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Note: Schedule and dates subject to change. Visit our website at www.tcdla.com for the most up-to-date information.

**August 2019**

- **August 8–9**
  CDLP | Actual Innocence for Lawyers
  *Austin, TX*
- **August 16**
  TCDLA | 17th Annual Top Gun DWI
  *Houston, TX*
- **August 30**
  CDLP | Against All Odds | co-sponsored with SACDLA
  *San Antonio, TX*

**September 2019**

- **September 5**
  TCDLEI | Conference Call: TCDLEI Board Meeting
- **September 12–13**
  TCDLA | Voir Dire
  *Austin, TX*
- **September 14**
  TCDLA Board and CDLP and Executive Committee Meetings
  *Austin, TX*
- **September 20**
  CDLP | We Make Champions
  *Corpus Christi, TX*
- **September 27**
  CDLP | We Make Champions
  *Wichita Falls, TX*

**October 2019**

- **October 10–11**
  CDLP | 17th Annual Forensics
  *Austin, TX*
- **October 24–25**
  TCDLA | 15th Annual Stuart Kinard Memorial Advanced DWI Seminar
  *San Antonio, TX*

**November 2019**

- **November 14**
  CDLP | Capital and Litigation
  *South Padre Island, TX*
- **November 30**
  CDLP | Mental
  *South Padre Island, TX*

**December 2019**

- **December 5–6**
  TCDLA & TCDLEI Board and CDLP and Executive Committee Meetings
  *Dallas, TX*
- **December 7**
  TCDLA | Sexual Offenses
  *Dallas, TX*
- **December 13**
  CDLP | 12th Annual Hal Jackson Memorial Jolly Roger Seminar | co-sponsored with DCCLA
  *Denton, TX*

**January 2020**

- **January 8**
  CDLP | Nuts ‘n’ Bolts | co-sponsored with LCDLA
  *Lubbock, TX*
- **January 9–10**
  TCDLA | 39th Annual Prairie Dog Lawyers Advanced Criminal Law Seminar | co-sponsored with LCDLA
  *Lubbock, TX*
- **January 17**
  CDLP | We Make Champions
  *Waco, TX*
- **January 24**
  TCDLA | 7th Annual Lonestar DWI
  *Austin, TX*
- **January 30–31**
  CDLP | DNA
  *Houston, TX*

**February 2020**

- **February 20**
  CDLP | Indigent Defense
  *Dallas, TX*
- **February 20**
  CDLP | Capital
  *Austin, TX*
- **February 20**
  CDLP | Veterans
  *Austin, TX*
- **February 21**
  CDLP | Criminal Defense Appeals Writs
  *Austin, TX*

Texas Criminal Defense Lawyers Educational Institute offers scholarships to seminars for attorneys in need.

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 unless noted “open to all.” **Open to all members**
Oh South Padre Island—how I miss you already!!! A fabulous time was had by all on the island on our TCDLA Annual Members Trip. Melissa and our staff made sure everything was absolutely perfect! We wined and dined and learned and sunned (maybe in that order)! The beach at SPI is so gorgeous and the Snodgrasses always entertain us, although this year we had some close encounters with a stingray and a few jellyfish. Despite a couple of ER visits, we all survived and had a truly wonderful time. I always love spending time with all of our TCDLA brothers and sisters and their families—one of my favorite things about the Members Trip to SPI.

The learning I mentioned: On Wednesday, Laurie Key had our Training the Trainers seminar with presentations about how to be a great speaker when we are teaching other lawyers about defending criminal cases. Then on Wednesday, Clay Steadman and Laurie had speakers for our final Criminal Defense Lawyers Project (CDLP) “Come and Take It” of the year. It was chock full of great information on the topics we’ve presented throughout the state over the past year.

Our upcoming year’s CDLPs will be held in Corpus Christi, San Angelo, Wichita Falls, Bryan/College Station, McAllen, Waco, Longview, and Lajitas. The theme will be Defense: We Make Champions! I’m so excited to see our new speakers who will be presenting in these venues!

I encourage everyone to plan on being at our upcoming 17th Annual Top Gun DWI seminar in Houston on August 16th and our Voir Dire seminar in Austin September 12–13. We have incredibly good speakers for both of these seminars, and the Voir Dire seminar will involve actually watching attorneys conduct a voir dire with attendees doing so as well. Check out the agendas on the TCDLA website—you’ll be a better lawyer and better equipped to represent the citizen accused after you are there!

A special thanks this month to my heroes Robb Fickman and Chuck Lanehart for our incredible Declaration and Bill of Rights readings—and all their leaders across the State, and across several other States! Our voicing the protection of our liberties was especially moving for me this year. Thank you, gentlemen!

Hope the heat isn’t too overwhelming in your neck of the woods and look forward to seeing all of you soon. Tell another lawyer he/she did a super job in a hearing/trial this week. You’ll feel better and so will your colleague!
The Outlaw Grillers
Ride Again
2019 Rusty Golf Winners

1st Place
Mark Lassiter & Austin Berry

2nd Place
John Hardin & David Reddell

Closest to the Pin
Mark Lassiter x 2

Longest Yard
Bradley Clark

Thanks to Jeremy Rosenthal & Ted Wood for organizing and sponsoring!
Note: moving to Thursday next year.

