical notions of those statutes, the majority concluded that Congress unambiguously defined “misdemeanor crime of domestic violence” in §922(g)(9) to include an offense “committed by” a person who had a specified domestic relationship with the victim, regardless of whether the misdemeanor statute made a “domestic relationship” an element of the crime. The rule of lenity was not applied because it is only used on ambiguous statutes.


Under Saucier v. Katz, 533 U.S. 194 (2001), federal courts considering whether law enforcement officers were entitled to qualified immunity for alleged constitutional violations were generally required to decide first whether there was a constitutional violation, and, only if so, whether the violation was “clearly established” so that the officers should have been on notice of the unconstitutionality of their behavior; under the Saucier rubric, the Tenth Circuit found that a warrantless search of plaintiff’s home violated the Fourth Amendment; the Tenth Circuit declined to adopt the “consent once removed” exception to the Fourth Amendment warrant requirement adopted by other circuits, which authorized police officers to enter a home without a warrant immediately after an undercover informant bought drugs inside; the Tenth Circuit then found that the officers were not entitled to qualified immunity for the warrantless search; on review, the Supreme Court held that Saucier does not inflexibly require lower federal courts to decide a difficult constitutional question first, when the case may be easily disposed of on the question of qualified immunity (i.e., whether the alleged constitutional violation is “clearly established”); applying this option here, the Court held that defendant officers were entitled to qualified immunity; it was not clearly established that the warrantless search here was unconstitutional, given that several state supreme courts and federal courts of appeals had accepted the “consent once removed” doctrine.


The lower federal courts erred in granting federal habeas relief on the basis of the jury instructions
on accomplice liability given in a homicide case; the state court's conclusion that the jury instructions (which quoted the state statute) were unambiguous was objectively reasonable, and the federal courts, sitting in habeas, should have gone no further; moreover, even if the instruction were ambiguous, the Ninth Circuit erred in finding it so ambiguous as to merit federal habeas relief under the AEDPA; the state courts reasonably applied United States Supreme Court precedent when they found no "reasonable likelihood" that the jury applied the instruction in a way that relieved the State of its burden to prove every element of the crime beyond a reasonable doubt, especially given the strength of the evidence against the defendant and the jury’s failure to convict a co-defendant also prosecuted as an accomplice.


Where district court categorically agreed with the 100-to-1 ratio inherent in the Guidelines for “crack” cocaine offenses, and instead assessed defendant’s sentence on the basis of a 20-to-1 ratio, the Eighth Circuit erred in reversing that sentence; under Kimbrough v. United States, __U.S.__, 128 S. Ct. 558 (2007), “district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines”; if district judges are entitled to disagree with the crack Guidelines, then a sentence based on that disagreement does not become unreasonable simply because the judge chose to specify his disagreement, and the degree of his disagreement, with the 100-to-1 ratio by specifically employing a different ratio; accordingly, the Court granted certiorari and summarily reversed the Eighth Circuit’s judgment reversing the sentence.


Police officer’s patdown search of passenger in a vehicle that had been lawfully stopped did not violate the Fourth Amendment; in a traffic-stop setting, the first condition of Terry v. Ohio, 392 U.S. 1 (1968)—a lawful investigatory stop—is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation; the police need not have, in addition, cause to believe any occupant of the vehicle is involved in a criminal activity; to justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous; here, defendant was still lawfully detained pursuant to a valid vehicle stop, and thus could be patted down if the police had a reasonable belief that he was armed and dangerous; given that the court below had merely assumed, without deciding, that such a reasonable belief existed, the Supreme Court reversed the judgment below and remanded for further proceedings.

Fifth Circuit

Wardlaw v. Cain, 541 F.3d 275 (5th Cir. 2008)

District court did not err in dismissing Louisiana state prisoner’s federal habeas petition as time-barred under the AEDPA; prisoner’s state petition for postconviction relief was not “properly filed” so as to toll the AEDPA 1-year limitations period, see 28 U.S.C. §2244(d)(2), because it was ultimately dismissed as untimely under state law; under the Supreme Court’s decision in Pace v. DiGuglielmo, 544 U.S. 408 (2005), postconviction petitions rejected on the basis of “filing conditions”—including time limits for filing—are not “properly filed” for purposes of §2244(d)(2) (as opposed to petitions rejected on the basis of procedural bars that go to the ability to obtain relief; although the Fifth Circuit had held to the contrary in Smith v. Ward, 209 F.3d 383 (5th Cir. 2000) (by holding that a Louisiana state postconviction petition could be “properly filed” even if ultimately dismissed as untimely; because the state statute governing timeliness contained certain exceptions which required some level of judicial review), the Fifth Circuit held that Smith v. Ward had been abrogated by the Supreme Court’s decision in Pace. (Inasmuch as Smith v. Ward relied on a similar holding with respect to Texas law in Villegas v. Johnson, 184 F.3d 467 (5th Cir. 1999), it seems likely that Villegas is likewise no longer good law.)

