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Prairie Dog

and it was good.

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Lubbock, Texas
Texas Tech University School of Law

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**January 2019**
- January 30–February 1
  - TCDLA | SFST Practitioner Course | co-sponsored with Harris County Criminal Lawyers Association
  - Houston, TX

**February 2019**
- February 1
  - CDLP | PD/Indigent Defense
  - Dallas, TX

- February 13–17
  - TCDLA | Presidents Trip to Nashville
  - Nashville, TN

- February 21
  - CDLP | Appeals and Writs
  - Austin, TX

- February 21
  - CDLP | Mental Health
  - Austin, TX

- February 22
  - CDLP | Capital
  - Austin, TX

- February 22
  - CDLP | Veterans
  - Austin, TX

- February 28
  - TCDLEI | LEI Conference Board Meeting
  - Austin, TX

**March 2019**
- March 7–8
  - TCDLA | 38th Annual Prairie Dog Lawyers Advanced Criminal Law Seminar | co-sponsored with Lubbock Criminal Defense Lawyers Association
  - Lubbock, TX

- March 9
  - TCDLA & TCDLEI Board and CDLP and Executive Committee Meetings
  - Lubbock, TX

- March 22
  - CDLP | Come and Take It
  - Kerrville, TX

- March 24–29
  - CDLP | 43rd Annual Tim Evans Texas Criminal Trial College
  - Huntsville, TX

*Accepting applications*

**April 2019**
- April 4–5
  - TCDLA | 26th Mastering Scientific Evidence in DUI/DWI Cases | co-sponsored with National College for DUI Defense
  - New Orleans, LA

- April 5
  - CDLP | Come and Take It
  - El Paso, TX

- April 12
  - CDLP | Come and Take It
  - Midland, TX

- April 19
  - CDLP | Come and Take It
  - Tyler, TX

- April 19
  - CDLP | Welfare Forensics
  - Houston, TX

- April 19
  - CDLP | Winning Warriors | co-sponsored with Harris County Criminal Lawyers Association
  - Houston, TX

**May 2019**
- May 3
  - TCDLA | 12th Annual DWI Defense Project
  - Richardson, TX

**June 2019**
- June 12
  - CDLP | Public Defender Training
  - San Antonio, TX

- June 13–15
  - TCDLA | 32nd Annual Rusty Duncan Advanced Criminal Law Course
  - San Antonio, TX

- June 15
  - TCDLA | 32nd Annual Rusty Duncan Advanced Criminal Law Course
  - San Antonio, TX

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

TCDLA seminars are open only to criminal defense attorneys, mitigation specialists, defense investigators, or other professionals who support the defense of criminal cases.

Law enforcement personnel and prosecutors are not eligible to attend unless noted **open to all.** **Open to all members**

Texas Criminal Defense Lawyers Educational Institute offers scholarships to seminars for attorneys in need.
Sitting down to write this February column, I am somewhat at a dead end on things to write about. The holidays are over and it is time to get to get back in the saddle and get on with the practice of law. All the news outside the office seems to be tied in to politics. The federal government is partially shut down due to a standoff over a border wall. The Texas Legislature is back in session, and many villages feel like they are missing an idiot. Every day it seems a new Democrat is announcing that he or she will run for president.

When I was assigned to write this monthly column, I was told I could write about whatever I wanted. While sometimes tempted to express my views on the political matters of the day, I have tried my best to keep those opinions to my everyday life, as I am aware that this organization has members of all political affiliations, religious affiliations, all races, all sexes, and all creeds. I just figured that I really do not have any business espousing a political platform in the name of this great organization.

That took me back to square one. The Martin Luther King Jr. holiday was fast approaching. One of my fondest memories as a part of this organization occurred during a trip to Memphis in February 2009 with Rick Hagen on his TCDLA president’s trip. We were truly fortunate to have a tour of the National Civil Rights Museum located at the Lorraine Hotel in Memphis where Dr. King was assassinated. Prior to our tour, we had a luncheon with the Reverend Billy Kyles. Reverend Kyles spoke to us and relived the assassination through his eyes while standing on that famous balcony next to Dr. King. I will never forget looking around the room and seeing grown men and women with tears in their eyes as Reverend Kyles described Dr. King, what he was doing, and what he stood for.

One thing that stuck with me was Reverend Kyles telling us that all the leaders in the civil rights movement there that day—Himself, Dr. King, Jesse Jackson, Andrew Young, and Ralph Abernathy—were all 40 or so years old. He pointed this out to show us that you didn’t have to be old to make a difference or make things happen. These people were able to change the world for the better at a young age.

Trying to come up with something to write about, I started looking at quotes of Dr. King. One that stuck out to me is this: “Our lives begin to end the day we become silent about things that matter.”
After thinking about that quote, I realized I could no longer stay silent about a longtime controversial subject—chili. The great debate of beans vs. no beans in chili has been going on as long as I can remember, and people usually take a pretty firm position on the issue. I must admit up front, however, that I am willing to eat a bowl of chili with or without beans. Heck, I personally have been known to add beans for a little cheap filler when people I don’t really like are likely to show up for a bowl of red.

A quick glance at social media will show there are people on both sides of this great debate. The internet has made everyone an expert on chili, just as it does with most other topics. People seem to give their opinion as if other people actually care about their preference. People are turning against lifelong friends. In my life I have never seen people this polarized about the issue of chili. If I did not know better, I would swear the Russians are trying to stir up controversy in the great beans-versus-no beans debate.

So, coming full circle, I asked myself what Dr. King would think about chili. My guess is he would judge chili by the character of its content. My guess is he would not mind people challenging the societal norms of today, but he would object to bigotry and prejudice simply because the chili did not look like the chili to which he was accustomed to having. I think Dr. King would tell you he dreams of a day when men and women and children of all races and beliefs could sit down over a bowl of chili and have a rational discussion.

Dr. King once said, “People fail to get along because they fear each other; they fear each other because they don’t know each other; they don’t know each other because they have not communicated with each other.”

When people believe their way is the only acceptable way and are unwilling to simply listen because the other side is different, there is never a winner. So, my hope in this new year is that we somehow can listen to each other and communicate. Whether it be with judges, juries, prosecutors, or simply your neighbor. After all, even a bad bowl of chili is still a bowl of chili.
Cheers to a new year and another chance for us to get it right.
—Oprah Winfrey

December was a very productive month. We had our quarterly board meeting in Fort Worth, and the board voted to redo our board terms to allow for nine new board positions to be available each year. This year we had a limited number of board spots open as we worked to correct this ongoing issue. All of the applicants were qualified, and the Nominations Committee struggled to make their selections. We want to congratulate our slate for 2019: Secretary‑Elect David Guinn and the two new incoming board members, Lisa Greenberg and Chad Van Brundt. The membership will vote on everything above at our annual members board meeting in June at Rusty Duncan (June 13–15, 2019). With the quality of applicants who applied this year and the number of positions that will open up next year (nine), we urge everyone to reapply next year.

The Membership Committee also met in Fort Worth. Congrats to the committee lead by Carmen Roe, Monique Sparks, and Nathan Miller; they are halfway to achieving their goal of increased membership this year. We hope everyone will continue to renew their memberships. Did you know you could save 10% if you sign up for auto‑renew? Call us today at 512.478.2514 to get started. And if you know a new lawyer or new member, reach out to them and offer up some camaraderie, welcoming them to our TCDLA family. It can be scary out there alone. We are also here at the home office to assist our members and to give you an update on all the member benefits—such as walking you through the TCDLA app or our various listserves. The Membership Committee continues to come up with new ideas to increase member services—look for these in the coming months. If you yourself have any recommendations, email them to Miriam at mrendon@tcdla.com.

Our Nexus Committee also met to discuss new seminar topics and venues. If you have any suggestions, send them to Kerri Anderson‑Donica at kerri@kerridonicalaw.com. And the Legislative Committee met to work on our legislative strategies and goals for this coming session. If you know a legislator on a personal level, let our lobbying team know by emailing legislative@tcdla.com. All told, we have more than 30 committees staffed by volunteers working endlessly to improve the criminal justice system for our members. Visit our website and look under the “Contact” tab to see if there is a committee you would like to join.

In other news, the Texas Criminal Defense Lawyers Education Institution presented
Nneka Akubeze $5,000 as the 2018 recipient of the Charles Butts Memorial Scholarship. Nneka is a 3L law student at Texas Southern University Thurgood Marshall School of Law. She attended the Sexual Assault seminar, board dinner, and board meetings—where everyone had the pleasure of getting to know her and hearing her compelling thoughts on what she sees as her role in our criminal justice system. These are just a few of the good works TCDLEI does with your donations!

In other developments during the quarterly meeting, we heard that our mentor program with TIDC, HCPDO, and TCDLA had an overwhelming number of qualified applicants. We look forward to selecting 25 candidates from throughout the state of Texas. Once the mentors are contacted and make the commitment, they will undergo extensive training before mentee applications are sent out.

As we begin a new year, we’d like to encourage any lawyers who’ve practiced for five years or less to apply to attend the Tim Evans Texas Criminal Trial College this March. TCTC is a powerful hands-on training concentrating on everything you need to know for criminal defense. This program is limited to 80 attorneys, so get your application in today. Ask anyone who attended—it is an exception program that everyone raves about.

With a new year’s fresh start, we hope to set goals for increasing membership, improving our seminars and attendance, and producing the best criminal defense publications while keeping all of our members up to date with new legislation and relevant topics. Remember: We have, among other groups, a stellar Strike Force ready to assist members in need, an Ethics Committee to answer your questions pronto, and an Amicus Committee to fight for you.

I hope everyone is beginning the year with a bang—though here are a few suggestions to help you start off your year stress-free:

- Put yourself at the top of the list
- Do a yearly review of what worked well and what . . . not so much
- Finish what you started
- Be realistic
- Focus on what you want
- Spend time with friends
- Tell a different person each week that you love them.

TCDLA Swag:
Show your colors with the new long-sleeve TCDLA t-shirt, now available online at www.tcdla.com, or call 512.478.2514.

And while you’re at it, take a look at the other new swag—the tumbler for your hot or cold drinks (or to house your canned libation) and the new blankies.

Sponsored by TCDLEI
Jason Wayne Irving was a Kansas registered sex offender who had child pornography on his Facebook account. Kansas law enforcement officers, acting under the authority of search warrants issued by a Kansas state judge, discovered this pornography. Because of the exceptional work of Assistant Federal Defender Timothy J. Henry of the Federal Public Defenders Office for the District of Kansas, United States District Judge Eric F. Melgren suppressed the evidence obtained during these two searches, holding that: (1) Irving had standing to object to the searches; (2) the first search warrant had been invalid as overbroad; and, (3) the good faith exception to the exclusion of evidence did not apply. United States v. Irving, ___F.Supp.3d___, 2018 WL 4681631 (D.Kan. September 28, 2018)

[Note: Although this case is more than three months old, it just came up in WestLaw's WTH-CJ database.]

[The Facts]

Officer Jordan Garrison of the Pittsburg, Kansas, Police Department became interested in Irving when he received information that Irving had been seen walking with a young juvenile at odd hours of the night. Garrison learned that Irving had a Facebook page with the user ID of jason.irving. The profile picture on Irving’s Facebook account looked like his registered sex offender pictures.

Garrison was aware that registered sex offenders were required under Kansas law to provide online identities used by the offenders. He found that Irving had not provided any such information as to the Facebook account. Garrison went to a Kansas state judge and requested and received a search warrant that permitted him to obtain from Facebook seven categories of evidence:

(1) all contact and personal identifying information, (2) all activity logs showing his posts, (3) all photoprints, (4) all Neoprints (which included profile and news feed information, status updates, wall posting, friend lists, future and past event posting, comments, tags, and more), (5) all chat and private messages, (6) all IP logs, and (7) all past and present lists of friends.

When Garrison received the requested information from Facebook, he reviewed the records and observed that there were communications between Irving and suspected mi-
nors that involved nude photographs. Another officer, Le'Mour Romine, reviewed the information obtained by Garrison and obtained a second warrant that permitted him to search Irving's home for child pornography. Romine found and seized this child pornography.

Irving was indicted on a four-count indictment. Two of the counts were dismissed, but counts alleging possession and distribution of child pornography remained. Irving's lawyer filed a motion to suppress all evidence obtained as a result of the two searches. He contended that the first warrant lacked particularity and was overbroad; further, because the first warrant was overbroad, all evidence from the two searches should be suppressed.

Judge Melgren's opinion reads, in part, as follows:

[An Overview]
Defendant argues that the Fourth Amendment requires suppression of all evidence found against him because the first search warrant lacks particularity and is overbroad. The government contends that (1) Defendant lacks standing to object to the search, (2) the warrant is sufficiently particular, and (3) even if the warrant lacks particularity, the good faith exception is applicable.

[The Reasonable Expectation of Privacy Approach]
Under the reasonable expectation of privacy approach, "[a] search only violates an individual's Fourth Amendment rights if he or she has a legitimate expectation of privacy in the area searched." There is a two-part test in determining whether a reasonable expectation of privacy exists. First, the defendant must demonstrate that he "manifested a subjective expectation of privacy in the area searched." Next, there is the question of "whether society is prepared to recognize that expectation as objectively reasonable."

[The Government's Position]
The government contends that Defendant does not sufficiently demonstrate that he had a legitimate expectation of privacy to object to the search because (1) he was an unauthorized user of Facebook, (2) much of his account was public, and (3) any expectation of privacy was thwarted by Facebook's Terms of Service ("TOS") and notification of its intention to provide information to law enforcement. Defendant disagrees and asserts that he does have standing.

* * *

The government argues that Defendant does not have a legitimate expectation of privacy in his Facebook account because he was an unauthorized user of Facebook. Defendant was an unauthorized user of Facebook because he was a convicted sex offender and Facebook's TOS prohibits convicted sex offenders from using Facebook.

* * *

Next, the government argues that much of Defendant's Facebook account was public.

* * *

Finally, the government contends that any expectation of privacy was thwarted by Facebook's TOS and its notification to Defendant of its intention to provide information to law enforcement.

[The Court's Response]
Facebook . . . allowed Defendant to have an account on Facebook and he remained on Facebook at the time of the search (and after the search). Thus, it appears that Facebook viewed Defendant as an authorized user who had privacy rights in his account. This conclusion is bolstered because Facebook sent a notice to Defendant that the government sought a search warrant for his account. Furthermore, it is unclear why an unauthorized user loses a reasonable expectation of privacy. In the same way that an individual who is a smoker may falsely represent to a landlord that he is not a smoker to obtain an apartment lease, that individual does not lose all expectation of privacy in the rented apartment. Accordingly, the Court finds the government's argument without merit.

* * *

Facebook . . . has privacy settings as well and allows its users to set posts to private or public. In addition, Facebook has a "messenger" component which is always private because it is not available for the public to view. Indeed, the government states that an area in which Defendant could ostensibly assert a privacy interest would be his Facebook messages. The fact that the majority of an individual's information may be found on a "public" portion of Facebook does not mean that one gives up any expectation of privacy. "A person does not surrender all Fourth Amendment protection by venturing into the public sphere." Furthermore, the fact that there is a line between public and private access would further demonstrate a reasonable expectation of privacy in the information shared privately. Thus, the government's argument fails on this point.

