March 1–2, 2018

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Houston, Texas

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Thursday
Effective Story-Telling: The Art of Crafting an Opening and Closing • Tyrone Moncrief
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Pretrial Litigation: Setting the Tone and Tempo for Trial Begins in Pretrial • Michael Heiskell
Effective Jury Charge: Blue Print for the Defense • Wendell Odom
Preparation of an Effective Direct Examination: Having a Conversation Worth Listening To • Betty Blackwell
Cross-Examination: Dissecting the Adversarial Witness • Nicole DeBorde
The Expert Witness: How to Use & Abuse the Expert (705 Motions) • David Guinn

Friday
Extraneous Offenses: Preparing for the Trial within a Trial • Reagan Wynn
Pretrial Investigations: Your Client’s Defense Begins with an Effective Pretrial Investigation and Defense Strategy • Heather Barbieri
Reframing the Issue: Tylenol, Cyanide & the Burden of Proof • Frank Sellers
Preserving Error: Prepare and Hope for the Best, But Always Plan for the Worst • Jani Maselli Wood
Taking Care of Yourself: Coping with the Stress of a Trial • John Hunter Smith
Rise Up: Trials and Tribulations of the Criminal Defense Lawyer • Stan Schneider

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Stan Schneider
Clay Steadman

Anatomy of a Trial
March 1–2, 2018

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Texas Criminal Defense Lawyers Educational Institute offers scholarships to seminars for attorneys in need.
Robert Louis Stevenson's family were all engineers. Both of his grandfathers, two of his uncles, and his father were all in the same profession. They were primarily known for lighthouse design. It was assumed that young Robert would follow in their footsteps.

But from an early age, Robert's interest was always in writing. When he told his father that he preferred building stories to building lighthouses, the elder Stevenson agreed to let his son follow his dream, but only if Robert would agree to study law with a view toward becoming a Scottish lawyer. After all, this profession could ensure a way of earning a living while writing probably would not.

Robert agreed, studied the law, and qualified for the Scottish bar. Fortunately for the world, he continued to focus on his passion, writing. Over his lifetime, he wrote classics that still are read two centuries later—Treasure Island, Kidnapped, and The Strange Case of Dr. Jekyll and Mr. Hyde.

Plagued by illness all his life, Stevenson traveled the world looking for a climate and environment more conducive to better health. His travels eventually led him to the Pacific Islands in 1888. For three years he trekked to Hawaii, Tahiti, New Zealand, and Samoa.

In Samoa, Stevenson and his wife eventually purchased land and built a home. Stevenson came to love the Samoan people, and they reciprocated. He became an advocate for them. There, Stevenson was known by the name the Samoans gave him, Tusitala, which translates into “Teller of Tales.”

Stevenson wrote "so long as we are loved by others, I would say we are indispensable and no man is useless while he is loved.” It is no wonder that the road to Stevenson's home was known by the locals as “the road of the loving heart.”

On December 3, 1894, Stevenson suffered an apparent stroke while opening a bottle of wine. Within a few hours, Tusitala had died at the age of forty-four. The Samoans insisted on guarding his body throughout the night. The next day they bore him down "the road of a loving heart” and up nearby Mount Vaea, where they buried him overlooking the ocean.
Stevenson was beloved because of the friendship and love he bestowed upon others.

The same is true of Joseph Martinez. It is hard to express the sadness that I feel with his resignation and retirement. Joseph came to TCDLA at a time when we were in dire need.

For sixteen years he has served TCDLA as our Executive Director. He always carried himself with such grace and dignity. Joseph was a perfect figurehead for us—he exuded class. I would guess that for most of our members, he is the only Executive Director they have ever known.

But as much as anything, I will always treasure Joseph because of the love he showed to our members. He was never too busy to always greet you with a smile and a hug, and it did not matter whether you were the president or a first-year lawyer at Trial College.

Joseph, and his wonderful wife Bertha, were great ambassadors for TCDLA.

Thank you, Joseph, for your years of service, but more than that, thank you for being such a loving personal friend.

Now at the printer!

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Dear TCDLA Membership,

I have decided after 16 unforgettable outstanding years it is time for me to leave TCDLA as your executive director and begin the next phase in my life and enjoy retirement!

I express my sincere gratitude to David Moore, president, for his exceptional leadership over the last few years and more especially in this most recent eight months. Thanks to David, TCDLA is in the unique position of being one of the best, if not the best, state association for criminal defense lawyers in the nation.

I want to thank all of the boards of directors and committee chairs I have served over the years for their contributions to TCDLA, as well as for being the best examples I have ever seen of giving to the cause.

I want to thank the TCDLA past presidents for their wise and sage advice throughout the years. I know they were always there for more than just a word of advice and friendship. Special thanks to our first president, the Honorable Frank Maloney. He, in particular, provided special support to me.

I recognize the individual members across the state who would talk to me at our CLE—with whom I have lasting relationships. I have incredibly fond memories of each encounter. I thank the local criminal defense bars and their leadership for their support of TCDLA.

I want to acknowledge your exceptional TCDLA staff. They are without question the finest, dedicated professional staff I have ever known. Melissa Schank, your assistant executive director, has the most profound work ethic I have ever seen.

These are just a few of the unique moments I will cherish for the rest of my life. I will continue to share my experiences and memorable stories with my grandkids. Some of my best recollections:

★ My first Prairie Dog seminar in Lubbock;
★ My first Semaan seminar in San Antonio;
★ My first and all the subsequent 15 Rusty Duncan Advanced Criminal Law Courses;
★ All of the CLE I attended;
★ All of the TCDLA and TCDLEI board meetings I attended;
★ All of the Tim Evans Texas Criminal Trial Colleges in Huntsville.

I am grateful to the TCDLA Board of 2001–2002 for offering me the job of a lifetime. I express gratitude to our members for giving me the time of my life all these years. Again, I thank the local criminal defense bars and their leadership for their support of TCDLA. Together over the years, everyone has made TCDLA a successful organization.

I love you all. One last time, good verdicts to all of you.

Joseph A. Martinez
As I write this column as editor of the Voice on the eve of Martin Luther King Jr. Day and following the latest racially charged comments from the president, it’s impossible not to think about voices and words. The ones that inspire us. The ones that outrage us. The ones that haunt us. The ones that torment us. The ones that help us. The ones that expose us. The ones that comfort us. The ones that save us. The ones that call us to action.

We are TCDLA, the largest criminal defense organization in the state. Our noble “purpose is to protect and ensure by rule of law those individual rights guaranteed by the Texas and Federal Constitutions in criminal cases; to resist the constant efforts which are now being made to curtail such rights; to encourage cooperation between lawyers engaged in the furtherance of such objectives though educational programs and other assistance; and through such cooperation, education, and assistance to promote justice and the common good.” This is our call to action. Our purpose. Don’t gloss over it because it’s familiar; really read the words. It is no small undertaking.

The members of our Corrections and Parole Committee—Scott Ehlers, David O’Neil, William Habern, Nancy Bunin, Curtis Barton, Daniel Clancy, Gary Cohen, Nicholas Hughes, Scott Pawgan, and Courtney Stamper—heard the call to action from TCDLA and recently became a loud voice for the disaffected and oppressed within the prison system. In 2014, TCDLA passed a resolution “calling for TCDLA to support an Independent State Counsel for Offenders (SCFO) Established Pursuant to the ABA.” There was a very real concern that the SCFO was not operating independent of the influence of the prison system, and that the representation of inmates provided by SCFO suffered because of that influence. This concern was brought to the State Bar’s Legal Services to the Poor in Criminal Matters Committee (LSPCM). As a member of that committee also, Scott Ehlers is the principal author of the recent report examining the operations of the SFFO. The report is sure to inspire necessary change to improve representation of inmates by SCFO. The full report is posted on Voice Online, and the Texas Observer has published a frank story on the report. See https://www.texasobserver.org/new-report-finds-surprise-indigent-defense-attorneys-shouldnt-be-under-the-control-of-the-state-prison-system/. Both are worth reading.

Mike Ware, among other heroes and heroines of our group, is a powerful voice for the wrongfully convicted. His featured article outlines the law for attacking false evidence and junk science in wrongful convictions for all of us. There are wrongfully convicted people in prison in our state. Their voices should not be muted because the system failed. They write us letters. The least we can do is respond back even if it’s just to refer them to the Innocence
Project of Texas for help or explain that we cannot help. Let’s not ignore the letter from the inmate who may have been wrongfully convicted. Let’s not stamp out that voice crying for help.

It is the voices and words of the political dissidents of 1776—our founding fathers—that bring us together every July to read the Declaration of Independence with one collective powerful voice that has made people take notice. Let’s make certain that we continue to recite the words of the Declaration and Bill of Rights with one loud and proud voice. Those are words that need to be spoken, remembered, and really heard. It will take all of us again this year to make that happen.

So, as we begin another new year, let’s be intentional and purposeful with our words and voices. Let’s collectively serve the purpose of TCDLA in every courtroom with every case. Voices and words have always been important. But in this time, they are more important than ever before. What will your voice be this year? What words will you use to make your voice heard? What will our collective voice be this year? What words will we use to make our voice heard? Let’s continue to speak out. Words matter. Our Voice matters.

_Injustice anywhere is a threat to justice everywhere._
—Dr. Martin Luther King Jr.
Letter from Birmingham Jail 1963

March 18, 2018 marks the 55th anniversary of _Gideon v. Wainwright_!

Please join us and the National Association for Public Defense in celebrating the right to counsel and public defender offices all over the country starting March 19, 2018. We hope to see offices in Texas celebrate _Gideon_ (Friday taco party, anyone?) or at least take a few seconds to breathe and pat each other on the back for all of the hard work and tenacity that goes into working in a public defender office. Not a public defender? No problem! Please join us in celebrating the right to counsel.

Stay tuned for more information about the week-long party as March approaches. Any questions? Please contact Jessica Canter for more information at jcanter@trla.org. See y’all March 19!
Stories are the vehicle through which criminal defense lawyers typically communicate with juries. Since the jury decides whether a defense case is persuasive or not, it must be built from their point of view. And since juries are people oriented, rather than law oriented, they use their feelings and emotions to make decisions more often than logic. That’s why the story is such an effective way to communicate with them. Juries determine how plausible a case is by placing the story next to their own ideas about how the world works. Consequently, criminal defense attorneys are usually great storytellers. That being the case, what other ways could defense lawyers use stories in their law practices to help them be more successful? Put another way, how could you use stories to address the essential needs of a potential new client and distinguish yourself from the competition at the same time?

When you interview prospective clients who just bonded out of county jail, they are scared and worried about an uncertain future. In that case, they have an inherent need to be comforted. What if, for example, during the intake interview with a potential client you used stories, based on your experience, to show the client you’ve handled their kind of case before and were able to achieve results they may be hoping for? Telling them about the history of your firm, about your aggressive courtroom capabilities, or telling them how many jury trials you’ve litigated neither comforts them nor does it distinguish you from your competitors. Almost everyone could say those things about their law practice. The marketplace is replete with claims of tough, top-tier, former prosecutors claiming to be experienced and aggressive criminal defense lawyers. These types of credibility statements are becoming cliché. Furthermore, if you focus only on your skills, rather than results, you’ll never address the client’s bigger underlying need for comfort. Instead, use stories to highlight your firm’s track record of accomplishing favorable results for other clients who faced similar problems.

Utilizing stories of past success is not the same as guaranteeing future results. The Texas Disciplinary Rules of Professional Conduct provide guidance in this matter. Rule 7.02(a)(2) states: “A lawyer shall not make a false or misleading communication about the qualifications or the services of any lawyer or firm. A communication is false or misleading if it: . . . (2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these rules or other law. Tex. Disciplinary Rules Prof’l Conduct R. 7.02(a)(2). Therefore, to avoid running afoul of the disciplinary rules, make sure your account of past success is accompanied by appropriate qualifications or disclaimers to guard against the prospective client believing that similar results will be
obtained for them without reference to their specific factual and legal circumstances. In other words, use your story like a client referral. Use it to affirm your experience with similar cases, to affirm your capabilities, and to affirm your record of success.

Furthermore, when done appropriately, recounting stories of past outcomes does not violate client confidentiality nor does it label you as a bragger. Rather, a good story about a former client in a similar situation may help the prospective client to reason that “depending upon the circumstances of my case, if this lawyer can get those kinds of results for other people, maybe he can do it for me, too.” You could highlight a story from a former client with the same criminal charges and relate some compelling facts that share similarities with the prospect’s case. In fact, you could create a list of 2–3 stories related to the particular kind of case the prospect has now and know them inside out. At the same time you’re comforting them with accounts of your past favorable outcomes, you can use the stories to distinguish yourself from your competition since no list of trial skills on your resume is as convincing as a factual success story based on your professional experience helping others with similar problems.

But what if you are young or just beginning your criminal law practice? What if you lack the breadth of experience from which these factual success stories come? Don’t worry. With some ingenuity, patience, and sacrifice you can begin to amass a varied and impressive story-base of your own. Accepting court appointments is always the best place to start. The leading defense lawyers I know all started their careers accepting court-appointed cases. Court appointments come in all shapes and sizes. There’s no better place to obtain experience in handling forensic evidence and cross-examination. And whether they are misdemeanors or felonies, defending court-appointed cases not only hones your defense lawyer skills, it develops a base of experience from which your success stories will flow. Another way to get experience is to offer your time to colleagues defending criminal cases. The more difficult and complicated the case, the better. Your story about sitting second chair will be just as compelling as any other. Beyond this, you’ll build a reputation among your professional peers for being determined and hard-working.