United States v. Fuentes-Oyervides, 541 F.3d 286 (5th Cir. 2008)

District court did not err in applying a twelve-level enhancement of defendant’s base level under USSG §2L1.2(b)(1)(B), because defendant’s conviction under Ohio Rev. Code Ann. §2925.03(A)(2) (criminalizing “[p]repar[ing] for shipment [, etc.] a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale”) was a qualifying “drug trafficking offense”; such an individual effectively “commits an act of distribution under the Guidelines.”

United States v. Garza, 541 F.3d 290 (5th Cir. 2008)

In sentencing defendant convicted of transporting an unlawful alien, district court reversibly erred in applying an enhancement under USSG §2L1.1(b)(6) (2006) for creating a “substantial risk of death or serious bodily injury to another person”; particularly, the district court erred in applying effectively a per se rule that transporting aliens through the South Texas brush necessarily and always involved subjecting them to a substantial risk of death or serious bodily injury; it is not enough to say, as the district court did here, that traversing an entire geographical region is inherently dangerous; rather, it must be dangerous on the facts presented and used by the district court; nor could the Fifth Circuit infer such particularized danger from the record.
of the case (which included the fact that the group of aliens at issue slept overnight in a motel); accordingly, the Fifth Circuit vacated the sentence and remanded for resentencing.

**United States v. Posada Carriles, 541 F.3d 344 (5th Cir. 2008)**

1. District court reversibly erred in dismissing indictment (charging defendant with making false statements in his application for naturalization as a United States citizen as well as during his naturalization interview) for outrageous governmental misconduct; the district court erred in finding that the naturalization interview was merely a pretext for a criminal investigation, because nothing in the record suggested that the naturalization interview was anything other than a bona fide examination conducted in accordance with the applicable regulations; nor did the questions posed by the government during the interview exceed the legitimate scope of the inquiry delineated by the regulations; moreover, a claim of outrageous governmental misconduct will not lie where, as here, the defendant was an active, willing participant in the conduct that leads to his arrest.

2. District court likewise reversibly erred in suppressing the statements made by the defendant in his naturalization interview; whatever the extent of due process protections attaching to naturalization proceedings (a question the Fifth Circuit did not decide), the true basis for the district court’s suppression of the statements—that incompetent translation of the questions posed to defendant during the interview caused him to misunderstand and, hence, misanswer those questions—was flawed; the record simply did not support a finding of fundamental ambiguity, necessary in order to uphold the district court’s order suppressing defendant’s statements.

**CCA—Appellant’s PDRs**

**Layton v. State, _S.W.3d_ (Tex.Crim.App. No. 408-07, 2/4/09); Reversed**

In a DWI case, Appellant argues that evidence of his use of Xanax and Valium was allowed (through statements on cop’s video) without requiring the State to show that it was reliable and competent scientific evidence. Counsel objected to this evidence repeatedly in the form of a motion to suppress the video and at trial. COA refused to address this issue, holding it was not preserved. CCA holds Appellant’s objection was specific enough to put the trial judge and opposing counsel on notice of the issue and to afford them the opportunity to remedy the defect by calling an expert witness. Trial court specifically stated that Appellant made his record for the objection. This indicates that the trial judge was aware of the basis for objection, but found it did not have any merit. Accordingly, error was preserved as to all evidence referencing Appellant’s use of Xanax and Valium. Moreover, there was no evidence to show any synergistic effect on Appellant’s use of alcohol. Without evidence of the length of time between the ingestion of the medication and the time of arrest, a lay juror is not in a position to determine whether Xanax and Valium, taken more than 12 hours before arrest, would have any effect on Appellant’s intoxication. There was no testimony indicating that the arresting cop had any medical knowledge regarding the uses of Xanax and Valium, or about the effect of combining the medications with alcohol. Judgment is reversed and case is remanded for a harm analysis.