* * *

[Facebook's Terms of Service]
Facebook's TOS has several provisions relating to collecting information and the content posted on Facebook. The TOS generally informs users that Facebook collects a user's content and information. The TOS also provides that the user, by accessing Facebook, agrees that Facebook can collect and use content and information in accordance with its
Here, the warrant at issue (the first search warrant) states there is demonstrated probable cause. It described evidence relating to a specific crime for which to ensure that the search is confined in scope to particularly makes reference to a particular offense; the warrant must executing the warrant. “It is not enough that the warrant general searches and strictly limits the discretion of the officer regard to the particularity requirement, it “prevents gen‑searched, and the persons or things to be seized. ‘” With

Facebook’s TOS does not have explicit terms about monitoring user’s accounts for illegal activities and reporting those activities to law enforcement. Instead, Facebook’s TOS generally states that Facebook can collect data and information. It also states, however, that the user owns all of the content and information and can control how to share it. Although Facebook’s TOS does state that a user should not post content that is pornographic or unlawful, it makes these statements in the context of safety and in asking for the user’s help “to keep Facebook safe.”

Defendant’s account was active and viable at the time the government sought a search warrant. Indeed, at the time the government sought the search warrant, there was no indication that Defendant had violated Facebook’s TOS. Accordingly, the Court finds that Defendant has standing because he had a reasonable expectation of privacy in his Facebook account.

“The Fourth Amendment provides that ‘no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.’” With regard to the particularity requirement, it “prevents general searches and strictly limits the discretion of the officer executing the warrant.” “It is not enough that the warrant makes reference to a particular offense; the warrant must ensure that the search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause.”

Here, the warrant at issue (the first search warrant) states that the crime being investigated is a violation of the Kansas Offender Registry Act. This act requires a convicted sex offender to register any and all email addresses and online identities used on the internet. The warrant lists seven categories of items to be seized. These include (1) all contact and personal identifying information, including name, user identification number, birth date, gender, contact email addresses, Facebook passwords, Facebook security questions and answers, physical address, telephone numbers, screen names, and other personal identifiers; (2) all activity logs and all other documents showing the user’s posts; (3) all photoprints, including all photos uploaded by the user or photos tagging the user; (4) all Neoprints, including profile contact information, status updates, photographs, wall postings, friend lists, groups and networks, rejected friend requests, comments; (5) all other records of communications and messages made or received by the user including all private messages, chat history, video calling history, and pending friend requests; (6) all IP logs; and (7) all past and present lists of friends created by the account.

The government argues that the warrant was limited to the specific Facebook account and identified areas associated with user attribution information. This warrant, however, allowed the officer to search virtually every aspect of Defendant’s Facebook account. It required disclosure of all data and information that was contained in his account. It included all contact and personal identifying information, all private messages and chat histories, all video history, all activity logs, all IP logs, all friend requests, all rejected friend requests, all photoprints, all Neoprints, and all past and present lists of friends. In addition, there was no specified time frame so the warrant covered the entire timeframe that Defendant operated and had the Facebook account. In sum, the warrant encompassed everything in Defendant’s Facebook account and there were no set limits.

As noted by the Eleventh Circuit, Facebook searches can be limited to specific information. In United States v. Blake, 868 F.3d 960 (11th Cir. 2017), the Eleventh Circuit found the government’s Facebook search to be overbroad because it “required disclosure to the government of virtually every kind of data that could be found in a social media account.” The Eleventh Circuit noted that the warrant could have been more limited in time and limited to the crime at issue. Had the request been more limited, the Eleventh Circuit stated that it “would have undermined any claim that the Facebook warrants were the internet-era version of a ‘general warrant.’”
[The First Warrant Was Overly Broad and General]  
Similarly, in this case, the warrant could have been more limited in scope and time. The only crime specified was the registration violation. This crime is simply that Defendant, as a registered sex offender, failed to register that he had Facebook account. The information that the officer sought was user attribution information and that Defendant was on Facebook and failed to register his account. The scope of the warrant should have been defined and limited by that crime. Instead, the warrant allowed for the search and seizure of Defendant’s entire Facebook account. It appears to be more akin to a general warrant rummaging through any and all of Defendant’s electronic belongings in Facebook. Thus, the warrant here was overly broad and general. Accordingly, it was an improper search warrant.

* * *
As noted above, the warrant in this case was overbroad and amounted to a general rummaging of Defendant’s effects, albeit electronically through his Facebook account.

[The Good Faith Doctrine]  
“Even if the warrant was not sufficiently particularized to comply with the Fourth Amendment, the evidence need not be excluded if the search qualified under the good faith doctrine of United States v. Leon.”

[The Government’s Burden]  
There are several circumstances, however, in which the Leon good faith exceptions may not be applicable. Relevant to this case, an officer may not rely on a warrant when it “is so facially deficient that the executing officer could not reasonably believe it was valid.” In making this determination, “the good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate’s authorization.” “It is the government’s burden to prove its agents’ reliance upon the warrant was objectively reasonable.”

* * *

[The Affidavit Was Insufficient for a Finding of Good Faith]  
In this case, the officer who executed the search warrant is the same one who prepared the affidavit for the search warrant. And the affidavit in support of the search warrant does not support a finding of good faith. In his affidavit to the court, the officer noted the facts for the warrant. When identifying the description of the items seized, he stated that the Facebook records had the “potential to provide identifying information for the account’s user, identify investigative leads, and corroborate other information obtained during the investigation.” In this case, the officer’s affidavit did not limit the search to Defendant’s user attribution information. Instead, the affidavit appeared to expand the officer’s search of Defendant’s belongings as he averred that the information from Facebook could identify investigative leads and corroborate other information obtained during the search.

* * *

[The Good Faith Exception Is Not Applicable]  
There does not appear to be an objective reason that the officer should have believed that this general rummaging would be permitted. “A reasonably well-trained officer should know that a warrant must provide guidelines for determining what evidence may be seized.” Thus, the Court finds the good faith exception inapplicable.

[Conclusion]  
In sum, the Court finds that Defendant has standing to object to the search. Further, the first search warrant was overbroad and thus an invalid search warrant. In addition, the good faith doctrine does not save the execution of the first search warrant. Finally, because the first search warrant was invalid, the second search warrant was also invalid as the probable cause for the second warrant was based on the evidence obtained from the first search warrant.

My Thoughts

♫ Once again, we have great work by an assistant federal defender. When I talked with Mr. Henry, he was as laid back as a prevailing lawyer could ever be. You would have thought that his win in Irving was just a common occurrence—and maybe it was.
♫ We have all heard Racehorse Haynes say that he never had a win without some help from the other side. Mr. Henry explained that he was helped by Garrison’s seeking information for further investigation when he applied for the first search warrant.
♫ If you had asked me whether a defendant could ever prevail on a reasonable expectation of privacy issue like the one that we see in Irving, I would have bet the farm against it.
♫ Congratulations to Mr. Henry!

Buck Files is a member of TDCLA’s Hall of Fame and a former President of the State Bar of Texas. In May 2016, TDCLA’s Board of Directors named Buck the author transcendental of the Texas Criminal Defense Lawyers Association. This is his 227th column or article. He practices in Tyler with the law firm of Bain, Files, Jarrett, and Harrison, PC, and can be reached at bfiles@bainfiles.com.
A big shout out to the Innocence Project and TCDLA member Julie Lesser, exoneration attorney of the Dallas Public Defenders Office, for seeing justice finally done in the case of Steven Mark Chaney. Chaney was convicted in a 1987 double murder based on testimony that he had left a bite mark on the arms of one of the victims— that there was a “one to a million” chance somebody besides Chaney had made that mark. One juror after Chaney’s trial said the bite evidence convinced her he was guilty, despite testimony from nine witnesses who said that they had spent time with him the day of the slayings and that he couldn’t have been at the victims’ home when they were killed. Defense lawyers also charged prosecutors with knowingly presented false evidence that blood had been found on the bottom of Chaney’s shoe, withholding notes from another expert who said there was no blood found. In addition to declaring Chaney innocent, the CCA found that he is entitled to relief under Texas’ change in science law, which provides an avenue for relief for wrongful convictions based on science that has been discredited since the time of trial. The Innocence Project also commended the work of the Dallas District Attorney’s Conviction Integrity Unit (CIU), led by Patricia Cummings and Cynthia Garza, and Judge Susan Hawk, a former Dallas district attorney, for reexamining Chaney’s case and seeking his release and relief. Well done, all.

Kudos to TCDLA Director Roberto Balli and the missus, Claudia, of Laredo for a recent win: It dealt with an immigrant client who had lived in the country since he was three years old. Roberto explains: “We filed a writ arguing that our client’s plea of guilty in 2011 was not voluntary because he was not properly advised on the immigration consequences by his lawyer. After a hearing, the judge granted our writ. The prosecutor did the right thing and dismissed the case.” Roberto says that the client, who has no criminal history, is now going to apply to stay in the United States. Congratulations, Ballis, on a job well done.

Shout out to TCDLA Director and DWI Committee Co-Chair Mark Thiessen and team for fighting the good...
On March 18, 1963, the United States Supreme Court published a monumental unanimous decision that states are required under the Sixth Amendment of the U.S. Constitution to provide counsel to defendants in criminal cases who are unable to afford their own.

Join public defender offices across the country in celebrating the anniversary of this decision on Monday, March 18, 2019. Spend the day, or even just an hour, to reflect on the opinion, the differences it has made, and the work still yet to do. Don’t forget to pat one another on the back and thank each other for all of the hard work that goes into being a public defender or court-appointed attorney. You deserve it!

**Ways to Celebrate**

- Watch the documentary “Defending Gideon”: https://youtu.be/MkgcD2UkNdY
- Watch “Gideon’s Army,” available on Amazon Prime
- Watch “Strong Island,” available on Netflix
- Watch an episode or two of “Time: The Kalief Browder Story,” available on Netflix
- Discuss feel-good stories/cases
- Enjoy a potluck lunch with your team
- And more!

**TCDLA Ethics Hotline**

Confronted by an ethical dilemma? Your ethics hotline is just a call away. Call 512.646.2734 and leave a message. You will receive a call or several calls within 24 hours.

Shout out to Voice Ethics Editor (and chair of the TCDLA Ethics Committee) Robert Pelton for his new title: Editor of the Harris County Criminal Lawyers Association magazine *The Defender*. He’s already started working with Executive Director Christina Appelt, and you can see their work on the HCCLA website. I think they’d both agree with the Ben Franklin quote: “If you want something done, give it to a busy person.”

We now have Gideon t-shirts—order online, www.tclala.com, or call 512.478.2514.
News on Proposed TCDLA Bylaws Change

At the Annual Meeting following Rusty Duncan this year, you will be asked to approve a set of Bylaws amendments. Those amendments are all related to the way our Board of Directors is organized, and they are to solve a significant problem. The amendments are based on years of both study and frustration by the Nomination Committee and the Bylaws Committee. They have been approved by our Board of Directors and are recommended by our staff.

The Problem
The current Bylaws result in wild fluctuations in the number of openings for the board each year. Sometimes it is as few as 3, sometimes it is more than 12. The great differences make consistency and continuity difficult, and create much extra work for our staff. Worse still, they discourage good members from seeking office, and discouraged good members lose interest. We MUST solve the problem, and the Bylaws amendments will do just that.

The Reason for the Problem
We have two types of board members: 16 Associate members and 42 Regular members. They have the same voice and right to vote but different terms. Associate members are eligible to serve two one-year terms. After completion of those two one-year terms, they are eligible for two three-year terms as Regular members. The idea of “Associate” was to have a sort “evaluation” period to see who would work hard and embrace the position. To be frank, that “evaluation” has proved to be unnecessary. As you can imagine, those very different terms have created the wild fluctuations. On top of that, for various reasons, we have slowly added Directors so that we now have a total of 58 Directors. Our board is enormous. The national average for boards such as ours is 9! With the crazy different terms and the number of Directors at 58, we can never get a consistent, common-sense turnover in Directors.

The Fix
Our full board voted overwhelmingly to (A) merge the two boards into one, (B) change the number slightly from 58 to 54, (C) group the 54 into 6 groups of 9, (D) make the 6 groups based on when current Directors would be scheduled to “cycle off,” and (E) make each Director eligible for two three-year terms. This “fix” is strongly supported by TCDLA staff.

The Result
These Bylaws changes will result in 9 openings for the Board each year. It will always be 9. Even when we lose a Director early, it will stay at 9. That is because the “replacement” can only serve out the term or terms available to the Director he/she replaced. The amount of time this will save our staff is significant. Melissa and staff spend untold hours sorting through board openings each year. More importantly, it will provide a consistent way for our members to step forward to serve. The lifeblood of our great TCDLA is the service and brain power of its members. We need opportunities for them, and these Bylaws changes fix a serious problem and make opportunities available.

Why Now?
Those of us who have served on the Nomination Committee and the Bylaws Committee have been vexed by this for years. Every time in recent years we proposed the “fix,” it would have resulted in several loyal, hard-working board members getting what amounted to being kicked off the board. This year, the stars have aligned for us perfectly. The changes proposed will result in NO current board members losing their jobs. All we need do is leave 4 unfilled openings on what is now the Associate board. That is what the full board authorized the Nomination Committee to do, and that is what the Nomination Committee did. If the Bylaw amendments are approved by you, those 4 vacancies are permanently eliminated. We fully expect to have a significant increase in board applications when the changes are known to our members. Knowing that opportunity to serve is possible will strengthen our already strong organization.

On a more personal note, some of us involved in this effort have been TDCLA members for many years. As we approach the time when we are no longer actively involved, we are striving to leave TDCLA better than we found it. The Bylaws changes we propose will increase participation, bringing new faces into leadership positions, and make new ideas part of our future.

Thanks for your support.
Adam Kobs for the Bylaws Committee
Tip Hargrove for the Nomination Committee

EDITOR’S NOTE:
The Bylaws changes are shown here and will be posted on our website. If you have questions, Adam Kobs, Tip Hargrove, and TDCLA leadership are happy to discuss them with you.
SBOT RUSTY SCHOLARSHIPS

The Criminal Justice section of the SBOT has allocated monies for scholarships for Rusty Duncan tuition (at the early-bird rate) and an additional $750 expense stipend. The Scholarships may also be used to attend the SBOT Advanced Criminal Law seminar. The requirements:

★ Request an application at www.txbarcjs.org/scholarships/. Once completed, email to nmyhra@texasbar.com.
★ Applicants who have practiced 5 years or less will be given preference.
★ Applicants may apply for both seminars, but only one scholarship per applicant will be awarded, regardless of the number of seminars applied to.
★ The SBOT Advanced Criminal Law scholarship may be used to attend the “boot camp” offered as part of the Advanced Criminal Law seminar.
★ Applicants must be a member of the Criminal Justice section of the SBOT, or, in the alternative, may join when they apply for the scholarship.

Deadline for applications is Friday, April 15, 2019, and recipients will be notified by May 1, 2019. You can email questions to Dwight McDonald, at Dwight.Mcdonald@ttu.edu.