Six Flags—a Member Benefit!

Just log into your own Six Flags site to buy tickets with substantial savings off the main gate price. This online benefit program offers not only substantial savings, but allows you to “print and go” so you have your ticket in hand when you get to the park with no waiting in the line to purchase tickets.
Executive Director’s Perspective

What could we accomplish if we knew we could not fail!
—Eleanor Roosevelt

Summer is here, and with that comes the changing of the guard. It was a pleasure working with Mark Snodgrass and being able to spend more time with his family. As we begin the year under the reign of Kerri Anderson Donica, I look forward to working under her leadership and helping her accomplish her goals as president.

Looking forward, mark your calendars for these upcoming seminars: Legislative Update, Innocence, Top Gun DWI, and a new Voir Dire seminar. This new format will include interactive small-group breakouts along with lectures and demos, scheduled for Sept 12–13, and followed by the TCDLA Board meeting on Saturday.

A highlight of the TCDLA Annual Members Meeting in June was a bylaw change eliminating associate director positions and replacing them with directors, which allows all positions to serve 3-year terms. Hats off to Tip Hargrove for his persistence in seeing this through. This will create a rotation of 9 vacancies each year. You can find the board application online; get involved and apply today. This year we swore in 26 new and renewing directors.

Rusty Duncan was very successful thanks to our course directors—Jani Maselli Wood, Doug Murphy, and Bobby Mims—as well as a stellar lineup of speakers donating their time, preparing materials, and presenting. Sister Helen Prejean, in particular, gave an amazing and uplifting presentation, and we will be sharing it with our members. She gets it. In addition, in conjunction with TIDC and HCPDO we had our mentee/mentor kickoff, involving more than 50 participants.

A busy Rusty this year included committee meetings, the awards banquet, yoga, bike ride, golf, round tables, board specialization study, a past-president photo session, 15 interviews, the Pachanga, the membership party, and a silent auction. Thank you to those who generously sponsored our membership party—with special recognition to Justin and Yanina Kiechler and Mark and Taly Thiessen. Everyone had a great time. Our silent auction and LEI booth raised more than $20,000, which is available for scholarships for our members. We could not have done it without our members’ generous contributions. A list of our donors is included on the facing page.

On a personal note, I recently accomplished my goal of becoming a certified association executive (CAE). The certification is issued by the American Society of Association Executives
(ASAE). I started studying for the course in 2012 and finally built up the courage to take the exam this year. It took many months of dedication, commitment, and support from my family to take the time to study for the exam, attend classes and study groups, and take a million practice exams. I have a deeper appreciation and respect for anyone who receives a certification of any type. With that being said, if you decide to pursue board certification, TCDLA offers the board specialization study guide.

I always look forward to the July 4th readings of the Declaration of Independence organized by Robb Fickman and Chuck Lanehart. The TCDLA staff joined in with the Austin Criminal Defense Lawyers Association (ACDLA), organized by Betty Blackwell, Bradley Hargis, and Rick Flores. We had a great turnout, and it was a very patriotic way to start my Fourth of July camping trip. I hope everyone takes a break and enjoys the rest of the summer.

A big thanks to everyone who donated to the Rusty Silent Auction for TCDLEI scholarships . . .

Jay Freeman
Deandra Grant
Susan Kelly
Mark Thiesen
Paul Tu
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Kendra Scott

Efrain Sain
Clay Steadman
Brittany Bass
Angela Moore
Sarah Roland
Patrick Metze
Angela Moore
TCDLA

. . . and to everyone who purchased these items:

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Starr Bauer
Paul Fort Jr.
Patricia Cantu
Susan Anderson
Felix Sarabia
Warren Wolf
Lisa Gonzales
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Craig Stewart
Cris Estrada
John Caldwell
Brent Hill
Jani Maselli Wood
Mark Snodgrass
Randy Wilson
Pat Metze
Roger Bridgwater
Paul Lechowick
Chris DeAnda

Rusty Passport Winners

Fire HD: Dan Meehan
Membership: Michelle Moore
Rusty registration: Cheryl Jaksa
Fire Kids Tablet: Clifford Duke
Galaxy Tablet: Selena Solis
Amazon Echo: Leon Haley
$100 publications: Elizabeth Haley
$100 publications: Betsy Johnson
Fire 7 Alexa: Shane Phelps
I struggled this month with my column. Not because I didn’t have any material. I just finished a brief on double jeopardy and collateral estoppel that’s easily transformed into a short article. Nor was it because I didn’t know what I should write. Rather, I struggled because in my soul I knew exactly what I must write—not to gain any sympathy or pity but to hopefully strike a chord or spark some action . . .

According to the CDC, drug overdoses killed 63,632 Americans in 2016. The number topped 70,200 deaths in 2017. The numbers have increased exponentially since 1999. The statistics aren’t in for 2018 yet, but the trend is telling. The numbers are staggering. To put them in perspective, though, the number of overdose deaths in the last two years is over 20,000 more than the number of fatal car accidents, according to the National Safety Council (2016: 40,327 and 2017: 40,231).

My youngest brother, Randy, was one of the 63,632 people in 2016. Like everyone else, though, he’s more than just a statistic.

