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Bobby Barrera, Michael Gross & Adam Kobs
Course Directors

November 3–4, 2016
Menger Hotel
San Antonio, Texas

SACDLA and SABA members get TCDLA rate

Texas Criminal Defense Lawyers Association

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The Neurobehavioral Clinic
Dr. M. K. Hamza, PhD, LP, PA
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- Child Custody
- Counseling & Psychotherapy
October 2016

- October 12
  CDLP | Innocence for Students | co-sponsored with IPOT
  Houston, TX

- October 13–14
  CDLP | 14th Annual Forensics
  Houston, TX

- October 22–23
  EPCLG | 24th Annual Criminal Law in Ruidoso
  Ruidoso, NM

- October 28
  CDLP | Beating the Drum for Justice
  Laredo, TX

November 2016

- November 3–4
  TCDLA | 12th Annual Stuart Kinard Memorial Advanced DWI Seminar
  San Antonio, TX

- November 16
  CDLP | Beating the Drum for Justice
  McAllen, TX

- November 17–18
  CDLP | Capital Litigation/Mental Health
  South Padre Island, TX

- November 18
  CDLP | Beating the Drum for Justice
  Galveston, TX

- November 18
  CDLP | Nuts ‘n’ Bolts | co-sponsored with San Antonio Criminal Defense Lawyers Association
  San Antonio, TX

December 2016

- December 1–2
  TCDLA | Defending Those Accused of Sexual Offenses
  San Antonio, TX

- December 3
  TCDLA Board and CDLP and Executive Committee Meetings
  San Antonio, TX

- December 16
  CDLP | 9th Annual Hal Jackson Memorial Jolly Roger Seminar | co-sponsored with Denton County Criminal Defense Lawyers Association
  Lewisville, TX

January 2017

- January 5–6
  CDLP | Junk Science
  Austin, TX

- January 12
  CDLP | Nuts ‘n’ Bolts | co-sponsored with Lubbock Criminal Defense Lawyers Association
  Lubbock, TX

- January 13–14
  CDLP | 36th Annual Prairie Dog Lawyers Advanced Criminal Law Seminar | co-sponsored with LCDLA
  Lubbock, TX

- January 20
  CDLP | Beating the Drum for Justice
  Sugarland, TX

- January 20
  CDLP | Beating the Drum for Justice
  McKinney, TX

February 2017

- February 9–10
  CDLP | 6th Annual Craig Washington & Senator Rodney Ellis Criminal Law | co-sponsored with Thurgood Marshall School of Law and Earl Carl Institute
  Houston, TX

- February 9
  CDLP | Public Defender/Indigent Defense
  Dallas, TX

- February 9
  CDLP | Capital
  Dallas, TX

- February 10
  CDLP | Mental Health
  Dallas, TX

March 2017

- March 9–10
  TCDLA | Federal Law
  El Paso, TX

Seminars sponsored by CDLP are funded by the Court of Criminal Appeals of Texas. Seminars are open to criminal defense attorneys; other professionals who support the defense of criminal cases may attend at cost. Law enforcement personnel and prosecutors are not eligible to attend.

TCDLA seminars are open only to criminal defense attorneys, mitigation specialists, defense investigators, or other professionals who support the defense of criminal cases. Law enforcement personnel and prosecutors are not eligible to attend unless noted “open to all.”

**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.
DNA mixture issues have been at the forefront during the first half of 2016. An update is in order, but first some background. While some in the forensic community have raised this issue for years, it got widespread attention in May 2015, when the FBI notified labs across the country of discrepancies discovered in the interpretation of DNA mixture cases—those in which multiple contributors may be present. Acting quickly thereafter, the Texas Forensic Science Commission (TFSC) assembled a panel of experts to review lab procedures to determine if they were meeting scientifically accepted standards, and notified the entire criminal justice community that results in DNA mixture cases might be inaccurate.

TFSC reviewed standard operating procedures from labs across the state. The results were that in some jurisdictions, the procedures were utterly deficient and unreliable. After reviewing the procedures at the Austin Police Department crime lab, for example, TFSC found issues affecting the accuracy of the analyses at every stage of the testing process. There were issues including contamination, improperly calibrated instruments, incorrect interpretations of results, incompetent analysts, and more. The lab’s accreditation has since been withdrawn, the head of the lab fired, and the lab closed indefinitely.

In the wake of these discoveries and others across the state, TFSC and the Texas Indigent Defense Commission (TIDC) jointly created the Texas DNA Mixture Review Project (“Project”). The Project has received requests from more than 900 persons in 120 counties who have been convicted in cases involving DNA mixture evidence.

The Project is being tasked to review those cases to determine whether improperly calculated DNA mixture evidence may have undermined a conviction. The six attorneys staffing the Project have requested recalculation in at least 50 of the cases after careful review. More than 30 counties have sent out notices on cases affected by their respective district attorney’s offices, while other requests come from public notices and law library postings about this ongoing forensic issue. Some of the larger counties are still sending notices to individuals across the state whose convictions might have been affected by this problem. TIDC continues to award grant funding so that clients with this issue can be screened and identified. In December, there will be a State
Bar CLE offered on criminal writs in Austin.

TCDLA has supported the Project and will continue to update our members on this important collaborative effort to help review thousands of cases from all over Texas. While no exonerations have taken place yet, we will not stop until these cases are all given a full and thorough review.

TFSC hosted a DNA mixture training seminar recently in San Antonio. One of TCDLA’s experts on this issue, Pat McCann of Houston, reports that the seminar was a good mix of science and practical issues for lawyers handling cases with DNA mixture evidence. While not directed to DNA mixture cases, the Court of Criminal Appeals hosted a post-conviction seminar that will also help ensure that clients with this issue get adequate appellate review of their cases.

This is an issue that may require years of vigilant work by TCDLA and our members. Together, and with the help of TFSC and TIDC, we will work to identify cases in which innocent people might have been convicted due to unreliable DNA mixture evidence. We will discover those cases in which justice was not served, no matter how long it takes.

Welcome to New Members of TCDLA
(8/21/2016 – 9/20/2016)

**Regular Members**
Kleon Constantine Andreadis, El Paso
Alice M. Balagia, Manor
Ron Baron, Plano
Ryan Patrick Boyer, San Antonio
Hugh Scott Brasher, Houston
Stephen R. Edwards Jr., Baton Rouge
Andrew C. Froelich, San Antonio
Rebecca M. Grothaus, Sugar Land
Linda Mazzagatti, Bellaire
Rachel Moreau-Davila, San Antonio
Alan De Jesus Perez, Houston
Matthew Louis Pospisil, Houston

**Public Defender Members**
David Bost, Wichita County
Joanne Marie Heisey, Austin
Jeremy Schepers, Austin
Elizabeth Tandiwe Stewart, Austin
Gretchen Sims Sween, Austin
Derek Richard VerHagen, Austin
Ben Wolff, Austin

**Federal Public Defender**
Erin Marie Eckhoff, Austin

**Affiliate Member**
Jennifer Shahan, Nacogdoches

**Investigator Member**
Mona Kermani, Austin

**Student Member**
Judith Davila-Nelson, San Antonio

To access members-only information on your TCDLA website, you first must sign in. Then, in the bar on top with blue entries, click on the menu item labeled “Members Only,” next to the “My Account” tab. All the TCDLA resources are then available to you. For member assistance: mrendon@tcdla.com or call 512-478-2514.

www.tcdla.com
The TCDLA membership met on June 18, 2016, in San Antonio for the 45th Annual Membership Meeting. The following motions were made.

MOTION: Approve Minutes—February 13, 2016
Motion to adopt the minutes from the Board Meeting on February 13, 2016, in New Orleans, Louisiana, made by Nicole DeBorde, seconded by David Ryan—motion carries.

MOTION: Board Electronic Votes—Motion to approve electronic votes for recipients of:
- Percy Foreman Lawyer of the Year: Richard Gladden and Brian Wice, made by David Ryan, seconded by Keith Hampton—motion carries.

MOTION: Dallas Bar Affiliate
Motion to have the Dallas Bar as a TCDLA Affiliate, made by Susan Anderson, seconded by Ron Goranson—motion passes.

MOTION: Article VII—Board of Directors
* * *
(b) No director may be elected to serve for more than two (2) full consecutive terms, not to include any term or terms served as an associate director provided this restriction shall not prevent officers and the editor of the VOICE for the Defense who are directors by virtue of office from serving on the Board of Directors. Any director who is ineligible to be reelected to the Board is also ineligible for election as associate director. No associate director may be elected for more than two (2) consecutive terms, except as deemed necessary by the nominations committee and approved by the Board, associate directors terms may be extended by one year. The executive committee shall have the responsibility for establishing rules to ensure the orderly election of the board of directors.

Motion made by Adam Kobs, seconded by Ron Goranson—motion carries.

MOTION: Long Range Plan
Motion to adopt the Long Range Plan printed in June Voice and in board packet made by John Convery, seconded by Dan Hurley—motion carries.

MOTION: Slate of 2016–2017 Officers: Nominations Committee Recommendations, Sam Basset
Motion to approve the slate of nominations for 2016–17 officers (below) and the new and renewing directors and associate directors made by Ron Goranson, seconded by Gerry Morris—motion carries.
Slate of Officers: John Convery, President, David Moore, President-Elect, Mark Snodgrass, 1st Vice President, Kerri Anderson-Donica, 2nd Vice President, Grant Scheiner, Treasurer, Michael Gross, Secretary

MOTION: 2016–2017 Board Members—Associate Directors and Directors

MOTION: to approve the slate of nominations made by Sam Bassett, seconded by Bobby Mims—motion carries.

MOTION to adjourn at 12:45 pm, made by John Convery, seconded by Sam Bassett—motion carries.

TCDLA Annual Report, FY 2016 (September 1, 2015, through August 31, 2016)

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* Includes persons trained at CAI Law in Plano by Rick Wardroup through CDLP funds.

TCDLA received notice from the Texas Court of Criminal Appeals in August of the following grant awards for fiscal year 2016 (September 1, 2016, through August 31, 2017).

- Criminal Defense Lawyers Project $1,128,432
- Innocence $100,000
- Public Defenders $33,033
- Total CCA grants $1,261,465

TCDLA will maximize these grants and conduct 42 seminars in the coming year in 19 cities across Texas. In addition, 77 seminars will be online on our TCDLA website. Working together with the public defender offices and our local criminal defense bars, we project we will train 4,692 lawyers in coming fiscal year 2017. We thank the Texas Court of Criminal Appeals for having the trust and confidence in TCDLA/CDLP to provide quality continuing legal education to criminal defense lawyers involved in indigent defense across Texas. We thank in particular Judge Barbara Hervey, the judicial oversight for the entire $18,000,000 Court Personnel Grant. She has been an outstanding supporter over the last 14 years.

Miriam Duarte, membership coordinator, celebrated 10 years with TCDLA on 7/14/2016. Miriam has contributed to the success of TCDLA through her steadfast dedication to TCDLA and her outstanding service to our members. She has been an outstanding role model to all the staff.

Our 2016 Declaration of Independence Reading project, under the direction of Robb Fickman (Houston) and, as he called them, the F Troop (regional coordinators), accomplished what seemed like an impossible task—the reading of the Declaration of Independence in all 256 counties in Texas. A preliminary video can be seen via our website. I encourage you to take a look at it. Look at the pride on our members’ faces participating in what has been an annual event. We thank those of you who participated in 2016 and look forward to you volunteering to participate in 2017.

Special thanks to course directors Kerri Anderson-Donica (Corsicana), Heather Barbieri (Plano), and Mark Bennett (Houston) for our Voire Dire CLE and Jason Cassel (Longview) and Audrey Moorehead (Dallas) for our Cross-Examination CLE held in Dallas in September. Thanks to all of them and our excellent lineup of speakers, we had 133 attendees.

Special thanks to Gary Udashen and Mike Ware, our course directors for the Actual Innocence for Lawyers, co-sponsored with Innocence Project of Texas and held in Austin in August. Thanks to their efforts, we had 141 attendees. We had Jim McCloskey and Billy Smith, exonoree, speak at our Innocence Dinner program.

Special thanks to Bill Habern and David O’Neil, course directors for our Post-Conviction CLE held in Austin in August. Thanks to them and our speakers—which included David Gutierrez, chair of the Texas Board of Pardons and Parole—we had 115 attendees.

Special thanks to Patricia Jay (San Antonio), president of the San Antonio Criminal Defense Lawyers Association, for allowing CDLP to co-sponsor their CLE held in San Antonio. We also thank Jennifer Zarka (San Antonio), SACDLA’s new executive director, for her help and support. Thanks to their efforts, we had 36 attendees.

John Hunter Smith (Denton), chair of the Criminal Defense Lawyers Project (CDLP), and Heather Barbieri (Plano), vice-chair, have developed the theme of Beating the Drum for Justice for our CDLP CLE that will be held in 11 cities over the next year. The first was held in Fredericksburg in late September. Our goal is to bring the very best quality CLE to criminal defense lawyers who don’t usually have access to CLE. Please check out website for the locations of these CLE.

TCDLA currently has 3,203 members. It is the largest criminal defense lawyers association in the country. We ask our members to encourage other lawyers who practice criminal law to join TCDLA.

Good verdicts to all.
t’s that time of year again—Fall Ball, postseason baseball, the Fall Classic. I’ve always loved baseball. I still love to play catch and burnout and have a whole baseball collection. My brothers and I grew up in a baseball family. Our dad introduced us to baseball early on. He coached and sponsored our little league teams, and when it was clear we loved baseball as much as he did, he built us our own field of dreams . . . complete with a real cornfield in the outfield and wooden bleachers. “If you build it they will come.” People came every Sunday to play with us until it got too cold. Everyone always played, and the bags were really 90’ apart. My dad always pitched.

My brother George always had a love for the game on a whole different level, though. All three of us kids collected baseball cards, but George memorized, and could recite, statistics about most every player. Baseball is a game of statistics.

Statistics. That got me thinking about our clients and our profession. How often do clients come in and want to know our personal stats and their odds? These are statistics that we don’t keep because the reality is that we are typically the underdogs. Real trial lawyers lose more cases than they win (certainly, if a win is judged by an acquittal). And we sure can’t guarantee or even insinuate a guaranteed outcome to anyone. The best we can do is promise our very best.