Welcome to New Members of TCDLA
(11/16/2018 – 1/15/2019)

Regular Members
Steven Boman, Angleton
Judith Ann Cantu, McAllen
Sharon Yu-Hao Chu, Houston
J. Daniel Clark, Southlake
Joey Contreras, San Antonio
Mark A. Diaz, Galveston
Catherine Evans, Houston
Lauren Fisher, San Antonio
Jose Pepe Garza, Rio Grande City
John Anthony Gomez III, San Antonio
Katie LueAnn Gomez, Killeen
Javier Guzman, Laredo
Kyra Rose Leal, Lubbock
Patricia Love, Edinburg
Melsandra Mendoza, Rio Grande City
Melissa Rios Montes, Edinburg
Laura Poppes, Austin
Rollin R. Rausch, Albany
Kathleen Roberts, Pearsall
Nicholas Robinson, New Braunfels
Don Snodgrass, Plainview
Jace L. Spiegelhauer, College Station
Craig Stewart, Houston
Robert Matthew Thompson, Fort Worth
Lisa A. Wyatt, Midlothian

Public Defender Members
William Edmund Ahee, El Paso
Hensleigh Crowell, Houston
Gabriel Nieto Garcia, Laredo
Leonel Mata, Rio Grande City
Robert Bradley Wilson, Quitman

Affiliate Members
Jeremy Cassius, Dallas
J. David Likens, Lubbock

Student Members
Dennis G. Brown Jr., Houston
Lauren McCollum, San Antonio
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
Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing . . .

Tex Code Crim Proc. 37.07, § 3(a)(1).

The sentencing stage of any case, regardless of the potential punishment, is the time at which for many defendants the most important services of the entire proceeding can be performed.


Those two quotes summarize the gravity of the second stage of a trial. This is where the rubber truly meets the road for a criminal defendant; just about anything is usually game. No matter how you plan on proceeding for guilt or innocence, punishment needs to be on your mind from day one. While every one of us would like that two-word verdict, the reality is that most trials aren’t about guilt or innocence. Often, it’s because the defense and the state couldn’t agree on an outcome. The goal of this article is to provide some tools to help determine what is coming at you, what defense attorneys should be looking for, and some technical considerations in punishment, enhancement, and community supervision.

I. Figure Out What Is Coming

Talent is cheaper than table salt. What separates the talented individual from the successful one is a lot of hard work.

—Stephen King

The number-one tool for any case of any kind is preparation.
Unfortunately for many defense attorneys, the sentencing phase of a trial is often spent rebutting bad information instead of being able to provide good information about our clients. The biggest advantage is in preparation and knowing what is coming at you before the second half of your trial. Luckily the Texas Code of Criminal Procedure and the Texas Rules of Evidence provide requirements of information that the State must provide. Below are some avenues that can be used in finding out what is coming at you, and your client, in the second half of the trial.

A. The Indictment

The first and best place to see what will be presented at sentencing is the indictment. The indictment and subsequent motions to amend or enhance the indictment put you on notice of what range of punishment your client will be looking at and what extraneous bad acts will be presented at sentencing. Take the time to look at the enhancement paragraphs if they are there. Make sure dates and cause numbers are correct. Pull copies of past convictions, including probable cause affidavits, and if appropriate, testimony from those proceedings. Your client may have previously been convicted of aggravated robbery, but it could make the difference to a judge or jury if your client was just the driver instead of the one inside with the gun.

Be aware, prior offenses used to enhance your client’s range of punishment do not have to be included in the indictment. Brooks v. State, 957 S.W.2d 30, 33 (Tex. Crim. App. 1997). However, the State must give “proper notice” of the intent to enhance. Id. That notice to enhance can come as late as the beginning of the punishment phase of the trial. Villescas v. State, 189 S.W.3d 280, 294 (Tex. Crim. App. 2006). Make sure to use your requests for disclosure, discussed below, to know what prior offenses the State intends to use during your trial.

B. Discovery Orders

Under the Due Process Clause of the Fourteenth Amendment, a prosecutor has an affirmative duty to turn over material exculpatory evidence. Brady v. Maryland, 373 U.S. 83, 87–88 (U.S. 1963); Ex parte Kimes, 872 S.W.2d 700, 702 (Tex. Crim. App. 1993). Brady is also now codified in the Texas Code of Criminal Procedure §39.14(h). The prosecution violates due process when it suppresses evidence in its possession favorable to an accused “where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Brady, 373 U.S. at 87. Evidence withheld by a prosecutor is “material” if there is “a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” United States v. Bagley, 473 U.S. 667, 782 (1985). A “reasonable probability” is a “probability sufficient to undermine confidence in the outcome.” Id.

Prior to the passage of SB 1611, better known as the Michael Morton Act, a Defendant was required to make a showing of good cause to have the inspection and copying of evidence in the State’s possession and have the court order the production. Now, upon a “timely request” a Defendant is entitled to inspection and duplication of essentially everything in the State’s possession. Tex Code Crim Proc. 39.14(a)

If discovery is requested and the State fails to comply, then the non-disclosed evidence should be excluded from trial. “Evidence willfully withheld from disclosure under a discovery order should be excluded from evidence.” Oprean v. State, 201 S.W.3d 724, 726 (Tex. Crim. App. 2006), citing Hollowell v. State, 571 S.W.2d 179, 180 (Tex. Crim. App. 1978). However, when the evidence is disclosed during trial and still comes in, the materiality question turns on whether the defendant was prejudiced by the delayed disclosure. Williams v. State, 995 S.W.2d 754, 761–62 (Tex. App.—San Antonio 1999, no pet.). When previously withheld evidence is disclosed at trial, the defendant has an opportunity to request a continuance. Id. The failure to request one waives any Brady violation, as well as any violation of a discovery order. Gutierrez v. State, 85 S.W.3d 446, 452 (Tex. App.—Austin 2002, pet. ref’d). If confronted with evidence that was not turned over in discovery, you must make your objection, request a continuance, and make your record to object to the surprise the evidence creates and how it is materially adverse to your client.

C. Requests for Disclosure of Extraneous Offenses

Like the new procedures under the Michael Morton Act, a request for disclosure triggers an automatic requirement for disclosure of prior bad acts and extraneous offenses. “On timely request of the defendant, notice of intent to introduce evidence under this article shall be given in the same manner as required by Rule 404(b), Texas Rules of Evidence.” Tex Code Crim Proc. 37.07 §3(g). If the extraneous offense is one that has not resulted in a conviction, then notice must include 1) the date of the alleged bad act, 2) the county in which the alleged bad act occurred, and 3) the name of the alleged victim of the crime or bad act. Id. Additionally, Texas Rule of Evidence 609(f) also excludes evidence of prior convictions if proper notice is not given after a specific request.

Special rules apply to cases involving a sex offense against a child under 17 years old. Tex Code Crim Proc. 38.37. Evidence of other crimes, wrongs, or acts by a defendant against the child victim in this type of case will be admissible to show the relationship between the defendant and the child. In this type of...
case, make sure to include in your request those prior bad acts pursuant to Tex Code Crim Proc. Article 38.37 §3, which must then be disclosed in the same manner as Article 37.07 notice.

D. Expert Disclosure

In addition to the information obtained from the State in discovery, Tex Code Crim Proc. Article, 39.14(b) allows for discovery of experts the State intends to introduce. When properly requested, the defense is entitled to the name and address of any experts to be used to present evidence under Rule 702, 703, and 705. Be aware that the same goes for the disclosure of defense experts when the State makes a request under 39.14(b).

Unlike traditional civil discovery, disclosure of an expert's identity and address does not necessarily entitle a defendant to disclosure of an expert's opinion, or the facts and data used to form that opinion. Additionally, those facts and data may not necessarily be in the State's control. Make sure to include in any request for expert disclosure the summary opinion of each expert, as well as the facts and data relied on to form that opinion pursuant to Texas Rule of Evidence 705. If necessary, do a separate motion (and get a ruling from the Court) about the additional requested information.

E. Pre-Sentence Report—Formerly Pre-Sentence Investigation (PSI)

A Pre-Sentence Report can be a useful tool in convincing an otherwise reluctant District Attorney to offer probation, or to prepare for an open plea of guilt for probation. Under the amendments to the Texas Code of Criminal Procedure Article 42.12, codified in article 42A, if punishment is being assessed by the Judge, the court is required to order a Pre-Sentence Report, with some exceptions. Tex Code Crim Proc. 42A.252. A defendant is allowed to waive the preparation of a Pre-Sentence Report. Tex Code Crim Proc. 1.14; Griffith v. State, 166 S.W.3d 261, 263 (Tex. Crim. App. 2005). A judge is not required to order a Pre-Sentence Report if punishment is agreed to by plea bargain, the only possible sentence is imprisonment, or if punishment is to be assessed by a jury. Id. A Pre-Sentence Report is also not required in a misdemeanor case if waived by the Defendant or the Judge finds sufficient information is apparent from the record. Id.

A Pre-Sentence Report will include, at the least, a report of the offense, restitution if any, and the criminal and social history of your client, a community supervision plan, IQ testing, or “any other information relating to the defendant or the offense as requested by the judge.” Tex Code Crim Proc. 42A.253. It can also include a drug or alcohol evaluation, Tex Code Crim Proc. 42A.257, and sexual evaluations in cases of sex offenses. Tex Code Crim Proc. 42A.258.

A Judge is not allowed to review the report or disclose it to any party until there is plea or finding of guilt. Tex Code Crim Proc. 42A.254. However, at least 48 hours prior to sentencing a Defendant must be allowed to review the Pre-Sentence Report and comment or introduce evidence alleging factual inaccuracy in the report. Tex Code Crim Proc. 42A.255. Be cautious. The State is allowed access to any information provided to the Defense in the Pre-sentence Report. Tex Code Crim Proc. 42A.255(c).

II. Admissibility: What's Coming In?

As noted above, admissibility of evidence during sentencing is governed in section 37.07 of the Texas Code of Criminal Procedure. The purview is broad, allowing for anything the court deems relevant. Ellison v. State, 201 S.W.3d 714, 721 (Tex. Crim. App. 2006). The general, overarching rule is that punishment evidence is relevant if it provides information about the defendant's life and characteristics. Brooks v. State, 961 S.W.2d 396, 396–400 (Tex.App—Houston [1st Dist.] 1997, no pet.).

A. Relevance

Relevance is not without limits, however. The Texas Court of Criminal Appeals equates relevance analysis to that of Texas Rule of Evidence 401: That evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without evidence. Tex. R. Evid. 401. “Relevancy in the punishment phase is a question of what is helpful to the jury in determining the appropriate sentence for a particular defendant in a particular case.” Accordingly, the admissibility of evidence during the punishment phase of a noncapital trial is a function of policy rather than a question of logical relevance.” Ellison v. State, 201 S.W.3d 714, 719 (Tex. Crim. App. 2006), citing Rodgers v. State, 991 S.W.2d 263, 265 (Tex. Crim. App 1999).

On the opposite side, a defense attorney can and should use the broadness of the sentencing law to provide any and as much positive, mitigating information as is available. A defendant's personal responsibility and moral blameworthiness for the offense is admissible. Miller-El v. State, 782 S.W.2d 892, 896 (Tex. Crim. App. 1990). Evidence that a defendant is remorseful may be admissible. Renteria v. State, 206 S.W.3d 689, 697 (Tex. Crim. App. 2006). Jurors may consider what sentence will sufficiently punish the defendant, and what sentence is appropriate to deter future criminal conduct of a defendant. Lopez v. State, 860 S.W.2d 938, 946 (Tex.App.—San Antonio 1993, no pet.). Be creative in present-
ing evidence to judge or jury to lessen your client’s punishment.

B. Penitentiary Packets and Prior Convictions

To prove that a defendant has been convicted of a prior offense, the State must (1) prove the existence of the conviction and (2) link the conviction to the defendant. *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007). For enhancement purposes the State must also prove that your client’s second previous felony conviction was committed after the first previous conviction became final. *Tex. Penal Code* § 12.42; *Wiggins v. State*, 539 S.W.2d 142 (Tex. Crim. App. 1976).

One of the most frequently used pieces of information that will be used against your client to prove prior convictions will be prior Judgments or Penitentiary Packets. While both are hearsay under Texas Rule of Evidence 801, both have exceptions to them under Texas Rule of Evidence 803: TRE 803(6) for Penitentiary Packets as Records of Regularly Conducted Activity and TRE 803(22) as Judgment of a Previous Conviction. Don’t accept the State’s offering of evidence on its face. Just because an exception exists for a type of document does not mean the document fits into the exception.

Look again at Texas Rule of Evidence 803(6), better known as the Business Records Exception. Business records are accepted over a hearsay objection because of their inherent trustworthiness. There is no need for confrontation or cross-examination because the documents themselves are trustworthy. But section 6 has a failsafe built into it when “the source of information or the method or circumstances of preparation indicate lack of trustworthiness.” *Tex. R. Evid.* 803(6). Courts have recognized that just because information is in a government report that it does not automatically have the “indicia of reliability sufficient to insure the integrity of the fact-finding process and commensurate with the constitutional rights of confrontation and cross-examination.” *McCrary v. State*, 604 S.W.2d 113 (Tex. Crim. App. 1980), citing *Chambers v. Mississippi*, 410 U.S. 284 (1973).

Remember too that beyond overcoming hearsay, documents entered into evidence must be authenticated. While the Court of Criminal Appeals has done away with the requirement that a certified judgment from the original court accompany a penitentiary packet to self-authenticate, there must still be some evidence to support that the evidence in question is what its proponent claims. *See Reed v. State*, 811 S.W.2d 582, 587 (Tex. Crim. App. 1991); *Tex. R. Evid.* 901.

Even if a penitentiary packet is admitted, be careful to review what information is being admitted. Just because the record itself is admissible, the probable cause affidavit, victim impact statement, motions to revoke probation, or random notations in the file containing testimonial information are not subject to cross-examination and should not be admissible. When a business record contains “sterile recitations . . . of offenses and punishments,” that information can be admitted as a business record. *Ford v. State* 179 S.W.3d 203, 208 (Tex.App—Houston [14th Dist.] 2005, pet. ref’d). However, incident reports or disciplinary reports from correctional facilities or the like that include statements from corrections officers or narrative reports are not admissible if those individuals are not there to testify to them in open court. *Russeau v. State*, 171 S.W.3d 871, 880 (Tex Crim. App. 2005). Make sure to object to those statements to keep them out.

One special circumstance to look at is prior Juvenile Convictions. An adjudication under Texas Family Code Section 54.03 provides that when a child engages in conduct that occurred on or after January 1, 1996, that results in a commitment to the Texas Youth Commission, it is a final felony conviction for enhancement purposes. *Tex. Penal Code* § 12.42(f). However, because of the Family Code’s limitation of the effect of juvenile felonies, “a defendant with only a juvenile felony can apply for probation and truthfully aver that he has not been previously convicted of a felony.” *Thompson v. Sate*, 267 S.W.3d 514, 517 (Tex. App. Austin 2008, pet. ref’d). Those juvenile priors can’t remove your client’s eligibility for probation, but they can enhance the punishment.

Finally, remember that with any extraneous offense the State must prove the offense beyond a reasonable doubt. *Tex Code Crim Proc.* 37.07 § 3(a)(1). The defense has an absolute right to request that the court make a determination that the State has sufficient evidence to prove it to a jury beyond a reasonable doubt prior to it being submitted to the jury. *Harrell v. State*, 884 S.W.2d 154, 160 (Tex. Crim. App. 1994).

Look at what evidence is in the packets and judgment to reflect that the person in that judgment is your client. Most often this is done by comparing fingerprints in the judgment or penitentiary packet to fingerprints from your client. Review the prints in the packets beforehand if possible and see if they are viable. Always review the demographic and identifying information. You will be amazed at how often typos and mistakes occur that may keep a prior judgment out of evidence.
C. Other Objectionable Evidence

Evidence that is admissible during the sentencing phase of a trial is broad, but 37.07 does not give the State carte blanche to the judge or jury. Aside from objections to relevance, the Texas Rules of Evidence addressing hearsay, privilege, competency of witnesses (either lay or expert), and authentication of exhibits still apply. This is in addition to constitutional rights of confrontation of witnesses for any evidence to be presented. Although outside the scope of this paper, objections based on Crawford, Melendez-Diaz, and Daubert all still apply during a sentencing hearing. Constitutional protections do not go out the window just because your client has plead or been found guilty.