Using stories to showcase your past successes can help comfort potential new clients. When you talk to them about tangible benefits and potential results you could achieve for them, you provide the peace-of-mind every worried client desires. Furthermore, these success stories help distinguish you from the competition as you contend with other lawyers for the same business. And when done appropriately, you are not guaranteeing future results. Rather, you are affirming your experience and capabilities solving similar problems. So, since criminal defense lawyers are such great storytellers, why not leverage past successes into concrete benefits for both you and a potential new client?

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.

“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.
The Department of Homeland Security and the Department of Justice are competing against each other in a turf battle and playing tug of war with our clients. DHS is tugging on one arm, seeking deportation. The Department of Justice is on the other arm, seeking prosecution. This is a fact situation we have seen recently in two cases: United States v. Boutin, ___F. Supp.3d___, 2017 WL 6611569 (E.D.N.Y. December 20, 2017) [Memorandum and Order, Chief United States District Judge Dora L. Irizarry], and United States v. Ailon-Ailon, 875 F.3d 1334 (10th Cir. 2017) Per Curiam [Panel: Circuit Judges Lucero, O'Brien, and Phillips].

This presents a problem for our clients, for us, and for the courts. Recently, in Boutin, Judge Irizarry expressed her frustration with this as she wrote,

Both the United States Department of Homeland Security ("DHS") and the United States Department of Justice ("DOJ") are part of the same Executive Branch of the federal government. The instant case, like Ventura, reflects a failure of coordination between the two agencies that jeopardizes the ability of DOJ to protect the interests of the government and of the people of the United States in prosecuting federal crimes. "The Executive, in the person of the Attorney General, wishes to prosecute defendant. The same Executive, in the person of the Assistant Secretary of Homeland Security for ICE, may want to deport him." United States v. Barrera-Omana, 638 F. Supp.2d 1108, 1111–12 (D. Minn. 2009). Case law, statutes, and DHS’ own regulations provide a resolution to this conflict, yet DHS, under the auspices of ICE, apparently will deport an alien regardless of the resulting prejudice to criminal prosecutions. In doing so, DHS also purposefully contravenes the Bail Reform Act, which, in part, exists to protect a defendant's constitutional rights. The Court is gravely concerned by this apparent willingness to prejudice the interests of the people of the United States and the constitutional rights of the accused, with resulting waste of DOJ, court, and defense resources. Nonetheless, "it is not appropriate for an Article III judge to resolve Executive Branch turf battles." United States v. Barrera-Omana, 638 F. Supp.2d 1108, 1111–12 (D. Minn. 2009). ICE can choose to delay a deportation when a criminal prosecution is pending. See Ailon-Ailon, 875 F.3d at 1339. Should ICE be unwilling to do so, "it is a matter for the Executive Branch to resolve internally." The Court's duty is "to treat defendant like any other alleged offender under the Bail Reform Act . . . [which] is not dependent upon the way in which ICE decides to act." United States
v. Marinez-Patino, No. 11-cr-064 (SIS), 2011 WL 902466, at (N.D. Ill. Mar. 14, 2011). It may not allow the Executive Branch to have it all ways. Accordingly, “the Executive Branch should decide where its priorities lie: either with a prosecution in federal district court or with removal of the deportable alien.” Ventura, 2017 WL 5129012.

In Ailon-Ailon, the United States Court of Appeals for the Tenth Circuit held that as a matter of first impression, the risk of a defendant’s involuntary removal by immigration officials did not establish a serious risk that he would flee, as would support pre-trial detention. The per curiam opinion of the Court reads, in part, as follows:

[An Overview of the Case]
We expedited consideration of this bail appeal to consider Mario Ailon-Ailon’s argument that the government has misinterpreted the word “flee” as it appears in 18 U.S.C. § 3142(f)(2), resulting in his illegal pre-trial detention. He argues that involuntary removal by the Bureau of Immigration and Customs Enforcement (“ICE”) does not constitute flight of the sort that would justify detention. On initial consideration, a magistrate judge agreed and determined that Ailon-Ailon should not be detained before trial. On review of the magistrate judge, the district court reversed, ordering that he be detained. We conclude that the plain meaning of “flee” refers to a volitional act rather than involuntary removal, and that the structure of the Bail Reform Act supports this plain-text reading. Exercising jurisdiction under 18 U.S.C. § 3145(c), we reverse and remand for further proceedings.

[The Background of the Case]
Ailon-Ailon, a citizen of Guatemala, has lived in Dodge City, Kansas, for at least seven years. In July 2017, he was arrested by ICE agents, who determined that he had reentered the United States illegally after he was ordered removed in 2001. Rather than immediately removing him again, ICE referred the matter for criminal prosecution. Ailon-Ailon was charged with one count of illegal reentry in violation of 8 U.S.C. § 1326(a), as enhanced by § 1326(b)(1). He is subject to a reinstated removal order, and ICE has lodged a detainer with the United States Marshals Service, requesting custody of Ailon-Ailon if he is released from the Marshals’ custody.

[The Government’s Motion to Detain Before a Hearing]
The government moved to detain Ailon-Ailon prior to trial on the ground that, if he was released, he would be removed from the country by ICE before trial. It argued that because he is subject to a reinstated order of removal, ICE would be obligated to remove him within ninety days. He would therefore not be present for trial. A magistrate judge denied the government’s motion, concluding that Ailon-Ailon was not a flight risk because “the risk of flight that the [Bail Reform Act] is concerned with is not a flight paid for by the U.S. Government, and if the Government can’t decide whether to keep him and prosecute him or deport him, that’s on them.” The magistrate judge ordered that Ailon-Ailon be released subject to a ten-thousand-dollar bond and certain conditions.

[The District Court’s Reversal of the Magistrate Judge’s Order]
On appeal of the magistrate’s decision to the district court, the government reasserted its definition of “flee.” By written order, the district court reversed, but specifically concluded in doing so that Ailon-Ailon was not a voluntary flight risk, and acknowledged that “[a]s a policy matter, . . . if the United States government, through the Department of Justice, wanted [Ailon-Ailon] present for prosecution, it should not . . . complain [about his] non-appearance due solely to the actions of the United States government, through the Department of Homeland Security.” However, the district court found by a preponderance of the evidence that ICE would remove him before trial and that such removal qualified as flight. It ordered that Ailon-Ailon be detained. This appeal followed.

[The Bail Reform Act]
“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” United States v. Salerno, 481 U.S. 739, 755, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The Bail Reform Act sets forth one such exception. Under that Act, individuals charged with a crime are generally “released on personal recognizance or upon execution of an unsecured appearance bond,” 18 U.S.C. § 3142(a)(1), or they may be “released on a condition or combination of conditions” that will reasonably ensure their appearance in court and the safety of the community. § 3142(a)(2), (c)(1).

[The Two-Step Process]
The Act establishes a two-step process for detaining an individual before trial. § 3142(f). First, the government may move for pre-trial detention if the defendant has been charged with certain enumerated offenses or “in a case that involves . . . a serious risk that such person will flee; or . . .
a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.” If the court determines that there is such a risk, the government must prove at the second step of the process that there “is no condition or combination of conditions” that “will reasonably assure the [defendant's] appearance . . . as required [as well as] the safety of any other person and the community.” The district court is directed to consider various factors in making this determination, including “the nature and circumstances of the offense charged,” “the weight of the evidence against the person,” “the history and characteristics of the person,” and “the nature and seriousness of the danger to any person or the community that would be posed by the person's release.” § 3142(g).

[The Government's Burden]
In this case, the government did not allege that Ailon-Ailon represented a danger to the community; it relied solely on the risk that Ailon-Ailon would flee in urging pre-trial detention. The government bears the burden of proving a defendant is a flight risk by a preponderance of the evidence. United States v. Cisneros, 328 F.3d 610, 616 (10th Cir. 2003).

"We apply de novo review to mixed questions of law and fact concerning the detention or release decision, but we accept the district court's findings of historical fact which support that decision unless they are clearly erroneous." [Ailon-Ailon's Position]
Ailon-Ailon argues that the word “flee” as it appears in § 3142(f)(2) does not encompass involuntary removal. He contends the risk that he would be removed from the United States by ICE does not constitute a risk that he will flee prior to trial. This is an issue of first impression in this circuit.

[The Court's Conclusion]
District courts considering this argument have reached varying conclusions.

* * *
We agree with the latter set of courts that a risk of involuntary removal does not establish a "serious risk that [the defendant] will flee" upon which pre-trial detention may be based. § 3142(f)(2)(A). Having failed to make the threshold showing required by § 3142(f), the government's detention motion fails at the first step of our analysis.

[The Statutory Interpretation]
In interpreting a statute, "we look initially to the plain language of the provision at issue. If the words of the statute have a plain and ordinary meaning, we apply the text as written." Fruitt v. Astrue, 604 F.3d 1217, 1220 (10th Cir. 2010) (quotation, citation, and alteration omitted). The ordinary meaning of "flee" suggests volitional conduct. For example, Black's Law Dictionary (10th ed. 2014) defines "flee" as: “To run away; to hasten off . . . To run away or escape from danger, pursuit, or unpleasantness; to try to evade a problem . . . To abandon or forsake.” Webster’s Third New International Dictionary (1976) defines “flee” as “to run away from.” As Ailon-Ailon noted at oral argument, one would not describe an individual who has been arrested at a crime scene and involuntarily transported to a police station as having fled the scene.

The structure of the Bail Reform Act supports this plain-language interpretation.

* * *
The Act provides that a removable alien may be temporarily detained for up to ten days to permit ICE to take custody. § 3142(d)(2). If ICE declines to do so, such "person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings." This provision demonstrates that a defendant “is not barred from release because he is a deportable alien.”

* * *
Further, although Congress established a rebuttable presumption that certain defendants should be detained, it did not include removable aliens on that list. See § 3142(e)(3). The Bail Reform Act directs courts to consider a number of factors and make pre-trial detention decisions as to removable aliens "on a case-by-case basis." Barrera-Omana, 638 F.Supp.2d at 1111 (quotation omitted). Yet under the government’s construction, the Act’s "carefully crafted detention plan . . . would simply be overruled by an ICE detainer," precluding "any kind of individualized consideration of a person before the Court.”

Finally, the Bail Reform Act provides an affirmative defense to prosecution for failure to appear if "uncontrollable circumstances prevented the person from appearing or surrendering, and . . . the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender." § 3146(c). This section implies that the Act is concerned with "the risk that the defendant may flee or abscond, that is, that he would fail to appear by virtue of his own volition, actions, and..."
[The Government’s Argument]
Despite the plain meaning of the word and the structure of the Act, the government argues that interpreting “flee” to include involuntary removal would better effectuate congressional intent. It argues that such an interpretation would reconcile ICE’s authority to refer cases for criminal prosecution with its statutory duty to promptly remove individuals who are subject to reinstated removal orders. See 8 U.S.C. § 1231(a)(1)(A) (stating that ICE “shall remove the alien from the United States within a period of 90 days”). But it is not clear to us that ICE must remove Ailon-Ailon before trial. An illegal reentry prosecution may well be completed prior to the ninety-day deadline. The government also argues that pre-trial detention is justified by the inconvenience to ICE that will be involved if it must take Ailon-Ailon into custody under its detainer. While it would be more convenient and efficient for him to be held by the Marshals up to and during his trial, the government’s convenience cannot justify a tortured reading of statutory language.

[This Is a Matter for the Executive Branch]
To the extent any conflict exists, it is a matter for the Executive Branch to resolve internally. “The problem here is not that defendant will absent himself from the jurisdiction, but that two Article II agencies will not coordinate their respective efforts. . . . It is not appropriate for an Article III judge to resolve Executive Branch turf battles.” Barrera-Omana, 638 F.Supp.2d at 1111; see also United States v. Tapia, 924 F.Supp.2d 1093, 1098 (D.S.D. 2013) (“[O]ne arm of the Executive, wishing to prosecute this defendant criminally, is arguing that he is likely to flee based on the possible actions of a different arm of the same Executive”); United States v. Trujillo-Alvarez, 900 F.Supp.2d 1167, 1170 (D. Or. 2012) (“If the Executive Branch chooses not to release the Defendant and instead decides to abandon criminal prosecution of the pending charge and proceed directly with Defendant’s removal and deportation, the law allows the Executive Branch to do that”).

In light of the plain meaning of “flee,” the structure of the Bail Reform Act, and the importance of the liberty interests at stake in this case, we decline to resolve the alleged conflict within the Executive Branch. We hold that, in the context of § 3142(f)(2), the risk that a defendant will “flee” does not include the risk that ICE will involuntarily remove the defendant.

[The Result]
The order of the district court denying Ailon-Ailon pre-trial release is reversed. We remand with instructions to set appropriate conditions for Ailon-Ailon’s release pending trial. When the conditions of release have been met, the United States Marshals shall release Ailon-Ailon to ICE custody, pursuant to the detainer. We grant Ailon-Ailon’s motion to file a reply brief.