**Stokes v. State, _S.W.3d_ (Tex.Crim.App. No. 0417-06, 2/11/09); Vacated & Remanded**

PDR was granted to determine whether a docket entry constitutes “presentment” for purposes of a motion for new trial. **Holding: The docket-sheet entry, “Motion New Trial presented to court no ruling per judge,” was sufficient to show that the motion was presented to the trial court as required by Rule 21.6.** Appellant complained that trial court should have held a hearing on his properly filed and presented motion, but COA disagreed because the docket entry was not signed by the trial court. CCA notes that *Carranza v. State, 960 S.W.2d 76, 78 (Tex. Crim.App. 1998)*, contains no requirement for a presentment to be signed by the trial court. The purpose is to put the trial court on notice that a motion has been filed and the defendant wants the trial court to take some action such as holding a hearing. The docket sheet entry sufficiently placed the trial court on notice, and therefore COA erred in ruling the motion had not been presented. Judgment is reversed and case is remanded to address the merits of Appellant’s complaint.

**Billodeau v. State, _S.W.3d_ (Tex.Crim.App. No. 0969-07, 2/11/09); Reversed**

PDR was granted to determine this issue: When a defendant is accused of aggravated sexual assault, and the only evidence in the case consists of the testimony of the victim and the testimony of the accused, should the trial court prevent the defense from presenting evidence about threats and false, similar allegations made by the complainant after the date of the charged offense, but before the date of the complainant’s testimony at trial? CCA notes the possible animus, motive, or ill will of a prosecution witness who testifies against the defendant is never a collateral or irrelevant inquiry, and the defendant is entitled, subject to reasonable restrictions, to show any relevant fact that might tend to establish ill feeling, bias, motive, interest, or animus on the part of any witness testifying against him. *London v. State, 739 S.W.2d 842, 846 (Tex. Crim. App. 1987)*; Tex.R.Evid. 613(b). Thus it was immaterial here that alleged false threats occurred before the victim accused Appellant or after; both periods may be used to evaluate his bias, motive, or ill feelings towards Appellant, and thereby, his credibility. Tex.R.Evid. 613(b). Therefore, trial court abused its discretion by denying Appellant the opportunity
to cross-examine the victim about threats against the Klines (whose son the victim had falsely accused of molesting him), thus preventing Appellant from presenting admissible evidence, namely the rebutting testimony of the Klines, to show J.B.’s possible motive for accusing Appellant of sexual molestation. Error is also found harmful under Tex.R.App.Proc. 44.29(b). Judgment is therefore reversed and case is remanded to the trial court for a new trial.

Ivey v. State, __S.W.3d__ (Tex.Crim.App. No. 0552-08, 2/11/08); Affirmed

Question here is whether a trial court can suspend a jury-assessed punishment and order community supervision when the jury itself could not have recommended community supervision. Appellant deliberately elected for jury punishment and decided not to file a motion for community supervision even though he was eligible because he did not want the jury to assess it. Court holds that a trial court may place an eligible defendant on community supervision even if the defendant has elected to have his punishment assessed by the jury and the jury does not recommend it. Here it was within the discretion of the trial court under Article 42.12, §3, to do so, so long as Appellant met the criteria for community supervision spelled out there. CCA rejects Appellant’s arguments that (1) to allow the trial judge to do so violated his statutory right to elect the jury to assess his punishment, and (2) the language and legislative history of Article 42.12 should lead courts to prefer a construction that would prohibit the trial judge from circumventing the jury’s prerogative not to place him on community supervision.

Davis v. State, __S.W.3d__ (Tex.Crim.App. No. 0613-08, 2/25/08); Affirmed

COA agreed with Appellant that the trial court erred in failing to give an instruction on accomplice witness testimony. However, he failed to meet Strickland’s prejudice prong. But, COA’s reasoning was flawed:

In our view, if trial counsel performs deficiently in failing to request an accomplice-witness instruction, then the question of whether there is a reasonable probability that, but for counsel’s deficient performance, the result of the guilt stage would have been different will not turn simply on whether the non-accomplice evidence sufficed to connect the defendant to the crime charged or even whether such evidence would itself support the verdict of guilt. Rather, that question will generally turn on whether there was a substantial amount of non-accomplice evidence and whether the record reveals any rational basis on which the jury could have doubted or disregarded that evidence. Compare Herron v. State, 86 S.W.3d 621, 631–34 (Tex.Crim.App. 2002) (where trial court erroneously refused defense counsel’s request for accomplice-witness instruction, error was harmless because there was substantial non-accomplice evidence presented and record revealed no rational basis on which jury could have doubted that evidence). We hasten to add that each case must be judged on its own unique facts.

COA got it right, but with the wrong reasoning. Judgment is therefore affirmed.