If we’re talking about statistics, though, here are some sobering statistics and numbers that do matter:

- 1989: the first DNA exoneration took place (innocenceproject.org)
- 263 inmates on death row in Texas as of January 1, 2016 (deathpenaltyinfo.org)
- $17,340: cost per year to keep inmate in prison (deathpenaltyinfo.org)
- $1.2 million: estimate of cost of death penalty case from indictment to execution (deathpenaltyinfo.org)
- 124 prison units in Texas (texastribune.org)
- 143,065 inmates in Texas prisons as of July 2016 (texastribune.org)
- 12 state hospitals (dshs.texas.gov/mhhospitals)
- 122: average wait time for a maximum security bed at a state hospital (reserved for those charged with serious violent crimes) as of April 1 (Department of State Health Services)
5: number of states, including DC, where marijuana has been legalized

>200,000: number of students who have lost federal aid eligibility because of a drug conviction (drugpolicy.org)

>$51,000,000,000: amount spent annually in the U.S. on the war on drugs (drugpolicy.org)

3,197: members of TCDLA

125: criminal law seminars held by TCDLA/CDLP during the past fiscal year, including 77 webcast

There is more to the numbers than what meets the eye. The statistics tell a story. They paint a picture that requires urgency and attention—a story to inspire action. We must all do our part for every client, every time. We are the front line—and we hold the line. Each of us individually and collectively can make a huge impact on the lives of those individuals and families navigating the uncertainty and harshness of the criminal justice system. We are the faces of empathy and humaneness for our clients in a system often lacking.

And as my dad always told us, “The things in life that count, ain’t things.”

TCDLA Member Benefit

Let them know you stand with the best: The TCDLA logo is now available for use on your website or on your business cards. TCDLA will create camera-ready artwork for business cards. For more information, email mrendon@tcdla.com.
Successfully summoning an out-of-state witness to testify in Texas is a chore. Texas Code of Criminal Procedure, Article 24.28, is entitled Uniform Act to Secure Attendance of Witnesses from Without State. Section 4 provides our authority to subpoena a witness from another state. The process is error-prone and rarely guaranteed. Nonetheless, your out-of-state witness may be the lynchpin of your case. To this end, some insight into the logistical pitfalls may save you hours of work and millimeters of stomach lining. Of course, the following is only a primer to assist in understanding the scope of the problem. It won’t substitute for your independent research.

First, you’ll need to build a sister-state team. A licensed attorney and investigator in the state where your witness is located are your most indispensable assets. They do the heavy lifting. Consequently, choose dependable and committed people you can trust. Experienced lawyers are worth their weight in gold. Pay them whatever they want . . . the peace of mind is worth it. I’ve had success working with federal or state public defender offices in the sister-state. They know what’s at stake and how much you are depending upon them. Plan on 30–90 days to obtain the out-of-state subpoena and to serve your witness. In addition, you are responsible for making witness travel arrangements and paying for room and board. Be prepared to pay for these expenses in advance, and be poised to assure the sister-state judge these expenses are covered.

The next step (and easiest) is filing an application for the out-of-state witness with the applicable Texas court in which your case is pending. The application must assert the witness possesses material evidence. The application must assert the last-known location of the witnesses, how long they are needed, and through which states they must travel to arrive in Texas. The application must also assure these states will give the witness protection from arrest and service of civil and criminal process in connection with matters arising before their entrance into said state. The template I used for this application was obtained from the “Investigator Desk Reference Manual,” Austin, TX: Texas District & County Attorneys Association, Merillat, A. P. (2006). The Texas court judge must then issue a certificate stating these facts are true and enter an order advising the sister-state judge that the presence of the witness is necessary for the administration of justice. This certificate may also include a recommendation the witness be taken into immediate custody and be delivered to an officer of Texas to assure attendance in court.

Following this, a certified copy of the Texas certificate must be filed in the county where
your witness is located. The presiding judge in that jurisdiction will conduct a hearing to determine whether the witness is material, necessary, and whether complying with the subpoena would cause the witness undue hardship. Your sister-state attorney will determine the proper titles for these documents, complete the filing in the appropriate county, and get a hearing date set. In addition, your investigator must coordinate with the attorney in locating the witnesses and bringing them before the sister-state court for the hearing. Sometimes the witnesses can waive their appearance and agree to be served. Otherwise, the witness must appear at the courthouse and participate in the hearing. After the application hearing occurs, the presiding judge there will issue a summons (subpoena) for the witness to appear in Texas. Your investigator then serves this summons on the witness. It directs the witness to appear for testimony as outlined in your original Texas application. The final problem is getting the witness on the bus, plane, or train to transport them to your jurisdiction. Oftentimes the witness may have never traveled on a bus or airplane before. This is where your trusted sister-state investigator can help assure the witness makes the bus stop or boarding gate on time with ticket, boarding pass, itinerary, and proper identification in hand.

Building a reliable team and planning ahead are keys to success in securing the out-of-state witness for trial. In fact, your team is indispensable. Moreover, the relationships you build with them make this stressful process as smooth as possible. But even in the best of circumstances, you won’t know it worked until you lay eyes on the witness at the airport. Finally, you may be asked to return this favor someday. Always be ready to help a fellow defense attorney in need.

Stephen Gustitis is a criminal defense lawyer in Bryan-College Station. He is Board Certified in Criminal Law by the Texas Board of Legal Specialization. He is also a husband, father, and retired amateur bicycle racer. Reach him at gustitis@mac.com.

“Off the Back” is an expression in competitive road cycling describing a rider dropped by the lead group who has lost the energy saving benefit of riding in the group’s slipstream. Once off the back the rider struggles alone in the wind to catch up. The life of a criminal defense lawyer shares many of the characteristics of a bicycle rider struggling alone, in the wind, and “Off the Back.” This column is for them.
On July 12, 2016, United States District Judge William H. Pauley III, of the Southern District of New York, granted the defendant’s motion to suppress the narcotics and drug paraphernalia recovered by law enforcement agents in connection with a search of his apartment. Judge Pauley held that (1) the warrantless use of a cell-site simulator to locate the defendant’s apartment as the place of use for the target cell phone, was an unreasonable search; (2) the attenuation doctrine was inapplicable; and, (3) the third-party doctrine was also inapplicable [emphasis added]. United States v. Lambis, ___F.Supp.3d___, 2016 WL 3870940 (July 12, 2016).

Because of space constraints, this column will focus only on that portion of the opinion that discusses the use of the cell-site simulator. Judge Pauley’s opinion reads, in part, as follows:

[The Facts]

In 2015, the Drug Enforcement Administration (the “DEA”) conducted an investigation into an international drug-trafficking organization. As a part of that investigation, the DEA sought a warrant for pen register information and cell site location information (“CSLI”) for a target cell phone. Pen register information is a record from the service provider of the telephone numbers dialed from a specific phone. CSLI is a record of non-content-based location information from the service provider derived from “pings” sent to cell sites by a target cell phone. CSLI allows the target phone’s location to be approximated by providing a record of where the phone has been used.

Using CSLI, DEA agents were able to determine that the target cell phone was located in the general vicinity of “the Washington Heights area by 177th and Broadway.” (April 12, 2016, Suppression Hearing Transcript (“Supp. Tr.”), at 39.) However, this CSLI was not precise enough to identify “the specific apartment building,” much less the specific unit in the apartment complexes in the area. (Supp. Tr. at 39.)

To isolate the location more precisely, the DEA deployed a technician with a cell-site simulator to the intersection of 177th Street and Broadway. A cell-site simulator—sometimes referred to as a “StingRay,” “Hailstorm,” or “TriggerFish”—is a device that locates cell phones by mimicking the service provider’s cell tower (or “cell site”) and forcing cell phones to transmit “pings” to the simulator. The device then calculates the strength of the “pings” until the target phone is pinpointed. (See Supp. Tr. at 40.) Activating the cell-site simulator,
the DEA technician first identified the apartment building with the strongest ping. Then, the technician entered that apartment building and walked the halls until he located the specific apartment where the signal was strongest (Supp. Tr. at 41) [emphasis added].

The cell-site simulator identified Lambis’ apartment as the most likely location of the target cell phone. That same evening, DEA agents knocked on Lambis’ apartment door and obtained consent from Lambis’ father to enter the apartment. (Supp. Tr. at 8–9.). Once in the apartment, DEA agents obtained Lambis’ consent to search his bedroom. (Supp. Tr. at 13.) Ultimately, the agents recovered narcotics, three digital scales, empty zip lock bags, and other drug paraphernalia. (Supp. Tr. at 14.) Lambis seeks to suppress this evidence.

* * *

[The Fourth Amendment]
The Fourth Amendment guarantees that all people shall be “secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. CONST. Amend. IV. “[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable.” New Jersey v. T.L.O., 469 U.S. 325, 337, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). “[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.” Kyllo v. United States, 533 U.S. 27, 33, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). Barring a few narrow exceptions, “warrantless searches ‘are per se unreasonable under the Fourth Amendment.’” City of Ontario v. Quon, 560 U.S. 746, 760, 130 S.Ct. 2619, 177 L.Ed.2d 216 (2010) (quoting Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). The home has special significance under the Fourth Amendment. “At the very core of the Fourth Amendment ‘stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’” Kyllo, 533 U.S. at 31, 121 S.Ct. 2038 (quoting Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)).

[Kyllo v. United States]
In Kyllo, the Supreme Court held that a Fourth Amendment search occurred when Government agents used a thermal-imaging device to detect infrared radiation emanating from a home. 533 U.S. at 40, 121 S.Ct. 2038. In so holding, the Court rejected the Government’s argument that because the device only detected “heat radiating from the external surface of the house,” there was no “search.” Kyllo, 533 U.S. at 35, 121 S.Ct. 2038. The Court reasoned that distinguishing between “off-the-wall” observations and “through-the-wall surveillance” would “leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home.” Kyllo, 533 U.S. at 35–36, 121 S.Ct. 2038. Thus, the Court held that “[w]here . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.” Kyllo, 533 U.S. at 40, 121 S.Ct. 2038 [emphasis added].

[The Similarity of the Facts Here to Those in Kyllo]
Here, as in Kyllo, the DEA’s use of the cell-site simulator to locate Lambis’ apartment was an unreasonable search because the “pings” from Lambis’ cell phone to the nearest cell site were not readily available “to anyone who wanted to look” without the use of a cell-site simulator. See United States v. Knotts, 460 U.S. 276, 281, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983); see also State v. Andrews, 227 Md.App. 350, 395–96, 134 A.3d 324 (2016)(holding that the use of a cell site simulator requires a search warrant based on probable cause, and finding that the trial court properly suppressed evidence obtained through the use of the cell-site simulator). The DEA’s use of the cell-site simulator revealed “details of the home that would previously have been unknowable without physical intrusion,” Kyllo, 533 U.S. at 40, 121 S.Ct. 2038, namely, that the target cell phone was located within Lambis’ apartment. Moreover, the cell-site simulator is not a device “in general public use.” Kyllo, 533 U.S. at 40, 121 S.Ct. 2038. In fact, the DEA agent who testified at the hearing had never used one.

[The Government’s Argument and the Court’s Response]
The Government counters that Kyllo is not implicated here. In Kyllo, the Court expressed concern that the Government could employ devices, like a thermal imaging device, to learn more intimate details about the interior of the home, such as “at what hour each night the lady of the house takes her daily sauna and bath.” Kyllo, 533 U.S. at 38, 121 S.Ct. 2038. The Government contends that because the only information to be gleaned from a cell-site simulator is the location of the target phone (for which the Government had already obtained a warrant for CSLI), no intimate details of the apartment would be revealed and Lambis’ expectation of privacy would not be implicated. But the Second Circuit has rejected a similar argument even when the search at issue could “disclose only the presence or absence of narcotics” in a person’s home. United States v. Thomas, 757 F.2d
1359, 1366–67 (2d Cir.1985) (holding that a canine sniff that “constitutes a search under the Fourth Amendment . . . when employed at a person’s home”).

* * *

[United States v. Karo and Its Application to This Case]

The Supreme Court adopted a similar rationale in United States v. Karo, 468 U.S. 705, 717, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984). There, the Court held that “[t]he monitoring of a beeper in a private residence, a location not opened to visual surveillance, violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence.” Karo, 468 U.S. at 706, 104 S.Ct. 3296.

* * *

[T]he Court explained that “[t]he primary reason for the warrant requirement is to interpose a neutral and detached magistrate between the citizen and the officer engaged in the often competitive enterprise of ferreting out crime,” and that “[r]equiring a warrant will have the salutary effect of ensuring that use of beepers is not abused, by imposing upon agents the requirement that they demonstrate in advance their justification for the desired search.” Karo, 468 U.S. at 717, 104 S.Ct. 3296 (quotations omitted). Thus, even though the DEA believed that the use of the cell-site simulator would reveal the location of a phone associated with criminal activity, the Fourth Amendment requires the Government to obtain a warrant from a neutral magistrate to conduct that search.

The fact that the DEA had obtained a warrant for CSLI from the target cell phone does not change the equation. “If the scope of the search exceeds that permitted by the terms of a validly issued warrant . . . , the subsequent seizure is unconstitutional without more.” Horton v. California, 496 U.S. 128, 140, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990); see also United States v. Voustianiouk, 685 F.3d 206, 212 (2d Cir.2012). Here, the use of the cell-site simulator to obtain more precise information about the target phone’s location was not contemplated by the original warrant application. If the Government had wished to use a cell-site simulator, it could have obtained a warrant. See Karo, 468 U.S. 705, 718, 104 S.Ct. 3296.

* * *

. . . And the fact that the Government previously demonstrated probable cause and obtained a warrant for CSLI from Lambis’ cell phone suggests strongly that the Government could have obtained a warrant to use a cell-site simulator, if it had wished to do so.

[The Court’s Conclusion: What We Have Here Is a Violation of the Fourth Amendment]

The use of a cell-site simulator constitutes a Fourth Amendment search within the contemplation of Kyllo. Absent a search warrant, the Government may not turn a citizen’s cell phone into a tracking device. Perhaps recognizing this, the Department of Justice changed its internal policies, and now requires government agents to obtain a warrant before utilizing a cell-site simulator. See Office of the Deputy Attorney General, Justice Department Announces Enhanced Policy for Use of Cell-Site Simulators, 2015 WL 5159600 (Sept. 3, 2015) [emphasis added].

* * *

My Thoughts

Lambis was the second federal case in which a defendant filed a motion to suppress evidence obtained by the use of a cell-site simulator. It is clear that federal agents are now required to secure a search warrant before they can use a cell-site simulator. Interestingly, Circuit Judge Diana Gribbon Motz, of the United States Court of Appeals for the Fourth Circuit, had already recognized this requirement in Footnote 4 to her opinion in United States v. Graham, 824 F.3d 421 (4th Cir. May 31, 2016), which reads, in part:

Like these instances of government surveillance, when the government uses cell-site simulators (often called “stingrays”) to directly intercept CSLI instead of obtaining CSLI records from phone companies, the Department of Justice requires a warrant. See Dept of Justice, Department of Justice Policy Guidance: Use of Cell-Site Simulators 3 (2015) available at www.justice.gov/opa/file/767321/download [emphasis added].

In the first federal case in which a defendant filed a motion to suppress evidence obtained by the use of a cell-site simulator, United States District Judge David G. Campbell of the District of Arizona addressed whether a search warrant has to identify a cell-site simulator as being authorized by the warrant:

Defendant argues that the search exceeded the scope of the warrant because the warrant did not specifically authorize the FBI to use a cell-site simulator.