Ultimately, whether evidence is relevant is left to the trial court, which has broad discretion in making that determination. Rodriguez v. State, 203 S.W.3d 837, 841 (Tex. Crim. App. 2006). Don’t roll over and just accept that everything that the State attempts to introduce is relevant, and in the same breath fight for the relevancy of any positive piece of information you can find.

III. What Should We Be Looking For?

From the first day of being appointed to or retained by a client, we have to start the process of finding positive information about them. The purpose of this is threefold: first obviously to help counter the view that our client’s purported crime makes them an unsalvageable criminal. The second is that collateral information from friends, family, doctors, therapists, and so on may assist in winning a case outright. Finally, identifying problem areas that our clients may have such as anger management, drugs, or psychological issues and addressing them far before trial will not only help with showing remedial measures at trial but will probably help in your attorney-client relationship as well.

A. Friends and Family

Aside from being the first and most obvious place to start humanizing our clients, failure to interview friends, family, teachers, coaches, co-workers, church members, and so on for mitigating evidence in our client’s past has been found to be ineffective. See Wiggins v. Smith, 539 U.S. 510 (2003). Kevin Wiggins was convicted of first-degree murder, robbery, and theft. Wiggins’ attorneys failed to present evidence of their client’s difficult childhood, including evidence of alcoholic parents and sexual abuse by his foster parents. The Supreme Court found their performance to be deficient not because they failed to present the mitigating evidence, but because they failed to investigate mitigating factors. A court will be hesitant to second-guess trial strategy if an attorney determines that a client’s background would not be helpful in trial, but the decision not to pursue such avenues must be based on professional judgment, not failure to investigate. Ex Parte Woods, 176 S.W.3d 224, 228 (Tex.Crim.App. 2005).

Don’t limit your investigation just to people. School, military, CPS, medical, and prior criminal records all can provide insight into the human being that your client is. You know that the State is going to introduce that aggravated robbery charge, so find the records that mitigate the prior offense. The State is going to show one side and one side only of your client. Your job is to paint the rest of the picture.

B. Medical and Psychological Experts

Medical and scientific advances are beginning to call into question the volition behind many criminal acts. Minor changes in the balance of brain chemistry, even small ones, can cause large and unexpected changes in behavior. See, e.g., David Eagleman, “The Brain on Trial,” The Atlantic (July/August 2011), available online at http://www.theatlantic.com/archive/2011/07/the-brain-on-trial/85201/. Beyond biological changes brought on by drugs and disease, our very ability to make appropriate choices is influenced by our beginning biology and the environment we grow up in. Our client’s mother’s substance abuse during pregnancy, low birth weight, neglect and physical abuse as a child, head injuries, and untreated childhood disease all affect development—and accordingly their adult ability to control behavior. Alternatively, consider a completely well-developed adult and introduce completely legal medication such as Xanax, Lunesta, or Ambien and you can and will find bizarre and frightening results.

It is extremely important that all of these avenues be researched, and it is our duty as attorneys to educate ourselves on our client’s issues and situations. In your interviews with friends, family, and doctors, find out what medication your client is on and what medical problems they have. Know the side effects of the medication your client is taking. Familiarize yourself with more common psychological disorders to be able to spot them in clients who may have never been diagnosed. When friends and family tell you that the criminal actions your client is accused of are completely out of character, ask yourself, “What is causing it then?” A change in medication? An undiagnosed issue? Remember, it was a nickel-sized brain tumor on the thalamus of Charles Whitman’s brain that caused him to kill 13 people and wound 32 more from the UT Tower in 1966.

In order to be able to truly assist your clients you will at some point need expert assistance. Psychologist, psychiatrists, medical doctors, therapists, pharmacologists, and so on can help with biological and developmental explanations and mitigation.
Gang experts, parole experts, and prison consultants can help convince a judge or jury that a shorter sentence with rehabilitation would be more beneficial than long-term incarceration. The goal is to explain the factors that led to a bad decision, and how those risk factors can be taken away in the future through treatment, medication, and rehabilitation.

If your client, either appointed or retained, is indigent and cannot afford to pay for necessary expert assistance, you must request court funds pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985). If you cannot get the money you need to properly investigate your case, you should move to withdraw. Ex Parte Briggs, 187 S.W.3d 458, 468 (Tex. Crim. App. 2005).

IV. Technical Considerations

A. Enhancing Ranges of Punishment

For every case, step through your information or indictment for the charge itself and every enhancement allegation. There are specific enhancements to different types of crimes (e.g., multiple charges of DWI, Burglary of a Motor Vehicle, Evading Arrest, or Prostitution) and different enhancements outside the charges themselves. A Drug Free Zone enhancement, found in Texas Health and Safety Code §481, will not only increase the potential jail time for your client, but can also make the sentence automatically stacked. Tex. Health & Safety Code §481.134(h). Also, don’t be surprised if the State is attempting to enhance something improperly. Go through each and every charging instrument every time.

Different enhancement rules apply to different levels of charges. It is important to figure out if the charge your client is facing has been enhanced, or only the punishment range. State Jail Felonies will always be State Jail Felonies. Even if the punishment is enhanced by prior State Jail or penitentiary trips, they are still State Jail convictions. This does two things. First, your client can never face more than second-degree penalty ranges for a State Jail offense, 2–20 years. See Dickson v. State, 986 S.W.2d 799, 803 (Tex. App. Waco 1999). Second, even if a prior charge has been enhanced to penitentiary-level punishment, a State Jail offense can never be used to enhance a 1st-, 2nd-, or 3rd-degree felony. Campbell v. State, 49 S.W.3d 874, 877 (Tex. Crim. App. 2001).

Remember too that in enhancing 1st-, 2nd-, and 3rd-degree felonies, “the State carries the burden of proving beyond a reasonable doubt that a defendant’s second previous felony conviction was committed after the defendant’s first previous felony conviction became final.” Jordan v. State, 256 S.W.3d 286 (Tex. Crim. App. 2008). A conviction is not final if a case is appealed. Jones v. State, 711 S.W. 2d 634, 636 (Tex. Crim. App. 1986). If the evidence of a prior conviction raises the question of an appeal or final disposition, the State has the burden of making a prima facie showing of finality. Id.

Finally, remember that even if your client is convicted, but is given community supervision, the conviction is not final (so cannot be used to enhance) unless the community supervision is revoked. Ex Parte White, 211 S.W.3d 316 (Tex. Crim. App 2007), citing Ex parte Langley, 833 S.W.2d 141, 143 (Tex. Crim. App. 1992), citing Ex parte Murchison, 560 S.W.2d 654, 656 (Tex. Crim. App. 1978). (“[I]t is well-settled that a probated sentence is not a final conviction for enhancement purposes unless it is revoked”). More importantly, if a conviction is set aside after probation pursuant to Texas Code of Criminal Procedure 42A.701(f), that person “is not a convicted felon.” Cuellar v. State, 70 S.W.3d 815, 818 (Tex. Crim. App 2002) (emphasis in original). Rudy Cuellar was convicted of Unlawful Possession of a Firearm by a Felon, but had his conviction overturned because the underlying predicate felony was discharged after community supervision. Id.

The Legislature has made an exception where some probated sentences can be used to enhance in Texas Penal Code §12.42(g). Check all of the enhancements that the State is attempting to use against your client, and make sure they are actually useable to enhance.

On a practical note, try and be strategic in how you deal with enhancement paragraphs. Remember that just because an enhancement is presented, the judge or jury does not have to find them true. They must be proven beyond a reasonable doubt. This can create an equitable argument for your client who is facing 25 to life because of 2 prior felony convictions from 30 years ago. There is no legal basis for a judge or jury ignoring proof of a prior, but it can be done. Alternatively, if you are looking at deferred probation when enhancement paragraphs are present, ask your judge to defer a finding on the enhancement paragraphs as well. That way if revoked, your otherwise 25-to-life client may still have some wiggle room if you can work out a plea.

B. Stacking

The concurrent or cumulative imposition of sentencing is governed by Texas Code of Criminal Procedure §42.08 and Texas Penal Code §3.03. For multiple offenses out of the same criminal episode that are prosecuted in one trial, the sentences must run concurrently unless they fall under the exceptions to §3.03, or are specific in the charge as with Drug Free Zones mentioned above. If the offenses are out of multiple criminal episodes, or if they are tried separately, the decision to run sentences concurrently or consecutively is completely in the discretion of the

Make sure to check that the offense you are defending is not stackable, or mandatorily stacked. One way to get around mandatory stacking is to plea bargain or have your client found guilty of an “attempt” of the offense. A conviction for an attempt to commit one of the offenses under Section 3.03 does not qualify for the stacking of sentences. Parfait v. State, 120 S.W.3d 348, 350 (Tex. Crim. App. 2003).

C. Judge v. Jury

The determination of whether you will present your case for punishment to judge or jury will largely be a case-by-case determination. It will depend on the judge you are in front of, the jury pool you can expect to draw from, and how your specific facts will play to each one. Take the time to research your audience. If you are not familiar with a judge or jurisdiction, ask attorneys who have practiced there before. One judge may be great to hear a certain case, while the other may tend to give defendants maximum sentences.

In either instance, you must make the election for punishment prior to the beginning of voir dire. If an election is not made, then punishment will be determined by the judge. Tex Code Crim Proc. 37.07 §2(b). In order to elect for a jury to assess punishment, the request must be made in writing prior to the beginning of jury selection. Id. After a finding of guilty you can change your election of who will assess punishment, but only with the consent of the State. Id.

Aside from personality determinations on who will assess punishment, there are some technical matters to keep in mind. The judge is the only person who can give your client Deferred Adjudication Probation—and then only on a plea of guilty or nolo contendre. Tex Code Crim Proc. 42A.101. As an interesting side note, depending on the judge you are in front of, the judge may still acquit your client upon a plea of nolo contendre. See In re State ex rel. Villalobos, 2006 Tex. App. LEXIS 109, 2006 WL 20617 (Tex. App. Corpus Christi Jan. 3, 2006) (mem. op., not designated for publication). In contrast, a judge cannot give straight probation in cases that involve a finding of a deadly weapon, murder, capital murder, indecency with a child, aggravated kidnapping, aggravated sexual assault, aggravated robbery, sexual assault, injury to a child in the first degree, sexual performance of a child, criminal solicitation in the first degree, if there is an affirmative finding of a Drug Free Zone or that a child was used in a drug offense, or when the minimum punishment is over ten years. See Tex Code Crim Proc. 42A.054. Many, but not all, of those charges can receive deferred adjudication.

If you elect to have a jury assess punishment, then the judge is required to suspend the sentence if it is recommended by the jury and the defendant otherwise qualifies for probation. Tex Code Crim. Proc. 42A.055. In order to qualify, the defendant must have not been previously convicted of a felony and must file a sworn motion before the commencement of trial to that fact. Tex Code Crim. Proc. 42A.055(b). The length of the community supervision cannot be less than the penalty recommended by the jury. Tex Code Crim Proc. 42A.053(d) (1). For example, if the jury returns a sentence of five years with a recommendation for community supervision, the least amount of community supervision the judge can impose is five years. Remember, even a jury cannot recommend community supervision for a sentence over ten years, or for a conviction for indecency with a child, aggravated sexual assault, sexual assault, sexual performance by a child, aggravated kidnapping of a child under 14 with the intent for sexual abuse, or murder. Tex Code Crim. Proc. 42A.056. Additionally a jury cannot recommend community supervision if there is an affirmative finding of a drug-free zone when there has been one in the past. Id.

The other consideration to make when presenting a punishment case to a jury is how to start preparing them in voir dire. It can seem weird to talk to a jury about punishing your client in the same breath that you’re reminding them about the high burden of beyond a reasonable doubt and how your client is innocent until proven guilty. It doesn’t have to be, though. In fact, ferreting out jurors’ opinions on punishment and rehabilitation can often help identify those jurors who would be better or worse during the guilt and innocence portion of your trial. It is a proper question to ask the panel what factors they feel are important in assessing a sentence. Davis v. State, 349 S.W.3d 517, 519 (Tex. Crim. App. 2011). It is also proper to ask prospective jurors if they can follow charging instructions not to consider parole, and if they can consider the entire range of punishment. Jones v. State, 223 S.W.3d 379, 382 (Tex. Crim. App. 2007). Knowing what buttons may press a juror one way or another can assist not only in punishment but also when presenting your client's
D. Community Supervision

Too often, prosecutors, and even our judges and jurors, think that probation is akin to an acquittal. It is anything but. Knowing what Community Supervision is, and what it is not, can help you overcome this perception and get your client on probation if that is what they want. More importantly, knowing ahead of time what probation is really going to mean for your client will help you plan accordingly to advocate for that goal.

As noted above, there are two types of community supervision: deferred adjudication or a suspended sentence, a.k.a. straight probation. Deferred adjudication probation, while potentially beneficial because there is no finding of guilt, has limitations and potential liabilities that should be considered. Only a judge can grant deferred adjudication. Tex Code Crim Proc. 42A.101. However, a judge cannot grant deferred adjudication in a number of cases. Additionally, your client will face the entire range of punishment on a showing that they violated their deferred community supervision. It is important to consider what is more important: avoiding a final conviction or limiting your client’s potential exposure to incarceration down the road. Finally, remember that deferred adjudication will not remove the entire taint of a guilty plea. Even after dismissal and discharge, deferred adjudication can be used in subsequent punishment proceedings. Tex Code Crim Proc. 42A.111 It can also be used in consideration for certain licenses, and cannot remove affirmative findings of family violence or requirements under the Sex Offender Registration Program. Id. Deferred adjudication will also usually be treated the same as a finding of guilt for deportation and removal proceedings with Immigration. Moosa v. INS, 171 F.3d 994, 1005–06 (5th Cir. 1999) (holding that deferred adjudication is considered a conviction for immigration purposes).

In contrast, a suspended sentence or straight probation is where your client is sentenced to some term in jail or prison and then that sentence is suspended pending some period of community supervision. In this type of probation your client is convicted of the underlying crime and will remain so without additional action by a judge. See Tex Code Crim Proc. 42A.701.

Additionally, be aware that §42A.301 gives the judge the ability to impose “any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant.” Tex Code Crim Proc. 42A.301(a). This includes confinement as a condition of probation, which can be added at any time during the probation. Tex Code Crim Proc. 42A.302.

There are limitations on conditions of probation that a judge may impose based on your client’s ability to pay for those conditions. A judge must consider the ability of a defendant to make payments before imposing monetary conditions as a condition of probation. Tex. Code Crim. Proc. 42A.655. The trial court’s ability to order terms and conditions of probation is limited to the ability of the defendant to pay. Mathis v. State, 424 S.W.3d 89, 94 (Tex. Crim. App. 2014).

Be aware of what will be and may be required of your client on supervision. This is important for three reasons. The first is when making a plea for probation to judge or jury, you can use this information to remind them that probation is not letting your client get away with anything. The State will often argue that probation is somehow the same as an acquittal, which is simply not the case. The second is to be aware of what conditions are usually imposed, what conditions are going to be imposed, and argue for your clients on what should be imposed. Conditions of probation are completely within the discretion of the judge, which means that conditions can be added or taken away depending on what we ask for.