State’s PDR

Pollard v. State, __S.W.3d__ (Tex.Crim.App. No. 0363-08, 2/11/09); Affirmed

Appellant was convicted of retaliation for threatening the young victim for implicating Appellant in an aggravated sexual assault case. Holding: Admission of a 1986 murder conviction, as well as victim’s testimony that Appellant told the victim of the murder, was not relevant to show either Appellant’s state of mind, or as background evidence, and the error was harmful. Nothing indicated the evidence was admitted for anything other than the truth of the matter asserted. Trial court’s instruction to the jury immediately after victim’s testimony not to consider this “extraneous offense” unless the jury believed that Appellant committed it also appears to confirm that this evidence was offered to show that Appellant had actually killed a person and not to show that he merely told the victim that he had killed a person. COA got it right, thus its judgment is affirmed.

Writ Opinion

Ex parte Rowe, __S.W.3d__ (Tex.Crim.App. No. AP-76,088, 2/4/09); Relief Granted

Applicant was convicted and sentenced in Texas and was then sent to Georgia, where he was put on probation for an offense committed there. He was returned to Texas to begin serving his sentence, but TDCJ did not take him into custody for several months; it issued a premature release warrant. Applicant had been under the supervision of a probation officer (his Georgia conviction was transferred to Texas), to whom he revealed his unserved Texas sentence. CCA holds Applicant is entitled to credit for the time he spent out of the custody of TDCJ. CCA rejects TDCJ’s argument that Ex Parte Hale, 117 S.W.3d 866 (Tex. Crim. App. 2003) (inmates entitled to time spent while on erroneous release from TDCJ), is inapplicable to his case. What happened was no fault of Applicant’s, and he in fact brought TDCJ’s attention to the matter. TDCJ is ordered to credit Applicant’s sentence with all the time from the date of Applicant’s sentencing, together with any pre-sentence credit awarded by the trial court.

PDRs Granted in February 2009

2/4/09

08-1780 Langham, Pamela Shareka

The court of appeals erred in determining that hearsay
statements from the confidential informant that implicated appellant in drug dealing from the house in question were not testimonial, and were further not harmful.

08-1441 Anderson, David Lee II

1. Whether a court of appeals has decided an important question of state law that conflicts with the decision of the court of criminal appeals. (Is a written motion an absolute requirement to preserve error on a claim of improper denial of a motion for continuance?)

2. Whether the decision of the court of appeals conflicts with another court of appeals on the same issue.

2/11/09

08-1263 Mansfield, Rodger Eugene, Jr.

The court of appeals has held that the trial court did not abuse its discretion in refusing to permit a father to testify that his son, the appellant, had never before been placed on community supervision, thus forcing appellant to take the stand to establish probation eligibility.

08-1111 Joseph, Wesley Charles

The Court of Appeals erred in affirming the trial court’s denial of the motion to suppress Mr. Joseph’s statement, because Mr. Joseph did not make a knowing, intelligent, and voluntary waiver of his rights under Tex. Code Crim. Proc. Art. 38.22 and Miranda v. Arizona.

2/25/09

08-1318 Kennedy, Michael Patrick

The court of appeals erred in holding that appellant waived the right to appeal the trial court’s rulings on his motion to suppress.

08-1508 Grammar, Danny Wayne

Whether the court of appeals erred in overruling appellant’s challenge to the trial court’s failure to hold a separate punishment hearing as required by Tex. Code Crim. Proc. Art 37.07(3) and Art. 42.12(5)(b), in that the court did not hear the initial plea and failed to conduct a presentence investigation or allow for the presentation of evidence in mitigation of punishment.

08-1530 Menefee, Robert, Smith

The court of appeals, in affirming the trial court judgment allowed a conviction not supported by the evidence in the case.

09-0119 Pfeiffer, Daniel

The court of appeals erred in finding the appellant failed to preserve error and that there was sufficient evidence to support the trial court’s judgment (awarding $11,620 of restitution).

Court of Appeals

COA summaries are by Chris Cheatham of Cheatham & Flach, PLLC, Dallas, Texas

After defendant entered negotiated plea of guilty on capital murder charge, he appealed and won, because the detective presented the defendant with a false fingerprint forensics lab report, which in turn was used to secure defendant’s confession, despite the State’s attenuation of taint argument


State was unsuccessful in its attempt to use a 1983 DWI conviction to support a felony DWI enhancement, where the 1983 conviction was probated and, under the law in effect at the time of defendant’s DWI, a conviction that occurred before January 1, 1984 and for which the sentence was probated was not a final conviction


“Appellant’s 1983 conviction could therefore not be used for enhancement purposes, and without two enhancement convictions, appellant’s DWI was not a felony.”