We grew up in a very stable and loving family. We were afforded all the opportunities a kid can hope for and benefit from. We had good parents who set the best example for us. We had rules and chores, went to church, spent time together as a family, and knew what was expected of us. We loved each other. Family was always was the most important thing to all of us. Randy knew without question we loved and supported him, and we know that he loved us. Randy was compassionate, kind, fearless, funny, and smart. He loved animals (especially fish), drawing, movies, and books. He was a genuinely good-to-the-core person. I am so proud to be his sister.

Randy began using drugs when he was 14 after the sudden death of our dad due to heart failure. He did not exhibit the typical signs of a drug user in the beginning, though. His grades were exceptional, he still appeared to follow the rules, and his friends didn’t change. But his use quickly escalated, and it became clear he was different than everyone else around him. He couldn’t stop and always needed something more or better. He was an addict. Then the series of rehabilitation stints began.

If addiction could be cured by enough love, Randy would have been cured as soon as he started using. Love isn’t the issue. If addiction could be cured by will power and determination, Randy would have defeated it hands down; he as much will power and grit as anyone I have ever met. If addiction could be cured by experience, then Randy would have been cured; he experienced so much.

But it cannot be cured by those things because addiction is currently an incurable disease. There are only periods of remission. There is no magic pill or quick fix, and it is inexplicable why
some make it and some don't. It doesn't discriminate among us. It is not stereotypical, and no one particular category of people is immune from its effects. It affects us all regardless of race, gender, education, or socioeconomic status. It isn't a disease for only the criminals and less fortunate among us—it affects all walks of life. I have seen it firsthand. Addiction causes immeasurable havoc and pain on the addict and his family. The suffering caused by addiction to individuals and society as a whole is incalculable. It must be controlled and stopped.

Before the tragedy of Randy’s death, I had no idea that August 31st is International Overdose Awareness Day (IOAD). I first mentioned International Overdose Awareness Day in 2016 several months after Randy died. IOAD is a day to remember those who have died due to the tragedy of overdose and to help educate in order to prevent such tragedies in the future.

IOAD was started in Australia in 2001 at the Salvation Army. In Texas in 2016, there was one IOAD event in Austin. My family attended. Then we became involved. It’s the way we’ve found to constructively channel our grief and, at the same time, remember and honor Randy and positively affect change in our community. We started North Texas Overdose Awareness Day. We are having our second annual remembrance and prevention event this year. This year there are multiple events throughout the state. To learn more and about how to get involved about IOAD visit www.overdoseday.com.

IOAD is a great thing but we can all do something to help our clients on a daily basis, though. We are on the front lines. We all have clients who struggle with addiction. Often, we are the last person left who hasn’t abandoned them because of their addiction. Let’s try to see past the addiction to the person. Let’s try not to see it as a defect of character. Let’s provide resources for treatment. Let’s follow up with phone calls to check on our clients. Let’s educate people about the law on Narcan and Naloxone, opioid antagonists. See Tex. Health & Safety Code Section 483.101, et seq. We keep Narcan in our office and freely give it to clients and/or their family members. To have a chance to get clean and sober, a person has to be alive. Let’s be realistic and meet them where they are in order to best help them. And, let’s encourage them when they achieve successes. Maybe, just maybe, we can do our part to help reduce the statistics . . .

These folks donated $100 or more to TCDLEI for scholarships at Rusty this year. Thanks so much! We couldn’t do this without you.

Phil Baker, La Grange
Claudia Balli, Laredo
Laura Barbosa, Edinburg
Samuel Bassett, Austin
Roger Bridgewater, Houston
Victoria Carter, Abilene
Albert Charanza, Lufkin
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Clay Steadman, Kerrville
Frank Suhr, New Braunfels
William Trantham, Denton
Randy Wilson, Abilene
I need a lay witness to testify. It’s too late for a subpoena. Is it unethical to compensate her for her time to appear?

The answer is in the ABA Model Rules of Professional Conduct, which were adopted by Texas on June 20, 1989, as Tex. Disciplinary Rule Prof. Conduct 3.04. ABA Model Rule 3.4(b) states that an attorney “shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.” The comments to this rule, and specifically Comment 3, provide that it is not improper to pay a witness’ expenses, but the common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying. This has been construed to mean that you can pay a fact-witness for expenses and time lost preparing to testify and to testify. This consideration is not the same as paying a “fee for testifying.” The comments provide that “there is no reason to draw a distinction between compensating a witness for time spent in actually attending a deposition or a trial and compensating him for time spent in pretrial interviews with the lawyer in preparation for testifying so long as the lawyer makes it clear to the witness that payment is not being made for the substance of the testimony or as an inducement to ‘tell the truth.’” But if you pay a witness and attach any conditions to the payment, such act may be considered as influencing testimony. So, you cannot pay a witness if it is conditioned on giving testimony in a certain way, to prevent attendance at trial, or contingent on the outcome of the case. The factors that you should consider are: (1) what is reasonable consideration for the witness’ time; and (2) whether the agreement is in writing (always do this).

Tex. Disciplinary Rule Prof. Conduct 3.04, Rule 3.04, Fairness in Adjudicatory, provides that a lawyer shall not: (a) unlawfully obstruct another party’s access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act; (b) falsely evidence, counsel or assist a witness to testify falsely, or pay, offer to pay, or acquiesce in the offer or payment of compensation to a witness or other entity contingent upon the content of the testimony of the witness or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of: (1) expenses reasonably incurred by a witness in attending or testifying; (2) reasonable compensation to a witness for his loss of time in attending or testifying; or (3) a reasonable fee for the professional services of an expert witness . . .