Finally, make sure that probation is the right thing for your client. Is it in the client’s best interest to have 25 to life hanging over their head with a pretty good chance they will violate their probation? Should they place themselves under the control of the court for up to ten years when they could resolve the case with some relatively small amount of jail time? These are important factors to consider when deciding on what to ask for in a punishment case.

V. Conclusion

Let’s be honest: Punishment is the last place that any defense attorney really wants to be. It means we lost, right? No, not necessarily. What happens to our clients after they’ve been convicted is just as important (or sometimes more so) than whether they are convicted. The conviction on their record may mean a lot less than the number of days, months, or years that they will be spending in prison. Punishment is the place that with good preparation and a little creativity we can make a real difference for our clients.

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This article is meant for the criminal lawyer who seldom does work in the area of prison law. Particularly the area of due process applied to prison discipline activity. I wrote this article as a respectful effort to show my appreciation to a journalist friend named Keri Blakinger with the Houston Chronicle. Because of her effort and the outstanding results achieved by her investigative effort and reporting skills, she recently exposed a series of long-going prison discipline abuses and published her findings in the Houston Chronicle. Her outstanding work has caused me to want to refresh my awareness of the law of prison discipline actions where inmates stand little chance when the administrative law deck is stacked against them by guards using illegal and fraudulent means by which to gain administrative convictions. Her recent publications reflect what I believe to be the “tip of the iceberg” when it comes to the all-too-frequent abuse inmates suffer when subject to fraudulent prison discipline activity.

Keri’s good work exposing the fraudulent and illegal discipline activity at the Ramsey Unit near Angleton, Texas (and some other units), has resulted in the reversal of hundreds of defective discipline actions in selected Texas prison units. Keri’s writing did more good in exposing these problems for the TDCJ inmate population than a team of civil rights lawyers might do with a federal court judgment. It has also led to the reported termination of employment of several TDCJ unit employees. The violations by some TDCJ ex-employees are reported to
have included the illegally setting quotas for prison guards to meet each day by requiring the filing of inmate discipline actions—and include her discovering that some guards were planting evidence in some cases to secure inmate administrative convictions. Some terminated employees are reported to be subject to criminal investigation for their conduct while on the job. I understand a few indictments have issued against former prison employees.

While I certainly take no credit for the exceptional investigative reporting by Ms. Blakinger in her series of articles, I hope I contributed to her interest in pursuing these issues.

Shortly after Keri was hired by the Chronicle, we both learned of each other, and we met for dinner. She had been brought to Houston by the Chronicle to cover criminal justice, and that included prison issues. We met to get to know each other, and to discuss issues of mutual interest involving the world of Texas corrections. While my practice these days is generally limited to matters that relate to parole and I only limitedly get involved in litigation of prison issues, Keri is an experienced prison journalist, and she understood that discipline infractions by inmates can seriously affect their parole status and quality of prison life. We enjoyed a great evening discussing our past experiences and discussing how poorly enforced prison policy affects both inmates and their loved ones. I believe I can speak for both Keri and me when I state that abusing inmates in discipline matters by fraudulent allegations, fraudulent evidence, and unjustified and unearned punishment causes great disrespect by offenders for all those who administer the enforcement of prison rules. Such activity does nothing to enhance rehabilitation, and as Keri's article points out, there has been way too much of it ongoing in TDCJ prison units.

This article is just a basic, brief, and very general review of the limited Constitutional Rights and procedures available to inmates facing a prison discipline action. Limited Constitutional Due Process applies to protect what is known as an illegal loss of a liberty interest. As a practical matter stated in general terms, loss of a liberty interest means:

1) Loss or reduction of good-time earning capacity (loss of a liberty interest) afforded by prison state administrative policy reducing one's ability to retain a previously achieved level of good time, or
2) or a discipline action that creates the loss and/or reduction in good-time ability as punishment.

Since one can suffer the loss of good time earning capacity as punishment or can suffer a reduced class rank resulting in a reduced allotment of good time earning capacity as punishment, in either case this equals the loss of a liberty interest. The wrongful taking of even one day of prison time credit arising from a defective discipline procedure is subject to the protection of one's Due Process Constitutional protection (see Wolff and Sandin cases (supra)).

In Teague v. Quartermian, 482 F.3d 769 (5th Cir 2007), loss of good time, even a small amount of good time, arising from a discipline action is not de-minimus in nature. This decision also makes clear that it no longer makes a difference if the time-credit loss affects one subject to mandatory supervision (in effect from 1976 to 1996) or discretionary mandatory supervision (which began in 1996 to present). Both forms of mandatory relief now have limited protected liberty interests.

**Due Process and Prison Discipline**

The two major U.S. Supreme Court cases that speak to the aspects of the basic Fifth and Fourteenth Amendment Due Process rights of inmates facing discipline actions are found in Wolff v. McDonnell, 94 S.Ct. 2963 (1974), and Sandin v. Conner, 115 S. Ct. 2293 (1995). (Many other cases apply to how prison due process applies to discipline activity, but for purposes of this article I refer the reader to the above two primary cases as good starting points. However, before undertaking litigation representing a client in a prison discipline case, any defense lawyer should carefully study all the twists and turns discipline cases have created. It is my opinion this area of law is not one affording the offender an even balance of current due process.)

In Wolff the USSC determined the following due process applies:

1) A 24-hour advance notice of allegations must be given prior to any hearing.
2) Written statements are required by the fact finder of evidence relied upon and reasons for the ultimate decision.
3) The prisoner may be allowed to call witnesses and present documentary evidence in his/her defense, providing there is no undue hazard to institutional safety or correctional goals. (Note there is no absolute right to confront and cross-examine a witness as that is discretionary with the prison disciplinary board. See Sandin v. Conner, 515 US 472 (1995).)
4) Counsel substitute should be allowed when the prisoner is illiterate or when the complexity of the issues make it unlikely that the prisoner will be able to collect and present the evidence necessary for an adequate comprehension of the case.
5) The prison disciplinary board must be impartial. (Note there is NO provision that the offender has a right to licensed counsel).
The provisions of *Wolff* left many legal authorities with concern that the due process afforded was insufficient to provide fairness in a prison setting. What defense lawyers should keep in mind is that while not all Constitutional Rights disappear when the prison gates slam, still many due process rights are at times greatly impaired. After *Wolff*, certain circuit courts began to fill in the due process gaps *Wolff* failed to install. For example, in one case in Wisconsin the Court expanded the "Notice" provision to include that the offender must have the right to respond to the notice when faced with suspension of privileges. A circuit court also determined that where the offender is facing not only a prison discipline action but also a state criminal action, legal counsel must be afforded. Yet another decision suggested:

When denied the right to confront and cross examine a witness, the inmate must receive written reasons for the denial, and if this requirement fails, then it will be deemed a prima facie evidence of an abuse of discretion.

It is likely that these expanded rights afforded by Federal District Judge decisions after *Wolff* were caused by trial judges looking back to the *Wolff* case. Judges may have incorrectly presumed they could "fill in the blanks" where they felt a lack existed in discipline due process upon reading what Justice White had expressed in the *Wolff* decision:

Our conclusion at some, but not all, of the procedures specified in Morrissey and Scarpelli must accompany the deprivation of time by state prison authorities is not graven in stone. As the nature of the prison disciplinary process changes in future years, circumstances may then exist which require further consideration and reflection by this court.

Later the Supreme Court corrected those lower decisions, making additions to the due process of the *Wolff* case. In *Baxter v. Palmigiano*, 425 US 308 (1976), expanded due process added by district courts like those above noted from the likes of the *Taylor* decision were removed. In *Baxter* the court added that due process from the *Wolff* decision was the standard to be used. In addition, *Baxter* indicated that:

… adverse inference may be drawn from an inmate’s silence at his or her disciplinary hearing.

*Baxter* also noted, “Federal courts have no authority to expand the *Wolff* requirements, which have the extent of cross examination and confrontation of witnesses (left) to the sound discretion of prison officials.”

Finally, the *Baxter* court noted (referring to the likes of the circuit decisions such as the *Taylor* case):

The Court of Appeals acted prematurely when it required procedures such as notice an opportunity to respond even when an inmate is faced with a temporary suspension of privileges as distinguished from a serious penalty.

**Low Burden of Proof in a Prison Discipline Case**

There are several frustrating issues that can result when dealing with a discipline hearing. For example, the extremely low burden of proof the prison must meet. All the prison must prove to make a discipline case against an inmate is that they introduce “some evidence” to support a discipline allegation. “Some evidence” means almost any minimal evidence at all. (See *Clarke v. Stalder*, 154 F3d 186 (5th Cir. 1998).) This is the lowest burden of proof that exists in our legal system. This fact alone gives the prison a huge benefit and makes winning discipline cases extremely hard for the prisoner.

**Suffering a Major Discipline Time Loss and Parole Eligibility**

Other frustrating realities include the fact that the loss of good time or line class good-time earning ability can set back one’s parole consideration for some time—as long as a year to 18 months. (Unless it is the first parole vote, as one’s initial parole vote is determined by statute. However, a major discipline action prior to the initial parole vote can result in a negative outcome in a first parole hearing.) One can also be punished by loss of a job assignment, can be transferred, and can even lose certain privileges such as visitation, commissary, and other similar privileges as a sanction punishment for violating prison regulations.

**Lawyers Are Not Allowed During These Administrative Procedures**

During a prison discipline hearing, there are only minimal Due Process rights afforded inmates. (See *Murphy v. Collins*, 26 F3d 541 (5th Cir 1994).) This does not include the right to legal counsel. However, where the inmate is illiterate or suffers from disabilities that affect one’s ability to represent him/her self, then in certain cases, the offender may be entitled to a “counsel substitute.”

Note, there is only a limited right to a “Counsel Substitute.” These are usually prison employees who are not lawyers and serve when the offender appears to need assistance. There is no
right to have a lawyer when facing an administrative prison discipline action. The Supreme Court has determined that a prison discipline action has to do with the administrative functions of a prison. The courts have indicated that lawyers have no business involved in prison administration discipline matters.⁹

**Who Is Exempt from Litigating a Wrongful Discipline Case?**

Note that if one has a 3(g) offense, or a conviction where the benefit of good time credit is not applicable, then there is no right to later challenge a discipline finding in a court of law even if one alleges a violation of Due Process rights during that hearing. (See Art. 508.149 Tx. Govt. Code.)

On the other hand, if the offender qualified for good-time credit and is punished by loss of time credit or class standing, thus causing a decline in good-time earning capacity, these rules of due process do apply. Once the hearing is over, the offender, most usually on his/her own, must exhaust all administrative appeal procedures. Then there are circumstances where litigation over any constitutional error that is alleged during the hearing may be litigated. To reach the prospect of litigation when challenging constitutional violations that have occurred in a discipline hearing in a court, one may use a lawyer, but first there are steps the qualifying offender must take before seeking the protections of the court. First, the offender (without legal assistance) must follow each step in the administrative appeals process to “exhaust administrative remedies.” Again, lawyers can afford little to no assistance during the administrative appeal process. However, once exhaustion of administrative remedies is completed, and if no relief has been granted the offender, then a trip to federal court may be considered—where a lawyer can be brought into the game.

**Challenging in Court the Loss of Good Time or Classification Standing (Ya Gotta Stay Out of State Court)**

First, to pursue litigation there must be the loss of good time or time-credit classification. (This loss amounts to the “loss of a Liberty Interest.”) This means that the offender must be convicted of an offense which affects the earning of good-time credit. Otherwise, litigation has no meaning since no “good time” has been lost, and there is no loss of a liberty interest. The offender must be convicted of an offense that affords one the right to good-time credit to benefit parole eligibility. If one so qualifies, then after all administrative remedies have been exhausted, and, if there are constitutional due process violations within the discipline proceedings leading to the taking of one’s time credit (even if it was only one day of lost time credit), the inmate may file a writ of habeas corpus to challenge the alleged constitutional violation(s) and seek restoration of the lost time credit. However, there are several serious barriers such litigator must overcome.

The first barrier is the fact that one cannot file for relief in a Texas State Court. Texas courts have indicated they will hear no more writs challenging prison discipline actions. (See Ex parte Brager, 704 SW2d 46-A (1986).) The appropriate remedy is to file in federal court. Jurisdiction issues are discussed in Brager (infra), Preiser v. Rodriguez, 411 U.S. 475 (1973), and Wilkinson v. Dotson, 125 S.Ct. 1242 (2005).¹⁰ Since time credit is involved, one files a writ, and not a civil rights action. (See Wilkinson [infra], which overrules Heck v. Humphrey, 512 US 477 (1994), and clears some of the procedural smog from Edwards v. Balisok, 117 S.Ct. 584 (1997).)

Once all administrative law procedures are exhausted, one can then litigate any discipline constitutional violation believed to exist within that proceeding, but one must file a writ of habeas corpus in the Federal courts. Normally, jurisdiction is where the alleged violation took place—see 28 U.S.C. Sec 2254 (this is the statute to use when challenging the fact or duration of one’s confinement). This procedure can be complicated, it can potentially take several years of litigation before the issue is resolved, and if a lawyer is employed, the cost and time involved can be prohibitive to most inmates. If the inmate prevails in a litigated matter, it is normal for Texas to appeal till no more appeal exists.

Many inmates make the mistake of challenging the results of discipline actions by filing a federal civil rights suit under 42 USC Sec. 1983, which requires the filing of a writ, and not a civil rights action. (See Wilkinson v. Dotson, 125 S.Ct. 1242 (2005), will show where the issue in question relates to the loss of time credit or is an attack on the validity of one’s conviction, Wilkinson requires the filing of a writ of habeas corpus (28 USC 2241).¹¹ Civil rights litigation is reserved for challenging constitutional issues arising from the conditions or procedures within the policies by which a prison or parole agency operates.

**There Are a Few Cases Where Litigation Does Pay Off**

There are those few efforts at litigation of a discipline case where the inmate wins. For example, Bransard v. Johnson, 918 F.Supp 1040 (D. Texas 1996), where the only evidence presented amounted to a conclusion given by the investigating officer who got his evidence (and conclusions) from the warden’s personal opinion. Thus, a hearsay problem presented itself. There must
be REAL EVIDENCE to support an adverse decision.

Morgan v. Dretke, 433 F.3d 455 (5th Cir. 2005), where the offender was charged with assaulting a guard. Turns out that there was no discipline action listed as assaulting a guard, so the case had to be reversed to find an offense for which discipline could be administered.

In Berenguel v. Bell et al., No. 07-10066 (5th Cir. 6-27-08 unpublished), where the inmate's First Amendment rights were violated when the mail room interfered with his communication with his lawyer, letters to his mother, and his filing of a grievance to appeal the discipline action.

Adams v. Gunnell, 729 F.2d 362 (5th Cir 1984), where the inmate prevailed as the notice of violation pointed to a rule violation that did not exist in the prison discipline rulebook.

Cassels v. Stalder, 342 F. Supp 555 (M.D. La 2004), where the offender was disciplined for “spreading rumors” because his mother put an internet message up that her son in a Louisiana prison was not being afforded proper medical care. The case was reversed, and the alleged rule was removed from the prison publications of inmate rules.

In Summary

Prison discipline proceedings are intended to enforce compliance with legitimate penal social structure and safety. The problem is that the administrative rules of discipline are administered by prison employees who too frequently abuse the intended purpose of the intent of discipline procedures, often resulting in segregation or loss of access to commissary or parole eligibility.