My Thoughts

I was intrigued with Ailon-Ailon but had not seen Boutin until Ed Mallett emailed me the opinion. It’s not often that we see the Court focus its unhappiness on the Government instead of on us and our clients. Nice.

I suppose that this is one of the rare instances in which we will cheer for the Department of Homeland Security. After all, being deported beats being prosecuted and deported.

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 & Harrison, PC. He can be reached at bfiles@bainfiles.com.
Shout outs to TCDLA Director Frank Sellers and former Voice editor Greg Westfall for the big NG on some serious charges: Continuous Sexual Abuse of a Child, Aggravated Sexual Assault of a Child, and Indecency with a Child. D, who had just started his job as a jailer in Dallas County, was accused of continuously having sexual contact with his then 6-year-old stepdaughter. After the 10:30 pm Friday-night verdict, one juror stayed after to tell our heroes that not only had they “proven” a reasonable doubt; he also thought it was proven by a preponderance of the evidence that Grandma had planted these false memories in her granddaughter’s head because of her hatred of D. Greg says they could not have done this without the help of their expert witness on false memory and forensic interviewing, Dr. Aaron Pierce. Congratulations, guys, on a job well done.

Congrats to Seth Kretzer for a win on a recent appeal. D had pleaded guilty to a 5-count indictment—one on a gun and four on ammunition—and was sentenced to 30 years. Seth pointed out the Double Jeopardy problem: Unless the feds could show D acquired the gun and ammo at separate times, D could only be sentenced on one count. In an earlier hearing, Feds conceded they had no idea when D acquired the ammunition—and appealed to “common sense” (Seth: “code words for ‘prosecutor serving as unsworn witness to fill in the holes in their evidence they don’t have’”). The judge didn’t buy it and capped D’s exposure at 10 years. Good job, Seth.

Kudos to Michael Mowla for his recent win in the Second Court of Appeals. D, convicted of intoxication manslaughter and AA/DW in 1997, was arrested again for DWI in 2013 and indicted as an F-3. On taking over the case with Sarah Roland, Michael filed a writ of habeas corpus on the 1997 cases—which was denied, but exposed that (1) D did not have drugs in her system as the state claimed; (2) her BAC was below the legal limit; and (3) a witness in the vehicle confirmed that the wreck was a horrific accident caused when she inadvertently distracted the D. Michael and Sarah filed a motion to reconsider the MTS (which had previously been denied) and litigated it: MTS was granted, the state appealed, and the 2nd COA affirmed the trial court’s granting of the MTS. The State recently dismissed the case, and now D can move on with her life. Great work, Michael and Sarah. Congratulations.

Shout out to TCDLA Director Keith Hampton, who walked his client out of the state hospital system this January after he won not guilty by reason of insanity verdicts for his former Marine sniper client. The State prosecuted D on seven counts: two counts of attempted murder; two counts of aggravated assault; two counts of deadly conduct; and one count of tampering with evidence. Keith won NG verdicts on four counts and “not guilty by reason of insanity” on the remaining counts. D then went into the state hospital system. Over a span of six years (with the help of an incredible team at Kerrville State Hospital and a wonderful family), his mental health improved. In Keith’s estimation, it was time for him to get out and lead a normal life. The Comal County District Attorney’s office fought back, but after a spirited hearing in which Keith carried the burden of proof, he won his client’s freedom. Hampton adds that his client has an array of support and oversight to ensure he leads the great life he deserves. “This is exactly the way the system should work,” Keith said. Congratulations on making that system work, Keith.

A shout out to Louis Lopez of El Paso for a big win for a wrongly accused soldier. It seems the ex-wife downloaded child porn from a USB flash drive onto a laptop he owned while he was in Japan and then turned it over to the El Paso City police. Louis notes that the police did not do any forensic evaluation (“the detective had taken one class in cell phone forensics”). The soldier was arrested and spent a year in county, where he suffered much abuse due to the type of charges brought. Louis hired a forensic computer analyst (a former FBI section chief), and he was able show ex-wife downloaded the porn two
At the 5th Annual Lone Star DWI seminar, DWI Chair Mark Thiessen and President David Moore honored the latest members of the DWI Trial Warriors, so named for attending any five TCDLA DWI seminars within a two-year period. December’s honorees, clockwise from right, are Jeffrey D. Adams, Jack Razis, Tyler A. Flood, Nnamdi C. Ekeh, and Wayne Goralski. Congratulations, gents.

Thad Davidson sends along a shout out to Erick Platten of Tyler for his recent win in the 114th District Court—in the case State v. Ronnie Rogers—in a punishment trial for intox manslaughter. As Thad noted, “To get probation in Smith County on any kind of case involving the death of a person pretty much requires a miracle, but Platten did it.” Erick says the court was hostile throughout the proceedings, as were the aggressive prosecutors, but the jury apparently paid attention to the evidence—and gave D probation. Kudos, Erick, for a job well done.

Kudos to TCDLA Director Carmen Roe and co-counsel Nathan Mays of Houston for their work on a 1st-degree-felony trial running seven days. The 41-year-old truck driver’s aggravated assault trial ended in a mistrial days after seven hours of jury deliberation over two days. A sheriff’s deputy say D tried to use his Jeep to run him over, though evidence showed D was shot four times through the side of his truck. Carmen credits a “dream team” of lawyers and people who volunteered their time behind the scenes because they believed in the case.

A big shout out to Ignacio Estrada and Linda Estrada for their big win in a difficult trial in El Paso. D was charged with one count of Intoxicated Manslaughter and one

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days before she turned it into the police. She also had done several google searches on the laptop looking for and eventually downloading an app to change the date on files. She then back-dated the porn files to a time when the laptop was not in existence. Louis established that D had been in Japan at the time of the downloads and did not have access to the laptop. After evaluating the evidence, DA dismissed all charges. Righteous win, Louis.

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A big shout out to Ignacio Estrada and Linda Estrada for their big win in a difficult trial in El Paso. D was charged with one count of Intoxicated Manslaughter and one
count of Manslaughter based on signs of intoxication, admissions of drinking, and a BAC of .07 performed two hours after the car accident. The State’s lowest plea offer was 8 years in prison. The jury found D not guilty on Count 1 and guilty on Count 2—and then gave him probation. The Estrada’s credit the probation verdict to Dr. Jason Dunham, who testified extremely well in sentencing. Good work, team.

Congratulations are due Dean Watts of Nacogdoches for a reversal he snagged in the 12th Court of Appeals of a 40-year sentence for retaliation. D, arrested for public intoxication and taken into custody, rambled on belligerently on the way to jail, making vague statements about the arresting officer—who egged him on, asking, “Why is that sir,” “What do you mean?”, and so on. This led to D making threats. No Miranda warning was given. The jury gave him 40 years because he was a habitual offender. Dean credits fellow TCDLA member John Boundy, the trial lawyer, as well. Way to go, guys.

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This series is all about Unleashing Your Inner Beast, allowing you to honorably, aggressively, and ethically defend your client. We all know, and the statistics prove, that too many citizens are falsely accused, over-charged, or mercilessly punished. The Beast series is about tenaciously fighting to successfully and ethically defend your client while being fully prepared and primed with the law. You will receive an abundance of tools and insight from the excellent presenters, so you can vigorously and ethically defend your client with a fury that will not be forgotten.

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Nominations
Mark Snodgrass
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Past Presidents
Betty Blackwell
(512) 479-0149

Prosecutorial Integrity
John Hunter Smith
(903) 893-8177

Public Defender
Michelle Ochoa
(361) 358-1925

Rural Practice
Clay Steadman
(830) 257-5005
David Ryan
(713) 223-9898

Strike Force
Nico Deborde
(713) 526-6300
Reagan Wynn
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Technology & Communications
Jeremy Rosenthal
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Women’s Caucus
Betty Blackwell
(512) 479-0149-9060
Julie Hadofr
(210) 738-9060
Cynthia Orr
(210) 226-1463
TCDLA Awards Nomination Form
(Criteria for each award is below)

Please use this form for all award nominations and add additional pages as needed. Email the completed Awards Nomination Form to mschank@tcdla.com or fax to the home office at 512-469-9107. The deadline is noon, April 10th. You must receive confirmation from Melissa Schank for your nomination.

The award(s) will be presented at TCDLA’s Rusty Duncan seminar by the current President of the Texas Criminal Defense Lawyers Association. Award(s) are not required to be awarded annually.

Check One:

☐ TCDLA Hall of Fame  
☐ TCDLA Charles D. Butts Pro Bono Lawyer of the Year  
☐ TCDLA Percy Foreman Lawyer of the Year  
☐ TCDLA Rodney Ellis Award

A. Name, Texas bar card number, address, phone, district number (if known), and email address of nominee
   Type Response Here

B. Background information (concerning nominee’s legal services and career)
   Type Response Here

C. Description of services provided (describe pro bono legal services provided by the nominee, including if possible the number of hours and/or the approximate number of pro bono cases handled during the past two years)
   Type Response Here

D. Any outstanding achievement and/or results
   Type Response Here

E. Other relevant information (additional information and supporting materials, such as letters of support)
   Type Response Here

F. Name, address, phone, email address, Texas bar card of person submitting nomination, and reason, if relevant, for nomination
   Type Response Here
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 included form and submitted to TCDLA by noon on April 10th.

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 included form and submitted to TCDLA by noon on April 10th.

This award is not required to be awarded annually.

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 included form and submitted to TCDLA by noon on April 10th.

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-attorney 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 included form and submitted to TCDLA by noon on April 10th.
Preliminary Matters

Your convicted defendant may or may not have made an unsuccessful previous attempt to obtain post-conviction relief by way of an article 11.07 T.C.C.P. writ. Whether a previous writ has been filed is an essential, procedural fact to know early in your pursuit of post-conviction relief from a wrongful conviction. If your client has filed a previous article 11.07 writ and lost, for example, any subsequent writ must first hurdle the procedural obstacles, or bars, enumerated in art. 11.07, Sec. 4, T.C.C.P., before the Court of Criminal Appeals will consider the substantive merits of your current claims. This holds true even if the previous writ was pro se garbage filed by your client. The corollary to that unforgiving section of art. 11.07 is that in filing your client’s first 11.07 writ, you are erecting those same obstacles that any subsequent writ must hurdle, if your initial writ is not successful. The hurdles you will create for a subsequent writ application include this: establishing that the factual or legal basis of the subsequent writ claim was not raised in the previous writ (your writ) and was, in fact, “unavailable on the date the applicant filed the previous application.” Article 11.07 Sec. 4(a)(1). So, in filing an initial writ, you will bar your client from subsequently raising claims you never raised, but could have raised because the factual and legal bases were theoretically “available” at the time you filed the initial writ.1

Actual Innocence

The prototypical “actual innocence” case is one in which the defendant has been convicted of a crime, usually a felony, and has exhausted his or her direct appeals. Most often, the defendant was convicted after a trial, but an actual innocence claim can also arise from a guilty plea, plea bargained or otherwise.2

In Texas, article 11.07 T.C.C.P. is the most common vehicle
used for seeking post-conviction relief for a wrongful conviction, including claims of “actual innocence” and “false evidence.” Article 11.073 T.C.C.P., which became effective September 1, 2013, and was amended effective September 1, 2015, provides a separate and more specific vehicle for a post-conviction claim—that bad science used by the State at trial substantially contributed to the wrongful conviction, or that good science, unavailable at the time of the trial, can be used to now correct the wrongful conviction.

Existentially, “actual innocence” is a claim that as a matter of historic, objective fact, your client was convicted of a crime that was committed by someone else. Perhaps the crime occurred pretty much as the witnesses, the police, and the prosecutors claim it occurred. But the wrong person (your client) was arrested, charged, and convicted. Mistaken eyewitness identification is one generally recognized, common cause of these wrongful convictions. In general, the “DNA exonerations” typify the “wrong person was convicted” actual innocence claim. Unfortunately, in the vast majority of these cases, there is no preserved DNA to test.

The other type of existential, actual innocence claim is where no crime was ever committed by anyone. The crime has no existence beyond the printed words in the indictment and final judgment. Examples could include an arson/murder where a post-conviction investigation establishes that the fire causing the death or deaths was not the result of arson, or a “shaken baby” case where the alleged cause of the injury is not supported by science. Imagine someone convicted of embezzlement, and it turns out there was a bookkeeping error and no funds were, in fact, misappropriated.1 Possibly the most common scenarios for a “no crime ever occurred” claim are cases of sexual abuse of a child, particularly if there is an alleged recantation by the named injured party claiming that their trial testimony was untrue and that, in fact, there was no sexual assault or other impropriety committed by anyone. Note: These cases are extremely hard to prove as the courts can be highly skeptical of such “recantations.”

In *Ex parte Navarijo*, 433 S.W.3d 558 (Tex.Crim.App. 2014), the habeas court found that the now-adult victim’s exculpatory recantation was more credible and believable than her inculpatory trial testimony as a child, in an aggravated sexual assault of a child case, and that the applicant had, therefore, met his *Elizondo* burden. The Court of Criminal Appeals disagreed. First, they found fault with the habeas court’s credibility assessment, pointing out the lack of detail in the recantation. Further, Judge Alcala, writing for the majority stated:

The habeas court’s analysis appears to have been based on an assessment of the complainant’s credibility and whether her recantation testimony was more credible than her trial testimony, rather than on an assessment of the probable impact of her new recantation testimony on the State’s case as a whole.