* * *

There is no legal requirement that a search warrant specify the precise manner in which the search is to be executed.
United States v. Rigmaiden, 2013 WL 1932800 (D. Ariz. May 8, 2013) [Note: Rigmaiden elected to proceed without the assistance of counsel and filed dozens of motions seeking suppression of evidence or some form of sanction against the Government. Judge Campbell denied this latest motion to suppress and also ordered that he file no further motions for suppression or sanctions based on the Government’s searches in this case.]

**So, what is there to worry about?** How about that instance in which the Government used a cell-site simulator without first obtaining a warrant and this occurred before Lambis and Graham were decided? The answer is simple—raise the issue as to whether a cell-site simulator was used by the Government in the investigation of your client. If you don’t, there is a potential for your client to file an ineffective assistance of counsel claim against you. See Marcantoni v. United States, 2016 WL 3855644 (D. Md. July 15, 2016). United States District Judge Roger W. Titus of the District of Maryland denied the petitioner’s application for habeas relief in which he had alleged multiple instances of ineffective assistance of counsel, including a failure to seek a suppression of evidence. Judge Titus wrote:

Petitioner also claims his counsel was ineffective in failing to seek suppression of the Line J wiretap evidence on the basis that it was discovered through warrantless use of a cell site simulator.

* * *

Petitioner has offered no evidence to show his counsel had or should have had any awareness at the time of the suppression hearing that a warrantless cell site simulator was used to find Line J. Counsel cannot be found ineffective for failing to move based on facts unknown to them or facts they cannot reasonably be expected to have known.

Sad, I have to admit that I had never heard of a cell-site simulator until I began researching for this column. It’s amazing what’s out there!

Buck Files, a member of TCDLA’s Hall of Fame and past president of the State Bar of Texas, practices in Tyler, Texas, with the law firm Bain, Files, Jarrett, Bain & Harrison, PC. He can be reached at bfiles@bainfiles.com.

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**Texas Criminal Defense Lawyers Educational Institute**
Call for TCDLA Awards Nominations

(Criteria for each award listed below)

Form is required for submission. For a copy, email mschank@tcdla.com. The form can also be found on the website, www.tcdla.com. The deadline is noon, April 10th. An application is required for each award nomination.

The awards will be presented at TCDLA's Rusty Duncan seminar by the current president of the Texas Criminal Defense Lawyers Association. Awards are not required to be given out annually.

**Hall of Fame**

- Charles D. Butts Pro Bono Lawyer of the Year
- Percy Foreman Lawyer of the Year
- Rodney Ellis Award

**TCDLA Hall of Fame**

**Criteria**

The TCDLA Hall of Fame Award honors a qualified lawyer for membership in the Hall of Fame who meets the criteria.

The investigation of the nominee shall be under the direction of a director from the membership district in which the nominee resides. That director shall submit to the TCDLA Hall of Fame Committee a full investigation report at the committee meeting.

The Hall of Fame Committee shall, by unanimous decision, vote to submit a nomination to the Board of Directors. The Board of Directors by three-quarters majority by members present and voting at a board meeting may elect a nominee to the Hall of Fame.

**The criteria for the award are as follow:**

1) Minimum of thirty (30) years has elapsed since engaging in active practice of law or the candidate is deceased

2) Substantial commitment to defense of persons accused of crimes on appeal or trial, not to be based solely on won-lost record or publicity, but in court excellence; and

3) Significant contributions to the profession.

Nominations for the award must be on the required form and submitted to TCDLA by the deadline.

**TCDLA Charles D. Butts Pro Bono Lawyer of the Year**

**Criteria**

The Charles Butts Pro Bono Lawyer of the Year Award honors an individual attorney who has provided outstanding pro bono work. The recipient of the award must be a member in good standing of the Texas Criminal Defense Lawyers Association (TCDLA) and the State Bar of Texas.
The award is named after Charles D. (Charlie) Butts, President of TCDLA (1987–88) and member of TCDLA’s Hall of Fame, in recognition of his over 64 years of service as an attorney.

**Definition of Pro Bono**
The legal work must have been done for free—though in extremely rare or exceptional cases it may apply to one who gets some money. Court appointments or reduced fees do not qualify.

**The criteria for the award are as follow:**
1) Recipient must be a member in good standing of TCDLA and the State Bar of Texas;
2) Paid court appointments do not qualify except in extremely exceptional cases where the work done far exceeded the pay;
3) Nominations for the award must be on the required form and submitted to TCDLA by the deadline.

This award is not required to be awarded annually.

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**TCDLA Percy Foreman Lawyer of the Year**

**Criteria**
The Percy Foreman Lawyer of the Year Award honors the individual attorney who has provided outstanding legal representation. The recipient must be a member in good standing of the Texas Criminal Defense Lawyers Association (TCDLA) and the State Bar of Texas.

The award is named after Percy Foreman, the renowned Criminal Defense Lawyer and TCDLA Charter Member with almost 60 years of service as an attorney.

**The criteria for the award are as follow:**
1) Recipient must be a member in good standing of TCDLA and the State Bar of Texas;
2) Nominations for the award must be on the required form and submitted to TCDLA by the deadline.

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**TCDLA Rodney Ellis Award**

**Criteria**
The Rodney Ellis Award was named after Rodney Ellis for serving as the voice and/or advocate to TCDLA. The recipient is a non-lawyer who has gone above and beyond in demonstrating and supporting TCDLA.

**The criteria for the award are as follow:**
1) Recipient must be a non-lawyer;
2) Exceptional commitment to advocacy; demonstration of specific endeavors related to criminal defense; spreading awareness of TCDLA initiatives and endeavors; having a positive impact on criminal defense attorneys.

Nominations for the award must be on the required form and submitted to TCDLA by the deadline.
Kudos to Harris County Chief Public Defender Alexander Bunin, who was presented with the Champion of Public Defense Award by the National Association of Criminal Defense Lawyers (NACDL) at its 59th Annual Meeting in Palm Beach, FL, in August. The Champion of Public Defense Award recognizes an individual for exceptional efforts in making positive changes to a local, county, state, or national public defense system. The award is nothing new to Alex, who served 12 years as the Federal Public Defender in Northern New York—where he received the New York City Bar Association’s Thurgood Marshall Award. In 2010, he was appointed to be the first Chief Public Defender for Harris County, TX, which prior to his arrival did not have a state public defender office. Alex received the 2012 Torch of Liberty Award from the Harris County Criminal Lawyers Association for his work in public defense. One more feather in his cap for a lifetime fighting for justice.

Congratulations to appellate attorney and listserv docent Michael Mowla on his recent win in the CCA. Michael’s client, a member of a prominent Dallas family involved in litigation against his father in federal court over management of a trust, was indicted in 2011 for mortgage fraud. Client believed father was disgruntled over the outcome of the federal trust litigation and was seeking revenge through the Dallas County DA’s office. As “luck” would have it, there were questions about big bucks donated to DA’s reelection campaign. After a messy melee in the courts, admirably documented in Michael’s analysis (available here: http://tinyurl.com/hgx9kjq), the CCA stepped in and reversed and remanded. Listserv kudos noted that Michael had provided “an excellent analysis of prosecutorial vindictiveness and misconduct.” Way to go, Michael, for once again showing how it’s done.

Justin Underwood of El Paso and co-counsel Thomas Carter recently heard the big NG on a murder trial in the 384th District Court. D, an 18-year-old who was days away from moving to San Antonio to attend art school, has spent the last 3 years in jail, charged with the murder of a former 15-year-old girlfriend. After a week-long trial, the jury took 2 hours to return the verdict. Of particular note is Justin’s quote to the El Paso Times about D’s family: “We have gotten to know each other over the last three years to the point where they’re like family to us. This is not just a job for us. This is real and this is what we do every single day. Defense lawyers, not just Mr. (Tommy) Carter and I, we fight for the people when the government comes after them full bore. We fight for the individual who says, ‘Hey, I didn’t do this. You’ve got to help me.’ ” That’s what it’s all about. Good job, guys.

Former president Sam Bassett had a motion to suppress granted in County Court in Austin with a novel set of facts. Defendant had a one-car accident under I-35 after a night of drinking—no other car involved and no one else with him. He sees a tow truck, flags it down, and is in the process of having the car towed when an officer, responding to a dispatch about the accident, stops the tow truck with client as passenger (car already fully loaded). Officer tried to justify the stop, stating that tow trucks are prohibited from soliciting jobs without being called. Sam notes that there was no evidence that this had happened. Further justifications from officer: Dispatch reported the accident, officer was reasonable in responding, and it was 1 a.m., a time when a lot of drivers are intoxicated. The winning argument apparently was that a driver has no obligation to immediately contact police about an accident when no damage to property, no injuries, and no other persons involved. Judge granted motion based upon insufficient grounds for the stop. All in a day’s work, eh Sam?

John Hunter Smith of Sherman got a big NG on a doubly
enhanced felony DWI in Grayson County. John Hunter represented an illegal resident of the United States on a DWI 3rd or more—enhanced to a second-degree felony. To complicate matters, an interpreter was needed. John Hunter notes that the proposed jury panel looked like participants at a Trump rally. A great deal of time was used in addressing jurors’ biases based on ethnicity. John Hunter says that one of the jurors said that once they determined the verdict, they took great pride in not considering his ethnicity and his prior DWIs. Kudos, John Hunter, for the win in a tough case.

Working pro bono on a student pot bust, George Roland of Denton successfully got a motion to suppress granted. The police officer had received a tip the accused was growing pot in his apartment. Police went to the apartment without a warrant and without exigent circumstances. The judge agreed, finding no exigent circumstances and saying the cop should have just gotten a warrant. Kudos, George, on a job well done.

It’s been a busy summer for Patty (Tress) Morris. In August, she, Scott Palmer, and Rebekah Perlstein received a not guilty on an injury to a child case from 2013. She notes that the first battle won was when Scott and Bekah filed a Motion to Quash the first indictment, forcing the state to elect a specific means—i.e., with the defendant’s hands. A hard battle with D having to face an intransigent doctor, the team successfully neutralized him and receive a just verdict.

In September, Patty and J. Kem Carlson received an NG on two indictments for Sexual Assault. This was certainly an odd case: adult sexual assault with a 68-year-old client with no prior criminal history. He maintained his innocence throughout. The jury agreed with Patty and Kem on both indictments. Kudos, Patty and team, for all your hard work.

Send your kudos, katcalls, and/or letters to Editor Sarah Roland at sarah@sarahlroland.com or Craig Hattersley at chattersley@tcdla.com.
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Introduction

Kid cases—whether they be allegations of physical or sexual abuse—are the hardest cases to defend. Jurors, understandably, come in with an inherent prejudice against our client and wanting to save the child. It is an uphill battle from the start. However, it’s not impossible to win child injury cases when you know what to get, how to get it, and how to use it.

I. The Law

A. Injury to a Child—PC 22.04

Injury to a child is codified in Section 22.04 of the Penal Code, which provides:

(a) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual:
   (1) serious bodily injury;
   (2) serious mental deficiency, impairment, or injury; or
   (3) bodily injury.

It is an essential element of the felony offense of injury to a child that the child is "14 years of age or younger." Lang v. State, 586 S.W.2d 532 (Tex. Crim. App. [Panel No. 2] 1979). The statute provides for different penalties depending on the applicable mens rea. As an additional matter, injury to a child is a result-oriented crime because the focus of the mens rea is on the result of the conduct, not the conduct itself. Banks v. State, 819 S.W.2d 676, 678 (Tex.App.—San Antonio 1991, pet. ref’d).

“What matters is that the conduct (whatever it may be) is done with the required culpability to effect the result.” Alvarado v. State, 704 S.W.2d 36, 39 (Tex.Crim.App.1985). The offense of injury to a child can also be the underlying felony for a felony murder indictment.
There are affirmative defenses embedded in the statute itself. Subsection (k) provides what is commonly referred to as the “Good Samaritan” defense:

That the act or omission consisted of:

(1) Reasonable medical care occurring under the direction of or by a licensed physician; or

(2) Emergency medical care administered in good faith and with reasonable care by a person not licensed in the healing arts.

The “Good Samaritan” defense is what is commonly referred to as a confession and avoidance or justification type of defense. The accused cannot deny the act or omission or the associated mental state in order to be entitled to this defense. See Shaw v. State, 243 S.W.3d 647 (Tex. Crim. App. 2007, reh'g denied) (holding that in order to obtain an instruction on the “Good Samaritan” defense embodied in Section 22.04(k) of the Penal Code, the appellant must show that the record contains evidence sufficient to support a rational finding—not that she lacked the requisite mental state necessary to commit the offense, but that she in fact harbored the requisite mental state but nevertheless engaged in the conduct under emergency circumstances, in good faith, and with reasonable care).

Subsection (l) provides a defense

(1) That the act or omission was based on treatment in accordance with the tenets and practices of a recognized religious method of healing with a generally accepted record of efficacy;

(2) For a person charged with an act of omission causing to a child . . . a condition described [herein].

Beggs v. State, 597 S.W.3d 375 (Tex. Crim. App. 1980)(involving mistake of fact defense), and Sparks v. State, 68 S.W.3d 6 (Tex. App.—Dallas 2001, pet. ref’d)(involving involuntarily conduct defense), are two cases that must be in every defense lawyer's arsenal for child injury cases. Both are fact specific and should be read in their entirety. In Beggs, the testimony of the defendant, who assisted in giving the child a bath for punishment (according to the defendant, the child so hated to bathe that a normal bath was punishment), that she mistakenly believed the temperature, which scalded the child, was normal, was sufficient to entitle her to a defensive instruction on mistake of fact. In Sparks, the defendant’s testimony that injuries to his 10-month-old child occurred when he accidentally struck the child with his elbow after tripping and falling onto the child while walking across the floor of a very cluttered apartment supported an instruction on involuntary conduct.

B. Abandoning or Endangering a Child—PC 22.041

As with injury to a child, section 22.041 applies to children who are younger than 15 years of age. As the title to the statute suggests, there are two ways to commit an offense under 22.041:

(a) A person commits an offense if, having custody, care, or control of a child younger than 15 years, he intentionally abandons the child in any place under circumstances that expose the child to an unreasonable risk of harm.

(b) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engages in conduct that places a child younger than 15 years in imminent danger of death, bodily injury, or physical or mental impairment.

Two cases that are still good for the defense and worth having in the trial notebook for defending abandoning/endangering cases are Millsagle v. State, 81 S.W.3d 895 (Tex.App.—Austin 2002), and Garcia v. State, 367 S.W.3d 683 (Tex. Crim. App. 2012). Both are sufficiency cases, and both are must-reads. In Millsagle, the evidence was held to be insufficient to prove that the defendant placed his child in imminent danger of death, bodily injury, or physical or mental impairment when he left the child alone in the vehicle in order to ingest drugs in a nearby restaurant restroom. Similarly, the evidence was held to be insufficient in Garcia where when the police found the defendant she was sitting inside a car holding her child—who was wearing only a wet diaper in 58-degree weather, was shivering, and had blue lips—up against her body for warmth, the child did not cry until the police took the child from her, and the child did not exhibit any signs of pain or impairment.