Use good judgment when paying fact-witnesses. If the fact-witness is a busy professional like a doctor, attorney, teacher, plumber, electrician, or any other person whose time lost

Question

Is Pay Okay?
equals livelihood lost, then figure out a reasonable fee to pay the fact-witness. But if the fact-witness is a retiree or a 15-year-old kid, that witness’ time lost will be worth a lot less. And if the fact-witness is some mooch who lives in his parent’s garage, basement, or never left the bedroom he grew up in and who smokes pot and plays video games all day, his time lost will be worth what’s in the center of a doughnut or close to it.

Two other considerations: paying a fact-witness opens up the door for cross-examination as to your witness’ motives for testifying. And, you must also consider Tex. Disciplinary Rule Prof. Conduct 3.03, Candor Toward the Tribunal.

—Michael Mowla

I don’t think anyone would disagree with the answer from Michael. I would emphasize the necessity of a written agreement when you pay any witness for his/her time and/or expertise.

—Jack Zimmermann

I don’t understand “too late for a subpoena” because it is easier than ever to serve one. I’m not sure how this issue arose. I agree on one thing: compensation for witnesses you can’t attribute to the court is a fair (and devastating) basis for impeachment of defense witnesses, one to be avoided, ironically, at all costs. If you can, preserve the issue, and you can do so in a variety of ways.

—Keith Hampton

Thanks to Michael Mowla, Jack Zimmermann, Joseph Connors, and Keith Hampton.

Congratulations to 2019 Hall of Fame honorees
Vincent Perini, Mac Secrest & Bob Hinton
Auto-Renewal takes the work out of membership so you can sit back and enjoy the benefits.

#TCDLAStrong
#RaisingtheBar
In the mid-1980s, we began to hear about the proposed United States Sentencing Guidelines. There were going to be studies done and the United States Sentencing Commission would take into account thousands of cases and the sentences imposed in these cases as they put together a Guidelines table.

As the introduction to the Guidelines notes,

In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice. It analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission’s guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice [emphasis added].

For each offense, an empirical approach was supposed to be the basis for arriving at a Guideline level and the specific offense characteristics which could increase the Guideline level and the sentencing range for the offense.

The latest amendments to §2G2.2 was clearly based on emotion rather than on empirical data. That section’s specific offense characteristics—many of which are found in almost every child pornography prosecution—effectively increase the sentence in almost every case.

Even though the United States Sentencing Commission continues to be critical of §2G2.2, neither Congress nor the courts are impressed. The latest federal case to discuss the tension between the Sentencing Commission and the courts is United States v. Lynde, ___F.3d___, 2019 WL 2402924 (6th Cir. June 7, 2019) [Panel: Circuit Judges Cook, Nalbandian, and Murphy (Opinion by Judge Murphy)]. The Court held that [1] the sentence was substantively reasonable, even though enhancements under Guidelines did not arise from Sentencing Commission’s empirical study of courts’ past sentencing practices; [2] the enhancements under Guidelines are valid no matter how often they apply; and [3] the report from Sentencing Commission,
adding its expert voice to criticism of the enhancements, could not compel the judicial branch to depart from its legal judgment that the enhancements were valid.

[The Court's Attitude Toward the Sentencing Commission's Criticism of § 2G2.2]

Section 2G2.2 of the Sentencing Guidelines increases the recommended sentence in child-pornography cases if the offense involves a minor under the age of 12, the use of a computer, or other aggravating factors. This Guideline has repeatedly been subject to the criticism that its enhancements apply in most child-pornography cases and generate unduly harsh sentences. Our court has just as repeatedly rebuffed claims that courts must decline to follow § 2G2.2 because it arose from too much democratic tinkering by Congress and not enough empirical research by the Sentencing Commission. United States v. Cunningham, 669 F.3d 723, 733 (6th Cir. 2012). Lawrence Lynde, who pleaded guilty to a child-pornography offense, asks us to depart from our cases and reject § 2G2.2 because the Commission added its expert voice to the criticism in a 2012 report to Congress. But just as this report cannot compel the legislative branch to depart from its policy choices about § 2G2.2's content, cf. United States v. Bistline, 665 F.3d 758, 761–64 (6th Cir. 2012), so too it cannot compel the judicial branch to depart from its legal judgment about § 2G2.2's validity. We thus affirm Lynde's sentence.

[The Facts]

Before detailing our reasoning, we start with the facts. In October 2015, federal officials received a tip from Canadian authorities that Lynde had been trading child pornography online. An investigation uncovered that he had exchanged 62 images with another individual on the online application “Kik” between October and December 2014. Executing a search warrant at Lynde’s home in December 2015, federal agents recovered 322 images and five videos of child pornography. The images showed, among other things, prepubescent minors, including toddlers, engaged in genital-to-genital intercourse with adult males. Lynde ultimately pleaded guilty to receiving and distributing child pornography, in violation of 18 U.S.C. § 2252(a)(2).

[The Offense]

The knowing receipt and distribution of child pornography carries a statutory minimum of 5 years’ imprisonment and a statutory maximum of 20 years.