Id. at 572.

The United States Supreme Court has never confirmed that the United States Constitution provides judicial relief from imprisonment or execution merely because a person is, in fact, innocent, as long as there are no identified, significant, procedural errors in the trial record. In essence, the accuracy of the outcome is irrelevant. *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); District Attorney’s Office v. Osborne, 557 US 52, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009). Notwithstanding the utter failure of Herrera’s innocence claim at the Supreme Court (he was executed), a free-standing claim of actual innocence, is sometimes referred to as a “Herrera claim.”

In *Ex parte Elizondo*, 947 S.W.2d 202 (Tex.Crim.App. 1996), decided three years after *Herrera*, the Texas Court of Criminal Appeals first recognized a freestanding claim of actual innocence as a cognizable ground for relief in a post-conviction state writ. The Court based their decision on the due process clause of the Fourteenth Amendment to the United States Constitution. The claimant must establish by “clear and convincing” new evidence that no rational juror who heard the original trial evidence and then heard the new evidence would be able to find guilt beyond a reasonable doubt. Since *Elizondo*, Texas has established a significant body of “actual innocence” jurisprudence. The Texas Court of Criminal Appeals has repeatedly characterized the claimant’s burden in prevailing on a bare claim of innocence as “herculean.”4

In *Ex parte Sonia Cacy*, 2016 Tex.Crim.App. Unpub. LEXIS 982, the Texas Court of Criminal Appeals agreed with the court of conviction that Cacy had met her “herculean” burden under *Elizondo* and vacated her conviction for arson/murder. Judge Yeary, joined by Judge Keller, wrote a concurring opinion noting that meeting the “herculean” burden established by *Elizondo* does not necessarily mean that person is “manifestly innocent.”

The *Elizondo* standard, on its face, does not really focus on innocence per se. It is, instead, an exceedingly high burden by which an applicant must show that, if newly available evidence were added to the evidentiary mix, no reasonable jury would have found the State’s case to have been compelling enough to defeat the systemic presumption of innocence . . . This is not the same as establishing that the applicant is manifestly innocent.

Although their ontological reasoning seems sound, it is not entirely clear (yet) why Judges Yeary and Keller are drawing the distinction between *Elizondo*, “actual innocence,” and
“manifest innocence.”

Even more recently, in *In Ex parte Wimberly*, No. WR-64,017-05 (Tex.Crim.App. Nov. 1, 2017)(unpublished), Judge Yeary agreed with the majority’s decision to deny the applicant’s *Elizondo* claim, but stated the majority’s opinion “describes this admittedly ‘herculean’ standard as even more ‘herculean’ than it really is.” Judge Yeary accurately points out that there is a difference between establishing that no reasonable juror “would” or “could” have found guilt beyond a reasonable doubt, in light of the new evidence, on the one hand, and “unquestionably establishing innocence, on the other hand. He is satisfied with the lesser *Elizondo* standard but is bothered with the Court conflating it with what Judge Yeary terms “manifest innocence.” *Id.*

“Not every successful *Elizondo* applicant is necessarily literally ‘actually innocent.’” *Id.* (Judge Yeary quoting his concurring opinion in *Cacy*.) It is not yet clear whether Judge Yeary is simply bothered by what he perceives as misleading nomenclature and imprecise thinking, or whether he believes the two standards should, in some way, be recognized as separate standards and applied in different ways with different legal consequences.

It is worth noting that jeopardy does not attach to a finding of actual innocence, and that someone granted relief under an *Elizondo* claim can, legally, be re-tried and convicted of the same offense.

**False Evidence**

Closely related to post-conviction, actual innocence/ *Elizondo* claims are claims alleging that the state sponsored false, perjured testimony or other false evidence at trial. Like an *Elizondo* claim, a claim of false state-sponsored evidence is based on the due process clause of the Fourteenth Amendment to the United States Constitution.

As Judge Price wrote in his concurring opinion in *Ex parte Henderson*, 384 S.W.3d 833 (Tex.Crim.App. 2012):

A bare claim of actual innocence and a claim that false evidence was inadvertently used to obtain a conviction both fall along a continuum of due process violations. At one end of the continuum is a claim that the State has knowingly used false or perjured testimony. Here due process is primarily concerned with the fairness of the trial. Because of the State’s complicity in undermining the integrity of the process, the standard for materiality is relatively low: a reasonable probability that the false or perjured testimony contributed to the conviction. At the other end of the continuum is a bare claim of actual innocence. An actual innocence claim does not depend upon a showing of misconduct of any kind on the part of the state. The due process concern is with the accuracy of the result . . .


The unknowing use of perjured or false testimony falls [or at least should fall] between these end-points, with a mid-level standard (or standards) of materiality.

*Id.*

*Henderson* came three years after *Ex parte Chabot*, 300 S.W.3d 768 (Tex.Crim.App. 2009), where the Texas Court of Criminal Appeals clearly held, for the first time, that the State’s *unknowing or inadvertent* use of perjured testimony was a violation of due process.

The knowing use of perjured testimony is a trial error that is subject to a harmless error analysis. Under the applicable standard, “the applicant has the burden to prove by a preponderance of the evidence that the error contributed to his conviction or punishment.” Although the present case involves unknowing, rather than knowing, use of [perjured] testimony, we see no reason for subjecting the two types of errors to different standards of harm.


In *Chabot*, Gerald Pabst, Clay Chabot’s co-defendant, testified for the State that he tagged along with Chabot, his brother-in-law, to settle a bad drug deal. When they arrived at the target residence, only the drug dealer’s wife was at home. Pabst testified that he stood by in fear as Chabot raped and murdered the victim in retaliation for the bad drugs sold to him by her husband. Chabot was convicted of murder and given a life sentence based largely on Pabst’s testimony. After Chabot’s conviction, Pabst, who “had no deal,” was allowed to plead guilty to misdemeanor theft for some items stolen from the residence.

Twenty years later, DNA testing from the original sexual assault kit established that Pabst directly participated in the sexual assault of the victim. However, there was no real evidence that the original trial prosecutors knew that Pabst had perjured himself about not directly participating in the sexual assault. In 2008, Pabst was arrested in a bar in Ohio, brought to Dallas, convicted of capital murder, and given an automatic life sentence.
The Dallas County District’s Attorney’s office did not agree that Chabot was entitled to Elizondo relief, but did agree that Pabst’s perjury was “material,” and that Chabot’s due process rights were violated, notwithstanding that the prosecutor’s use of Pabst’s perjury by the State was unknowing. The Court of Criminal Appeals agreed.

Since Chabot, under Texas law a claimant is no longer required to prove that the state was aware that the testimony or other evidence sponsored by the state at trial was false, although proof that the state did, in fact, know that the evidence was inaccurate or that their witness was committing perjury strengthens the claim. Likewise, after Chabot and the cases following Chabot, the claimant does not need to prove that the sponsoring witness of the false or inaccurate evidence or testimony knew it was false or inaccurate or that the witness actually committed knowing perjury at the time he or she testified inaccurately for the state. It is sufficient to invoke due process protection if the state-sponsored evidence or testimony was inaccurate, or simply left a false impression (for example, by omitting relevant facts), as long as the inaccuracy or false impression is “material.” The inaccuracy or false impression is “material” if there is a “reasonable likelihood that inaccurate testimony or other evidence affected the outcome of the trial.” Ex parte Ghahremani, 332 S.W.3d 470 (Tex.Crim.App. 2011). This “false impression”/due process standard and analysis applies to both guilt/innocence and punishment. Id.

In an unpublished opinion written by Judge Keasler, the State’s expert testified, in an eyewitness identification case, in which the defendant presented an alibi that a hair from the crime scene “was consistent with the known head hair sample of [the defendant].” Ex parte Chavez, 2010 Tex.Crim.App. Unpub. LEXIS 686. The expert went into substantial detail as to similarities between the crime scene hair and the defendant’s known sample, including length, coloring, color pattern, “the way the pigment was distributed down the root to the shaft,” diameter, amount of cuticle, size of cuticle, color of cuticle, and “a patch type coloring distribution and this was similar in [the defendant’s] hair . . .”

On cross-examination, the State’s expert conceded that she could not definitely identify the hair as the defendant’s.

In summation, the prosecutor emphasized the expert’s testimony by saying the hair collected from the crime scene “matched or was consistent with” the defendant’s hair.

Post-conviction DNA testing established that the hair from the crime scene was definitely not the defendant’s hair. However, the defendant’s false evidence claim failed. Judge Keasler, writing for the majority, reasoned that the expert’s testimony was technically “not false just because post-conviction DNA testing later proved the hair did not come from [the defendant]. The similarities between the physical characteristics of the unknown hair and [the defendant’s] hair identified by [the state’s expert] at [the defendant’s] trial have not been refuted.” Id.

In Ex parte Franklin, 72 S.W.3d 671 (Tex.Crim.App. 2002), the defendant was convicted of the aggravated sexual assault of a thirteen-year-old girl. At trial, the alleged victim testified that Franklin, a Fort Worth police officer, “raped her in the backyard of her father’s house.” Id. at 673. At the time, she was thirteen years old. “Applicant testified that prior to the time of the sexual assault, she had never had sexual relations with anyone.” Id.

The alleged victim’s testimony was corroborated by her mother, who testified that a day after the alleged sexual assault, she noticed that the victim had a pair of blood-stained underwear, and that the stain was a different color than menstrual blood. That is, implying that it was consistent with loss of virginity blood and, therefore, consistent with her daughter’s trial testimony. The State also presented the testimony of the doctor, who conducted the sexual assault examination, albeit several weeks after the alleged rape. The doctor testified that her examination of the alleged victim revealed evidence of “blunt force trauma” indicative of past sexual intercourse. Id. at 673.

In May of 1998, over three years after the defendant was convicted, “the Tarrant County District Attorney’s office notified applicant’s trial counsel that it had received an affidavit from the police in which [the alleged victim] stated that she had been sexually assaulted by her stepfather from the time she was six years old until the time that her mother moved her away from her stepfather,” which was sometime after Franklin was convicted. Id. at 673. The victim, however, otherwise stood by her testimony of Franklin’s guilt.

Franklin filed art. 11.07 writ claiming that the new evidence entitled him to relief under Elizondo. He lost. Writing for the Court, Judge Myers stated as follows:

In Elizondo we held that an applicant asserting a Herrera-type claim must show by clear and convincing evidence that no reasonable juror would have convicted him in light of the newly discovered evidence . . . [I]t is clear that Elizondo requires that applicant’s presenting Herrera-type claims offer evidence that goes towards affirmatively proving applicant’s innocence.

* * *

Although applicant’s evidence is important, it is limited to the impeachment of [the alleged victim’s] claim that she did not have sexual relations with other men. It certainly calls into question her veracity in general, but only collaterally effects her accusations against applicant . . .

Id. at 677–678.
After Chabot was decided in 2009, Franklin filed a subsequent writ alleging that Chabot was new law and that he should prevail under Chabot. Both the habeas court and the Court of Criminal Appeals agreed and vacated the conviction. Ex parte Franklin, No. WR-44,521-03, 2016 Tex. Crim. App. Unpub. LEXIS 321 (Crim. App. Apr. 6, 2016). In December 2016, Franklin was acquitted in a jury trial.

In Ex parte Weinstein, 421 S.W.3d 656 (Tex.Crim.App. 2014), a murder case, a state’s key witness untruthfully denied that he had suffered delusions and auditory hallucinations. At the time of the testimony, the State was unaware that their witness had lied and that, in fact, he had suffered delusions and hallucinations.

In denying the defendant’s art. 11.07 due process/Chabot claim, the Court found that the false testimony, unlike Pabst’s false testimony in Chabot, was not material in that there was not a reasonable likelihood that the demonstrably false testimony affected the jury’s judgment. Many of the facts that the witness testified to were corroborated, and there was an abundance of evidence supporting the defendant’s guilt unrelated to that witness’ testimony.

Presiding Judge Keller, joined by Judge Price, wrote a concurring opinion asserting the need to assess the materiality of the State’s unknowing presentation of perjury (Chabot), versus the state’s knowing sponsorship of perjury, under different standards:

We filed and set this case to determine whether the state’s unknowing use of false testimony calls for the same standard of materiality as the state’s knowing use of false testimony. The Court appears to sidestep this issue . . .

Id. at 669 (Keller, P. J. concurring).

Judge Keller goes on to name and explain “three good reasons for imposing a higher standard of materiality for unknowing use than for knowing use.” Id. at 670. Those three reasons are: 1) “state action” ("when the witness is a private citizen, [state action] must, then, be supplied by the fact that the false evidence has actually adversely affected state judicial proceedings. A mere possibility that the proceedings have been affected [by the false testimony of a private citizen] is not enough"); 2) “finality” ("[a] prosecutor who knowingly uses false evidence should understand that the case is a ticking time bomb that is likely to explode the moment the defendant discovers what has happened.” Therefore, the State has no good faith interest in “finality”); 3) “the analytical nature of the claims” ("[t]he knowing use of false evidence is prosecutorial misconduct . . . . As such, the analysis can bypass “materiality” and go straight to a constitutional harmless error analysis). Id. at 670–672.