The statute itself also has two affirmative defenses provided therein:

(g) It is a defense to prosecution under subsection (c) that the act or omission enables the child to practice for or participate in an organized athletic event and that appropriate safety equipment and procedures are employed in the event.

(h) It is an exception to the application of this section that the actor voluntarily delivered the child to a designated emergency infant care provider under Section 262.302, Family Code.

C. Leaving a Child Unattended in a Vehicle

Summertime in Texas often garners much media attention for leaving children unattended in vehicles. There are social media
campaigns designed to raise awareness and prevent child deaths in hot cars. The unfortunate news stories seem endless. It is not surprising that there is a specific criminal offense called “Leaving a Child in a Vehicle.” What may be surprising, however, is that the offense is only a Class C misdemeanor offense.

(a) A person commits an offense if he intentionally or knowingly leaves a child in a motor vehicle for longer than five minutes, knowing that the child is:
(1) Younger than seven years of age; and
(2) Not attended by an individual in the vehicle who is 14 years of age or older.

It is important to note that Section 22.10 is broader than abandoning/endangering a child because 22.10 does not require a special relationship between the accused and the child. It is equally important to note that the two statutes are not in pari materia. See Fernandez v. State, 269 S.W.3d 63 (Tex.App.—Texarkana 2008, no pet.).

D. Justifications

An important defense for injury to a child cases is contained in Section 9.61 of the Penal Code. While it is not an affirmative defense, it is a justification for the act. Section 9.61 that

(a) The use of force, but not deadly force, against a child younger than 18 years is justified:
(1) If the actor is the child’s parent or stepparent or is acting in loco parentis to the child; and
(2) When and to the degree the actor reasonably believes the force is necessary to discipline the child or to safeguard or promote his welfare.
(b) For purposes of this section, “in loco parentis” includes grandparent and guardian, any person acting by, through, or under the direction of a court with jurisdiction over the child, and anyone who has express or implied consent of the parent or parents.

It should go without saying that this justification does not permit a teacher to use physical violence because a child is unable to perform, either academically or athletically, at a desired level of ability. See Hogenson v. Williams, 542 S.W.2d 456 (Tex.App.—Texarkana 1976, no pet.)

II. The Duty to Investigate

As criminal defense lawyers, we have an inherent duty to fully investigate every case no matter how bad or clear a case may appear (and indeed may be). That duty is also required by case law, the American Bar Association, and the State Bar of Texas Guidelines. A proper pretrial investigation will help you develop your theory of the case and win, whether a win is a lesser included offense, lesser punishment, or an outright acquittal.

A. Case Law

The Court of Criminal Appeals has recognized the duty of counsel to fully investigate a case:

Counsel’s function is to make the adversarial testing process work in the particular case. Accordingly, competent advice requires that an attorney conduct independent legal and factual investigations sufficient to enable him to have a firm command of the case and relationship between the facts and each element of the offense.


Furthermore,

[C]ounsel also has a responsibility to seek out and interview potential witnesses and failure to do so is to be ineffective, if not incompetent, where the result is that any viable defense available to the accused is not advanced.

Ex Parte Lilly, 656 S.W.2d 490 (Tex. Crim. App. 1983) [emphasis added].

It is important to note that it is incumbent upon us to conduct our own independent investigation. This means not relying solely on the information provided in discovery from the State.

B. Guidelines

It should be no surprise that the national and state guidelines for the duties of criminal defense lawyers mirror what is required by case law on the subject. While these nation and state guidelines are not disciplinary rules nor black letter law, they provide a benchmark for our performance. As such, we should all be aware of these guidelines. Furthermore, in addition to case law we can and should use these guidelines to our advantage when making requests of the court. For example, when requesting monies from the court for a defense investigator and/or defense expert, it is helpful to cite these guidelines. A court will be hard pressed to deny a reasonable request for such funding if case law and the following guidelines are cited in the request.

a. American Bar Association

The duty to investigate is embodied in the American Bar Association Standards on Criminal Justice. Specifically,
Defense counsel should . . . explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused’s admissions or statements to defense counsel of facts constituting guilt or the accused’s stated desire to plead guilty.

Section 4-4.1(a).

The last sentence of the standard is of particular importance. Regardless of how bad the case appears and/or what heinousness our client has confessed to, we still have an independent duty to investigate. After all, we are the line of defense. This becomes a delicate balance when a client is wanting to expedite his/her case. However, in child injury cases, where potential prison sentences are for life, clients are appreciative of a defense lawyer wanting to fully investigate on their behalf—not accepting every accusation at face value.

b. State Bar of Texas

The State Bar Performance Guidelines for Non-Capital Criminal Defense Representation, which were adopted in January 2011, mirror those of the ABA and case law. “The Guidelines were drafted by the State Bar Committee on Legal Service to the Poor in Criminal Matters to encourage defense attorneys to perform to a high standard of representation and to promote professionalism in the representation of citizens accused of crime. They represent an effort to ‘hold the line’ for criminal defense practitioners against a host of financial and political pressures.” Blackburn and Marsh, “The New Performance Guidelines in Criminal Cases: A Step Forward for Texas Criminal Justice,” Texas Bar Journal, July 2011.

Guideline 4.1 specifically addresses pretrial investigations and, like the ABA guideline, states:

Counsel has a duty to conduct, or secure the resources to conduct, an independent case review and investigation as promptly as possible. Counsel should, regardless of the client’s wish to admit guilt, determine whether the charges and disposition are factually and legally correct and inform the client of potential defenses to the charges. Counsel should explore all avenues leading to facts relevant both to the merits and to the penalty in the event of conviction. In no case should counsel delay a punishment phase investigation based on the belief that the client will be found not guilty or that the charges against the client will otherwise be dismissed.

Guideline 4.1 specifically recognizes ten areas that defense counsel should investigate in order to effectively fulfill our role:

1. Charging documents, statues & case law
2. Client
3. Potential witnesses
4. Police & prosecution
5. Courts
6. Information from third parties
7. Physical evidence
8. The scene
9. Expert assistance
10. Mental health records

The good news is that these are all areas that we have probably already been investigating, perhaps even automatically and without realizing they are suggested.

III. What You Need and How to Get It for Child Injury Cases

While it is important to fully investigate each of the above areas in every case, it is of utmost importance in child injury cases. Further, in child injury cases, there are specific witnesses to speak to and specific records that must to be obtained in order to be an effective advocate.

A. The Story

In a child injury case, the first thing defense counsel should do is interview the client and get the story.

As an initial matter, it is important to understand who the client is and what the client has likely been experiencing before your first meeting. Often, the client is either the parent or a caregiver—a person who loves and cares for the child. And often, it is the client who has called 911 for help. The client usually goes to the hospital or emergency room behind the ambulance in a panic, only to be prohibited from seeing the child. The concern at this point is only for the welfare of the child. Then, the client is told by doctors or medical staff that the child has been abused. The client is met by law enforcement detectives and CPS investigators, who immediately and unrelentingly place blame for the child’s injuries squarely on the client, who most of the time was the last person with the child. The client is told that the doctors and professionals know it is abuse. The client, not being a medical professional, often begins to believe that he/she must have done something to have caused the injury. Then, of course, the client is arrested. It is at this point that the criminal defense lawyer enters the narrative, and in this state the defense lawyer receives the client. Be sure to appreciate the
B. Medical Records

The importance of obtaining all of the medical records in a child injury case simply cannot be understated. This is an area where it is especially important to do your own independent investigation. Regardless of whether the State has provided you with the child’s medical records, still obtain them on your own. The State just has what the hospital or doctor’s office has given to them. There are two options to obtaining the medical records: 1) subpoena duces tecum, or 2) through the child’s parent. In any event, be certain to get an original business records affidavit along with the medical records.

In your request be sure to ask for all nurses’ and doctors’ notes as well as all dictated and electronic medical records. Often, you will find that you will get more records than the State has been provided. That always makes for an interesting argument to the court when the State seeks to admit the medical records of a particular child by affidavit, especially a deceased child for which there would be no possibility of follow-up or aftercare records. Remember, trustworthiness is the touchstone of admitting business records by affidavit, and if there is something inherently untrustworthy about the records or the way they were compiled, then you have a good argument as to why the records should not be admitted. 

Additionally, in child injury cases it is important to get all of the child’s medical records, not just the records from the injury. This is especially true if the child is an infant. In that case you need prenatal records, birth records, and both well and sick visit records. Ordinarily, there is some golden nugget hidden in these records. Do not depend on the State to get these records, and do not wait until your case is set for trial to get these records. These records must be obtained early on for optimal use.

Call the hospital, doctor’s office, or medical examiner’s office before you request the records. Find out in what format the records are kept. Find out if the records need to be requested from multiple departments. For instance, if the child had imaging done, then a separate subpoena may need to be served on the radiology records department.

In child death cases you must know which records to request from the medical examiner’s office. Again, do not depend on the State to provide these records to you. That simply cannot be overstated. Request the autopsy report via subpoena or through a public information act request. To that end, be aware of Article 49.25 of the Code of Criminal Procedure, which provides that

[t]he full report and detailed findings of [an autopsy performed by the medical examiner] shall be part of the record . . . [and] the records may not be withheld, subject to discretionary exception under Chapter 552 Government Code [emphasis added].

Additionally, under Garcia v. State, 868 S.W.2d 337 (Tex. Crim. App. 1993), Denoso v. State, 156 S.W.3d 166 (Tex. App.—Corpus Christi 2005), and Texas Attorney General Opinion OR-2001845, an autopsy report is a public record. It is helpful to include the aforementioned references in your request for the autopsy.

In addition to the autopsy report, also subpoena all of the
autopsy photographs, the medical examiner investigator's report, and all toxicology reports. The photographs will either come in full color photographs, digital images, or both.

Perhaps most importantly, be aware that the biological samples taken at autopsy are retained for a relatively short period of time before they are purged. It is good practice to request that all of the samples taken be preserved so that your expert can review the same or perform additional testing if need be.

As a practice point, it is worth noting that oftentimes many doctors contribute to a final autopsy report. This can create a confrontation issue if only one of the doctors appears at trial. For instance, once the eyes are removed they may be sent to an ophthalmologist for evaluation, and he in turn would write a report. In that instance, it is likely that the ophthalmologist's report regarding the eyes has been cut and pasted into the final autopsy under the appropriate heading. If you suspect this is the case, then make the proper confrontation objections at trial if the ophthalmologist is not present to testify.

C. Evidence

Always, always go and inspect the physical evidence. Pictures of the evidence provided by the State will not suffice. You must see and inspect the physical evidence in person before trial. You have to see, in person, what the jury will be seeing. Take your investigator with you when you go see the evidence. Be sure to document what you see.

In the same vein, always, always go to the scene. It is not sufficient to view the location on a computer program. Go there. And go during the same time of day when the incident was alleged to have happened. Stand where your client stood. Take note of the smells, the sounds, the sights. How far is the scene from the nearest help? Is there anyone nearby who could have seen or heard what happened? Have your investigator take pictures.

D. Mitigation

In any case, it is too late to think about punishment once trial has begun, and it is certainly too late to think about it after a one-word verdict. Early mitigation and preparation for any potential punishment trial or hearing is absolutely necessary. After all, as criminal defense lawyers, we know that a success isn’t always a "not guilty" verdict. Sometimes it may mean probation or a tolerable prison sentence.

This is especially true when it comes to child injury cases. Begin thinking about mitigation as soon as you get the case. We have an ethical and legal duty to conduct a thorough investigation when it comes to punishment. See Williams v. Taylor, 120 S.Ct. 1495 (2000); Wiggins v. Smith, 539 U.S. 510 (2003)(decision of counsel not to expand investigation of petitioner's life history for mitigating evidence beyond presentence investigation report and department of social services records fell short of prevailing professional standards and prejudiced petitioner); ABA 4-4.1(a); SBOT Performance Guidelines for Non-Capital Criminal Defense Representation 4.1. To be successful in a punishment trial, we have to convince a jury that neither they nor the community have to be scared of our client.

Set the stage for your client early on. Help your client understand what a trial is like in a child injury case. Potential jurors walk into jury service believing that injury to a child is one of the worst, if not the worst, crime imaginable. The subject matter alone provokes repulsion and repugnance. That repulsion and repugnance is bound to be reflected in the ultimate punishment absent compelling intercession from us.

In child injury cases, the relationship between the accused and the child matters hugely in relation to the alleged incident. Was this a parent who had always been an active part of the child's life? Who was excited about the pregnancy? Attended the child's school events? Find witnesses who can tell you about the relationship between the accused and the child. Get pictures of the accused and the child together to use during trial. If you can paint a picture of a loving parent or caregiver from the beginning, then it will be a harder sell for the State to convince a group of 12 that the act was intentional or knowing or that the injury was even caused by the parent or caregiver.

E. Experts

You cannot go to trial defending a child injury case without the assistance of an expert. These cases center on expert testimony. That is not to say that your expert will necessarily testify or that your case will wind up in a jury trial. At a base level, you need an expert to help you understand the medical records so you can counsel your client to make intelligent and informed decisions about his case. Lawyers are not doctors nor should we be expected to be. There is always at least something helpful in the medical records.

With that said, do not rely solely on the expert. Do as much reading and research into the specific medical issue as possible. Get a library card from a medical school library. Check out books. Check out the books and articles written by the State's expert. Know what the publications say; there is likely something helpful from the defense perspective. Take the books to trial. Know the applicable medical jargon. Know the differential diagnoses. Know what is normal and what is not normal for the specific medical finding(s) in the case. Know enough to know what does not seem right about the State's theory. If we, as defense lawyers, are unable to explain the medical findings
in a common sense way to the jury, then we will certainly lose to the State's expert explanation every time. A defense expert can certainly help explain and point us in the right direction.

In order to get optimal use out of your expert, the expert needs the benefit of all of the medical records. It is good practice to always send the whole case file to the expert so that you can receive a credible opinion and your expert will not be blindsided. The expert has to know the worst thing about the case.

If you are retained and your client subsequently runs out of money to hire an expert, it is incumbent upon you to petition the court for funding. Failing to do so has been determined to be ineffective assistance. *Ex Parte Briggs*, 187 S.W.3d 458 (Tex. Crim. App. 2005) (injury to a child case).

Always request pretrial expert hearings to test the experts' qualifications and basis of knowledge and to find out what ultimate opinions they plan on offering. Never assume that the expert is qualified. As a practice point, if you are afforded a pretrial qualification hearing as opposed to a hearing outside the presence of the jury, then request a transcript of the hearing prior to trial for use during trial. Always request a pretrial qualification hearing in child injury cases, as the medical testimony is key and there are typically several experts. The basis for your request is one of judicial efficacy—there is no need for the jury to go back and forth over and over in the middle of trial versus having a day of qualifications hearings prior to trial. As further basis for this request, consider that you will not be able to be as effective if forced to do the expert hearing midtrial.