[The Guidelines Range]

18 U.S.C. § 2252(b)(1). The Sentencing Guidelines assigned Lynde’s crime a base offense level of 22. U.S.S.G. § 2G2.2(a) (2) (2016). His presentence report applied five §2G2.2 enhancements: (1) Lynde’s offense involved children under 12, id. §2G2.2(b)(2); (2) Lynde knowingly distributed child pornography, id. §2G2.2(b)(3)(F); (3) the child pornography presented sadistic or masochistic conduct and the sexual abuse of a toddler, id. §2G2.2(b)(4); (4) Lynde had used a computer, id. §2G2.2(b)(6); and (5) Lynde possessed over 600 images, id. §2G2.2(b)(7)(D). (Under the Guidelines commentary, every video is “considered to have 75 images.” Id. §2G2.2, cmt. n.6(B)(ii).) After reductions for acceptance of responsibility, Lynde’s total offense level was 34. With no criminal history, he faced a Guidelines range between 151 and 188 months.

[Lynde’s Counsel’s Argument at Sentencing]

At sentencing, Lynde’s counsel objected to the §2G2.2 enhancements. Counsel conceded that they applied. But he described §2G2.2 as “broken” because it produced harsh sentences through enhancements that enlarge the punishment in most cases. Counsel also highlighted Lynde’s otherwise productive life and strong family support. A married father of three who provided care to his sick wife, Lynde served in the military and then began a career servicing x-ray equipment, which occasionally took him overseas on charitable work. Lynde’s counsel thus requested the statutory minimum—a five-year sentence.

[The Court’s 18 U.S.C. §3553(a) Analysis and the Sentence Imposed]

The district court agreed that the presentence report correctly calculated the Guidelines range, but decided that a Guidelines sentence would be “longer than necessary” under 18 U.S.C. §3553(a). It rejected the use-of-a-computer enhancement because the court had never presided over a child-pornography case that did not involve a computer. It also decreased the offense level because of Lynde’s family circumstances. All in all, its reductions reduced the Guidelines range to between 97 and 121 months. Because of Lynde’s “particularly exemplary life,” the court settled on a 97-month sentence.

[The Standard of Review]

We review this sentence “under a deferential abuse-of-discretion standard.” Gall v. United States, 552 U.S. 38, 41, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). While a sentence
must be both procedurally and substantively reasonable, id. at 51–52, 128 S.Ct. 586 . . .

[The Defendant’s Position]
Lynde does not identify any procedural problems with his sentence. He simply disputes the bottom-line number, arguing that his 97-month sentence is “too long.” United States v. Rayyan, 885 F.3d 436, 442 (6th Cir. 2018). Lynde presents wholesale and retail challenges in support of this substantive argument: He broadly asserts that the district court should have rejected the §2G2.2 enhancements on policy grounds that would apply to most defendants, and he narrowly asserts that the district court wrongly balanced the §3553(a) factors in his case.

[The Appellate Presumption of Reasonableness]
We typically start with an appellate presumption of reasonableness if the district court imposes a sentence within the Guidelines range (or a sentence below that range where, as here, the defendant is the one appealing). United States v. Curry, 536 F.3d 571, 573 (6th Cir. 2008). This “presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, both the sentencing judge and the Sentencing Commission will have reached the same conclusion as to the proper sentence in the particular case.” Rita v. United States, 551 U.S. 338, 347, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007).

* * *

[The Defendant’s Arguments]
. . . Lynde argues that we should treat as unreasonable even a below-Guidelines sentence that relies on §2G2.2’s enhancements. That is so, Lynde claims, because those enhancements neither (1) arise from the Commission’s careful study into the courts’ past sentencing practices nor (2) adequately distinguish among child-pornography offenders.

[The Court Rejects the Defendant’s Two Arguments]
We have not taken kindly to Lynde’s claim that §2G2.2 deserves to be cast aside because of its “purported lack of empirical grounding.” Cunningham, 669 F.3d at 733. His premise is correct. Congress has actively policed §2G2.2, so the Commission’s usual statistical methods have taken a backseat to Congress’s desire to cast a wider criminal net[ ] and impose harsher punishments.” United States v. McNerney, 636 F.3d 772, 775–76 (6th Cir. 2011). But Lynde’s conclusion does not follow. To the contrary, Congress’ direct involvement is a “virtue, rather than [a] vice,” in a republic like ours because “[t]he Constitution is fundamentally a democratic document, not a technocratic one.” Bistline, 665 F.3d at 762. If the representatives who are accountable to the People reach “a retributive judgment that certain crimes are reprehensible and warrant serious punishment as a result,” the Commission cannot stand in their way. Id. at 764.

We have also rejected Lynde’s claim that §2G2.2’s enhancements must be disregarded because they apply in most cases and do not adequately distinguish among offenders. See United States v. Walters, 775 F.3d 778, 786–87 (6th Cir. 2015). If “the harm [an enhancement] addresses is real,” we have reasoned, “the enhancement is valid, no matter how often it applies.” United States v. Lester, 688 F. App’x 351, 352 (6th Cir. 2017) (alteration in original) (citation omitted). Here, Lynde does not dispute that real harms undergird two of the enhancements that he attacks—those for pornography involving children under 12, and for pornography that includes sadistic or masochistic conduct or the abuse of toddlers. U.S.S.G. §2G2.2(b)(2), (b)(4). (The phrase “res ipsa loquitur” comes to mind.) Rather, Lynde makes only the legally insufficient point that these enhancements arise frequently.