Pregnant probationer’s selective prosecution defense succeeded; sufficient evidence showed that her pregnancy was a motivating factor in the decision to prosecute her for probation violation, particularly the testimony that “. . . on some cases, CSCD has worked with individuals who tested positive for drugs. But CSCD was not willing to work with [probationer] because she was pregnant. [Officer] testified that ‘what drove this violation report was the positive [urinalysis] and her being pregnant.’”


“The trial court’s sole conclusion of law was that Lovill’s selective prosecution claim required proof that she was prosecuted ‘because of’ her pregnancy. It found as a matter of fact that Lovill was not prosecuted ‘because of’ her pregnancy. It appears that the trial court failed to recognize that in a selective prosecution claim, the discriminatory purpose need not be the only purpose for the prosecution. Rather, the discriminatory purpose must merely be a ‘motivating factor’ for the decision to prosecute.”

Deemed harmful error was exclusion of telephone conversation that tended to support theory of self-defense,
which conversation occurred between defendant and a police officer near in time to the shooting


“...The record shows that the State’s questioning of Officer English and Beth Hankins left the jury with the impression, later emphasized during closing arguments, that appellant had not given any explanation of the shooting immediately after the event. Officer English testified that he asked appellant if he wanted to talk about what had happened. That question hovered in the air, but the State cut the witness off and redirected him to other matters. The jury did not hear that from the very beginning, appellant told officers that he shot his brother in self-defense. ... John argues that it was harmful to let stand the false impression that he was a cool, calm killer who had refused to admit to the shooting and that he offered no explanation until trial. ... In any murder prosecution, the defendant’s trial testimony is suspect because time has elapsed, creating both opportunity and time to concoct a self-serving story. Thus, John’s statements to English at or near the time of the incident would likely have a higher level of credibility or persuasive effect on the jury.”

Deemed erroneous was jury instruction to wit “if you do not find by a preponderance of the evidence that the defendant committed the offense of murder under the immediate influence of sudden passion arising from an adequate cause ...” because it “conditioned the first-degree felony punishment range on only a failure to find sudden passion unanimously rather than a unanimous negative finding on the issue”


Pronouncement of sentence in defendant’s absence deprived appellate court of jurisdiction, warranting remand for a new sentencing hearing


“Two conflicting lines of authorities from the intermediate courts have opined on the issue before us. One would require us to invoke our jurisdiction and reverse and remand, while in the other, jurisdiction fails. The first noted line of cases holds that because the appellate timetables commence when the sentence is imposed as articulated under article 42.02, article 42.03 is not a jurisdictional requirement, but merely reversible error. ... The second line of cases concludes the opposite: because the appellate timetables commence when 42.03 has been fulfilled, compliance with article 42.03 is a jurisdictional requirement. ... We adopt the jurisdictional argument enunciated by the Court of Criminal Appeals in _Thompson v. State_. ... The State suggests that the proper remedy is dismissal. However, the rules of appellate procedure prohibit our dismissing an appeal if the trial court’s erroneous action or failure to act prevents the proper presentation of the case, and the trial court can correct its action or failure to act. ... The Court of Criminal Appeals noted in Thompson that ‘we need not address the question of whether there is only one proper remedy for this situation; it is enough to determine whether the court of appeals chose a proper remedy.’ ... We decline the State’s invitation to dismiss the appeal in light of these cases and appellate rule 44.4, and instead abate and remand for a new sentencing hearing.”

Jury charge impermissibly allowed jury to convict on less than unanimous consent as to various counts of child sex crimes, yet the error did not warrant reversal because, while the conditioning instructions were flawed, the general charge instruction required a unanimous verdict


Since the fundamental error alleged was not “structural,” the error was subject to a harm analysis, and the court found there was no egregious harm because the general charge instructions required a unanimous verdict, even though the conditioning instructions did not mention that the jurors were required to unanimously agree regarding specific act or acts they believed defendant had committed as to each count.

Traffic stop for defective headlight was not unreasonably prolonged, nor did the stop constitute a “fishing expedition” in this possession of codeine with intent to distribute case, because the lawful purpose of the traffic stop was still ongoing at the time defendant provided his consent to search (i.e., the officers were waiting on a license check when consent was given).