IV. Putting It All Together

So you know the law, have a pile of medical records, a list of witnesses, and pictures of the accused and child now. You have the information. You have knowledge. What do you do with all of this information once it's been organized? You tell your story. In your voice. Your way.

In order to successfully defend child injury cases, we must know every aspect of the case better than the State. That means getting all of the aforementioned information, then processing and understanding it. That means a significant investment of time for every case. That investment of time naturally evolves into a passion. And in the end, that knowledge and passion translates to credibility with the jury.

V. Conclusion

Child injury cases are the most challenging and time consuming cases. They are some of the most daunting. But when you know what to get, how to get it, and how to use it, you will be in the best position possible to be successful in your defense.

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You may be missing out!
Hey, are you really a lawyer? Can I ask you a couple of questions?

How many times have we been approached by someone with those questions? Is this person now a client or just a minor irritation? Do we have ethical obligations in that situation? What are they? Are we going to get sued? Whether it is for a friend or for a stranger, giving someone off-the-cuff advice can have consequences.

Is there even an attorney client relationship?

The Texas Disciplinary Rule of Professional Conduct (The Rules) 1.18 and its comments define when an attorney-client relationship exists and outline the resulting duties. “A person who consults with a lawyer about the possibility of forming a client lawyer relationship with respect to a matter is a prospective client.” Rule 1.18(a). Duties are owed whether it is a prospective or an actual client.

The legal relationship of attorney and client is purely contractual. It may be implied from the conduct of the parties if the parties explicitly or by their conduct manifest an intention to create the attorney-client relationship. Parker v. Carnahan, 772 S. W. 2d 151, 156 (Tex.App.—Texarkana 1989, writ denied). An attorney can be negligent in failing to advise that he is not representing someone where the circumstances lead that party to believe that the attorney is representing them. In the Parker case, a client’s wife signed documents in a lawyer’s office and therefore assumed that he was representing her and sued him. Parker v. Carnahan at p. 157. That lawsuit might have been avoided if the attorney had specifically told his client’s wife that he did not represent her.
If there is a written agreement specifying that the parties entered into a business deal rather than an attorney-client relationship, it is not dispositive. *Rosas v. Commission for Lawyer Discipline*, 335 S. W. 3d 311, 317 (Tex.App.—San Antonio 2010, no pet.). Mr. Rosas, the attorney in the above case, had such an agreement yet an attorney-client relationship was found due to the actions he had taken—filing documents and scheduling a hearing.

Whether an attorney-client relationship is created or not is based on objective standards of what the parties said and did and not on their alleged subjective states of mind. Actions and words are examined, as well as the circumstances at the time in question. *Terrell v. State*, 891 S. W. 2d 307, 313–314 (Tex.App.—El Paso 1994, pet. ref’d). The relationship of attorney and client is not dependent upon the payment of a fee, nor upon the execution of a formal contract. *E. F. Hutton v. Brown*, 305 F. Supp. 371, 388 (S.D. Tex. 1969).

An implied attorney-client relationship can be established by a request for representation, an engagement or confidentiality agreement, an expression of a belief by the purported client that the individual was acting as his attorney, an agreement or assurances that conversations were privileged or confidential, and/or the provision of legal advice. *In re Baytown Nissan*, 451 S. W. 3d 140 (Tex.App.—Houston [1st Dist.] 2014).

If no legal advice was ever given that indicates there was no attorney-client relationship. *Kiger v. Balestri*, 376 S. W. 3d 287, 295 (Tex.App.—Dallas 2012, pet. denied). A client may have more than one lawyer, so the fact that the client already has a lawyer does not defeat the existence of an attorney-client relationship with another attorney. For example, an attorney-client relationship might be established by a friend asking you for a second opinion about his case.

What are the dangers of establishing an attorney-client relationship? There is a huge amount of litigation on the issue of whether an attorney-client relationship exists. These cases arise in the context of an attorney defending against: a grievance, a legal malpractice claim, an ineffective assistance of counsel writ, and deceptive trade actions. It takes very little for an attorney who gives legal advice to become a defendant. Sometimes the lawyer wins these cases, and sometimes it is the individual who believes he is a client.

What duties arise from an attorney-client relationship? Once the attorney-client relationship is established, a lawyer owes numerous duties to the client. Ethically the most important are these:

- To use utmost good faith in dealings with the client;
- To maintain the confidences of the client; and
- To use reasonable care in rendering professional services to the client.

A) Attorney-client privilege

Any client may refuse to allow disclosure of confidential communications. Tex. R. Crim. Evid. 503 (b) A communication is confidential if it is not intended to be disclosed. This privilege belongs to the client, and only the client can waive it. *Carmona v. State*, 947 S. W. 2d 661, 663 (Tex.App.—Austin 1997, no pet.)

Rule 1.05⁴ protects the client from disclosure by the attorney of both privileged and unprivileged information. This includes all information relating to a client, or furnished by the client, or acquired by the lawyer during the course of or by reason of the representation of the client. The general rule is that an attorney may not reveal this information. This rule extends to former clients. Rule 1.05 (a), (b). Breaching confidentiality can and has resulted in litigation.

Narrow exceptions to the attorney-client privilege

There is an exception to the attorney-client privilege if the services of the lawyer were sought or obtained to enable anyone to commit or plan to commit a crime or fraud. Tex. R. Crim. Evid. 503 (d)(1) “[A] continuing or future crime is not enough; the attorney’s services must be sought or obtained to enable or aid the commission of the crime.” *Henderson v. State*, 962 S. W. 2d 544, 552 (Tex.Crim.App. 1997).

The lawyer may (but is not required to) reveal confidential information to the detriment of the client when the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a fraudulent or criminal act. Of course, the lawyer may also reveal confidential information to defend himself in a dispute with the client, or when the client consents, or when it is necessary to do so to represent the client (implied authorization), or to clean up a criminal or fraudulent act the client used the lawyer’s services to commit. Rule 1.05(c), (1–8) (d) (1–2).

The lawyer shall reveal confidential information when that confidential information clearly establishes that the client is likely to commit a criminal or fraudulent act that is likely to result in death or serious bodily harm to a person—but only to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act. The Rule 1.05(e).

The comment to this rule reminds us how extremely limited that duty is. This is because the proper functioning of the legal
system depends upon the preservation of the attorney-client privilege. There is a balancing test: that of potential victims against the client's need to be truthful with the attorney so that the attorney can counsel against the wrongful action. "When the threatened injury is grave the lawyer's interest in preventing the harm may be more compelling than the interest in preserving the confidentiality of the information." Henderson v. State, 962 S. W. 2d 544, 554–555 (Tex.Crim.App. 1997). The Henderson court reminds us that the ethical rules require maintaining confidentiality as to past activities.

The grave circumstances requiring disclosure detailed in Henderson are defined by example: a kidnap victim who is tied up, still alive, but will die unless the location is revealed quickly—and the lawyer and the client are the only ones with that information. Henderson at p. 556. The comment to the Model Rules of Professional Conduct gives an example of a client who has discharged toxic waste into the town's water supply, and the lawyer's disclosure is necessary to prevent a present and substantial risk that those who drink the water will contract a life-threatening and debilitating disease. Texas adopted the Model Rules in 1989.

Disclosing a statement given by a client to the attorney in confidence is deceptive and fraudulent. It also has been treated as a tortuous breach of duty. Damages for mental suffering can be appropriate because this is an invasion of privacy. Perez v. Kirk & Carrigan, 822 S. W. 2d 261, 266–267 (Tex.App.—Corpus Christi 1991, pet. denied).

Attorney-client privilege not applicable

Attorneys may release information and even testify against the client when no communication is involved—i.e., when the information is the result of the attorney's observations. For example, information may be disclosed as to the following: the client's location, the fact that the lawyer did not forge the client's name on a document or that the attorney was not the client's bondsman, the attorney's presence during a lineup, and information about the preparation of affidavits. An attorney's communication to the client of a trial setting is not subject to the attorney-client privilege. Austin v. State, 934 S. W. 2d 672 (Tex.Crim.App. 1996).

B) Conflict of interest

The ethical duty to avoid conflicts of interest with one's client is most commonly breached in criminal law by the representation of co-defendants.

Rule 1.06(a)4 dictates that a lawyer shall not represent opposing parties to the same litigation on a substantially related matter in which interests are materially and directly adverse. The comment to this rule explains that loyalty is an essential element in the lawyer's relationship to the client. "Directly adverse" is defined as "if the lawyer's independent judgment on behalf of a client or the lawyer's ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's responsibilities to the other client." State Bar of Texas v. Dolenz, 3 S.W.3d 260, 270–272 (Tex.App.—Dallas 1999, no pet.).

Client's consent as an affirmative defense to a conflict

Of course a client can waive the conflict and consent to his attorney's representation. That can provide a defense to the attorney in grievance proceedings or in defending against a writ. But this defense puts the burden on the attorney to prove: that the attorney reasonably believed the representation of each client (usually co-defendants) would not be materially affected, that there was full disclosure of all relevant facts to each client, and that the client(s) consented. It is a heavy burden the attorney bears to demonstrate that all relevant facts relating to the conflict were disclosed and explained to the client. An attorney breaches an ethical duty to his clients when he represents co-defendants and fails to advise each of them of even a potential conflict of interest. Ex parte Acosta, 672 S. W. 2d 470 (Tex.Crim.App. 1984) In the Acosta case the conflict did not become apparent until the middle of a contested hearing. The attorney was faulted for representing co-defendants and not advising them that a conflict might arise in the future.

C) Competent advice

Rule 2.01 states that “[i]n advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”

A client is entitled to straightforward advice expressing the lawyer's honest assessment . . . [A] lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.7

This means that one has to put one's "people pleasing" traits aside when giving advice and tell the potential client things like “I understand the complainant shot off his mouth and that you felt he needed to be hit, but 'needing to be hit' does not actually provide a legal defense.” This can be hard to do in a social setting.

D) Neglect

Rule 1.014 provides that a lawyer shall not accept or continue employment in a legal matter which the lawyer either knows or should know is beyond that lawyer's competence (unless the lawyer gets help). Furthermore, attorneys shall not neglect a legal matter entrusted to them or fail to carry out ob-
ligations owed to the client. Rule 1.15(d) provides that upon termination of representation that the lawyer shall continue to protect the client’s interests.

Once an attorney-client relationship is established, an attorney cannot neglect his client’s defense by failing to give advice upon request, failing to appear for hearings, or failing to represent the client. Hawkins v. Commission for Lawyer Discipline, 988 S.W.2d 927, 937 (Tex.App.—El Paso 1999, pet. denied). Mr. Hawkins was an attorney who did not believe that he represented the client in question. He was a probate lawyer who was court-appointed on a criminal case and believed he was required to withdraw because he was not competent to handle the case. Unfortunately, he chose to quit working on the case once his motion to withdraw was denied by the trial court. He was also grieved and disciplined.

Each attorney is held to the standard of care that would be exercised by a reasonably prudent attorney—an objective exercise of professional judgment, not a subjective belief that his acts are in good faith. If an attorney’s decision is that which a reasonably prudent attorney could make in the same or similar circumstances, there is no negligence even if an undesirable result occurs.

E) Fees

Rule 1.04 (a) provides: “A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a reasonable lawyer could not form a reasonable belief that the fee is reasonable.”

F) Soliciting employment

Disbarment of an attorney for soliciting employment is not an abuse of discretion even if it is an isolated act. State Bar of Texas v. Kilpatrick, 874 S.W.2d 656 (Tex. 1994)

Conclusion

In a moment of weakness you tell one of your buddies from the gym he just might have a defense to that DWI case he picked up Christmas Eve. Maybe you go on and suggest that the compelled warrantless blood draw probably should get thrown out. If you actually give him advice, he might believe that you represent him. It is possible that the more advice given, the firmer that belief. Certain questions to ask yourself: Should you tell him that you do not represent him? Are you required to keep his secrets now? Can you still represent someone whose interests are adverse to his? Do you have a duty to make sure that you give him good advice and that you have all of the facts necessary to accomplish that? Will he expect you to show up to court? These might be questions to consider. Me, I tell people that I am just there to repair the copier.

Notes

1. The point of this article is to avoid a lawsuit that none of us can afford, not to win a lawsuit.
2. Duties to Prospective Clients.
4. Competent and Diligent Representation.
5. Declining or Terminating Representation.

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Safe Weaving Is No Basis for a Stop

Those familiar with criminal defense in the state of Texas have likely encountered the issue of weaving within the lane as a basis for a police stop. It’s been referred to numerous ways: “weaving within the lane,” “safe weaving,” “failure to maintain the lane,” etc. What it ultimately boils down to is someone being stopped by an officer for either weaving within the lane they are driving in, or maybe even slightly out of the lane, and subsequently being arrested for a DWI or some other offense. This is fertile territory for Motions to Suppress, as Texas case law has long stated that there needs to be some additional, unsafe element to justify a stop by law enforcement.

However, prosecutors across the state are now rejoicing with release of the Court of Criminal Appeals’ Leming opinion. This case is now being cited by prosecutors as the magic new case that makes suppression matters based on weaving within the lane a moot point, and a cursory glance at the opinion may suggest as much. But this opinion is hardly the super weapon that prosecutors think it is. The purpose of this article is to explore what has long been the practice of this state’s courts in dealing with these issues and interpreting the relevant statutes. It will also look to why the argument relied on by prosecutors based on the Leming opinion is, at best, persuasive dicta, and how to argue against it.

First, a brief discussion of the history of cases that have shaped how the defense approaches this issue is necessary. The statute controlling this matter is Texas Transportation Code Sec. 545.060, titled “Driving on Roadway Laned for Traffic.” In relevant part, it states:

(a) An operator on a roadway divided into two or more clearly marked lanes for traffic:
(1) shall drive as nearly as practical entirely within a single lane; and
(2) may not move from the lane unless that movement can be made safely.

Courts have traditionally held that this means, in the event of a driver not maintaining their lane (weaving lightly outside of the lane, tires touching the lane dividers on either side, etc.), the “and” at the end of subsection (a)(1) makes subsection (a)(2) an additional requirement for there to be suspicion of any actual statutory violation. Therefore, something unsafe must accompany this weaving to justify a stop.

This has been illustrated in numerous cases. First, in State v. Tarvin, 972 S.W.2d 910 (Tex.App.—Waco 1998), a police officer stopped the Appellant after observing Appellant’s car drift two or three times to the right side of a two-lane road, causing his tires to go over the solid white line at the right-hand side of the road. The Court determined that mere weaving in one’s own lane of traffic can justify an investigatory stop only when that weaving is erratic, unsafe, or tends to indicate intoxication or other criminal activity. Since the Court found that there was nothing in the record to show that the officer there believed that to be the case, the stop was not justified. Id. at 912.