* * *

[The Guidelines Are Advisory]
To be sure, the Guidelines have been advisory since United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Thus, a district court may disagree with §2G2.2’s enhancements “for policy reasons, and may reject the Guidelines range based on that disagreement.” United States v. Brooks, 628 F.3d 791, 799–800 (6th Cir. 2011). But a district court faces a “formidable task” when it seeks to reject the policies underlying a Guideline, like §2G2.2, that “comes bristling with Congress’ own empirical and value judgments.” Bistline, 665 F.3d at 764.

* * *

[The Defendant’s New Attack on §2G2.2]

[The Court Rejects This Attack]
Does this report require us to reassess our cases upholding §2G2.2’s general validity? No. That’s analogous to suggesting
that Congress can compel the Supreme Court to depart from its authoritative interpretation of the law—not by amending the law through Article I’s bicameralism and presentment process—but by issuing a congressional report critical of the decision. Cf. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–25, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995); United States v. Wise, 370 U.S. 405, 411, 82 S.Ct. 1354, 8 L.Ed.2d 590 (1962). Since Congress cannot supersede judicial interpretations in this way, it should go without saying that the Commission—which has been described as “a sort of junior-varsity Congress,” Mistretta v. United States, 488 U.S. 361, 427, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (Scalia, J., dissenting)—cannot either. See also Bistline, 665 F.3d at 761–62. And while the Commission may follow the prescribed process for amending the Guideline (or convince Congress to do so for subsections out of its control), see 28 U.S.C. §994(p), Lynde concedes that neither Congress nor the Commission has amended §2G2.2 in response to this report.

We are not alone in taking this view. Other circuits have held that the Commission’s “report does not render the non-production child pornography guidelines in §2G2.2 invalid or illegitimate.”

[The Court’s Conclusion]

In sum, notwithstanding the Commission’s report, a sentence does not become unreasonable “because U.S.S.G. §2G2.2 [is] involved” Brooks, 628 F.3d at 799. Instead, a sentence following this Guideline receives the same appellate presumption of reasonableness that applies to a sentence following any other Guideline. See United States v. Wroten, 744 F. App’x 245, 249 (6th Cir. 2018).

[The District Court Did It Right]

Anyone who has reviewed the sentencing materials in this case—both the materials detailing the severe and lasting harm that child pornography causes its victims and those showing the effects of this conviction on Lynde and his family—would recognize that the district court faced a difficult decision. Our task as appellate judges is not to pick the sentence that we would prefer (whether higher or lower), but only to ensure that the sentence chosen by the district court fell within its broad range of reasoned discretion. On that, we are confident in the answer.

My Thoughts

- Congress is simply ignoring any input from the United States Sentencing Commission on §2G2.2. Although I did not find any cases from the United States Court of Appeals for the Fifth Circuit on point, I would bet the farm that they would come to the same conclusion as the judges of the Sixth Circuit reached in Lynde.

- I was reminded this morning of how repugnant child pornography cases are in the Texas courts. We have a 76-year-old client who was found to be in possession of 12 pictures or videos of child pornography. We declined to accept the State's offer of 120 years' confinement in the Texas Department of Criminal Justice and are now awaiting trial.

- State or federal, it doesn't make any difference. Child pornography cases are a huge challenge for any defense lawyer.

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 as the author transcendent of the Texas Criminal Defense Lawyers Association. This is his 232nd column or article. He practices in Tyler with the law firm of Bain, Files, Jarret & Harrison, PC, and can be reached at bfiles@bainfiles.com.
Tip of the hat to Bill Mason of Cleburne, who last month secured the big NG on an Indictment for Aggravated Sexual Assault and an extraneous Indecency With a Child. D was a 55-year-old step-grandfather with no priors, and “victim” was “6 or 7” at the time of the alleged assault. Bill says the facts were the usual Children Advocacy Center interview, SANE report, and a failed police polygraph, but notes: “My client and his wife had a prior custody battle with the mother of the complainant over a grandchild. The complainant’s mother coming to court with orangey-red dyed hair, tattoos, and anger made her appear to have a motive to get the defendant sent to prison so the long-going custody battle would end in her favor.” The jury deliberated less than two hours before returning the verdict. Congratulations, Bill, on a big win in a tough case.

Bill wanted to share in the kudos, sending along a shout out to TCDLA. Going right from Rusty to pick a jury on the Monday following, he says he utilized some of the new ideas he picked up there. According to Bill: “Words cannot express how thankful my client and I are for the techniques I learned at 2019 Rusty Duncan. My thanks to the whole organization, the seminar, and the speakers.

“My NEW jury selection approach was a combination of Robert Hirschhorn, Troy McKinney, and Heather Barbieri. I added in a little ‘fire’ that I picked up from Sister Prejean and a little humor I picked up from Gerry Goldstein.”

Shout out to Jason Milam of Waco, partner in Sutton Milam & Fanning, for being named Outstanding Young Lawyer of the Year by the McLennan County Young Lawyers Association in recognition of his excellence in practice and service to the community. Also honored by association President Stephen Rispoli, assistant dean at Baylor Law School, was Vic Feazell of Waco as an Outstanding Pro Bono Advocate. Congratulations, gentlemen, on the well-deserved honors.