We hear of way too many incidents where, just as a parole date approaches, an offender is charged with a highly questionable discipline action, the offender is found guilty and loses his parole date. Or, where parole has just been granted, some guard or inmate with a dislike of said inmate will create a discipline action, causing the offender to lose his parole.

Recently we have seen that guards can, and do, “set up” inmates by planting illegal evidence in a cell or by creating fraudulent allegations leading to a wrongful conviction of a discipline rule. The damage that visits the inmate and his/her loved ones over intended or fraudulent discipline abuses by TDCJ employees occurs far too often and causes far too much unnecessary emotional pain and frustration for the offender and loved ones. Such action by institutional TDCJ employees does not further inmate respect or rehabilitation. Thank God for Keri Blakinger and the Houston Chronicle for her exposing the reality of this damage.

One thing I have learned in my 40-plus years of representing inmates with prison and parole issues is that our prison does not do a very good job of policing its own operations. As to the future, and relying upon the many years I have observed those dealing with inmate life in the Texas prison system, I expect little will change. It is my observation that the administration of TDCJ does not pursue or get overly active when it investigates inmate claims of abuse of any kind until some journalist or judge takes the time to publicly expose what will be ongoing abuses in discipline actions. TDCJ’s attitude in disregarding inmate abuse is what brought Judge William Wayne Justice to call the infamous Ruiz v. Estelle case to the bar. During the period from the middle-to-late 1960s into the early 1970s, many states faced major constitutional issues with their prison systems, resulting in major litigation facing the Civil Rights Section of the Federal government. It strikes me as no surprise that to my knowledge, all such litigation was resolved with consent decrees—EXCEPT TEXAS, where Ruiz went to trial and created the most expensive civil rights litigation that the Federal Civil Rights Section ever engaged. What a waste of taxpayers’ money.

I suggest the U.S. Supreme Court might revisit the limited disciplinary due process rules currently in effect, and if so, maybe an independent Administrative Judge not employed by the prison or associated with TDCJ in any way, acting as the hearing officer, might make the system work more as intended by the Supreme Court justices.13 But I am not holding my breath.

Notes

2. Particularly see articles published in the Chronicle on May 5th, June 4th, June 11th, June 14th, July 20th, and Aug. 30th of 2018.
3. It has long been my opinion that one good journalistic exposure of a Texas Prison scandal is a faster way to correct an ongoing prison abuse than a federal court judgment.
4. Good time only acts to benefit reduction of the time one must serve before being scheduled for one’s next parole or discretionary mandatory supervision date. It does not deduct any time credit from one’s sentence expiration. In Texas, one sentenced to ten years in prison does not more promptly expire a sentence due to good time. One must serve every day of that ten-year sentence either in prison or on parole or discretionary mandatory supervision. (See Sec. 508.149 Tx. Gov’t Code for a list of those offenses that are exempt from good-time benefits.)
5. Mandatory Supervision is a legislatively mandated release of a prisoner to parole supervision when the combination of actual calendar time and good-time conduct time equal the total balance of the sentence. Good conduct time is credited to an offender for participating in work and self-improvement programs.
Not all offenders are eligible to litigate final administrative discipline actions. Offenders convicted of offenses listed under Sec 508.149(a), Texas Government Code, are not eligible. Also, the Board may deny mandatory release on a case-by-case basis for offenders whose offense date was on or after September 1, 1986. This is known as DISCRETIONARY mandatory supervision. For greater details and policy, one can review Parole Division Policy Statement #PD/POP-2.2.26.
7. Morrissey and Scarpelli refer to the two U.S. Supreme Court cases deal-
ing with Constitutional rights of those facing parole or probation revocation. 

8. *Wolff v. McDonnell*, 418 US 539 (1974): Substitute Counsel is generally a prison employee who assists inmates who lack the intellectual ability or have some other valid reason to be entitled to such assistance. These persons rarely have much legal training.

9. If a violation of constitutional rights takes place during an administrative hearing, once the offender exhausts all administrative remedies, a lawyer may then agree to represent that offender in a Federal writ of habeas corpus to challenge any Constitutional violation arising in that discipline action. Texas Courts no longer entertain state writs regarding discipline actions. (See *Ex parte Brager*, 704 SW2d 46-A (1986).)

10. *Wilkinson* is a very important case as it tries to clear up when one should file a writ vs a civil rights action (42 USC Sec 1983) when attempting litigation in a prison matter involving Constitutional rights of an offender. Most importantly, *Wilkinson* clears up the procedural issues that arose as a result of the *Heck* and *Edwards* cases above cited.

11. Prisoners may file post-conviction habeas corpus petitions under 28 USC 2241 in two circumstances:

1) Where the prisoner does not challenge the validity of his conviction and sentence, but rather its execution, such as times when the calculation of time credit is in dispute.

2) In exceptional cases where the prisoner can show that his remedy under Section 2255 is inadequate or ineffective under 28 USC 2255. Some suggest the writ should be joined by alleging both 28 USC 2241 and 28 USC 2254.

13. In closing, any reader interested in the history of the Texas prisons, it is my strong suggestion that such party purchase a copy of *Texas Tough* by Dr. Robert Perkinson, published by Metropolitan Books (2010). It is the most complete history of the Texas prisons yet published.

Bill Habern graduated from the Texas Tech School of Law in 1972. In the early 1970s he was an early member of the public defender’s office at the Texas Prison. He left that program and started his own practice, where he specialized in issues related to state and federal sentencing, parole, prison, and post-conviction matters for the next 40 years. He served as Executive Director for the Texas Criminal Defense Lawyers Project in the late 1970s, and thereafter for 10 years served as a member of the TCDLA Board of Directors and chair of the TCDLA Corrections Committee for over 20 years. Habern has published numerous articles and seminar papers dealing with prison, parole, and prisoners’ rights issues. In 2011 Bill received the Lifetime Achievement Award presented annually in Houston by the Harris County Criminal Lawyers Association, and in 2012 he and his firm were awarded the Mathew Plummer Sr. Award given annually by the Houston Lawyer’s Association to the law firm that “represents a commitment for securing equality for all people.” This award stemmed from the firm’s civil rights litigation on behalf of offenders placed on sex offender parole conditions even if they were without being convicted of a sex offense. These lawsuits resulted in hundreds of affected offenders with no sex convictions being removed from these unconstitutionally imposed sex offender parole conditions. Habern has been recognized as a Texas Super Lawyer. In 2016 Habern was inducted into the TCDLA Hall of Fame. Bill Habern and Nancy Bunin maintain a law practice in Houston, Texas. You can reach him at bill@parolecounsel.com.
When the trees move, the enemy is coming; when there are many blinds in the undergrowth, it is misdirection. Thus, what is of supreme importance in war is to attack the enemy’s strategy.

—Sun Tzu

**Misdirection**

What is misdirection? It is a form of deception in which the attention of a person is focused on one thing in order to distract his attention from another. When a magician holds a shiny coin up in the air in his right hand, telling you to look at this, while his left hand discretely reaches in his pocket to grab something, he is directing your attention away from what is really happening in an effort to trick you. And it works!

Attention can be controlled in various ways. Misdirection has much to do with re-framing the audience’s perception, and perhaps very little to do with the senses. The
minds of the audience members are distracted into thinking that an extraneous factor has much to do with the accomplishment of the feat, whereas it really doesn’t have any bearing on the effect at all. “The true skill of the magician is in the skill he exhibits in influencing the spectator’s mind.” (Dariel Fitzkee, Magic by Misdirection, pg. 33, copyright 1975).

Misdirection takes advantage of the limits of the human mind in order to give the wrong picture and memory. The magician uses this to manipulate the audience's ideas, or, perceptions of sensory input, leading them to draw false conclusions.

Misdirection is also a chess master's tool. The basic strategy of chess is to attack another player's side and weaken their position, eventually taking several pieces. One way to do this is by luring an opponent into a trap and then take a key piece. It might be done by sacrificing a less important playing piece of one's own in exchange for an opponent's important piece. The idea is to use misdirection to possibly hide which piece will move in to capture the exposed piece.

Misdirection in trial is a form of deception in which the attention of a jury is focused on one thing in order to distract its attention from another. It is used to cause the jury to become so concerned about other disturbing facts that are unrelated to the elements that must be proved that they forget about the offense and are encouraged to convict because of the other, shiny coin facts that are not even relevant to the offense.

Granted, this is a trial strategy that can be incorporated by either side, but I see this being used frequently by the state. In their defense, most of the time it isn’t even intentional. The reason I say it’s not intentional is because sometimes all the extraneous drama and other facts that are not relevant to the actual elements are just too attractive and too tempting to avoid presenting. The state has trouble separating them from the elements they must prove. They cannot resist the urge to misdirect the jury by waving the shiny, irrelevant facts, around like a flag, like a magician trying to distract his audience from what is really important.

For the state, it can be a very effective way to draw jurors’ attention away from what must be proved and instead have the jury focus on other facts that just make your client very disliked. In a DWI case, for example, these misdirections can include bad driving facts that even non-intoxicated people commit all the time (like disregarding a red light, driving with no lights on, being asleep behind the wheel, being in an accident, weaving because of texting while driving, or making derogatory statements to the police).

It is your job as the trial lawyer to recognize attempts of misdirection and expose this type of trial tactic. You must begin exposing this misdirection in voir dire, talk about it in opening and then re-emphasize in closing that the state is trying to re-direct the jury’s attention away from what must be proven and towards some shiny coin that does not prove anything.

We must expose the misdirection.
We must draw a line of separation.
You must draw a line with physical gestures in your closing.
Consider using a flip chart to distinguish for the jury between facts that prove the offense and irrelevant facts that were introduced in an effort to misdirect.

There are opportunities for the state to mislead and mis-direct a jury in any type of criminal offense. Jurors do not like lawyers who try to trick them. If you expose these attempts of misdirection, the jury will turn on that lawyer in an instant. Jurors will be so offended at this attempted deceit that you will be in a position to win them over and greatly increase the chances for a favorable verdict for your client.

The only real lawyers are trial lawyers, and trial lawyers try cases to juries.
—Clarence Darrow

Tyler Flood was born and raised in Houston. He graduated from Southwest Texas State University, where he spent his summers swimming with Ralph the famous swimming pig at Aquarena Springs amusement park. After graduating from college, Tyler worked in the music business for three years as a talent buyer/concert promoter for what is now Live Nation. Tyler hung out his shingle in 2003. He is a past president of Harris County Criminal Lawyers Association. He is married to Aimee and has two boys, Senator and March. Tyler is Board Certified in Criminal Law by the Texas Board of Legal Specialization and Board Certified in DUI law by the DUI Defense Lawyers Association. He holds the designation of Lawyer-Scientist from the American Chemical Society and owns the Texas Forensic Analytics lab. He can be reached at tyleraflood@gmail.com.

Looking for a motion that ran in the Voice? Check out the members-only section of your TCDLA website.
www.tcdla.com
The Texas Criminal Defense Lawyers Association team of lobbyists is ready to dive into the 86th Texas legislative session. This year, the team is composed of Allen Place, Shea Place, and David Gonzalez. We wanted to share a little about who we are and what we do both in and out of session.

Allen Place has worked for TCDLA for 20 years. Allen is a former State Representative of nearly 10 years. He was Chairman of the House Committee on Criminal Jurisprudence and authored the Penal Code revision during his time in the legislature. Allen maintains a general trial practice at his firm, Place Law Office, in his hometown of Gatesville, now primarily focusing on parole law.

Shea Place, a 2015 Baylor Law School graduate, practices with the Place Law Office in Austin. Shea joined the TCDLA team for the 2017 session and continued to assist with legislative efforts throughout the interim. You can catch regular legislative updates from her on the TCDLA listserve. In addition to her law practice and work with TCDLA, Shea assists other legislative clients in lobbying and developing grassroots programs.

David Gonzalez, a partner in Sumpter & Gonzalez in Austin, has worked for TCDLA for 10 years. He is board certified in criminal law and serves as an adjunct professor in the Trial Advocacy Program at the University of Texas School of Law. David was appointed by the Supreme Court to serve on the Board of Disciplinary Appeals and has served as a special prosecutor for Travis, Kendall, and Panola counties, as well as the City of Cibolo.

During the legislative session, the lobby team is at their busiest. Legislators were able to start filing bills as early as November 12, 2018. There are approximately 6,000–7,000 bills filed each year. The lobby team reads through every bill filed and narrows those down to those of interest to TCDLA. We usually end up tracking about 800–1000 bills relating to criminal justice each
session. Lobby team members attend numerous committee hearings for bills we support and those we oppose. We maintain continual interaction with legislative members, committee chairmen, and their staff. We continue following tracked bills through each chamber and ultimately to the governor’s desk.

When the legislature is not in session, the lobby team will travel to different parts of the state giving legislative updates at continuing legal education classes. We attend interim legislative committee hearings and state agency hearings. We also attend task-force group meetings and individual meetings with fellow stakeholders, as well as legislators.

Speaker Joe Straus did not seek re-election to the Texas House, which opened up a speakers race. At one point, seven different representatives filed for the speaker’s job. The last candidate to enter the race, Representative Dennis Bonnen of Angleton, announced in November 2018 that he had the necessary votes to be elected speaker on January 8th, 2019. Representative Bonnen has been in the legislature for more than 20 years and has been a member when his Republican party was in the minority as well as in the majority. Representative Bonnen understands and respects the traditions of the House. In his first press conference, the presumptive speaker announced that school finance was priority one, two, and three. The Senate remains under the leadership of Lieutenant Governor Patrick.

Both the Senate and House remain in Republican control, as does the governor’s office with the re-election of Governor Greg Abbott. TCDLA is working on a positive agenda, as well as preparing to defend against bills that negatively affect criminal justice in Texas. During the interim, there were numerous interim studies relating to state jail and bail reform. It is anticipated numerous bills will be filed that will alter state jail procedurally and substantially. Bail reform was discussed in 2017 and continues to be a topic of discussion due to jail lawsuits and jail overcrowding. Among other issues, TCDLA is looking at ways to improve nondisclosures, appointment of visiting judges, and the application of diligent participation credit on state jail sentences.

Now that you know a little about who we are and what we do, please know that you can contact us at any time. We are here to answer questions and assist in any way we can. You can contact us through the TCDLA Legislative email account at Legislative@tcdla.com. You can also fill out the grassroots form sent to your email account. This will help us in the event we need someone to testify on behalf of TCDLA or talk to his or her local legislator. Contact us if you have any questions or concerns.

See you after Sine Die,
Shea Place
John Sickel Jr. was a friend of mine. He was not just my friend, of course; he was the friend of many, a father, husband, grandfather, and an inspiration to us all.

It wasn’t too long after I began my practice in Athens, Texas, that I became acquainted with John. When I met him, he had just recently left office as the District Attorney of Van Zandt County. I learned that he was the kind of lawyer who was never too busy to mentor a young, inexperienced lawyer like I was back then. I can’t tell you how many times I leaned on his experience in the years since then. Many times, I called him for advice and counsel, and he never failed to give me the answer I needed at the time.

Another lawyer told me he would often go over to his office in Gun Barrel City just to ask a question and would end up spending an hour there. He said he always learned something from John. He said he felt like he had been to a CLE. He was generous with his time—not just to me, but also to other colleagues as well.