The same determination was made in Hernandez v. State, 983 S.W.2d 867 (Tex.App.—Austin 1998). In this case, the Court concluded that a single instance of crossing a lane dividing line by 18 to 24 inches into a lane of traffic traveling the same direction without showing the movement unsafe or dangerous does not give an officer a reasonable basis for suspecting that the...
defendant had committed a criminal traffic offense. Violations occur only when a vehicle failed to stay within its lane and the movement was not safe or was not made safely.

This can also be seen in State v. Cerney, 28 S.W.3d 796 (Tex. App.—Corpus Christi 2000), wherein the testimony established that Appellant was weaving somewhat within his own lane of traffic. There was no evidence that his actions were unsafe, and the court concluded the evidence did not support a finding that the trooper had a reasonable belief that the defendant had violated Section 545.060 of the Transportation Code. Similar decisions were made in Ehrhart v. State, 9 S.W.3d 929 (Tex. App.—Beaumont 2000, no pet.), Eichler v. State, 117 S.W.3d 897 (Houston, 2005), State v. Palmer, 2005 SW3d LWC 1646 (Tex. App.—Fort Worth 2005), and Fowler v. State, 266 S.W.3d 498 (Tex. App.—Fort Worth 2008).

The Court of Criminal Appeals has looked at this issue regarding a Community Caretaking argument. In Corbin v. State, 85 S.W.3d 272 (Tex.Crim.App. 2002), the Court found that slow driving and crossing into another lane, or onto the shoulder, for a length of 20 feet is not enough to constitute a stop under the Community Caretaking doctrine. The Court found that it was not objectively reasonable for an officer to believe that the Appellant’s driving conduct showed them to be in need of assistance. In short, while many an arresting agency has undoubtedly used weaving within the lane as basis to pull citizens over, ample case law exists to have these stops and any subsequent evidence suppressed.

The Leming Opinion

Leming is the new plurality opinion released by the Court of Criminal Appeals on April 13, 2016 (PD-0072-15, 2016 WL 1458242). At the trial court level, appellant filed a Motion to Suppress the product of the traffic stop by which the offense was discovered. The motion was denied, and later appealed to the Texarkana Court of Appeals, where the trial court’s ruling was reversed in Leming v. State, 454 S.W.3d 78 (Tex.App.—Texarkana 2014). In this case, the established facts were that the arresting officer received a report from a dispatcher that a car was driving erratically. The officer was able to find the vehicle that the citizen was calling in about. Upon following the appellant’s vehicle, the officer observed the vehicle weaving back and forth, from almost touching the curb on the right and back to touching the lane dividing line on the left multiple times. The arresting officer also observed the Appellant driving 13 mph under the posted speed limit, and continuously decelerating further. The plurality opinion analyzed both the relevant statute and what constitutes reasonable suspicion for a stop under said statute—and whether the driving behavior presented in the case was, in and of itself, a reasonable basis for a stop.

The plurality opinion, written by Justice Yeary, joined by Justice Keller ( justices Richardson and Meyers concurring), re-analyzes Texas Transportation Code Sec. 545.060. This analysis goes against the aforementioned history of Texas courts’ application of the statue. Primarily, the plurality determined that Texas Transportation Code Sec. 545.060(a)(1) and (2)’s conjunction “and” makes both of these subsections an independent basis for a police stop, not one that requires both a vehicle to weave within the lane and for there to be something fundamentally unsafe about it. Instead, the opinion determines that either of these can be a legal basis for a stop.

First and foremost, a four-judge plurality opinion is not binding, and has questionable precedential value. See Vernon v. State, 841 S.W.2d 407, 410 (Tex.Crim.App.1992). While concurring, Justice Alcala specifically does not concur with the section of the opinion about the interpretation of Texas Transportation Code Sec. 545.060. The dissenting justices Newell, Keasler, Johnson, and Hervey also obviously disagree with the plurality’s statutory interpretation. The dissent of Justice Keasler, which is joined by justices Johnson and Hervey, specifically points to the ridiculousness of interpreting the plain meaning of the word “and” to mean “or.” It additionally distinguishes the other statutes that the opinion of Justice Yeary relies on in the plurality interpretation of the statute. As stated for various reasons by a majority of the Court of Criminal Appeals, this heretofore unheard-of analysis of the statute is not sound, and should not be applied. Justice Newell’s dissent specifically agrees with Keasler’s regarding the interpretation of the statute.

Ultimately, a majority of the justices do not agree on this new interpretation of Texas Transportation Code Sec. 545.060, and defense attorneys should be articulating this early and often. The only thing that a majority of the Court may be agreeing on in this case is that failure to maintain the lane—when combined with a confirmed 911 call for erratic driving and driving 13 mph under the speed limit and continuing to decelerate—may be a reasonable cause for an officer to conduct a traffic stop. Furthermore, as of the time of this writing the Leming opinion has not been released for publication in the permanent law reports, and while unlikely, it could be subject to revision or withdrawal until it is released. This plurality’s radical departure from established case law and statutory interpretation should not be applied unless or until a majority of the Court determines it should be. Indeed, there is a history of such opinions falling to the wayside in Texas jurisprudence.

The Autran Legacy

Precedent exists of ignoring the reasoning of a three-judge
plurality opinion, and one need look no further than history of the Court of Criminal Appeals’ Autran decision for an excellent example. Regarding inventory searches, the Supreme Court of the United States has essentially determined that so long as reasonable police procedure is in place and there is no bad faith, inventory searches, even of closed containers, of a vehicle are allowed. See Colorado v. Bertine, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987), and Florida v. Wells, 495 U.S. 1, 110 S. Ct. 1632, 109 L.Ed. 2d (1990). States, however, may offer greater protections of their citizens’ rights than the constitutional minimums, and that is exactly what a plurality of the Court of Criminal Appeals purported to do in Autran v. State, 887 S.W.2d 31 (Tex.Crim.App. 1994).

This case involved a search of closed containers in the trunk of a van incident to arrest. The Appellants argued that while it is technically legal under case law regarding the Fourth Amendment, the Texas Constitution offers broader protections. After an in-depth analysis of Texas’ Constitution Art I § 9, the Court held Texas offers broader protection. Specifically:

that art. I, § 9, provides a privacy interest in closed containers which is not overcome by the general policy considerations underlying an inventory. This holding is consistent with the comparable jurisprudence discussed in Part IV, D, of this opinion. Just as those courts found greater protection under their state constitutional provisions concerning searches and seizures, we hold art. I, § 9, provides greater protection than the Fourth Amendment in the context of inventories. The officers’ interest in the protection of appellant’s property, as well as the protection of themselves from danger and the agency from claims of theft, can be satisfied by recording the existence of and describing and/or photographing the closed or locked container. This is not to say that officers may never search a closed or locked container, only that the officers may not rely upon the inventory exception to conduct such a warrantless search. We refuse to presume the search of a closed container reasonable under art. I, § 9, simply because an officer followed established departmental policy.

Id. at 41–42.

However, this was a three-judge plurality opinion, with four of the judges concurring in three separate concurrences, and the presiding judge dissenting. This opinion was applied once, in State v. Lawson, 886 S.W.2d 554 (Tex.App.—Fort Worth 1994), in which the Fort Worth Court of Appeals decided to apply the Autran reasoning to inventory searches, specifically stating: “As an intermediate appellate court, we follow the law as enunciated by the highest courts in this state. Accordingly, the State’s only point of error is overruled.” Id. at 556. However, numerous other appellate cases followed that chose not to apply Autran. In Madison v. State, 922 S.W.2d 610 (Tex.App.—Texarkana 1996), the Court refused to recognize Autran as binding precedent. Furthermore, in Hatcher v State, 916 S.W.2d 643 (Tex.App.—Texarkana 1996), the same court chose to expressly ignore Autran as binding precedent due to its being a plurality opinion. The Texarkana Court of Appeals specifically pointed to other opinions since made that failed to recognize or mention Autran, though it was relevant, and called the plurality opinion “unsound law.”

The Dallas Court of Appeals summed up the issues well in Trullijo v. State, 952 S.W.2d 879 (Tex.App.—Dallas 1997), where it discussed the split between the Fort Worth and Texarkana Court of Appeals application of Autran. The Dallas Court also discussed the fact that a three-judge plurality is not binding precedent—and the Court of Criminal Appeals’ refusal to provide a definitive answer on the issue in the face of conflicting decisions by two courts of appeals—and chose not to apply it either. Even the Fort Worth Court of Appeals later reversed its position in Lawson in Jurdi v. State, 980 S.W.2d 904 (Tex. App.—Fort Worth 1998).

The Takeway

While the Leming opinion creates a new challenge for defense attorneys, one should not allow the prosecution to characterize it as anything more than what it is, which is, at best, persuasive dicta. And with only three of the nine Justices of the Court of Criminal Appeals taking the stance that matters most here, even its persuasiveness is suspect.

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So What’s the Big Deal? Many attorneys in Texas were not impressed by the Rodriguez decision. Most people assumed that the Supreme Court was establishing a rule that when the reason for the traffic detention has been completed then the detention must cease. A prolonged traffic stop was illegal. In federal court, the “de minimis” doctrine had been established. The de minimis rule allowed the officer to continue the completed detention for up to 12–15 minutes, which was considered not to be a great enough violation of the Fourth Amendment to be illegal. The origin of the de minimis rule was Pennsylvania v. Mims, 434 US 106, 1977, and was originally based on officer safety.

In Rodriguez, the court reiterated its holding in Cabales, 543 U.S.405, 407 (2005), that a traffic stop prolonged beyond the time needed for the officer to complete his traffic-based inquiries is unlawful. Basically the de minimis rule was abolished.

The rule in Texas had been different. It had already been held that when the purposes of the traffic stop had been effectuated, the detention must cease. Balentine v. State, 71 S.W.3d 763, 770 (Tex. Crim. App. 2002); see also Davis v. State, 947 S.W.2d 240, 244–245 (Tex. Crim. App. 1997). So what’s the issue about Rodriguez?

The two cases the Supreme Court relied on in Rodriguez, supra, were Cabales, supra, and Johnson, 555 U.S. 323 (2009). What’s important about Rodriguez is the restatement that the authority for the seizure ends “when the task tied to the traffic investigations are or reasonably should have been completed.” See Sharp, 470 U.S. 675, 686 (1985). In determining the reasonable duration of the stop, it is appropriate to determine if the police diligently pursued the investigation.

This opens up a whole new analysis that did not exist as long as the de minimis rule applied. Now, not only must the officer terminate the detention when the purposes of the stop have been effectuated. He must also diligently pursue the purposes of the traffic stop and not divert and do things that cause the traffic stop to be extended.

In Rodriguez a canine officer stopped Mr. Rodriguez for driving on a highway shoulder, a violation of Nebraska law. After the officer had attended to everything relating to the stop—including checking the driver’s license of Mr. Rodriguez and his passenger and issuing a warning—he asked Mr. Rodriguez for permission to walk his dog around the vehicle. When Mr. Rodriguez refused, the officer detained him until a second officer arrived. The first officer then retrieved his dog, who alerted to the presence of drugs in the vehicle. The ensuing search revealed methamphetamine. Seven or eight minutes elapsed from the time the officer issued the warning until the dog alerted.

Mr. Rodriguez was indicted on federal drug charges. He moved to suppress the evidence seized from the vehicle on the ground, among others, that the officer prolonged the stop without reasonable suspicion in order to conduct the dog sniff. The magistrate judge recommended denial of the motion. He found no further reasonable suspicion supporting the continued detention, but under the Eighth Circuit precedent, he concluded that prolonging the stop by seven to eight minutes was only a de minimis intrusion in the defendant’s Fourth Amendment rights and for that reason was permissible. The district court then denied the motion to suppress. Mr. Rodriguez entered a conditional plea of guilty and was sentenced to five years in prison. The Eighth Circuit affirmed. The Supreme Court vacated the Eighth Circuit and remanded.
The law is reasonably well settled, although extremely confused, on what constitutes reasonable suspicion. The Fourth Amendment limits the permissible length of a traffic stop. The tolerable duration of police inquiries in the traffic stop context is determined by the seizure’s “mission,” which is to address the traffic violation that warranted the stop and attend to related safety concerns. This allows the officer to examine the driver’s license and vehicle registration and ask about the purposes and itinerary of the driver’s trip. These matters unrelated to the justification for the traffic stop do not convert the encounter into an unlawful seizure, so long as those inquiries do not measurably extend the duration of the stop.

But, once the tasks tied to the traffic infraction are, or reasonably should be, completed, the authority for the seizure ends unless the Government can show an exception to the Fourth Amendment that allows the stop to continue. An often invoked exception derives from Terry v. Ohio, and it permits prolonging the traffic stop if reasonable suspicion of additional criminal activity emerges during the investigation of the traffic violation. An officer may conduct certain unrelated checks during an otherwise lawful traffic stop, but may not do so in a way that prolongs the stop, absent the reasonable suspicion to justify detaining an individual. Almost anything is available to the officer that does not prolong the stop. In addition to driver’s license, insurance papers, and registrations, the officer may run a computer check on those documents and also run computer checks for warrants on the driver or the passenger. During the stop, the officer may also ask about purposes of the trip and may also ask about unrelated matters as long as the questioning does not prolong the stop. This includes asking different occupants of the vehicle the same questions to see if their stories diverge.

Of course, observations are not excluded. These observations may include but are not limited to nervousness, criminal history, use of another’s vehicle, traveling through known drug trafficking corridors, altered gas tanks, altered tires, or providing false or implausible information.

For Fourth Amendment purposes, reasonable suspicion exists if the police officer can point to specific articulable facts indicating that criminal activity is occurring or is about to occur. The level of suspicion of wrongdoing is obviously less than necessary for probable cause. Suspicion need not be related to a particular crime; it is sufficient to have reasonable suspicion that criminal activity may be afoot. The appellate courts review the district court’s reasonable suspicion finding de novo, looking at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing. (What is or is not reasonable suspicion based on specific examples is contained later in this article.)

As it relates to the Fifth Circuit, the cases go both ways. In U.S. v. Davis, 620 Fed. Appx. 295, U.S. App. Lexis 14745 (2015), the court found that nervousness, lack of criminal history, presence in a known drug trafficking corridor, having a vicious dog, and conflicting statements created reasonable suspicion independent of the traffic stop. In U.S. v. Madrigal, 2015 U.S. App. Lexus 16755, the Fifth Circuit found that the unreasonable travel itinerary, vehicle description, criminal history, and round trip on the same day were insufficient to establish reasonable suspicion to continue the detention. (Go figure, makes no sense!)

the officer did surveillance on a known drug house. He watched Tucker arrive at the drug house, stay approximately two minutes, and then depart. The officer thought he had purchased narcotics, so he followed him and detained him for fail to signal within 100 feet of a turn. Tucker did not pull over immediately, but did not evade. The officer then testified that Tucker was nervous and his hands were shaking. Tucker informed the officer that he had been asked to pick up somebody from the location and take him home. The officer knew where the passenger lived and observed that Tucker did not take a direct route to drop him off. The officer believed that he had reasonable suspicion that Tucker was in possession of a controlled substance, and he asked for consent to search. Consent was denied and the traffic stop continued for approximately 15 minutes to conduct a free air sniff. The canine alerted. A subsequent search of the vehicle revealed drugs. The Court found that the initial traffic stop was lawful; however, the officer’s failure to diligently pursue the traffic investigation, and instead shifting directly to a narcotics investigation, violated Rodriguez. The court found that the information in the officer’s possession did not establish reasonable suspicion, and that the extension of the traffic stop was unlawful.