Kudos to Nnamdi Ekeh of Dallas for his recent win in a case where D faced ten years in prison on a rather strange case. Alleged victim stabbed D with a knife, whereupon D called 911—and was arrested. D maintained his innocence through a variety of offers. He was first offered a misdemeanor A reduction, and he turned it down. He was then offered a conditional dismissal to take a battered intervention and prevention program, rejecting it as well. Class C misdemeanor? No. Class online and a certificate? No. He turned everything down.

Representative Senfronia Thompson was honored during the awards ceremony at Rusty Duncan with the Senator Rodney Ellis Award, given to one with “exceptional commitment to advocacy, demonstration of specific endeavors related to criminal defense, spreading awareness of TCDLA initiatives and endeavors, and having a positive impact on criminal defense attorneys.” Awards Chairman David Botsford did the honors.
Shout out from Chuck Lanehart of Lubbock (right), co-chair of the TCDLA Declarations Readings each year. Here he presents the James G. Denton Distinguished Lawyer Award at the Lubbock Area Bar Association’s Law Day Banquet to Justice Phil Johnson. The award, presented to Chuck last year, is the highest honor bestowed by the bar, “in recognition of extraordinary contributions and exceptional service to the legal profession and the Lubbock community.”

and requested a jury trial. Before a trial date could even be set, though, he got an outright dismissal. Nnamdi passed this on: “Salute to citizens who stand up for their rights.” And to Nnamdi for sticking up for those rights.

Ethics Chair/Editor Robert Pelton sent along a shout out to ex-prez Betty Blackwell of Austin. Robert says that no sooner had she joined the Ethics Committee than she got a call to work on a problem coming in on the Ethics Hotline. Robert says, “Thanks again for joining us, Betty, and for handling the call.” Welcome aboard, Betty, and good work.

And in somewhat of a departure here, kudos to Robert’s son, Robert Pelton, who recently used CPR training he received in the army to help resuscitate a maintenance worker in a parking lot. Robert Jr. works as an investigator in Houston and was eating lunch when he heard the commotion. And he appears to be a chip off the old block. Kudos to the Peltons.

Another member of the Ethics Committee, Ray Fuchs, and Joel Perez (both of San Antonio) got a big win for a D retried in a double murder. First go-around with a charge of capital murder ended in a mistrial, and DA retried on a straight murder charge. Ray and Joel argued that police conducted a “shabby” investigation, not following up on reports of an unidentified man seen running down the road after the incident. They also argued that testimony of a witness shouldn’t have been considered because she admitted to smoking crack that day. The jury deliberated for two days before arriving at the NG. Good work, team, on a tough case.

Shout out to Janet Prueitt of Gatesville, for the big NG on a charge of evading arrest. Janet remarked, “Law enforcement is not always careful about considering where it’s safe to pull over.” D traveled about ¼ of a mile before pulling off the road. Janet says he was trying to get to where there would be witnesses. In the course of the trial, the jury saw a video of D being slammed to the pavement by the officer. Turns out, the same officer had done that to him 4 months earlier—to which D testified. And . . . there was no speeding involved. Apparently the jury didn’t like the excessive force used. Congratulations, Janet, on a good win.
Rusty Duncan: The Ultimate in Networking

Where the young & the old, the veterans & the newbies mixed and mingled in San Antonio

Course Directors Bobby Mims of Tyler and Doug Murphy of Houston

President-Elect Grant Scheiner with Sister Helen Prejean and Course Director Jani Maselli Wood
This was a banner year for Rusty, with a record number of people in attendance—the old and the new.

As his final act, retiring President Mark Snodgrass turns it over to President Kerri Anderson Donica.
Jeep Darnell brought the family—wife Meghan, son Kennedy in the stroller, and James.

Aside from the heroes of criminal justice, there was some serious cute in attendance as well . . .

Fitting well within this category: mom-to-be Claudia Balli, shown here holding down the LEI booth

Nobody’s ever accused Dan Hurley of being cute, but his attempt to master a scooter out front definitely rates as something special.
Why We Read the Declaration

Chuck Lanehart
Ten years have passed, and the annual Texas Criminal Defense Lawyers Association Declaration readings are now a valued tradition throughout the Lone Star State. Perhaps it is time for reflection on how this began, why we do what we do on or before Independence Day each year, what it means and what it does not mean.

The first reading was in Houston on Thursday, July 1, 2010. The Harris County Criminal Lawyers Association was involved in an ongoing struggle with abusive judges. The struggle led to the filing of judicial misconduct complaints against some of the judges.

As an act of protest against tyrannical judges, Robert Fickman organized a reading of the Declaration of Independence at the Harris County Courthouse. Seeking no permission, 15 criminal defense lawyers gathered in front of the courthouse. As an act of protest and disrespect, they turned their backs to the building and read the great document with firm resolve.

They felt electrified and empowered by the reading, and similar readings slowly gained traction across the state. In 2016, readings were organized in all 254 Texas counties in honor of the 240th birthday of the great document. Last year, the readings were highlighted by a poignant reading held at the children’s immigration tent city at Tornillo.