A friend of mine said that she first met John in the courtroom because he was representing her ex-husband in a divorce. She said that he saw her a few years later and apologized to her for representing her ex. I’m not surprised at all. John was like that. He saw things as they truly were, and most of all he cared about people.

I learned at his memorial service that John had wanted to join the military when he was young, because his father and his ancestors had been in the military, a lineage traced back to the Revolutionary War! However, he was diagnosed with Type 1 diabetes as a boy and was unable to serve because of that. In 2009, he was allowed to enlist in the Texas National Guard as a JAG officer, and he was so proud to serve in that capacity. At his memorial service, several of those with whom he served were there to pay tribute to his service in the Guard.

John truly believed in the Constitution and the rights of the accused. He diligently fought for his clients and would take the case to trial if he believed that it would serve the ends of justice to do so. One court reporter commented that she could almost hear “The Star Spangled Banner” playing in the background as he delivered his closing argument. He was a classical liberal, believing in the presumption of innocence and the right to be free from unreasonable governmental intrusion.
John loved his family and cared for them until the very end of his life. Many tragedies came his way, but he never let those tragedies define him. He held his family even closer during those times.

John and I didn’t see eye to eye on politics, but we respected each other’s beliefs, and our conversations about the subject were never contentious. In fact, he mentioned that fact the last time I saw him. I know that John loved this country, and he not only respected my right to disagree with him, but would defend my right to do so as well.

John can never be replaced and will long be remembered by his family, friends, and colleagues. I aspire to be like him in so many ways. I especially want to treat my young colleagues the way he treated me. I want to never be too busy to consult with those who seek my advice about a difficult case, just like my friend, John Sickel, who helped me so many times.

Rest in Peace, my friend.

Danna Kirk Mayhall is a 1993 graduate of Baylor Law School. She has been in solo practice since May 17, 1993. Her main areas of practice are family and criminal defense. Danna has been married for 40 years to Terry Mayhall. They have 3 children and 6 grandchildren. Danna is past president of the Henderson County Bar Association, 2010–11 and 2016–17, and has organized the Henderson County Reading of the Declaration of Independence every year since the first year. You can reach Danna at dkmlaw93@gmail.com.
TCDLA thanks the Court of Criminal Appeals for graciously administering a grant which underwrites the majority of the costs of our Significant Decisions Report. We appreciate the Court’s continued support of our efforts to keep lawyers informed of significant appellate court decisions from Texas, the United States Court of Appeals for the Fifth Circuit, and the Supreme Court of the United States. However, the decision as to which cases are reported lies exclusively with our Significant Decisions Editor. Likewise, any and all editorial comments are a reflection of the Editor's view of the case, and his alone.

Please do not rely solely on the summaries set forth below. The reader is advised to read the full text of each opinion in addition to the brief synopses provided.

Supreme Court of the United States


Under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), a district court must impose a mandatory 15-year minimum prison term on certain defendants convicted of unlawfully possessing a firearm or who have at least three prior convictions for certain “violent” or drug-related felonies. Under 18 U.S.C. § 924(e)(2)(B), the prior felonies include any crime punishable by prison exceeding one year and that also (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Under Begay v. United States, 553 U.S. 137, 141 (2008), the ACCA requires a court to evaluate a prior state conviction in terms of how the law defines it and not how an individual might have committed it.

Under Mathis v. United States, 136 S.Ct. 2243 (2016), a prior state conviction does not qualify as generic burglary under the ACCA if the elements of the state statute are broader than those of generic burglary. This is the “categorical approach” under Mathis v. United States, 136 S.Ct. 2243 (2016).
The ACCA’s definition of burglary includes “ordinary” burglaries, defined as an unlawful or unprivileged entry into (or remaining in) a building or other structure with intent to commit a crime.

**United States Court of Appeals for the Fifth Circuit**

**United States v. Douglas,** Nos. 17-30884 & 17-30890, 2018 U.S. App. LEXIS 34984 (5th Cir. Dec. 19, 2018) (designated for publication) [Plain error, consecutive sentences involving groups; substantially the same harm]

When the defendant does not object to error before the district court, plain error review applies. Under Fed. Rule Crim. Proc. 52(b), a court of appeals may consider errors that are plain and affect substantial rights even though they are raised for the first time on appeal. Under *Molina-Martinez v. United States,* 136 S.Ct. 1338 (2016), and *United States v. Olano,* 507 U.S. 725 (1993), these conditions must be met before a court may consider plain error: (1) error has not been intentionally relinquished or abandoned; (2) the error must be plain (clear or obvious); (3) the error must have affected the defendant’s substantial rights, which requires the defendant to show a reasonable probability that, but for the error, the outcome of the proceeding would have been different; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Under U.S.S.G. § 3D1.1(a)(1), the district court must group the counts of conviction into distinct groups of closely related counts by applying U.S.S.G. § 3D1.2, which requires grouping counts involving substantially the same harm. Counts involve substantially the same harm when they represent essentially a single injury or are part of a single criminal episode or transaction involving the same victim. Otherwise, counts not involving substantially the same harm are treated as individual groups.

Under U.S.S.G. § 3D1.1(a)(2), the district court must determine each group’s offense level by applying the rules in U.S.S.G. § 3D1.3, which provides that the offense level for a group is the offense level after adjustments.

Under U.S.S.G. § 3D1.1, the combined offense level is used to determine the guideline sentence range.

Under *United States v. Candelario-Cajero,* 134 F.3d 1246, 1248 (5th Cir. 1998), when there are multiple counts of conviction contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding, under U.S.S.G. § 5G1.2, when a district court sentences a defendant on multiple counts that are not statutorily required to be a certain length or to be sentenced consecutively, it shall determine the total punishment and impose it on each such count except to the extent otherwise required by law.

Under § 5G1.2(d), a district court can impose consecutive sentences only to the extent necessary to produce a combined sentence equal to the total punishment (equal to the top of the guidelines range). If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences shall run concurrently except to the extent otherwise required by law.

*Editor’s note:* the complete analysis for plain error review: When the defendant does not object to error before the district court, plain error review applies. Under Fed. Rule Crim. Proc. 52(b), a court of appeals may consider errors that are plain and affect substantial rights even though they are raised for the first time on appeal. Under *Molina-Martinez v. United States,* 136 S.Ct. 1338 (2016), and *United States v. Olano,* 507 U.S. 725 (1993), these conditions must be met before a court may consider plain error: (1) error has not been intentionally relinquished or abandoned; (2) the error must be plain (clear or obvious); (3) the error must have affected the defendant’s substantial rights, which requires the defendant to show a reasonable probability that, but for the error, the outcome of the proceeding would have been different; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

**United States v. Foster,** No. 17-50465, 2018 U.S. App. LEXIS 34986 (5th Cir. Dec. 17, 2018) (designated for publication) [Confrontation Clause and deposition testimony]

Under U.S. Const. Amend. VI, the Confrontation Clause affords a criminal defendant the right to be confronted with the witnesses against him.

Out-of-court statements like a videotaped deposition may be introduced if the government can demonstrate the unavailability of the declarant whose statements it wishes to use.

Under *Ohio v. Roberts,* 448 U.S. 56, 63–64 (1980), the Confrontation Clause requires a defendant the right of a personal examination and cross-examination of the witness, in which the defendant has an opportunity not only of testing the recollection and sifting the conscience of the witness but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. This right is not absolute. Out-of-court statements like a videotaped deposition may be introduced if the government can demonstrate the unavailability of the declarant whose statements it wishes to use. A witness is “unavailable” if the prosecutor made a good-faith effort to obtain his presence at trial. The lengths to which the prosecution must go to produce a witness is a question of reasonableness.

Deposition testimony is admissible only if the government has exhausted reasonable efforts to assure that the witness will attend trial. Although the question of how much effort is required on the part of the government to reach the level of a good faith and reasonable effort “eludes absolute resolution applicable to all cases,” because of the importance of the right to confron-
tation, the good-faith-effort requirement demands much more than a merely perfunctory effort by the government.

Under Chapman v. California, 386 U.S. 18, 24 (1967), a defendant convicted on the basis of constitutionally inadmissible Confrontation Clause evidence is entitled to a new trial unless it was harmless in that there was no reasonable possibility that the evidence complained of might have contributed to the conviction. The government bears the burden of establishing the error is harmless beyond a reasonable doubt.

United States v. Harrison, No. 16-11641, 2018 U.S. App. LEXIS 35110 (5th Cir. Dec. 19, 2018) (designated for publication) [Actual conflict of interest and requirement for an evidentiary hearing]

A motion under 28 U.S.C. § 2255 requires an evidentiary hearing unless either: (1) the movant’s claims are clearly frivolous or based upon unsupported generalizations, or (2) the movant would not be entitled to relief as a matter of law even if his factual assertions were true.

Under Cuyler v. Sullivan, 446 U.S. 335, 348 (1980), for multiple representation to violate the Sixth Amendment, there must be an actual conflict of interest that adversely affects the representation. A defendant need not show prejudice because it is presumed.

Where an allegation of actual conflict of interest evinces something more than a speculative or potential conflict, a hearing must be held.

United States v. Reyes-Contreras, No. 16-41218, 2018 U.S. App. LEXIS 33640 (5th Cir. Nov. 30, 2018) (designated for publication) [16-level enhancement for a crime of violence; application of Descamps and Mathis]

Under U.S.S.G. § 2L1.2(b)(1)(A)(ii), a 16-level enhancement is added for a “crime of violence,” which includes an enumerated list of crimes, including manslaughter and an offense that has an element of the use, attempted use, or threatened use of physical force against another.

Editor’s note: When faced with whether a prior state offense qualifies as an enhancement, here is a clear explanation of the categorical approach versus the modified categorical approach, why some statutes are “divisible” and others “indivisible,” and of Descamps and Mathis:

• When considering whether a prior state conviction may be used to enhance certain offenses under the U.S.S.G., a court must look at the state statute to determine whether the statute qualifies for the enhancement.
• When a statute is alternatively phrased (like burglary), comprised of disjunctive subsections, a court must determine whether the statute sets forth alternative means of committing a single substantive crime (statute is indivisible) or separate elements (defining distinct offenses) (statute is divisible).

If a statute is indivisible, a court must compare the statute to its federal generic counterpart and determine whether any part falls outside the federal template (categorical approach). If a statute is divisible, a court must isolate the alternative under which the defendant was convicted and apply the federal template to only that alternative (modified categorical approach).

• Under the categorical approach, the court lines up the elements of the prior offense with the elements of the generic [enumerated] offense to see if they match. If the elements of the prior offense cover conduct beyond what the generic offense covers, then it is not a qualifying offense. The categorical approach does not consider the conduct of the defendant in committing the offense but is limited to the conviction and the statutory definition of the offense.
• Under Mathis v. United States, 136 S.Ct. 2243, 2251–2254 (2016), a statute is divisible (and subject to the modified categorical approach) only if it creates multiple offenses by listing one or more alternative elements (as opposed to merely listing alternative means of satisfying an element). The difference is that a trier of fact must agree on one of multiple elements that a statute lists versus not agreeing on the same alternative means so long as the trier of fact concludes that the defendant engaged in one of the possible means of committing a crime.
• If a statute is “divisible,” meaning it sets out one or more elements of the offense in the alternative, the court applies the modified categorical approach to narrow an offense that otherwise would not be a categorical match with an enumerated offense. Descamps, 133 S.Ct. 2276, 2281 (2013).
• Under the modified categorical approach, a court looks at “Shepard documents” [Shepard v. United States, 544 U.S. 13, 25–26 (2005)]: indictment or information, terms of a plea agreement, or transcript of the plea hearing in which the factual basis for the plea was confirmed by the defendant. This occurs if state law fails to provide a clear answer to the means or elements question, and the “Shepard documents” are reviewed only to determine whether the listed items are elements of the offense. If the Shepard documents reiterate all the terms of the law, then each alternative is only a possible means of commission, not an element that must be proved.
• For example, under Tex. Penal Code § 30.02(a), a person commits an offense if, without the effective consent of the owner, the person: (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault. Tex. Penal Code §§ 30.02(a)(1) and (a)(3) are indivisible. Texas courts have held that a jury need not unanimously agree on whether Tex. Penal Code § 30.02(a)(1) or (a)(3) applies to sustain a conviction, and (a)(1) or (a)(3) are not distinct offenses but separate means of committing one burglary offense.
Texas Court of Criminal Appeals


Under Tex. Penal Code § 9.31, a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other’s use or attempted use of unlawful force. The use of force is not justified in response to verbal provocation alone, or if the actor provoked the other’s use or attempted use of unlawful force. Under Tex. Penal Code § 1.07(a)(42), a “reasonable belief” is one that would be held by an ordinary and prudent man in the same circumstances as the actor.

Under Tex. Penal Code § 9.32(a), a person is justified in using deadly force against another (1) if he would be justified in using force against the other under Tex. Penal Code § 9.31, and (2) when and to the degree the person reasonably believes the deadly force is immediately necessary: (A) to protect the person against the other’s use or attempted use of unlawful deadly force, or (B) to prevent the other’s imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery. Per Tex. Penal Code § 9.01(3), deadly force means force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury.

Under Tex. Penal Code § 9.32(b), the person’s belief under Tex. Penal Code § 9.32(a)(2) that the deadly force was immediately necessary as described is presumed to be reasonable if the person: (1) knew or had reason to believe that the person against whom the deadly force was used: (A) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor’s occupied habitation, vehicle, or place of business or employment; (B) unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor’s habitation, vehicle, or place of business or employment; or (C) was committing or attempting to commit [aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery]; (2) did not provoke the person against whom the force was used; and (3) was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used.

Under Tex. Penal Code § 9.33, a person is justified in using deadly force against another to protect a third person if: (1) under the circumstances as the person reasonably believes them to be, the person would be justified under § 9.32 in using deadly force to protect himself against the unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and (2) the person reasonably believes that his intervention is immediately necessary to protect the third person (i.e., if under the circumstances as the defendant reasonably believes them to be, the third person would be justified in defending himself).

Under Saxton v. State, 804 S.W.2d 910, 913–914 (Tex. Crim. App. 1991), and Zuliani v. State, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003), and Krajcovic v. State, 393 S.W.3d 282, 286 (Tex. Crim. App. 2013), in a claim of self-defense or defense of third persons that would justify a defendant’s use of force against another, the defendant bears the burden to produce evidence supporting the defense, while the State bears the burden of persuasion to disprove the raised issues. The defendant’s burden of production requires him to adduce some evidence that would support a rational finding in his favor on the defensive issue. The State’s burden of persuasion is not one that requires the production of evidence; rather it requires only that the State prove its case beyond a reasonable doubt. In resolving the sufficiency of the evidence issue on a claim of self-defense or defense of a third party, the court determines whether after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of the offense beyond a reasonable doubt and also would have found against appellant on the self-defense issue beyond a reasonable doubt (and not whether the State presented evidence which refuted appellant’s self-defense testimony). The issue of self-defense is one of fact to be determined by the jury, and a jury verdict of guilty is an implicit finding rejecting the defendant’s self-defense theory. Defensive evidence that is merely consistent with the physical evidence at the scene of the alleged offense will not render the State’s evidence insufficient since the credibility determination of such evidence is solely within the jury’s province and the jury is free to accept or reject the defensive evidence.