In Richardson v. Texas, No. 10-14-00217-CR (July 9, 2015)(2015 Tex. App. Lexis 7066), an officer observed Richardson stop at a known drug location and spend a few minutes near a prostitute. He believed a drug transaction had taken place. However, he did not see a drug transaction. Richardson left and drove home. Richardson was detained once he pulled into his own driveway. He was told he was stopped for failing to stop at a designated point of the intersection. Two minutes into the detention the officer called in the driver’s license information and there were no outstanding warrants. The officer asked Richardson if he had any prior drug charges and he replied in the negative. Officers then removed Richardson from his vehicle and placed him on his front porch. Shortly thereafter, he was told he was not going to be issued a citation for the traffic violation. The investigation then continued for some 15 additional minutes so that a dog sniff could be conducted. The canine alerted on the vehicle and subsequently drugs were found. The court held that the traffic investigation was fully resolved when he was told he would not be issued a citation or warning for the traffic violation. Richardson should have been allowed to leave at that point. The continued detention was without reasonable suspicion and unlawful under Rodriguez.

The most important part about Rodriguez is the affirmations of the law contained in the Johnson and Cabales cases. Not only must there be separate reasonable suspicion to continue the detention, but law enforcement must also diligently pursue the investigation of the traffic violation and not delay while pursuing unrelated issues in an attempt to try and create reasonable suspicion for another offense.

This 4th Amendment column will be a new and standing column in The Voice in which search and seizure issues will be addressed by a different author every month. Please consider submitting your article (750–1,000 words) for publication.

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**Supreme Court**

**SORNA did not require D, a registered sex offender, to update his registration in Kansas once he left the state and moved to the Philippines. *Nichols v. United States*, 136 S. Ct. 1113 (2016).**

D moved from Kansas to the Philippines without updating his sex-offender registration, was arrested, escorted to the United States, and charged with violating the Sex Offender Registration and Notification Act, 42 U.S.C.S. § 16901 et seq., for failing to register under 18 U.S.C.S. § 2250(a). These statutes made it a federal crime for certain sex offenders to “knowingly fail[ ] to register or update a registration” and required sex offenders who move to another state to, “no later than 3 business days after each change of name, residence, employment, or student status,” inform in person at least one jurisdiction “where the offender resides[,]” After conditionally pleading guilty, D argued on appeal that SORNA did not require him to update his registration in Kansas. The Tenth Circuit affirmed his conviction, holding that though D left Kansas, it remained a “jurisdiction involved” for SORNA purposes.

The Supreme Court reversed: “Critical here is § 16913(a)’s use of the present tense. Nichols once resided in Kansas, but after moving, he ‘resides’ in the Philippines. It follows that once Nichols moved, he was no longer required to appear in Kansas because it was no longer a ‘jurisdiction involved.’ Nor was he required to appear in the Philippines, which is not a SORNA ‘jurisdiction.’ § 16911(10). Section 16913(c)’s requirements point to the same conclusion: Nichols could not have appeared in person in Kansas ‘after’ leaving the State. SORNA’s drafters could have required sex offenders to deregister in their departure jurisdiction before leaving the country had that been their intent. . . . The Government resists this straightforward reading. It argues that a jurisdiction where an offender registers remains ‘involved’ even after the offender leaves, but that would require adding the extra clause ‘where the offender appears on a registry’ to § 16913(a). Also unconvincing is the claim that § 16914(a)(3)’s requiring the offender to provide each address where he ‘will reside’ shows that SORNA contemplates the possibility of an offender’s updating his registration before he actually moves. That provision merely lists the pieces of information to be updated; it says nothing about an obligation to update in the first place. Finally, the Government’s argument that Nichols actually experienced two ‘changes’ of residence—first, when he turned in his apartment keys in Kansas, and second, when he checked into his Manila hotel—is inconsistent with ordinary English usage. . . . Recent legislation by Congress, as well as existing state-law registration requirements, offers reassurance that sex offenders will not be able to escape punishment for leaving the United States without notifying their departure jurisdictions.”

The Sixth Circuit improperly applied the AEDPA standard in finding D’s appellate counsel was constitutionally ineffective for excluding an ineffective-assistance claim; a fair-minded jurist could have concluded that repetition of an anonymous tip did not establish that the uncontested facts the tip conveyed were submitted for their truth, so
Michigan law enforcement received an anonymous tip that two white males were traveling between Detroit and Grand Rapids on I-96 in an Audi and were possibly carrying cocaine. D matched that description and was pulled over. Both he and his passenger were arrested when the officers found 125.2 grams of cocaine in the car. During D’s state-court trial, several police officers testified and described the anonymous tip, which was “not evidence” but admitted “only to show why the police did what they did.” D was convicted of possession of cocaine with intent to deliver. The court of appeals affirmed, and the Michigan Supreme Court denied leave to appeal. D sought state post-conviction relief and argued that the admission of the anonymous tip violated the U.S. Const. amend.

VI Confrontation Clause, his trial counsel was ineffective for failing to object to the tip on that ground, and his counsel on direct appeal was ineffective for failing to raise the previous two claims. The state court denied post-conviction relief because D failed to prove that his counsel acted unreasonably.

D then sought federal habeas relief under the Antiterrorism and Effective Death Penalty Act, which specifies that federal habeas relief is only available after a state court’s denial if the state court’s decision involved an unreasonable application of clearly established federal law; federal habeas relief is unavailable if “fairminded jurists” could disagree as to the validity of the state court’s determination. The federal district court denied relief by finding the state court’s denial of relief was objectively reasonable because D’s counsel was adequately prepared for trial. The Sixth Circuit reversed and held that D’s right to confrontation had been violated because the anonymous tip was referenced four times during trial, which indicated that the tip was admitted for its truth. The Sixth Circuit concluded D’s counsel had been constitutionally ineffective and no fair-minded jurist could conclude otherwise.

The U.S. Supreme Court reversed the Sixth Circuit. Under the AEDPA, a state court’s determination that a habeas claim lacks merit precludes federal habeas relief so long as “fair-minded jurists could disagree” on the state court’s decision. Additionally, when the claim at issue is for ineffective assistance of counsel, review must be “doubly deferential” to the state court. The Sixth Circuit incorrectly applied this standard; fair-minded jurists could disagree regarding D’s claim that his appellate counsel was constitutionally deficient for not challenging an anonymous tip on confrontation grounds.

Fifth Circuit

The federal stalking statute, 18 U.S.C. § 2261A, is not unconstitutionally vague simply for not defining “harass” and “intimidate.” United States v. Conlan, 786 F.3d 380 (5th Cir. 2015).

On plain-error review, the Fifth Circuit held that these are not obscure words and readily understandable by most people. Any vagueness concerns are further alleviated by the list of easily understood terms surrounding “harass” and “intimidate” (“kill, injure . . . or cause substantial emotional distress”) and by the statute’s scienter requirement, which narrows its scope and mitigates arbitrary enforcement.

(2) D’s two convictions under 18 U.S.C. § 2261A(2) were not multiplicitous and did not violate the U.S. Const. amend. V Double Jeopardy Clause, even though they arose out of the same conduct. The unit of prosecution for § 2261A(2) is the targeted individual; thus the Government needs to prove different intents to harm two victims to convict the defendant of two separate counts.

District court misapprehended its authority to vary downward from the Guideline range established by the “career offender” Guidelines; the district court failed to appreciate that 18 U.S.C. § 3553(a) provided it with discretion to vary from the advisory sentencing range. United States v. Clay, 787 F.3d 328 (5th Cir. 2015).

A district court has discretion to vary from a Sentencing Guideline range irrespective of whether that particular sentencing recommendation arises under the “career offender” provision in USSG § 4B1.1; a district court’s sentencing discretion is no more burdened when a defendant is characterized as a “career offender” under § 4B1.1 than it would be in other sentencing decisions. A district court’s failure to recognize its discretion to vary in this context constitutes procedural error. Because the Government did not establish that the error was harmless, the Fifth Circuit remanded for resentencing. The Fifth Circuit noted that the district court had, apparently inadvertently, failed to give D an opportunity to allocate at his first sentencing hearing, but the Fifth Circuit was “confident that the district court will allow [D] an opportunity to allocate prior to resentencing.”

D was not foreclosed from challenging his counsel’s failure to advise him of deportation consequences of his guilty plea solely because the district court notified him that deportation following the service of his sentence was “likely.” United States v. Batamula, 788 F.3d 166 (5th Cir. 2015).

Where noncitizen D—convicted on his guilty plea of making a false statement to a federal agent (18 U.S.C. § 1001) and making a false statement in an application for a passport (18 U.S.C. § 1542)—raised, in a 28 U.S.C. § 2255 motion, a claim under Padilla v. Kentucky, 559 U.S. 356 (2010)(a claim that he received ineffective assistance because his counsel did not advise him that the offenses to which he was pleading guilty would result in his deportation), the district court erred in granting the Government’s motion for summary judgment.
and denying D’s motion. A judge’s statement at the guilty-plea proceeding that deportation is “likely” is not dispositive of whether a petitioner whose counsel failed to advise him regarding the immigration consequences of his plea can demonstrate prejudice therefrom. Because the record was insufficiently developed to determine whether D was entitled to relief on his claim, the Fifth Circuit reversed and remanded.

In trial of drug offenses, district court did not abuse its discretion in denying D’s request for an instruction on sentencing entrapment (that the agents purposefully inflated the drug quantity). United States v. Macedo-Flores, 788 F.3d 181 (5th Cir. 2015).

Although the Fifth Circuit has never recognized this defense, the Fifth Circuit has stated that if it did accept the defense, it would only be cognizable in cases involving “true entrapment” or where there is proof of overbearing and outrageous conduct on the Government’s part; D’s case did not meet this standard.

District court reversibly erred in applying a 16-level “crime of violence” enhancement under USSG § 2L1.2(b)(1)(A)(ii) based on D’s prior Louisiana conviction for aggravated battery. United States v. Hernandez-Rodriguez, 788 F.3d 193 (5th Cir. 2015).

D’s prior offense of conviction (La. Rev. Stat. § 14:34) did not necessarily have as an element the use, attempted use, or threatened use of physical force because the conviction’s documents did not rule out a conviction under the administration-of-poison alternative of the statute. Furthermore, a conviction for the least culpable violation of the statute does not constitute generic “aggravated assault.” Because the Government did not carry its burden of proving this error harmless, the Fifth Circuit reversed for resentencing.

Use of a false immigration document is not a “continuing offense” for statute-of-limitations purposes; the indictment was filed outside the limitations period. United States v. Tavarez-Levario, 788 F.3d 433 (5th Cir. 2015).

The offense of “use” of an immigration document, “knowing it to be forged, counterfeited, altered, or falsely made” or “procured by fraud or unlawfully obtained” (18 U.S.C. § 1546(a)), does not qualify within the “doctrine of continuing offenses” for statute-of-limitations purposes. Consequently, the indictment in this case was filed outside the applicable five-year limitations period. The Fifth Circuit reversed D’s conviction and remanded for dismissal of the indictment.

In sentencing D convicted of receipt of child pornography, district court abused its discretion by imposing a special condition of supervised release that prohibited D from accessing computers or the internet for the rest of his life. United States v. Duke, 788 F.3d 392 (5th Cir. 2015).

Such a condition is not narrowly tailored and therefore imposes a greater deprivation than reasonably necessary to prevent recidivism and protect the public, especially in light of the ubiquity and importance of the internet. The district court also abused its discretion by imposing an absolute, lifetime special condition of supervised release prohibiting D from having any contact with minors for the rest of his life. The Fifth Circuit vacated those two special conditions of supervised release and remanded for resentencing.

Government did not plainly err in withholding a motion for a third-level reduction based on D’s refusal to waive appeal. United States v. Morales-Rodriguez, 788 F.3d 441 (5th Cir. 2015).

Though it would have been error for the Government to withhold a motion for a third-level reduction under USSG § 3E1.1(b) simply because the defendant refused to waive appeal, it was not plain that the Government withheld the § 3E1.1(b) for this reason. D was not entitled to relief on plain-error review.

Where the district court issued an unconditional writ releasing D and prohibiting retrial, the Fifth Circuit granted the State of Louisiana’s motion for a stay of the district court’s order for the duration of the appeal on the merits. Woodfox v. Cain, 789 F.3d 565 (5th Cir. 2015).

The district court issued an unconditional writ releasing D and prohibiting retrial after the Fifth Circuit affirmed the district court’s grant of federal habeas relief to Louisiana state defendant on the ground of racial discrimination in the selection of the grand jury foreperson. Woodfox v. Cain, 772 F.3d 358 (5th Cir. 2014). To succeed on the merits of the appeal, the State must show that the district court abused its discretion by ordering D’s unconditional release and prohibiting retrial. The State made a strong showing of likelihood of success on the merits. A federal court’s absolute bar on retrial by the state court is rarely warranted. Additionally, the remaining stay factors—the State’s irreparable injury and the public interest—also favored the State; indeed, the State maintained that D was still both dangerous and a flight risk. Although the Fifth Circuit granted the motion for a stay pending appeal, it also sua sponte ordered the appeal on the merits expedited.

In alien-transporting trial, D waived her Confrontation Clause challenge to the out-of-court testimony of the alien; counsel may waive his client’s U.S. Const. amend. VI right of confrontation by stipulating to the admission of evidence so long as the defendant does not dissent from his attorney’s decision, and so long as the decision was a legitimate trial tactic or part of
a prudent strategy. United States v. Ceballos, 789 F.3d 607 (5th Cir. 2015).

A permissible waiver of the right of confrontation is not contingent on evidence that the defendant affirmatively and personally agreed to counsel’s stipulation; she just must not dissent from that decision.

**Court of Criminal Appeals**

Trial court erroneously included a provoking-the-difficulty jury instruction as there was insufficient evidence of provocation; D suffered harm from the instruction based on its wording and his theory of self defense. Elizondo v. State, 487 S.W.3d 185 (Tex.Crim.App. 2016).

D, a U.S. Customs and Border Protection Agent, while off duty, shot and killed a man. D claimed self-defense, but the jury convicted him of murder. COA affirmed. D petitioned CCA to review COA’s analysis of the alleged jury-charge errors.