In Ex parte Tiede, 448 S.W.3d 456 (Tex.Crim.App. 2014),

the defendant was convicted of murder and sentenced to life. The defendant eventually filed an 11.07 writ and was given a new punishment hearing because of inaccurate testimony from the state’s expert, psychiatrist Dr. Grippon, who described the defendant as having an unremarkable mental-health history. This testimony turned out to be inaccurate. Further, “[t]he habeas evidence supports the conclusion that the jury likely would have sentenced applicant to a period of confinement for less than life in prison in light of the conclusive evidence that now explains his state of mind as experiencing disassociation when he killed the decedent and left her body in the refrigerator for an extended period of time.” Id. at 457 (J. Alcala concurring).

Note: After a new punishment hearing, the second jury also assessed a life sentence.

Although favorable findings on a post-conviction false evidence claim will vacate the conviction and/or sentence, such a finding is not, in itself, a finding of actual innocence either existentially or legally. In that respect, a successful false evidence claim is similar to a successful Brady claim. Neither are dispositive of guilt. However, both can be important, or even essential, components of a larger actual innocence claim. See, e.g., Ex parte Richard Ray Miles, 359 S.W.3d 647 (Tex.Crim.App. 2012) (the Texas Court of Criminal Appeals granted relief on both the Brady claims and on actual innocence).

Texas Code of Criminal Procedure, Article 11.073

Article 11.073 T.C.C.P. establishes a post-conviction statutory claim for relief that overlaps, to an extent, with constitutional, “false evidence” claims. However, art. 11.073 is limited to “scientific evidence.” Specifically, “scientific evidence” that was “not available to be offered by a convicted person” at their trial; “or (2) contradicts scientific evidence relied on by the state at trial.”

Since art. 11.073 did not become effective until September 1, 2013 (and was amended, effective September 1, 2015), it can provide a new “legal basis” for a previously “unavailable” claim within the meaning of art. 11.07, sec. 4 and 11.071, sec. 5, T.C.C.P., assuming that the previous, unsuccessful writ was filed prior to the effective date of the statute.

The current version of art. 11.073, T.C.C.P. reads as follows:

(a) This article applies to relevant scientific evidence that:

(1) was not available to be offered by a convicted person at the convicted person’s trial; or

(2) contradicts scientific evidence relied on by the state at trial.

(b) A court may grant a convicted person relief on an application for a writ of habeas corpus if:

...
(1) the convicted person files an application, in the manner provided by Article 11.07, 11.071, or 11.072, containing specific facts indicating that:
(A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and
(B) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and
(2) the court makes the findings described by Subdivisions (1)(A) and (B) and also finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.
(c) For purposes of Section 4(a)(1), Article 11.07, Section 5(a)(1), Article 11.071, and Section 9(a), Article 11.072, a claim or issue could not have been presented previously in an original application or in a previously considered application if the claim or issue is based on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the convicted person on or before the date on which the original application or a previously considered application, as applicable, was filed.
(d) In making a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the court shall consider whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based has changed since:
(1) the applicable trial date or dates, for a determination made with respect to an original application; or
(2) the date on which the original application or a previously considered application, as applicable, was filed, for a determination made with respect to a subsequent application.

In a case that can be fairly characterized as having a long and tortured history, the Texas Court of Criminal Appeals ultimately granted Neal Robbins relief from his capital murder conviction and life sentence under the 2013 version of art. 11.073. Ex parte Robbins, 478 S.W.3d 678 (Tex.Crim.App. 2014). The Court had previously denied his pre-article 11.073 actual innocence and false evidence claims. Ex parte Robbins, 360 S.W.3d 446 (Tex. Crim.App. 2011).

In 1999, a jury found Robbins guilty of capital murder of his girlfriend's seventeen-month-old daughter. The most pertinent facts in Robbins are as follows:

The child died after having been in the exclusive care of the defendant for several hours. The evidence was in dispute in its characterization of the defendant's prior relationship with both the child and the child's mother, as well as the defendant's behavior after the child died. There was evidence that inept, possibly dangerous efforts were made to revive the child by third persons. At trial, Harris County medical examiner Patricia Moore, who performed the autopsy, opined that the child's cause of death was "homicide." The defendant presented expert testimony that the cause of death was more appropriately characterized as "undetermined." The jury convicted Robbins and he received an automatic life sentence, the death penalty having been waived. After his conviction, the State's expert, Patricia Moore, changed her opinion and wrote a letter to the District Attorney stating that, since the time of her trial testimony eight years earlier, she had gained more experience and knowledge. She further stated that upon review of the autopsy report and her case file, her new, better-informed opinion was that the cause of death should be classified as "undetermined." An "undetermined" classification still does not rule out homicide, though.

Robbins filed a post-conviction, art. 11.07 writ based on the State's testifying expert's change of opinion, claiming actual innocence under Elizondo and false evidence, under the due process clause of the Fourteenth Amendment. He lost both claims. The Court of Criminal Appeals found that Robbins had not overcome his herculean burden required by Elizondo, and that Moore's change of opinion from "homicide" to "undetermined" did not mean that her original opinion, as testified to at trial, was "false" since, inter alia, it left open the possibility that "homicide" was, in fact, the cause of death.

After art. 11.073 went into effect in 2013, Robbins filed a subsequent writ under the new statute. On November 26, 2014, a divided Court of Criminal Appeals ruled in Robbins' favor. Ex parte Robbins, 478 S.W.3d 678 (Tex. Crim. App. 2014). Much of the controversy within the Court centered on whether the testifying expert's change in scientific knowledge met the requirements of the new statute.

The remaining question before this Court is whether the "scientific knowledge . . . on which the relevant scientific evidence is based has changed" [emphasis added]. Moore's conclusion certainly has changed, but does "scientific knowledge" apply to the knowledge of an individual?

Robbins, 478 S.W.3d at 691.
A divided court held that it did.

Moore’s revised opinion on the cause of death satisfies the requirements to be called “scientific knowledge,” and thus falls within the language of article 11.073. Moore’s opinion labeling cause of death as “undetermined” was not available at the time of trial because her scientific knowledge has changed since the applicable trial date.

Robbins, 478 S.W.3d at 692.

The State’s motion for rehearing was granted and oral arguments were set and heard in June 2015. In the meantime, the 2015 Texas Legislature amended art. 11.073 to specifically conform to the Court’s controversial interpretation of the 2013 version of art. 11.073, and the Governor signed the amended, 2015 version into law. Eventually, the Court dismissed the motion for rehearing as improvidently granted.

In Ex parte White, 506 S.W.3d 39 (Tex.Crim.App. 2016), a death penalty case, the Court cited the clear language of the statute and determined that, unlike a false evidence/due process claim, art. 11.073 only applies to guilt/innocence issues and does not apply to the punishment stage of a trial.

In Ex parte Mayhugh, Ramirez, Rivera, and Vasquez, 512 S.W.3d 285 (Tex.Crim.App. 2016), the habeas court granted relief to all four applicants under article 11.073. The habeas court, however, found that the applicants had not met the herculean burden required to prevail on their Elizondo/actual innocence claims. The applicants had submitted new evidence that the pediatrician who conducted the original sexual assault examinations of the two alleged victims had changed her opinion due to changes and advancements in scientific knowledge, and that her trial testimony that there was unmistakable physical evidence of sexual assault was inaccurate. In fact, there was no physical evidence of sexual assault.

Further, one of the two alleged victims had fully recanted and explained in significant detail how the false charges attributed to her sister and her had come about. Applicants also submitted new expert testimony corroborating the reliability of the recantation, as well as other expert testimony that, based on psycho-sexual examinations, none of the applicants were sexual deviants and none were prone to committing any kind of sexual offense. Applicants also submitted evidence, which had been disallowed in one of the original trials, establishing a motive for the father of the alleged victims to encourage and facilitate the fabrication of the charges.

In denying relief under Elizondo, the habeas court specifically referenced that there was no hard science, such as DNA, that unquestionably precluded the applicants’ guilt, and that one of the two alleged victims had not recanted. The Court of Criminal Appeals disagreed and granted the applicants’ Elizondo claim. In doing so, the court distinguished the “clear and convincing” burden established in Elizondo and legal insufficiency of the evidence. Mayhugh at 298. Writing for the Court, Judge Newell noted that, “[t]hough the math may become trickier when, as in this case, there is only one recantation between two accusers, the ultimate calculus should not change.” Mayhugh at 299.

Applicants have presented significant new evidence that unquestionably establishes their innocence. S. L. not only established that the offenses did not occur through her credible recantation testimony; she explained in detail how her father forced her and her sister to make the false allegations to the police in the first place. S. L.’s recantation is corroborated by other documented instances of S. L.’s father fabricating allegations of abuse in order to manipulate his wife in an ongoing custody dispute.

Mayhugh at 303.

Judge Newell’s opinion concludes as follows:

It has been suggested that the term “actual innocence” is inappropriate because applicants who are successful when raising a claim of actual innocence never truly prove that they did not commit the offense. But when the presumptions are reversed, the State does not have to prove that a defendant is definitively guilty. The State does not prove that a person has committed a crime beyond all doubt, or even beyond a shadow of a doubt. By proving its case at trial according to the applicable standard, the State secures the ability to proclaim to the citizens of Texas that the person responsible for a crime has been brought to justice, that the person is guilty. When defendants have accomplished the herculean task of satisfying their burden on a claim of actual innocence, the converse is equally true. Those defendants have won the right to proclaim to the citizens of Texas that they did not commit a crime. That they are innocent. That they deserve to be exonerated. These women have carried that burden. They are innocent. And they are exonerated. This Court grants them the relief they seek.


Conclusion

Successful post-conviction claims of actual innocence and/or false state-sponsored evidence take years to resolve and can be expensive, particularly if you are dealing with an uncooperative/
unethical district attorney's office. But even if you are not, Jim McCloskey of Centurion Ministries in Princeton, New Jersey, has said their successful exonerations, from all over the country, have taken an average of seven years. That has, likewise, been my experience in Texas. Feel free to contact the Innocence Project of Texas as a resource. You can also follow us on Facebook.

Endnotes

1. This all assumes that your “first or next wrongful conviction case” is not a death penalty case. Death penalty writs are brought under art. 11.071 T.C.C.P., and the analogous procedural barriers for subsequent writs are in section 5 of art. 11.071. Likewise, if your client is seeking relief from a wrongful conviction for which he or she is on community supervision, the writ should be brought under art. 11.072 T.C.C.P.

2. National Registry of Exonerations-2016. 45% of all exonerations in the United States for the year 2016 (74/166) were from guilty plea cases.

3. On August 16, 1660, in a village near Gloucester, England, 70-year-old William Harrison disappeared while on a walk. Some of his blood-soaked clothing was discovered by the side of the road. An investigation yielded a murder confession by his manservant, John Perry, who implicated his brother and his mother as well. He said they dumped the body in a nearby mill pond. The pond was dredged, but no body was found. All three persons were tried. All three denied guilt at their trial. All three were hanged. Two years later, in 1662, William Harrison showed back up in the village unharmed. He had a fantastical story as to where he had been for the previous two years, which no one really believed. Everyone was pretty sure, however, that he had not been murdered by the Perrys. See Wikipedia, the “Campden Wonder.”


6. “Moore’s re-evaluation falls short of the requisite showing for actual innocence because it does not affirmatively disprove that Applicant intentionally asphyxiated Tristen.” Robbins, 360 S.W.3d at 458.

7. “Moore’s testimony is not false just because her re-evaluation of the evidence has resulted in a different, ‘undetermined’ opinion, especially when neither she, nor any other medical expert, can exclude her original opinion as the possible cause and manner of death.” Robbins, 360 S.W.3d at 461.

Mike Ware lives in Fort Worth, Texas. He graduated from the University of Houston Law School in 1983, where he was research editor for the Houston Law Review. In 2006, he co-founded the Innocence Project of Texas. In July 2007 Mike left private practice to become the head of the newly formed Conviction Integrity Unit (CIU) in the Dallas County District Attorney’s Office, where he made national and international news for securing exonerations for 15 wrongly convicted innocent men, some of whom had served more than 25 years in prison. In 2011, he resumed private practice as a criminal defense lawyer, handling both trials and post-conviction matters, including capital murder and white-collar crimes. Mike is an adjunct law professor at Texas A&M School of Law. In 2014, he was named the Texas Criminal Defense Lawyer of the Year by the Texas Criminal Defense Lawyers Association. Mike is currently executive director of the Innocence Project of Texas.
Introduction

You have a client charged with aggravated sexual assault of a child. There is DNA evidence, a SANE nurse exam, and a forensic interview of the child at the child assessment center. In addition, there are, potentially, witnesses who may be able to provide rock-solid alibis for some of the occasions the sexual assaults allegedly took place.

Through your preliminary investigation you realize you need experts to deal with issues with cross-contamination of the DNA evidence, possible misinterpretation of the medical evidence by the SANE nurse, and problems with the CAC interview. In addition, you know you will need investigative assistance to be able to locate and interview those alibi witnesses.

Whether you’re court-appointed or retained, it can be daunting to know how to get sufficient funds to mount a proper defense. It can be done, though, and if done properly, the Court will have no choice but to help fund your defense.