Failing to use turn signal within 100 feet of turn justified detention from which DWI conviction spawned, rejecting argument that one need not use a turn signal when in the turn-only lane


“The plain language of the statute requires the driver to signal for a turn. It does not include exceptions for those situations in which there is only one direction to turn.”

DWI blood sample deemed admissible, despite the fact that sample was taken before defendant’s arrest (while at the hospital). Also rejected was the defendant’s argument that, since section 724.012(b) only allows for one sample, her second sample was involuntary.
Defendant, who owned a convenience store and routinely supplied third parties with legal products, which were later used by the third parties to create methamphetamine, was sentenced to life for money laundering. Since the overall amount of the proceeds of these individually small transactions amounted to more than $100,000, it was a first-degree offense. Granted there was plenty of evidence that he knowingly participated in this scheme, but still, are you serious? Life for selling Sudafed?


Pure spoliation claim for destruction of relevant evidence (as opposed to constitutional claim requiring compelled disclosure of exculpatory evidence) of field sobriety test videotape was not warranted even though it would have been helpful to the Defendant, because the officer did not act in bad faith in destroying the tape; he simply followed departmental policy, and other evidence existed demonstrating intoxication


“Even without field sobriety tests, the record contains other evidence of intoxication…. The missing tapes were not critical to whether the State could establish Freeman’s guilt beyond a reasonable doubt. . . . In summary, the tape of the field sobriety tests was subject to discovery. The State had a duty to preserve this evidence, which the State breached. Regarding the consequences which should flow from this breach, the State’s negligence was slight. The importance of the lost evidence is conflicting. The remaining evidence is more than sufficient to establish Freeman’s intoxication. Therefore, we hold that the trial court did not abuse its discretion by refusing to submit a spoliation instruction to the jury.”

Juror who had stomach virus, including symptoms of nausea, vomiting, and diarrhea, became “disabled” such that trial court could go forward with 11-member panel in DWI prosecution


Defendant convicted of aggravated kidnapping was not entitled to a lesser included offense instruction on unlawful restraint, because the evidence demonstrated an intent to keep the location of the Defendant and child secret, a key distinguishing element of aggravated kidnapping and unlawful restraint


It was not error to read witness’ testimony to the jury when the jury sent a note to the judge describing the jurors’ disagreement concerning what the witness said

In the same case, the court also rejected defendant’s argument that because her blood samples were below the legal limit, they “would invite the jury to conduct its own extrapolation because there is no other evidence of intoxication that the State would present”


Mistrial was not warranted, despite testifying officer’s reference to inadmissible confession, because the reference was brief, unclear, and not emphasized and defense counsel asked four more questions before approaching bench


Also, officer’s response did not expressly identify defendant as maker of confession; court’s instruction was worded in a way that minimized risk of prejudice, court instructed jury to disregard fact that officer said there was confession, and testimony demonstrated that defendant appeared to elicit officer’s reference to confession.


“Section 724.012 does not apply when a person consents to having his or her blood drawn. See Bennett v. State [Fort Worth, 1987] (whether defendant was under arrest when sample was taken is immaterial because there was no need to compel defendant’s submission to the test because defendant consented to giving a blood sample). Here, the police officer who requested the blood draws while defendant was at the hospital testified defendant consented to both the ‘first legal’ and ‘second legal’ blood draws. Nothing in the record contradicts the officer’s testimony that defendant consented, and nothing in the record supports defendant’s contention on appeal that her consent was involuntary. Therefore, we overrule defendant’s first and second issues . . . .” Regarding defendant’s Rule 403 argument, the court wrote: “Here, the police officer testified defendant admitted to him that she ‘had two beers,’ and he noticed that her eyes were bloodshot and watery. Because defendant was receiving treatment at the hospital, only two field sobriety tests were conducted: (1) the HGN test, which was consistent with intoxication, and (2) the Vertical Nystagmus test, which was inconsistent with a high level of intoxication. Because the field tests were inconsistent, the State needed the results of the blood draws to establish intoxication. Thus, the trial court could have reasonably concluded that the State’s need for the evidence weighed in favor of admissibility. . . . ”

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Also, defendant failed to preserve error by not objecting to trial court’s reading of said testimony to the jury.

Use of “stun belt” attached to Defendant during punishment phase of the trial did not amount to reversible error where the complaint was not preserved for review and where the jury was unaware that Defendant wore the apparatus


Considered as part of evidence supporting DWI conviction was information downloaded from “black box” of defendant’s vehicle indicating that defendant delayed applying his brake until less than one second before the collision


Also, defendant failed to preserve error by not objecting to trial court’s reading of said testimony to the jury.