CCA concluded that COA erred by upholding the inclusion of a provoking-the-difficulty instruction under Texas Penal Code § 9.31(b)(4) in the jury charge. There was no evidence that D orchestrated a set of events as a ploy to kill this man he did not know because there was no evidence that when D ran to his truck, he was goading the man into following him and attacking him. CCA additionally held that the erroneous inclusion of the provocation instruction caused D “some harm.” D suffered some error as a result of the instruction because the provocation charge that was given was incorrectly worded, misleading, and confusing, and D’s entire defense rested on a self-defense theory. CCA reversed COA and remanded for a new trial.

In D’s trial for evading arrest, he pleaded not guilty on the record, which was silent as to whether he pleaded to an enhancement for a prior conviction; CCA would not presume he pleaded “true” to the enhancement, but the evidence supported the finding that it was true. Wood v. State, 486 S.W.3d 583 (Tex.Crim.App. 2016).

D was found guilty of evading arrest, and the trial court found that the enhancement alleged in the indictment was “true.” D was sentenced to four years’ imprisonment. He appealed, arguing there was no basis for the finding that the enhancement paragraph was true. COA held that the State failed to prove the conviction used for enhancement. COA reversed the punishment portion of the judgment and remanded for a new punishment hearing. CCA reversed COA.

COA did not err by refusing to apply a presumption that D pleaded “true” to the enhancement; CCA rejected the State’s argument that a presumption should be applied if the trial court finds an enhancement “true” and the defendant does not object. Furthermore, although the judgment said that the plea to the enhancement paragraph was “true to repeater,” the rest of the record showed the contrary: D offered testimony and evidence at the bench trial in an attempt to refute the officer’s testimony, and requested probation, indicating that his guilt and punishment were disputed in the trial court. However, CCA concluded the evidence was sufficient to prove the enhancement allegation; D admitted a conviction for drug possession and that he had received a six-year term and had served three years in prison and three on parole.

**Trial court did not err to conclude officer was justified in stopping D’s vehicle; officer had reasonable suspicion to detain D to investigate both the offense of failing to maintain a single lane of traffic and the offense of DWI. Leming v. State, No. PD-0072-15 (Tex.Crim.App. Apr 13, 2016).**

D pleaded guilty to, and was convicted of, the offense of driving while intoxicated, a felony in this instance because he had two prior DWI convictions. Tex. Penal Code § 49.09(b) (2). Prior to his plea, D filed a motion to suppress the product of the traffic stop by which the offense was discovered. The trial court denied his motion, and D challenged that ruling on appeal. COA reversed the ruling. CCA reversed COA and reinstated the trial court’s judgment.

An officer had reasonable suspicion to stop D’s vehicle to investigate the offense of failing to maintain a single lane of traffic, even if he could not quite tell whether D had actually entered the adjacent lane, because he observed that D drove on the divider stripes and several times came close to entering the adjacent lane. Under Tex. Transp. Code § 545.060, it is an independent offense to fail to remain entirely within a marked lane of traffic so long as it remains practical to do so, regardless of whether the deviation from the marked lane is, under the particular circumstances, unsafe. The officer also had an objectively reasonable basis under U.S. Const. amend. IV to suspect D was intoxicated because a partially identified informant saw the vehicle swerving from side to side and the officer corroborated this observation.

Tex. Code Crim. Proc. art. 38.23(a) did not mandate that medical records of D’s blood alcohol concentration be suppressed; the State obtained the records in the absence of any specific statutory violation and in the absence of any manifest abuse of the grand jury’s ordinary investigative function, when the grand jury subpoena duces tecum was proper and within Tex. Code Crim. Proc. arts. 20.10 & 20.11. State v. Huse, No. PD-0433-14 (Tex.Crim.App. Apr 13, 2016).

In this prosecution for misdemeanor driving while intoxicated, the State obtained evidence of D’s blood-alcohol concentration by issuing a grand jury subpoena for his hospital medical records. The trial court granted D’s motion to suppress on two grounds relevant to D’s current petition for review: (1) obtaining D’s medical records without a warrant violated...
D’s punishment was properly enhanced even though the State did not prove the sequentiality of his two prior felony convictions and omitted the year of the second conviction; D’s plea of true to the enhancement allegations relieved the State of its burden to prove the allegations, and the record did not affirmatively reflect that the enhancements were improper. **Hopkins v. State, 487 S.W.3d 583 (Tex.Crim.App. 2016).**

D was found guilty of aggravated robbery with a deadly weapon. The State sought to enhance D’s punishment under the habitual-offender statute with two prior aggravated assault convictions. Tex. Penal Code § 12.42(d). D pled true to those two prior convictions. The trial court accepted D’s pleas and found the enhancements to be true, and sentenced D to life imprisonment. He appealed, arguing in part that the record affirmatively reflected that the enhancements were improper.

COA affirmed COA. The Health Insurance Portability and Accountability Act of 1996 did not materially impact the *Hardy* holding with respect to Fourth Amendment standing to complain of the State’s acquisition of specific medical records. Second, the State did not acquire D’s medical records by way of a grand jury subpoena process that violated either HIPAA or state law and thus did not necessitate that they be suppressed under Article 38.23.

The offense of improper contact with a victim was not unconstitutional as applied to D contacting his biological son while D was imprisoned for the aggravated sexual assault of his former step-daughter; D failed to show that a protected liberty interest was infringed because his right to privately communicate with his son had already been permanently enjoined in a civil order. **Schlittler v. State, 488 S.W.3d 306 (Tex.Crim.App. 2016).**

“Appellant challenges the statute defining the offense of Improper Contact with a Victim under Texas Penal Code Section 38.111, which prohibits a person confined in a correctional facility after being convicted of certain sex offenses from contacting the minor victim of the offense or a minor member of the victim’s family. He explains that he was convicted under that statute for contacting his biological son while imprisoned for the aggravated sexual assault of his former step-daughter, who is also his son’s half-sister. Appellant argues that, because it prohibits contact between him and his biological son, the statute, as applied, infringes upon his fundamental liberty interest in the care, custody, and management of his son, in violation of his rights to due process and equal protection under the Fourteenth Amendment to the federal Constitution . . . With respect to appellant’s due-process challenge, we conclude that, under the particular facts of this case that show that appellant’s right to privately communicate with his son had already been permanently enjoined as a result of a separate civil-court order, appellant has failed to show that he had a protected liberty interest that was infringed upon by the statute, and thus his constitutional rights were not violated on that basis. With respect to appellant’s equal-protection complaint, we further conclude that Section 38.111 is neither based on a suspect classification, nor does it unduly infringe upon a fundamental liberty interest under the facts of this case, and, therefore, its application to appellant’s circumstances does not result in a constitutional violation. We, therefore, affirm the court of appeals’ judgment upholding appellant’s conviction.”

During trial, defense counsel learned about a possible right-to-counsel violation that occurred before trial and presented evidence involving the alleged violation, but counsel did not complain until appeal; thus, D forfeited his complaints. **Darcy v. State, 488 S.W.3d 325 (Tex.Crim.App. 2016).**

D was on trial for burglary of a habitation. In an unrelated investigation of security at the county jail, a State investigator suspected a smuggling network was transmitting unauthorized messages to and from the jail. The investigator asked a friend of D’s to write D a note and pass it to the jail cook, which she did. At D’s trial, the friend was testifying for the State. During cross-examination, defense counsel produced the note and asked her to read it: “Chris, I know you are going to court Monday and I have been asked to be a witness. I have
Instruct the jury that the accomplice-witness testimony had been admitted into evidence. The prosecutor then said the State would offer the note into evidence. Asked by the court if he had any objection to the exhibit, defense counsel said "no." The note was admitted into evidence. On redirect, the prosecutor questioned the friend about the note. The State then called the investigator, who corroborated what the friend had said. Defense counsel did not object to any of the testimony about the note.

On appeal, D complained about the State causing the note to be written and sent to him. He argued that his "due process right to a fair trial was violated by the State creating 'evidence' intended to open the door to extraneous offenses," and that his "Sixth Amendment right to counsel was violated by the District Attorney's Office contacting him during adversarial proceedings while represented by counsel." COA sustained these complaints; in a harm analysis, COA observed that the State introduced the note into evidence, the jury heard the testimony concerning the origin of the note, the evidence of investigation into jail-smuggling operations made D look like a criminal, and the jury asked during deliberations about any response by D to the note. Concluding D suffered harm, COA reversed and remanded.

CCA said COA erred in failing to address preservation of error; D forfeited his complaints when he did not raise them at trial. D failed to raise any complaint to the trial court with respect to the note and sought relief for the first time on appeal. Any violation of the right to counsel relating to the note would have been immaterial to D's conviction if the note and testimony had not been admitted into evidence; if error occurred, it was upon the admission of the note and testimony about it. CCA affirmed the trial court.

COA properly applied the Almanza harm standard to a jury-charge error raised in a motion for new trial and concluded D did not suffer egregious harm; COA also properly declined to defer to the trial court's fact findings because they were matters of law or mixed questions of law and fact that did not turn on the credibility of evidence or demeanor of witnesses. State v. Ambrose, 487 S.W.3d 587 (Tex.Crim.App. 2016).

D was a former kindergarten teacher who was convicted of misdemeanor official oppression after a trial at which the testimony of a purported accomplice was presented. After the jury found her guilty, D filed a motion for new trial alleging that the jury instructions were erroneous in that they failed to instruct the jury that the accomplice-witness testimony had to be corroborated. D further asserted she was egregiously harmed by the error. The trial court agreed, and it made what it characterized as findings of fact and conclusions of law in support of its ruling. On appeal, COA assumed without deciding that the trial court properly determined the jury instructions were erroneous; but, as to the matter of harm, it disregarded the trial court's findings and conclusions and instead determined that D was not egregiously harmed under the substantive application of Almanza v. State, 686 S.W.2d 157 (Tex.Crim.App. 1984)(op. on. reh'g).

D's first two grounds for review contended COA erred by applying the Almanza egregious-harm standard and by failing to defer to the trial court's findings of fact made after the motion-for-new-trial hearing. D's third ground for review asserted COA erred in concluding that the error was not egregiously harmful to her. CCA overruled all three of D's grounds for review. COA properly held that (1) the Almanza harm standard applies to jury-charge error reviewed on appeal, even when the error was addressed in a motion for new trial, (2) it was not required to defer to the trial court's factual findings in this case, and (3) the record failed to show that D was egregiously harmed by the error in the charge. D did not suffer egregious harm from the omission of the accomplice-witness instruction because there was strong corroborative evidence under Tex. Code Crim. Proc. art. 38.14 to connect her to the offense of official oppression; in light of the testimony from the principal, the assistant principal, and D herself that she either instructed or asked the students to hit the child and that the child was hit one or more times after that, there was an adequate amount of non-accomplice testimony to connect her to the offense.

D articulated a valid legal claim in his motion for new trial but did not produce evidence or point to evidence in the record that substantiated his claim; D presented evidence that his sentence was too harsh, not that it was unconstitutional. State v. Simpson, 488 S.W.3d 318 (Tex.Crim.App. 2016).

D entered an open plea of guilty to second-degree felony robbery and true to an enhancement provision alleging one prior conviction for aggravated robbery. The trial court sentenced him to 25 years' confinement. D filed a motion for new trial, alleging his sentence constituted a grossly disproportionate punishment under U.S. Const. amend VIII. The trial court granted a new punishment trial. On the State's appeal, COA held that the record evidence did not substantiate D's claim and vacated the trial court's order. CCA affirmed COA.

D argued that COA did not adequately defer to the trial court on the question of whether he presented evidence to substantiate his legal claim that his sentence was grossly disproportionate to the crime he committed. However, even under an abuse-of-discretion standard, the trial court acted without reference to guiding rules and principles when it granted a new punishment trial on the basis that D's sentence was grossly disproportionate: "in light of Simpson's role in the robbery and his significant prior adjudicated and unadjudicated offenses, his 25-year sentence is not one of those 'rare' cases where gross
disproportionality can be inferred even when viewing the evidence in the light most favorable to the trial court’s ruling. . . . Simpson’s sentence fell well within the statutory range of 5 to 99 years or life. Accordingly, there is no reason to compare his sentence to sentences imposed on others. . . . The trial court’s decision—to the degree that it found the constitutional claim substantiated—lies outside that zone within which reasonable persons might disagree. . . . Simpson sought to use an Eighth Amendment claim to develop additional evidence. . . . The evidence adduced at the hearing on the motion for new trial—evidence about Simpson’s minimal role in the offense, the age and circumstances of the prior offenses, his need for drug treatment, his employment—was undoubtedly relevant to the trial court’s normative punishment decision. It did not, however, substantiate Appellee’s legal claim that his sentence was unconstitutional.”

**Court of Appeals**


“Desilets filed appeals from the trial court’s order denying his request for a judgment nunc pro tunc as related to his convictions on two counts of intoxication assault. . . . [H]is complaint concerns the trial court’s alleged failure to properly credit him with having served 61 days in county jail after being sentenced but before his transfer to a prison. . . .

“While appeals courts have jurisdiction over appeals from a final judgment of conviction, they do not have jurisdiction over appeals from orders denying requests for the entry of judgments nunc pro tunc because no statute has been passed creating appellate jurisdiction over such appeals. . . . Accordingly, the appeals are dismissed for lack of jurisdiction. A judgment nunc pro tunc makes a clerical change to the original judgment. . . . The trial court’s order denying Desilets’ motion makes no change to the original judgments; therefore, it is not a judgment nunc pro tunc.”

**Officer did not have authority to perform an inventory search and, therefore, did not have authority to continue detaining defendant passenger while preparing to perform that search; because D was unlawfully detained, the evidence was insufficient to prove him guilty of evading arrest or detention. *Capell v. State*, No. 06-15-00186-CR (Tex.App.—Texarkana Sept 1, 2016).

D was the passenger in a car subject to a traffic stop. Shortly after the initial stop, the vehicle’s driver was arrested and put in the patrol car. D waited in the vehicle while the investigating officer prepared paperwork. Approximately 15 minutes later, D exited the vehicle and fled the scene. He was subsequently arrested and charged with evading arrest or detention. D was found guilty in a bench trial. D appealed that he could not be convicted of evading detention because his detention was unlawful. In July 2016, COA reversed: “We find that Capell’s detention was unlawful and therefore reverse the trial court’s judgment and render a judgment of acquittal.”

Here, COA denied the State’s motion for rehearing: “[A]n inventory search may be performed before an impoundment. But, as the 14th Court of Appeals noted, ‘[b]efore an inventory search is lawful, there must be a lawful impoundment.’ . . . As we explained in our opinion above, the [officer] had no authority to impound the vehicle because he had a reasonable alternative to impoundment, namely, to turn the vehicle over to Capell. Because [officer] did not have authority to impound the vehicle, he did not have authority to perform an inventory search. Because he did not have authority to perform an inventory search, he did not have authority to continue detaining Capell. . . . [T]he State had the burden to prove there were no valid alternatives to impoundment[].”
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