Client’s Right to Court-Appointed Expert

In its seminal case Ake v. Oklahoma, 470 U.S. 68 (1985), the United States Supreme Court recognized that is patently unfair to not give indigent defendants access to funds for their defense, if a need was shown for the funds, simply because the defendant is indigent and cannot afford the funds for experts and investigators. The Court went on to say it was patently unfair that the state/government had unlimited resources to get the experts, testing, and investigators that the indigent defendant simply could not afford. While it is true that “the State need not ‘purchase for an indigent defendant all the assistance that his wealthier counterparts might buy,’ it must provide him the basic tools to present his defense within our adversarial system.” Rey v. State. 897 S.W.2d 333 (Tex. Crim. App. 1995) (citing Ake v. Oklahoma, 470 U.S. 68, 77, 105 S.Ct. 1087, 1093, 84 L.Ed.2d 53 (1985)).

The Supreme Court specifically held in Ake that upon a particularized showing of need, a trial court must provide reasonable funds for the defense to hire experts or investigators. The Supreme Court also realized that to make this particularized showing of need, a defendant would necessarily have to divulge trial strategy and facts maybe not known to the state/government. Thus, the Supreme Court stated that due process required these requests could be made ex parte.

The Texas Court of Criminal Appeals, in De Freece v. State,
In the case of an investigator, assistance is sought will be contested at trial or will be of importance to the defendant’s case. In the case of an expert, a particularized need is required; general­ized boilerplate language will be insufficient. Also, remember all motions for funding need to be ex parte and sealed.

To preserve the issue for review the particularized need must be detailed. Defense counsel will have to identify the defendant’s theory of the case, what the defenses are, and how the expert or investigator is necessary and material to further the theory or further the defense. This can be accomplished by attaching a detailed affidavit to the motion, describing the facts within the motion itself and verifying the motion—or on the record in an ex parte hearing. Without this detail, the appellate court cannot properly evaluate if the trial court committed error by denying the funds to a defendant.

As stated above, the motion to obtain funds needs to be done ex parte. Williams v. State, 958 S.W.2d 186 (Tex. Crim. App. 1997), specifically states the defendant is entitled to pursue expert funds ex parte. See also Ake, 470 U.S. at 82–83, 105 S.Ct. at 1096. Defense counsel should not file the motion until counsel has had the judge sign an order sealing the motion. Otherwise, if the judge refuses to sign the order and the motion is not sealed, the defendant’s trial strategy becomes a matter of public record for the State to be able to discover by simply going to the District Clerk’s office. It is also wise for defense counsel to include a certificate of presentment to the trial court when the motion for funding is presented to the court. We have all had the situation arise where a trial court takes an inordinate amount of time to rule on a motion (perhaps with the hope that defense counsel will forget to obtain a ruling). Make the record. Obtain a ruling. Even if the court denies the request for funds, a record will have been made, and it is rare a court that will refuse to sign the order sealing the motion.

In more rural counties or with newer judges, defense counsel should bring a copy of Williams v. State when approaching the court for ex parte funds. Usually, judges in these situations are not aware of the law entitling counsel to an ex parte hearing, and you may have to educate the judge on counsel’s right to the hearing.

To ensure you secure enough funding, always contact the expert and find out how much the expert requires to complete the necessary work as well as testify, if needed (if travel is also necessary, the comptroller’s office pays those expenses). For an

848 S.W.2d 150 (Tex. Crim. App. 1993), adopted the holding of the United States Supreme Court in Ake. In Williams v. State, 958 S.W.2d 186, 191 (Crim. App. 1997, reh’g denied), the CCA also held, consistent with Ake, that these requests were to be ex parte.

The Court of Criminal Appeals in Rey v. State, 897 S.W.2d 333 (Tex. Crim. App. 1995) (en banc), specifically held that Ake applies to non-psychiatric experts, too, and also addressed the proper error analysis for a situation where a proper request for funds is made and the Court denies the request. At issue in Rey was the trial court’s denial of the defense’s proper request for the assistance of a pathologist. Pursuant to the Rey Court, Ake is not limited to psychiatric experts; but the type of expert requested is relevant to the determination of whether the trial was fundamentally unfair without the expert’s assistance. Id. at 338. Regarding an error analysis, if a proper request for funds is made as described below and denied by the trial court, that denial affects a right so integral to the defendant receiving a fair trial that the error is considered structural. Id. at 345. Thus, when a properly preserved request for funds made to the court has been denied, no harm analysis needs to be performed prior to defendant being granted relief.

What happens, however, if the attorney has been retained but the family or defendant either has run out of money or cannot afford the necessary expert or investigative costs? In Ex Parte Briggs, 187 S.W.3d 158 (Tex. Crim. App. 2005), the Court of Criminal Appeals stated it was ineffective assistance of counsel for retained defense counsel not to seek funds from the court when the defendant cannot afford the necessary expert or investigator. It is true that the Court of Criminal Appeals did not explicitly hold that a court had to give funding to defense counsel of a retained defendant who cannot afford the expert or investigator. However, it would be ineffective for retained counsel not to seek funding from the court for expert assistance essential to the case where the accused has subsequently become indigent.

Procedure to Obtain Court Funds in Appointed Cases

In order to obtain funds, you need to demonstrate to the court a particularized need for the funds. In the case of an expert, a particularized need means showing the issue for which the assistance is sought will be contested at trial or will be of importance to the defendant’s case. In the case of an investigator,
investigator, get an estimate for completing the work and being available during trial to assist if matters come up requiring the investigator’s assistance. Since the investigator is the one interviewing the witnesses, the investigator will need to be present during trial to possibly impeach said witnesses.

If a judge refuses to sign an order to seal the motion, even if he/she denies the request for the additional funds, the judge can be subject to a mandamus action. Signing the order is a ministerial act, which if not performed means there is no adequate legal remedy available to the defendant. In fact, refusal to sign the sealing order will be certain to cause irreparable damage to the defense. In addition, if a judge refuses to sign an order sealing the motion and/or order, even if the access to funds is denied, this act should make the judge subject to recusal.

However, whether to pursue mandamus is, of course, a strategic decision. To do so counsel will have to file the motion and proposed order and thus give the state access to defendant’s trial strategy or access to facts the State may not have been aware of—potentially detrimental to the defense case. The author would suggest only pursuing a writ of mandamus if you pursue recusal and the recusal is denied.

Out of Money? Ask for More

More often than not, a trial court will provide funding for expert assistance. However, that funding is typically insufficient and perfunctory at best. The question then is what to do. Use the money provided and ask for more in the steps outlined above. Explain why more funding is necessary and what will be done with the additional funds. Explain what work was done with the previously allocated funds.

Remember, there is no limit on the number of times you can request additional funding from the court. Hinton v. Alabama, 134 S.Ct. 1081 (2014), is instructive on this issue. In Hinton, a death penalty case, the defense requested funding from the court for a “firearms and toolmark” expert. The court granted the request in an amount of up to $1,000 and invited the defense to ask for more. However, the defense never did ask for more funding, and the expert assistance the defense was able to obtain was “inadequate.” The U.S. Supreme Court held that Hinton’s counsel rendered ineffective assistance for failing to request additional funds for an expert because he mistakenly believed that funding for the expert was capped at $1,000.

In requesting additional funds, remind the trial court in written motion and/or on the record that the trial court’s allocation of a grossly insufficient amount of money for expert assistance effectively denies the accused one of the “basic tools to present his defense,” and that the resultant lack of expert assistance will necessarily call into question the fundamental fairness of the accused’s trial. Basically, do it right or get ready to do this thing all over again.

Procedure to Obtain Court Funds in Retained Cases

The Court of Criminal Appeals has made clear that simply because a defendant is represented by retained counsel does not mean that the defendant cannot qualify as indigent for other purposes. See Abdnor v. State, 712 S.W.2d 136, 142 (Tex. Crim. App. 1986) (“Outside sources such as relatives and even employers are not to be considered unless they are legally bound to pay for defendant’s appellate expenses” (citation omitted)). In fact, the CCA has found retained attorneys ineffective when they have failed to seek funding for necessary experts in cases where defendants have become indigent but where the attorneys were previously retained. Ex Parte Briggs, 187 S.W.3d 458, 463 (Tex. Crim. App. 2005).

In retained cases, just as in court-appointed cases, there needs to be a particularized need demonstrated to get the court to pay for experts and investigators. The additional step in a retained case requires a showing to the court that there has been a significant change in the defendant’s financial circumstances resulting in defendant’s indigence or inability to pay for the expert or investigator.

If the court refuses to enter the order funding the expert or investigator, or will not fund these experts and investigators for a defendant with retained counsel, retained counsel must consider filing a motion to withdraw. While the court has likely committed reversible error by denying the funds in an instance like this, the Court of Criminal Appeals held in Ex Parte Briggs it was not only ineffective assistance to not seek the funds, but also to not seek to withdraw if counsel could not obtain the necessary funds for the defense.

Once Funding Is Approved

Once the court approves the funds, defense counsel should take the motion and signed order to the district clerk. Also bring a manila folder for the clerk to put the motion and order into. Once the motion and orders are file-stamped, counsel should get a certified copy of the motion and for the file. In addition, counsel should get at a minimum three certified copies of the order appointing the expert or investigator. This allows counsel to provide a certified copy to the expert or investigator, keep a copy for counsel’s file, and retain an extra in case it is needed.

The next step is to contact the expert or investigator and notify them that the court has signed the order of appointment. For the expert/investigator to be effective, counsel should provide
any deadlines in effect. Finally, as the facts of the case dictate, counsel should get the expert/investigator access to the client and/or any documents and materials needed to get the work completed credibly. It is also critical for counsel to emphasize that the expert is a defense expert, even though the court is paying the fee. It is helpful to send a cover letter with the order clarifying this relationship to eliminate any confusion on the expert’s part.

Conclusion

Following these simple steps, you should be able to properly fund your client’s defense at the court’s expense.

Scott Pawgan is Board Certified in Criminal Law by the Texas Board of Legal Specialization. Scott has successfully represented criminal defendants in courts around the State. He has tried numerous first-degree and habitual felonies and received numerous acquittals in jury trials, ranging from the most serious offenses such as murder, aggravated sexual assault, sexual assault, and drug cases to offenses such as escape, unauthorized use of a motor vehicle, theft, and assault on a public servant. Scott is a Board member of the Texas Criminal Defense Lawyers Association and the Fort Bend County Criminal Defense Lawyers, and an officer with Montgomery County Criminal Lawyers Association. In addition, he is a member of National Association of Criminal Defense Lawyers, Harris County Criminal Lawyers Association, Polk County Criminal Lawyers Association, and the National Legal Aid and Defender Association. He has been a guest speaker and lecturer on many legal topics in national, state, and local bar meetings, conferences, and legal education courses.

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From Editor Michael Mowla:

1. I summarize each opinion in a manner that allows readers to generally use this SDR instead of reading every opinion.
2. If you determine that a summarized opinion is relevant to one of your cases, I urge you to read the opinion and not rely solely upon these summaries.
3. The summaries reflect the facts and relevant holdings and do not reflect my opinion of whether the cases correctly: (1) recite the facts presented at trial; or (2) apply the law. My opinions (if any) are preceded by “Editor’s Note.”
4. This SDR is for you. Send me suggestions on how I may improve it.

Supreme Court of the United States

No relevant opinions handed down since the last SDR.

Meanwhile, elsewhere in Washington, DC...

United States Court of Appeals for the Fifth Circuit


- Under Fed. Rule Crim. Proc. 11(a), a plea of "no contest" means "I do not contest [the charge]," is a statement of unwillingness to contest and no more, and admits every essential element of the
An individual who enters a plea of nolo contendere waives all constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.

Like a plea of guilty, under United States v. Ruiz, 536 U.S. 622, 629 (2002), a nolo contendere must be knowingly, voluntarily, and intelligently made.

An individual who enters a plea of nolo contendere waives all nonjurisdictional defects, and is limited to claiming that the indictment failed to state an offense, that the statute is unconstitutional, or that the statute of limitations bars prosecution.

An assertion that under the Eighth Amendment a sentence is grossly disproportionate “as applied” asks whether the defendant’s sentence is “grossly disproportionate”: (1) the court initially makes a threshold comparison of the gravity of the defendant’s offenses against the severity of defendant’s sentence; and (2) if the court infers from this comparison that the sentence is grossly disproportionate to the offense, the court compares the sentence received to (i) sentences for similar crimes in the same jurisdiction and (ii) sentences for the same crime in other jurisdictions.

• Under Roper v. Simmons, 543 U.S. 551, 572 (2005), the categorical analysis under the Eighth Amendment requires: (1) the court to consider objective indicia of society’s standards to uncover whether there is a national consensus against the sentencing practice at issue; and (2) the court to determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.