Use of “stun belt” attached to Defendant during punishment phase of the trial did not amount to reversible error where the complaint was not preserved for review and where the jury was unaware that Defendant wore the apparatus

Gary Trichter

Troy McKinney
Motion to Seat Defendant Nearest to the Jury

by Mimi Coffey

STATE OF TEXAS

VS.

DEFENDANT’S MOTION TO SEAT DEFENDANT AT COUNSEL TABLE NEAREST TO THE JURY

Now comes the Defendant and moves this honorable Court to allow Defendant to sit at the counsel table nearest the jury throughout the duration of the entire trial. Requiring Defendant to sit at the counsel table farthest from the jury is inconsistent with due process because it takes away the presumption of innocence and denies the Defendant a fair trial.

I. REQUIRING DEFENDANT TO SIT AT COUNSEL TABLE FARDEST FROM THE JURY FOR THE FULL LENGTH OF TRIAL IS INCONSISTENT WITH DUE PROCESS

Forcing the defendant to sit at the counsel table farthest from the jury burdens the presumption of innocence because this distance places the defendant at a disadvantage at trial. This disadvantage impairs the fairness of a trial.

A. THE COURT HAS A DUTY TO EXAMINE COURT ROOM PRACTICES FOR UNFAIRNESS

Though the practice of seating the defendant at the table farthest from the jury is a tradition accepted by most trial courts, there is a need to evaluate this tradition to assure that the defendant receives a fair trial. To implement the presumption of innocence, courts must be alert to factors that may undermine the fairness of the fact-finding process. Estelle v. Williams, 425 U.S. 501, 503 (1976). In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. In re Winship, 397 U.S. 398, 364 (1970).

The Supreme Court emphasized the need to scrutinize courtroom practices in Estelle v. Williams where the court reviewed a case involving the effect of a defendant wearing prison garb during trial. In Estelle the court stated:
The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience. Estelle, 425 U.S. at 504.

Courts must review their practices when there is a probability that those practices may negatively impact a defendant's rights. This is true of the custom that the State sits at the counsel table closest to the jury. A court must review this practice because there is likelihood that jurors may base their decisions on something other than the evidence at trial and proof beyond a reasonable doubt.

**B. REASON, PRINCIPLE, AND COMMON HUMAN EXPERIENCE**

The court's analysis of court practices should be based on reason, principle, and common experience. Reason, principle, and common experience reveal a number of reasons why counsel table seating arrangements can influence jurors and negatively affect a defendant's due process rights.

First, the court must keep in mind that jurors are generally not aware of the custom that the State sits at the table closest to the jury. Nor is the court likely to instruct or inform jurors that this is customary. A juror's lack of knowledge can cause them to draw any number of conclusions. Jurors can infer from common sense that the defendant has been placed far from them in order to protect them because the defendant is dangerous, violent, or undesirable. This would be a natural conclusion given the care and diligence most courts take in ensuring the integrity of juries. Jurors are monitored by bailiffs and given instructions to make sure they are not influenced improperly. The care taken to protect juries and the lack of knowledge about seating practices could easily lead jurors to make a negative judgment on the defendant's character that is entirely unrelated to the evidence. In fact, the judicial system is so concerned that jurors may make conclusions of guilt based on the notion that a defendant is violent or non-law abiding that it has limited the circumstances when such character evidence can be admitted against a defendant in the rules of evidence. See Tex. R. Evid. 404. It makes little sense to guard a defendant from evidence that may lead a jury to decide a defendant is guilty for an improper reason but institute a practice that can lead a jury to find a defendant guilty for the exact same improper reason.

Basic principles of fairness also suggest that the State should not be seated at the table closest to the jury. The common justification given to explain why the State is seated at the table closest to the jury is that the entire burden of proof is on the State. This response tacitly admits that the seating arrangement gives the State some advantage or is meant to balance the defendant's rights to presumption of innocence and proof beyond a reasonable doubt. There is no reason to diminish the defendant's rights especially when the result of seating the parties in this way can actually burden the defendant's rights.

It is not uncommon for adversaries in other contexts to trade sides halfway through a contest or switch sides to assure that neither party receives an unfair advantage where money is involved. For example this is the common practice in football, basketball, tennis and other sports, which involve two adversarial teams or players. Where liberty is involved, the founders always gave the citizen accused added advantage.