Under Tex. Code Crim. Proc. Art. 11.073, a defendant may obtain postconviction relief based on a change in science relied on by the State at trial if: (1) 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; (2) the scientific evidence would be admissible under the Tex. Rules Evid. at a trial held on the date of the application; and (3) the convicting court must make FFCL finding that had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted. Courts consider whether the field of science, a testifying expert’s scientific knowledge, or a scientific method on which the relevant scientific evidence is based has changed since the applicant’s trial.
Under Tex. Code Crim. Proc. Art. 11.073(d) and Ex parte Robbins, 478 S.W.3d 678, 691 (Tex. Crim. App. 2014), “Scientific method” means the process of generating hypotheses and testing them through experimentation, publication, and republication. “Scientific knowledge” includes a change in the body of science (the field has been discredited or evolved) and when an expert’s opinion changes due to a change in their scientific knowledge (an expert who, upon further study and acquisition of additional scientific knowledge, would have given a different opinion at trial).

Under Ex parte Weinstein, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014), due process of law under the Fourteenth Amendment is violated when a conviction is obtained using false evidence irrespective of whether the false evidence was knowingly or unknowingly used against the defendant. A defendant is entitled to relief on a false-evidence claim if he proves that the: (1) complained-of evidence was false and that (2) false evidence was material to his conviction. Whether evidence is false turns on whether the jury was left with a misleading or false impression after considering the evidence in its entirety. The good or bad faith of the parties is irrelevant. Falsity is a factual inquiry, and review of the court’s findings is under a deferential standard. The good or bad faith of the parties is irrelevant. Falsity is a factual inquiry, and review of the court’s findings is under a deferential standard. Materiality is a legal question reviewed de novo.

Under Ex parte Elizondo, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996), and Ex parte Brown, 205 S.W.3d 538, 544–545 (Tex. Crim. App. 2006), a habeas applicant can obtain relief on the basis that he is actually innocent of the crime for which he was convicted in light of newly discovered evidence. The applicant must prove by clear and convincing evidence that no reasonable juror would have convicted him based on the newly discovered evidence. Newly discovered evidence is that which was not known to the applicant at the time of trial, plea, or posttrial motions and could not be known to him even with the exercise of due diligence. An applicant may rely on a single piece or multiple pieces of new evidence so long as the burden of proof is met, and the newly discovered evidence must affirmatively support the applicant’s innocence. The court must weigh the newly discovered evidence against the State’s case at trial to determine the probable impact the evidence would have had at trial if the new evidence had been available.

Editor’s note: the opinion contains a long analysis on Chaney’s Brady claim. Because I do not believe that it is as relevant as his other claims, I exclude it from this summary.


Under the Fourth Amendment, a warrantless search is per se unreasonable unless it falls within a recognized exception. Per Missouri v. McNeely, 569 U.S. 141, 148–156 (2013), the exigent circumstances exception applies when the exigencies make the needs of law enforcement so compelling that a warrantless search is objectively reasonable. Under this exception, an officer may be justified in conducting a warrantless search to prevent the imminent destruction of evidence. In DWI cases, the natural dissipation of alcohol in the blood may support a finding of exigency but not do so categorically. The exigent-circumstances review should be informed by the totality of the facts and circumstances available to the officer and analyzed under an objective standard of reasonableness. Where officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.

Under Kotte v. State, 152 S.W.3d 54, 62–63 (Tex. Crim. App. 2004), as long as supported by the record, a trial judge’s findings of historical fact are entitled to deference since the judge is in a better position than the appellate court to settle disputes. Such findings are also typically considered to be highly relevant to deciding Fourth Amendment issues.

Under Brigham City, Utah v. Stuart, 547 U.S. 398, 405 (2006), an officer’s subjective motivation is irrelevant as far as the Fourth Amendment is concerned. But whether an officer was aware of a fact is subject to deference and relevant to a Fourth Amendment reasonableness inquiry. Under State v. Duran, 396 S.W.3d 563, 572 (Tex. Crim. App. 2013), the question of whether an officer has reasonable suspicion to detain an individual for further investigation is determined from the facts and circumstances known to the officer at the time of the detention (what he saw, heard, smelled, tasted, touched, or felt—not what that officer could have or should have known.)

Under Terry v. Ohio, 392 U.S. 1, 21–22 (1968), in assessing the reasonableness of an officer’s actions, a reviewing court should consider not only the facts known to the officer, but also the specific reasonable inferences that he is entitled to draw from the facts considering his experience. This necessitates an inquiry into whether an inference was reasonable under the circumstances.

Under United States v. Sharpe, 470 U.S. 675, 682 (1985), reasonableness is ultimately a question of substantive Fourth Amendment law. It should be informed by the practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Once the facts are settled, the appellate court is in just as good a position as the trial judge to decide this issue, so the trial judge’s determination that a law-enforcement inference was reasonable under the circumstances is reviewed de novo.

If an officer holds an objectively reasonable belief that an evidence-destroying medical treatment is about to take place, the Fourth Amendment does not command him to wait until the treatment is mere moments away before he may act. The officer is permitted to take reasonable measures, up to and including initiating a warrantless blood draw, to preserve the integrity of
important evidence.


The presentment of a valid indictment vests the district court with jurisdiction of the cause. A trial court’s jurisdiction over a criminal case consists of the power of the court over the subject matter of the case, coupled with personal jurisdiction over the accused. Unlike in civil cases, where personal jurisdiction may be had merely by that party’s appearance, criminal jurisdiction requires the filing of a valid indictment or information. Even if an indictment has a substantive defect, it can qualify as an indictment that vests a district court with jurisdiction unless it is so defective that it does not meet the constitutional definition of an indictment.

To meet the definition of indictment under Tex. Const. Art. V, § 12(b) and vest the court with personal and subject matter jurisdiction, the indictment must charge: (1) a person; and (2) the commission of an offense.

If a court and the defendant determine from the face of the indictment that the indictment charges an offense for which the court has jurisdiction, it is a valid indictment and not void. This is despite Tex. Code Crim. Art. 21.02, which requires the name of the accused for an indictment to be valid. An indictment can be defective but still be one that vests the court with jurisdiction.

Under Tex. Code Crim. Proc. Art. 1.14(b), if a defendant does not object to a defect, error, or irregularity of form or substance in an indictment before the date on which the trial on the merits commences, he waives the error and may not raise it on appeal or in any postconviction proceeding. The requisites of an indictment stem from statutory law alone, and a defect in a charging instrument (form or substance) is waived unless raised prior to trial.


The Double Jeopardy Clause protects against multiple prosecutions for the same offense. A trial may be discontinued without barring a subsequent trial for the same offense when circumstances manifest a necessity to declare a mistrial, including a jury’s inability to reach a verdict.

Under **Blueford v. Arkansas**, 566 U.S. 599 (2012), a report of a jury-verdict vote count is not a final verdict of acquittal for double jeopardy to attach if: (1) the jury is still deadlocked on the lesser-included offense; (2) the jury continues deliberating after the reported vote count; (3) the jury gives no further indication that it was still unanimous; and (4) nothing in the jury instructions prohibits the jurors from revisiting the prior vote.

**Texas Courts of Appeals**


Under **Jackson v. Virginia**, 443 U.S. 307, 319 (1979), and **Brooks v. State**, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010), to determine legal sufficiency, after viewing the evidence in the light most favorable to the verdict, a reviewing court considers whether the factfinder was rationally justified in finding the essential elements of the crime beyond a reasonable doubt. The reviewing court does not substitute its judgment for that of the factfinder by reevaluating the weight or credibility of the evidence but defers to the factfinder’s resolution of conflicts in testimony, weighing of evidence, and drawing reasonable inferences from the facts. The evidence is measured by the elements of the offense as defined by the hypothetically correct jury charge. **Malik v. State**, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Circumstantial evidence and direct evidence can be equally probative in establishing the guilt of a defendant, and guilt can be established by circumstantial evidence alone. The standard of review is the same for direct and circumstantial evidence. **Hooper v. State**, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). The reviewing court considers events occurring before, during, and after the commission of the offense and may rely on actions of the defendant that show an understanding and common design to do the prohibited act. It is not required that each fact “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.

Under Tex. Penal Code § 8.01 and **Riley v. State**, 830 S.W.2d 584, 585 (Tex. Crim. App. 1992), a defendant cannot be convicted of a criminal offense if at the time of the conduct charged the defendant, as a result of severe mental disease or defect, did not know that his conduct was wrong. Insanity is an affirmative defense, so the defendant bears the burden to prove by a preponderance of the evidence that: (1) because of severe mental disease or defect, (2) he did not know right from wrong at the time of the offense.

the defendant insane, the burden of proof shifts to the State, so the defendant is presumed insane and the State must disprove insanity. The State may defeat the presumption of insanity by showing that at the time of the charged conduct the defendant knew his conduct was illegal. The factfinder may consider the defendant’s demeanor before and after the offense including attempts to evade police.

Under Clark v. Arizona, 548 U.S. 735, 774–776 (2006), whether a defendant is legally insane is not the same issue as whether the defendant has been diagnosed with a mental illness causing psychosis.

Under Tex. Penal Code § 9.31(a), a person is justified in using force against another when and to the degree that he reasonably believes the force is immediately necessary to protect against the other person’s use or attempted use of unlawful force. If a person is so justified, under § 9.32(a), he may use deadly force when and to the degree he reasonably believes the deadly force is immediately necessary to protect himself against the other person’s use or attempted use of unlawful deadly force. A “reasonable belief” is that which would be held by an ordinary and prudent man in the same circumstances as the actor. “Deadly force” is force intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury. The amount of force used must be in proportion to the force encountered.

Under Saxton v. State, 804 S.W.2d 910, 914 (Tex. Crim. App. 1992), and Zuliani v. State, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003), the defendant bears the burden of producing some evidence to support his self-defense claim. Once the defendant produces the evidence, the State bears the burden of persuasion to disprove the defense. This burden of persuasion does not require the State to produce evidence to disprove the defense but must only prove its case beyond a reasonable doubt.


Under Carmouche v. State, 10 S.W.3d 323, 328 (Tex.Crim. App. 2000), if the trial court does not make explicit FFCL, the evidence is reviewed in a light most favorable to the trial court’s ruling and the review assumes that the trial court made implicit findings of fact supported in the record that buttress its conclusion.

Under Carpenter v. United States, 138 S.Ct. 2206, 2213–2214 (2018), and Riley v. California, 134 S.Ct. 2473, 2482 (2014), whether a person’s Fourth Amendment rights have been compromised by a warrantless search of his possessions depends on whether: (1) the person had a subjective expectation of privacy in those possessions; and (2) that subjective expectation of privacy is one that society is prepared to recognize as reasonable under the circumstances.

Under United States v. Knights, 534 U.S. 112 (2001) (probationers), probationers do not enjoy the “absolute liberty” to which every citizen is entitled. Courts granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens. However, a warrantless-search probation condition may diminish a probationer’s expectation of privacy in his home. A standard less than probable cause applies in the context of a warrantless search involving a probationer who is subject to a warrantless-search probation condition. The Fourth Amendment requires only reasonable suspicion that the probationer is engaged in criminal activity and reasonable suspicion existed.

Under Samson v. California, 547 U.S. 843 (2006) (parolees), parolees have fewer expectations of privacy than probationers because parole is more akin to imprisonment than probation. There is an overwhelming governmental interest in supervising parolees because they are more likely to commit future criminal offenses, have a high recidivism rate, and thus require close supervision. The Fourth Amendment does not prohibit an officer from conducting a suspicionless search of a parolee who is subject to a warrantless- and suspicionless-search parole condition (including at a halfway house).


Under Tex. Code Crim. Proc. Art. 38.37 § 2(2)(b), evidence that the defendant committed the following offenses is admissible for any bearing it has on relevant matters, including the character of the defendant and acts performed in conformity with his character: sex-trafficking of a child, continuous sexual abuse, indecency with a child, sexual assault of a child, aggravated sexual assault of a child, online solicitation of a minor,
sexual performance by a child, possession or promotion of child pornography, and an attempt or conspiracy to commit one of these offenses.


Under Tex. Rule App. Proc. 44.2(b) and Morales v. State, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000), nonconstitutional error is disregarded unless it affects substantial rights of the defendant, and a conviction will not be overturned for it if after examining the entire record, the reviewing court has "fair assurance that the error did not influence the jury or had but a slight effect." Improper admission of evidence is not reversible error if other unchallenged evidence proves the same facts.

Under Tex. Penal Code § 12.42(c)(2) and Anderson v. State, 394 S.W.3d 531, 535 (Tex. Crim. App. 2013), a person convicted of certain sexual offenses who has previously been convicted for one of the sexual offenses listed in § 12.42(c)(2)(B) or under the laws of another state containing elements that are substantially similar to the elements of an enumerated Texas offense must receive an automatic life sentence.

Under Prudholm v. State, 333 S.W.3d 590, 594–595 (Tex. Crim. App. 2011), to determine whether an out-of-state sexual offense contains elements that are substantially similar to a listed Texas sexual offense, a court must: (1) compare the elements of the out-of-state statute and the Texas statute, which must display a “high degree of likeness” (elements do not have to be identical and need not parallel one another precisely, but and although it is not required that a person who is guilty of an out-of-state sexual offense would be guilty of a Texas sexual offense, the out-of-state offense cannot be markedly broader than or distinct from the Texas offense); and (2) 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.


Under Tex. Penal Code § 22.011(a)(2)(A), a person commits sexual assault of a child (F-2) if he intentionally or knowingly causes the penetration of the sexual organ of a child by any means. Under Tex. Penal Code § 22.011(f), the crime is an F-1 if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under Tex. Penal Code § 25.01.

To trigger the enhancement under Tex. Penal Code § 22.011(f), the State is required to prove facts of a sexual assault and the six bigamy prohibitions listed in Tex. Penal Code § 25.01.

Merely being married to another at the time of the assault (per a marriage license) is insufficient to satisfy that burden if there is no evidence that the defendant took, attempted, or intended to take any action involving marrying or claiming to marry [the victim] or living with [the victim] under the appearance of being married.

Roman v. State, No. 01-17-00379-CR, 2018 Tex. App. LEXIS 10019 (Tex. App. Houston [1st Dist.] Dec. 6, 2018) (designated for publication) [Waiver of the right to complain of a condition of community supervision by failing to object when the condition is imposed]

Under Marvin v. State, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993), and Ex parte Heilman, 456 S.W.3d 159, 162 (Tex. Crim. App. 2015), the preservation requirements that apply to an alleged constitutional violation depend on the nature of the right allegedly infringed: (1) absolute, systemic requirements and prohibitions that cannot be waived; (2) rights that must be implemented by the system unless expressly waived; and (3) rights that are implemented upon request (waived if not asserted).

Under District of Columbia v. Heller, 554 U.S. 570 (2008), the Second Amendment right to possess a firearm for self-defense is a personal right that is not unlimited. Prohibitions on the possession of firearms by felons and the mentally ill, laws forbidding the carrying of firearms in sensitive places, or laws imposing conditions and qualifications on the commercial sale of arms are constitutional.

Under Dansby v. State, 448 S.W.3d 441, 447 (Tex. Crim. App. 2014), and Speth v. State, 6 S.W.3d 530, 534–535 (Tex. Crim. App. 1999), the placement of a defendant on community supervision occurs in the form of a contract between the trial court and a defendant. Community supervision is not a right but a contractual privilege, and conditions are terms of the contract entered into between the trial court and defendant. Conditions not objected to are affirmatively accepted by the defendant as terms of the contract. By entering into the contractual relationship without objection, a defendant affirmatively waives rights limited by the contract’s terms. In considering the plea agreement, a defendant must take or leave the conditions of supervision.
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