Facts:

• In 2007, pleaded guilty to 6 counts of child pornography and received 180 months in prison.
• In May 2015, while still in prison, guards found in his work station seven hand-drawn images depicting the [sexual exploitation of] minor females and two handwritten books describing sexual abuse of minors.
• Farrar admits purchasing the images from other inmates and writing the books.
• Farrar was indicted on one count of possessing six obscene depictions of a minor engaging in sexually explicit conduct under 18 U.S.C. §§ 1466A(b)(1) & (d)(5), which requires proof of “a visual depiction of any kind, including a drawing that depicts a minor engaging in sexually explicit conduct; and is obscene.”
• Farrar asked to be allowed to plead nolo contendere.
• During the plea-hearing, Farrar apologized to the court for having to view the images, stating he was not “trying to hide behind the law and trying to come out with some appeal issue.”
• Farrar admitted “that there [was] evidence in this case of the commission by [Farrar] of these essential elements” (of child pornography).
• Farrar was not just silent regarding obscenity; he acted just the opposite, agreed the images are obscene, agreed there was sufficient evidence for every element of the offense (including obscenity); stated he had no objection to the Government’s presentation of a factual basis (which included obscenity); apologized for the court’s having to view the images, and misled the court regarding his nolo contendere plea by stating he was not trying to hide behind the law and trying to come out with some appeal issue.
• The district judge accepted the plea of nolo contendere.
• Over Farrar’s objection under the Eighth Amendment, he was sentenced to the ten-year minimum under 18 U.S.C. §§ 1466A(b)(1) and 2252A(b)(2), but concurrent with the child-pornography sentence he was serving and to begin from the date of the offense (May 2015) rather than sentencing (July 2016).
• Ultimately, Farrar will serve an additional 4.5 years beyond what he is serving for the 2007 child-pornography conviction.

Editor’s Note: Farrar should have kept his mouth shut during the plea-hearing.

- Under Gall v. United States, 552 U.S. 38, 51 (2007), sentences challenged for substantive reasonableness are reviewed for abuse of discretion.
- If a defendant fails to object at sentencing to the procedural or substantive reasonableness of the sentence, review is for plain error.
- Under U.S.S.G. § 2B1.1(b)(11), a two-level increase is allowed if the defendant possessed or used an authentication feature to further the crime, which under 18 U.S.C. § 1028(d)(1) is any “symbol, code, image, or sequence of numbers used to determine if the document is counterfeited, altered, or otherwise falsified.”
- A district court’s loss-calculation, and its embedded determination that the loss amount was reasonably foreseeable, are factual findings reviewed for clear error. The district court need only make “a reasonable estimate of the loss” based on its assessment of the evidence, which will not be overturned provided they are “plausible in light of the record as a whole.”
- A sentence within the Guidelines range is presumptively reasonable, and the presumption is rebutted only if the appellant demonstrates that the sentence does not account for a factor that should receive significant weight, gives significant weight to an irrelevant or improper factor, or represents a clear error of judgment in balancing sentencing factors.

Editor’s Note: You may substitute any attorney general in office since the U.S.S.G.s were created by the Sentencing Reform Act of 1984 for Mr. Ashcroft and obtain the same result:


- To determine whether an appeal waiver applies to the issues presented, the Court considers the ordinary meaning of the waiver provision, narrowly and against the government. An appeal waiver bars an appeal if the waiver: (1) was knowing and voluntary and (2) applies to the circumstances at hand, based on the plain language of the agreement. A defendant must know that he had a right to appeal his sentence and that he was giving up that right.
- Under Montejo v. Louisiana, 556 U.S. 778, 786 (2009), The Sixth Amendment right to counsel applies to all “critical stages” of criminal proceedings. An accused is entitled to assistance of an attorney who plays the adversarial role necessary to ensure that the proceeding itself is fair. Although an IATC claim requires a two-prong showing that representation fell below an objective standard of reasonableness and prejudice, a trial is unfair if the accused is denied counsel at a critical stage of trial, and no showing of prejudice is required. If counsel is absent during a critical stage, then there is a presumption of prejudice and reversal is automatic.
- Under Rothgery v. Gillespie Cty., Tex., 554 U.S. 191, 212 (2008), a stage is “critical” where circumstances indicate that counsel’s presence is necessary to ensure a fair process, where the accused requires aid in coping with legal problems or assistance in meeting his adversary.
- To justify a stage as “critical,” a defendant need not explain how having counsel would have altered the outcome of his specific case, but the court considers whether the substantial rights of a defendant may be affected during the proceeding.
- Sentencing is a critical stage of a criminal proceeding.
- Under 18 U.S.C. § 3664(a), the probation officer must complete a PSR that contains sufficient information for the court to order restitution, including “a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant.”
- A defendant is entitled to an opportunity to be heard on restitution.
- Before issuing a final restitution determination, the sentencing court must resolve restitution issues, including objections raised by a defendant. Disputes regarding the proper amount or type of restitution is resolved by the preponderance of the evidence.
- The final determination of a mandatory restitution award under 18 U.S.C. § 3664(d)(5) constitutes a critical stage during which a defendant is entitled to the assistance of counsel.

Editor’s Note: Now why would the sentencing hearing be a “critical stage” of a criminal proceeding?
Under 18 U.S.C. § 1030(a)(5)(A), a person is prohibited from intentionally damaging a computer system when there was no permission to engage in that act of damage.

Under *Allen v. United States*, 164 U.S. 492, 499 (1896), the flight of the accused is competent evidence of guilt.

Editor's Note: I am not sure whether Thomas’s argument that he was “authorized to damage a computer” since his job-duties included “routinely deleting data, removing programs, and taking systems offline for diagnosis and maintenance” is the cleverest or most absurd argument I’ve heard this year.


- Review of a district court’s ruling on an MTS is de novo on questions of law and for clear error on factual findings. Factual findings are clearly erroneous only if a review of the record leaves the Court with a “definite and firm conviction that a mistake has been committed.” Factual findings that are “influenced by an incorrect view of the law or an incorrect application of the correct legal test” are reviewed de novo. A district court’s ruling on a MTS may be affirmed based on any rationale supported by the record.
- Under *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), a checkpoint at which the police stop motorists is a “seizure” because drivers cannot ignore officers or decline to answer questions, which is like any seizure under *Terry v. Ohio*, 392 U.S. 1 (1968): restraint of liberty.
- A commercial bus passenger lacks standing to challenge the voluntariness of the driver’s consent to permit the police to search the bus’ passenger cabin because such passengers resemble automobile passengers who lack property or possessory interest in the automobile. Like automobile passengers, bus passengers cannot direct the bus’s route, nor can they exclude other passengers.
- A defendant has standing under the Fourth Amendment to challenge a search if: (1) the defendant can establish an actual, subjective expectation of privacy with respect to the place being searched or items being seized, and (2) the expectation of privacy is one which society would recognize as objectively reasonable.
- Under *Florida v. Bostick*, 501 U.S. 429 (1991) and *United States v. Drayton*, 536 U.S. 194 (2002), a seizure does not occur simply because an officer approaches an individual and asks a few questions. The encounter is consensual so long as the civilian would feel free to either terminate the encounter or disregard the questioning. Police do not need reasonable suspicion to approach someone for questioning, and the encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature. A bus passenger has not been “seized” if a reasonable person would feel free to decline requests or otherwise terminate the encounter. Otherwise, police may question an individual, ask to examine his identification, and request consent to search his luggage provided the police do not convey a message that compliance with their requests is required.

Editor’s Note: I’d like to see these cops perform an “interdiction” on this bus.
Texas Court of Criminal Appeals


- Under Marin v. State, 851 S.W.2d 275, 279–280 (Tex. Crim. App. 1993), error-preservation rules are divided into three categories: (1) absolute requirements or prohibitions, (2) rights that are waivable-only, and (3) rights that can be forfeited.
- A facial challenge to the constitutionality of a statute falls within the third category involving rights that are subject to forfeiture.
- Although Tex. Penal Code § 21.12(a) refers to the conduct described in Tex. Penal Code § 33.021(b), held unconstitutional by Ex parte Lo, it contains the additional elements that the actor be a school employee and that the recipient of the sexually explicit communications be a student. Tex. Penal Code § 21.12(a) contains “material differences” from the portion of the online-solicitation statute found to be unconstitutional in Lo because the improper-relationship statute is limited to addressing only sexually explicit communications in the context of the teacher-student relationship (the government has greater leeway to regulate speech in the educational context).
- Failing to present a challenge to the facial constitutionality of a statute at any point prior to a habeas proceeding causes procedural default, and forecloses raising the challenge for the first time on habeas corpus.

Editor's Note: A teacher texting or instant-messaging his students is always a very bad idea, and not merely because the teacher enables the awful English grammar that often accompanies texting. For instance, we applaud “Mr. Mineti” for his clever retort to Cindy’s improper suggestion. But, what if Cindy stopped texting after Mr. Mineti texted “I’ve got a naughty idea ;)” and showed the exchange to other students, the school administration, or posted it to Facebook/Instagram/Snapchat?


- Under Tex. Const. Art. V, § 12(b), the presentment of an indictment or information to a court invests that court with jurisdiction over the case. To constitute an indictment or information, an instrument must charge a person with the commission of an offense in a way that the allegations in it are clear enough that one can identify the offense alleged. If they are, then the indictment is sufficient to confer subject-matter jurisdiction.
- A conviction for violating a civil-commitment order may be upheld when the underlying commitment order has been reversed on appeal if the violation occurs before the reversal. A civil-commitment order violation is a “circumstances surrounding the conduct crime.” The focus is on the circumstances that exist rather than the discrete, and perhaps different, acts that the defendant might commit under those circumstances.


- Habeas relief is available only for jurisdictional defects and violations of constitutional and fundamental rights, not for statutory violations.
- The TCCA overrules Sepeda, which used to allow habeas relief to compel the Parole Board to comply with a statute regarding parole-denial letters.
- Because a Texas inmate does not have a liberty interest in release on parole, the inmate filing for relief on a parole issue cannot show a jurisdictional defect or a violation of constitutional and fundamental rights.
- Postconviction relief from a failure to conduct a timely parole review must be had via mandamus.

Facts:

- Between 2013 and 2014, Applicant was convicted of forgery (10 years TDCJ), possession of a controlled substance (10 years TDCJ stacked), and delivery of a controlled substance (40 years TDCJ concurrent).
- The concurrent sentence with the latest parole-eligibility date is Applicant’s 40-year sentence.
- Appellant argues that the Parole Board ought to conduct a parole review of each sentence as it becomes eligible, as if it were the only sentence, which would result in parole review when his 10-year forgery sentence would become parole-eligible, so that he could be paroled on the forgery sentence earlier, and start the running of his possession-sentence earlier than if the first review is based on his eligibility on the 40-year sentence.

Editor’s Note: Rather than force the applicant back into “appeal-orbit” to file a mandamus, the TCCA could have construed...


- The automobile exception allows for the warrantless search of an automobile if it is readily mobile and there is probable cause to believe that it contains contraband. The only inquiry relevant is whether the officers had probable cause to believe the vehicle contains contraband.
- Probable cause exists where the facts and circumstances known to law enforcement officers are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. There must be a “fair probability” of finding inculpatory evidence at the location being searched. This “probability” should be measured by the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act, and the court must consider the totality of the circumstances known to the officer, and not use a “divide-and-conquer” approach.
- Review of a trial court's ruling on an MTS is in the light most favorable to the trial court's ruling, giving almost total deference to a trial court's express or implied determination of historical facts, and de novo to the court's application of the law of search and seizure to those facts.
- Furtive gestures alone are not a sufficient basis for probable cause. Although they may be valid indicia of mens rea, they must be “coupled with reliable information or other suspicious circumstances relating the suspect to the evidence of crime” to constitute probable cause.


- A judgment of conviction is not final while the conviction is on appeal.
- A challenge to the constitutionality of a statute is reviewed de novo, with great deference afforded to the Legislature and a presumption that the statute is constitutional and the Legislature did not act unreasonably or arbitrarily. The party challenging the statute normally bears the burden of establishing its unconstitutionality.
- The governor may grant clemency three ways: (1) reprieve (delays the execution of a judgment; postpones the sentence for a time); (2) commutation (change of punishment assessed to a less severe one); and (3) pardon (act of grace under the power entrusted with the execution of the laws that exempts the individual from punishment the law inflicts for a crime).
- The governor’s clemency power allows the governor to affect the punishment an individual is subjected to, but does not allow the governor to affect the underlying conviction because a pardon (and other forms of clemency) forgives only the penalty and does not allow the courts to “forget either the crime or the conviction”; a pardon implies guilt and does not obliterate the fact of the commission of the crime and the conviction. The Texas Constitution does not grant the governor the power to destroy judicial judgments and decrees.
- S.B. 746 affects the validity of convictions obtained under Tex. Health & Safety Code § 841.085(a), allowing prosecution for any violation of Tex. Health & Safety Code § 841.082(a). It does not prevent the governor from granting clemency to those prosecuted under 841.085 whose convictions remain valid. (It does not prevent the governor from granting clemency to individuals whose convictions have already become final under previous law.)
- The Legislature and governor have decided that a sexually violent predator’s failure to comply with his sex offender treatment program as part of his civil commitment should be resolved through the civil commitment program rather than give rise to a new criminal conviction. The Legislature was within its power to make this change and apply it to defendants whose criminal cases were pending on appeal at the time the amendment became effective.

Editor’s Note: A just outcome based on the law enacted by the Legislature.