Research and scholarly studies have show that mere proximity can influence the way people perceive others. For example, one study showed that eye contact increased when persons were close to each other. Anthony Chapman, Eye Contact, Physical Proximity and Laughter: A Re-Examination of the Equilibrium model of Social Intimacy, 3 Social Behavior and Personality 143, 149–50 (1975). Another study suggested that when non-disabled people were put in close proximity to disabled persons, negative feelings about disabled people lessened in general. Meyer, Gouvier, Duke, & Advokat, Influence of Social Context on Reported Attitudes of Non-Disabled Students Toward Students with Disabilities, 45 Rehabilitation Counseling Bulletin 50, 52 (2001). Another study found that a person tends to have positive evaluations of the relationships of others when the people being observed are closer to each other. Wellens & Goldberg, The Effects of Interpersonal Distance and Orientation Upon the Perception of Social Relationships, 99 The Journal of Psychology 39, 45 (1978).

Attached is a scholarly article by Mimi Coffey, which addresses space proximity from the social
sciences and proves due process is violated by this common practice. These examples and this paper show how seating the State at the table closest to the jury can result in unfairness that can violate defendants due process rights.

II. PRAYER

For these reasons, Defendant requests this court allow Defendant be allowed to sit at the counsel table nearest the jury throughout the duration of the entire trial.

CERTIFICATE OF SERVICE

I hereby certify DEFENDANT’S MOTION TO SEAT DEFENDANT AT COUNSEL TABLE NEAREST TO THE JURY was served on District Attorney by hand delivery on

This ____ day of, ____________, 2009.

Respectfully Submitted,

The Coffey Firm
4700 Airport Freeway
Fort Worth, Texas 76117
Phone: 817-831-3100
Fax: 817-831-3340

____________________
Mimi Coffey
STATE BAR NO: 00792435
ATTORNEY FOR DEFENDANT
Overview
TCDLA President-Elect Stanley Schneider is hosting a member's retreat in beautiful Santa Fe, New Mexico. All TCDLA members are invited to attend.

Santa Fe, New Mexico, located sixty miles north of Albuquerque, is a favorite vacation destination in the USA. As the second-oldest city in the United States, it offers a unique mix of history, architecture, culture, cuisine, outdoor activities, and shopping in a setting that epitomizes the American Southwest.

Agenda

Wednesday, July 22
Travel Day

Thursday, July 23

8:00 am  Join us for a hike (location to be determined)
12:00 pm  Group lunch in Santa Fe (location to be determined)
8:00 pm  Group dinner (location to be determined)

Friday, July 24
5:30 pm  Opera Tailgate Dinner (Santa Fe Opera)
6:30 pm  Prelude talk (Santa Fe Opera)
9:00 pm  La Traviata (Santa Fe Opera)

Saturday, July 25
8–noon  TCDLA Membership Retreat Spouses’ breakfast (location to be determined)
12:30 pm  Group Lunch (location to be determined)
1:30 pm  Shop Santa Fe
8:00 pm  Dinner (location to be determined)

Sunday, July 26
Travel Day
Meeting | Lodging Location
The Hotel Santa Fe and Hacienda and Spa is located at 1501 Paseo De Peralta, Santa Fe, NM 87501. Room rates are as follows: $179 per night for single and/or double occupancy. The group rate is available until June 22, 2009, or until the room block is full, whichever comes first. You may call in your reservation at 800.825.9876, and refer to booking #10317V and/or group name, TCDLA, for that rate. Parking is complimentary for registered guests of the hotel.

Travel Arrangements
To make flight or other travel arrangements, please contact your personal travel agent.

Santa Fe Attractions
Santa Fe has dozens of historic sites where you'll encounter thousands of years of rich history, from ancient Native American ruins to Spanish Colonial churches, mining towns and remnants of America's Wild West frontier days. Visit a Civil War battle site that played a pivotal role in the war's outcome. See a cattle ranch that once belonged to a 1930s Hollywood star.

You can meander through fragrant lavender fields, explore nature trails at a National Audubon Society center, and attend a wine festival in the country's earliest wine-producing region.

Attending

☐ YES! I would like to attend the TCDLA Retreat Santa Fe
☐ YES! I would like to attend La Traviata at the Santa Fe Opera, cost is $132.00 per ticket (please enter credit card information below)

$132.00 x Quantity: __________

Contact Information

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Bar Number________________________________________________
Street Address______________________________________________
City ______________________ State __________ Zip_______________
E-mail ______________________________________________________
Phone ______________________ Fax _________________________

Payment (CASH IS NOT ACCEPTED)

Payment for
☐ Santa Fe Opera registration

Credit Card Number __________________________ Expiration Date __________________________

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- [ ] Mrs.

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