Texas Courts of Appeals


- Under Tex. Code Crim. Proc. Art. 20.09 and Ex parte Edone,
740 S.W.2d 446, 448 (Tex. Crim. App. 1987), a trial court forms, impanels, and empowers a grand jury to inquire into indictable offenses, including aggravated robbery with a deadly weapon. Because a grand jury’s deliberations are secret, it retains a “separate and independent nature from the court.”

- Under Tex. Code Crim. Proc. Arts. 20.19–20.21, after the evidence is considered by the grand jury, it votes to determine whether to present an indictment. If nine members concur in finding the bill, the State prepares the indictment and the grand jury foreman signs it and delivers it to the judge or the clerk of the court.

- Under Tex. Code Crim. Proc. Art. 12.06, an indictment is considered “presented” when it has been duly acted upon by the grand jury and received by the judge or clerk of the court.

- Under State v. Dotson, 224 S.W.3d 199, 204 (Tex. Crim. App. 2007), an original file-stamp of the district clerk’s office on a signed indictment is “strong evidence that the returned indictment was ‘presented’ to the court clerk” within the meaning of Tex. Code Crim. Proc. Art. 20.21.

- Under Tex. Code Crim. Proc. Art. 4.05 and Tex. Gov. Code § 74.094, all district courts within the county have jurisdiction over the same cases, and criminal district courts have original jurisdiction in felony cases.

- Under Tex. Gov. Code §§ 24.024 & 74.093, in counties having more than two district courts, the judges “may adopt rules governing the filing and numbering of cases, the assignment of cases for trial, and the distribution of the work of the courts as in their discretion they consider necessary or desirable for the orderly dispatch of the business of the courts.” Thus, in multi-court counties such as Harris Co., although a district court may impanel a grand jury, it does not mean that all cases considered by that court’s grand jury are assigned to that court. If a grand jury in one district court returns an indictment in a case, the case may be then assigned to any district court within the same county.

Editor’s Note: Under the second issue raised, the court of appeals held that a $200 “Summoning Witness/Mileage” assessed is unconstitutional. The explanation of how the court arrived at this conclusion is long when compared to the relief granted (200 bucks). Thus, if this issue concerns one of your clients, I encourage you to read this part of the opinion.


- When reviewing the legal sufficiency of the evidence after a bench trial, under Robinson v. State, 466 S.W.3d 166, 173 (Tex. Crim. App. 2015), reviewing courts apply the same standard as in jury trials under Jackson v. Virginia, 443 U.S. 307, 309, 319 (1979): the court views all the evidence in the light most favorable to the defendant to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The trier of fact is the sole judge of the weight and credibility of the evidence, and may draw reasonable inferences from basic facts to ultimate facts. Each fact need not point directly and independently to the guilt of the appellant, if the cumulative force of all the incriminating circumstances is sufficient to support the conviction. Direct evidence and circumstantial evidence are equally probative.

- Under Flowers v. State, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007), to prove a defendant has a prior conviction, the State must prove beyond a reasonable doubt that: (1) a prior conviction exists, and (2) the defendant is linked to that conviction. No specific document or mode of proof is required to prove the elements. Any type of evidence, documentary or testimonial, might suffice, provided the document contains sufficient information to establish both elements.

- Whether an offense under the laws of another state contains substantially similar elements as one of the Texas Penal Code offenses is a question of law.

- Under Tex. Penal Code § 12.42(c)(2), when a defendant is convicted of indecency with a child and has a prior conviction for one of the sex offenses listed in Tex. Penal Code § 12.42(c)(2)(B), the trial court must impose a life sentence (the “two-strikes policy” for repeat sex offenders).

- Under Rushing v. State, 353 S.W.3d 863, 867–868 (Tex. Crim. App. 2011), the United States is “another state,” and the laws of the United States, including the UCMJ, are the “laws of another state,” so a prior court-martial conviction under the UCMJ counts as a “strike.”

- To determine whether an out-of-state offense contains substantially similar elements as a Texas offense, under Anderson v. State, 394 S.W.3d 531 (Tex. Crim. App. 2013) and Prudholm v. State, 333 S.W.3d 590 (Tex. Crim. App. 2011), a court must determine: (1) a high degree of likeness—they need not parallel one another precisely, but the elements of the out-of-state offense cannot be markedly broader than or distinct from the Texas offense; and (2) protection of Individual or public inter-
ests—the elements must be substantially similar with respect to the individual or public interests protected and the impact of the elements on the seriousness of the offenses—the court must determine if: (i) there is a "similar danger to society" that the statute is trying to prevent; and (2) the class, degree, and punishment range of the two offenses are substantially similar.


- Under Smith v. State, 297 S.W.3d 260, 267 (Tex. Crim. App. 2009), the sufficiency of an indictment is a question of law and is reviewed de novo.
- Under Tex. Const. Art. 1, § 10, defendants have the right to indictment by a grand jury for felony offenses.
- Under Cook v. State, 902 S.W.2d 471, 475 (Tex. Crim. App. 1995) and Tex. Const. Art. 5, § 12, an indictment: (1) provides notice of the offense to allow a defendant to prepare a defense; and (2) serves a jurisdictional function, and its filing is required to vest the trial court with jurisdiction over a felony.
- Under Tex. Code Crim. Proc. Art. 1.14, if the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he forfeits the right to raise the error on appeal a postconviction proceeding.
- Under Cook v. State, 902 S.W.2d 471, 474 (Tex. Crim. App. 1995), a charging instrument that is "so deficient as to not invest the trial court with jurisdiction" may be challenged for the first time on appeal. A reasonable construction of Tex. Const. Art. 5, § 12 does not allow the conclusion that the constitutional definition of an indictment falls under Tex. Code Crim. Proc. Art. 1.14.
- A charging instrument can be missing elements of an offense and still be an “indictment” for purposes of the Texas Constitution. The charging instrument must name a person to vest a trial court with jurisdiction.
- Under Stansbury v. State, 82 S.W.2d 962, 968 (Tex. Crim. App. 1935), a caption is not part of the charging instrument.

Facts:
- Jenkins was charged with continuous trafficking of persons under the indictment at left.
- Here, the only place Jenkins’ name appears is in the caption.
- Under Stansbury v. State, 82 S.W.2d 962, 968 (Tex. Crim. App. 1935), a caption is not part of the charging instrument.
- Jenkins did not move to quash or dismiss the indictment before trial.
- Jenkins was convicted by a jury and sentenced to 25 years.
- On appeal, Jenkins argued that the indictment is fatally defective because it does not name “a person.”

Editor’s Note: never depend on a caption.

- This is different than what occurred in Kirkpatrick v. State, 279 S.W.3d 324 (Tex. Crim. App. 2009), where the defendant was charged in one indictment with “forgery and tampering with a governmental record in three counts” and in another a single count of tampering with a governmental record by making a document, with knowledge of its falsity and with intent that it be taken as a genuine governmental record. The TCCA held that although the indictment properly charged a
misdemeanor and lacked an element necessary to charge a felony, the felony offense exists, and the indictment’s return in a felony court put appellant on notice that the charging of the felony offense was intended. The TCCA was considering whether the indictment sufficiently alleged an offense, not whether it named a defendant.

- Because a valid indictment is essential for jurisdiction, it is not subject to waiver, and the conviction is void.


- Under Tex. Const. Art. 5, § 12(b), and Tex. Code Crim. Proc. Art. 1.14, if the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he forfeits the right to raise the error on appeal a postconviction proceeding.

- Under State v. Dotson, 224 S.W.3d 199, 204 (Tex. Crim. App. 2007), an original file-stamp of the district clerk’s office on a signed indictment is “strong evidence that the returned indictment was ‘presented’ to the court clerk” within the meaning of Tex. Code Crim. Proc. Art. 20.21.

- Under Tex. Penal Code § 1.07(a)(17), a deadly weapon is “a firearm or anything manifestly designed, made, or adapted to inflicting death or serious bodily injury,” or “anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.”

- Under Brister v. State, 449 S.W.3d 490, 494 (Tex. Crim. App. 2014), and Plummer v. State, 410 S.W.3d 855, 864–865 (Tex. Crim. App. 2013), the evidence must show that an object that meets the definition of a deadly weapon was used or exhibited during the transaction on which the felony conviction was based, and other people were placed in actual danger. Mere possession of a deadly weapon during the commission of a felony is not enough: the deadly weapon must facilitate the associated felony. The evidence must establish that the weapon furthered the commission of the offense or enabled, continued, or enhanced the offense. Proximity is a factor in whether a deadly weapon was used or exhibited during the commission of a felony: There must be a connection between the deadly weapon and crime such that the deadly weapon “facilitated or could have facilitated” the crime.


- Under Jackson v. Virginia, 443 U.S. 307, 319 (1979), and Hoofer v. State, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007), in evaluating legal sufficiency, an appellate court reviews all the evidence in the light most favorable to the judgment to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. It is up to the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. In circumstantial-evidence cases, each fact need not point directly and independently to the defendant’s guilt provided the cumulative force of all the incriminating circumstances is sufficient to support the conviction.

- Under Tex. Penal Code § 19.03(a)(7)(A), capital murder as charged in this case requires proof that a person “intentionally” or “knowingly” caused the death of more than one person during the same criminal transaction.

- Under Louis v. State, 393 S.W.3d 246, 251 (Tex. Crim. App. 2012), capital murder is a result-of-conduct offense, and is defined in terms of one’s objective to produce, or a substantial certainty of producing, a specified result—i.e., the death. Murder is committed “knowingly” when an actor engages in conduct while aware that death is reasonably certain to result from his conduct. To be aware that his conduct is reasonably certain to result in death, the actor must also be aware of the lethal nature of his conduct.

- Under Ruffin v. State, 270 S.W.3d 586, 591–592 (Tex. Crim. App. 2008), mental culpability must be inferred from the circumstances under which a prohibited act or omission occurs. A jury may infer that a defendant intends the natural consequences of his acts and infer a defendant’s knowledge or intent from any facts tending to prove its existence, including the method of committing the crime, the nature of wounds inflicted on the victims, and the accused’s acts, words, and conduct.

- Under Jones v. State, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996), a jury may infer intent to kill from the use of a deadly weapon unless it would not be reasonable to infer that death or serious bodily injury could result from the use of the weapon.

- Under Samaripas v. State, 454 S.W.3d 1, 5 (Tex. Crim. App. 2014), a trial court has broad discretion over the voir dire process, including setting reasonable limits and determining the propriety of a question. A trial court abuses its discretion only when a proper question about a proper area of inquiry is prohibited. A voir dire question is proper if it seeks to discover a juror’s views on an issue applicable to the case. An otherwise proper question is impermissible if the question attempts to commit the juror to a verdict based on certain facts.

- Under Standefer v. State, 59 S.W.3d 177, 180 (Tex. Crim. App. 2001): (1) voir dire questions that are not intended to discover bias against the law or prejudice for or against the defendant, but rather seek only to determine how jurors would respond to the anticipated evidence and commit them to a specific verdict based on that evidence, are improper; and (2) commitment questions are improper when law does not require commitment and the question could not disqualify juror for cause or when question includes facts in addition to those necessary to establish challenge for cause. A commitment question is one where possible answers are that the prospective juror would resolve or refrain from resolving an issue in the case based on facts
contained in the question. A commitment question usually will elicit a “yes” or “no” answer, but an open-ended question can be a commitment question if the question asks the prospective juror to set the hypothetical parameters for his decision-making.


- Under Carmouche v. State, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000), the standard of review on a ruling on an MTS is bifurcated standard: almost total deference to the trial court’s determination of historical facts that depend on credibility, and de novo of the application of the law to those facts. The trial court is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. For facts explicitly found, a reviewing court must defer to them so long as they are supported by the record. For facts not explicitly found, the reviewing court views the evidence in the light most favorable to the ruling and assumes that the trial court made implicit findings of fact supporting its ruling so long as those findings are supported by the record. The reviewing court must sustain the ruling if it is correct under any theory of law applicable to the case.

- Under Missouri v. McNeely, 569 U.S. 141, 148 (2013), and State v. Villarreal, 475 S.W.3d 784, 796 (Tex. Crim. App. 2014), a warrant is required for an unconsented draw of specimen unless the exigency exception applies, which is when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment. Whether law enforcement faced an emergency that justified acting without a warrant calls for a case-by-case determination based on the totality of the circumstances. Blood testing is different from other destruction-of-evidence cases where police are confronted with a “now or never” situation because the body’s natural metabolism of intoxicating substances is distinguishable from the potential destruction of easily disposable evidence when the police knock on the door.

- Under Weems v. State, 493 S.W.3d 574, 578 (Tex. Crim. App. 2016), the State fails to meet its burden to establish that exigent circumstances existed at the time of a warrantless blood draw if the record indicates that probable cause was present at the time of the draw, that an officer who was not preoccupied in investigating an accident was available to pursue a warrant, and when the record is devoid of what procedures and how much time procuring a warrant would have required. Merely because a suspect is transported to a nearby hospital does not make obtaining a warrant impractical or unduly delay the taking of blood to the extent that natural dissipation would significantly undermine a blood test’s efficacy, especially if other officers are available to investigate the scene of the accident and escort the suspect to the hospital.

Editor’s Note: Now that McNeely, Villarreal, and Weems are established law and the State cannot admit into evidence warrantless blood draws unless there are exigent circumstances, it appears that some members of law enforcement may need to resort to other unconstitutional tactics:
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