That’s how the Houston readings started, but why do the rest of us continue the Houston tradition, and where do we go from here? The historical context of the Declaration leads us in the right direction.

The Declaration of Independence has been called one of the greatest documents ever written, but it is certainly imperfect. One paragraph is particularly unfair and offensive to Native Americans. “He has excited domestic Insurrections amongst us, and has endeavoured to bring on the Inhabitants of our Frontiers, the merciless Indian Savages, whose known Rule of Warfare, is an undistinguished Destruction, of all Ages, Sexes and Conditions.” Native Americans were totally subjugated to U.S. power about a century later.

The drafters of the Declaration envisioned a new order among the 13 colonies, but they did not include women in their vision. In Colonial America, women were pushed to the sidelines as dependents of men. Married women were under control of their husbands. Following the Revolutionary War, under the laws of the new United States, women were denied property rights, lacked the ability to vote, and could not make or enter into a legal contract. More than a century passed before women were granted the right to vote, and the struggle began for truly equal gender rights.

The Declaration promised life, liberty, and the pursuit of happiness to all, yet that promise did not apply to the thousands held in slavery across the Colonies.

Frederick Douglass eloquently addressed this dichotomy in his famous speech of July 5, 1852 (refusing to speak on July 4), dedicating the new Corinthian Hall in Rochester, NY:

What have I, or those I represent, to do with your national independence? Are the great principles of political freedom and of natural justice, embodied in that Declaration of Independence, extended to us? And am I, therefore, called upon to bring our humble offering to the national altar, and to confess the benefits and express devout gratitude for the blessings resulting from your independence to us?

I say it with a sad sense of the disparity between us. I am not included within the pale of glorious anniversary! Your high independence only reveals the immeasurable distance between us. The blessings in which you, this day, rejoice, are not enjoyed in common. The rich inheritance of justice, liberty, prosperity and independence, bequeathed by your fathers, is shared by you, not by me. The sunlight that brought light and healing to you, has brought stripes and death to me. This Fourth July is yours, not mine. You may rejoice, I must mourn.

What, to the American slave, is your 4th of July? I answer; a day that reveals to him, more than all other days in the year, the gross injustice and cruelty to which he is the constant victim. To him, your celebration is a sham; your boasted liberty, an unholy license; your national greatness, swelling vanity; your sounds of rejoicing are empty and heartless; your denunciation of tyrants, brass fronted impudence; your prayers and hymns, your sermons and thanksgivings, with all your religious parade and solemnity, are, to Him, mere bombast, fraud, deception, impiety, and hypocrisy—a thin veil to cover up crimes
which would disgrace a nation of savages. There is not a nation on the earth guilty of practices more shocking and bloody than are the people of the United States, at this very hour.

This year, TCDLA Declaration reading founder Robert Fickman also reflected on the Declaration’s shortcomings in his introductory remarks to the Houston reading:

In 1963, Dr. Martin Luther King observed, when the architects of our Republic wrote the Declaration, they were signing a promissory note to which all Americans were to fall heir. This note was a promise that all men would be guaranteed the unalienable rights of life, liberty and the pursuit of happiness. Dr. King eloquently observed “It is obvious today that America has defaulted on this promissory note.”

Now, in 2019, insofar as minorities and the poor are concerned, America continues to be in default. On a daily basis, in these courts, minorities and the poor continue to find their liberty stolen.

As defense lawyers, it is our duty to fight those who would deny others their liberty. So, we read the Declaration as a reminder that as a nation, our work is unfinished.

Let us work together toward that day when the promises of the Declaration are a reality and not a dream. Let us work toward that day, when all Americans have the Declaration’s guaranteed unalienable rights to life, liberty and the pursuit of happiness.

When reading the Declaration and celebrating our independence from Britain, we should keep in mind Frederick Douglass’ hard truths and Dr. Martin Luther King’s admonitions. We must not forget our founding forefathers’ shortsightedness and the shortcomings of the Declaration. Instead, these issues should be confronted head-on and directly.

In future readings, we will encourage organizers to stress that the Declaration freed not one slave, offered not one woman the right to vote, and recognized the human rights of not one Native American. Yet the Declaration spawned the US Constitution, the Bill of Rights and the American rule of law that eventually began to address these shortcomings.

Freedom, self-reliance, patriotism and protest are concepts all Americans embrace. The Declaration embodies and represents these concepts. Criminal defense lawyers everywhere understand how these themes evolved from the Declaration to the Constitution to the Bill of Rights and beyond.

In our daily work, we often speak of these themes, in jury selection, final summation and in other legal settings. We hope our listeners will understand and accept our reverence for such concepts and apply them accordingly in making decisions. But we all know it is not so. Judges, juries and prosecutors often carelessly and casually cast aside the rule of law in making decisions, as do politicians and lawmakers, and we are the ones who must attempt to pick up the pieces on behalf of our clients.

Organizers of future Declaration readings should reach out to those slighted by the Founders—African-Americans, women, Native Americans—and invite them to participate. Organizers should also explain to their audiences the reasons the Declaration is not a perfect document and how we should all strive to overcome those imperfections.

So, why do we read? Because John Adams told us to kick up our heels on July the 4th! Our readings are a part of an American
tradition Adams foresaw in 1776:

I am apt to believe that it will be celebrated by succeeding generations as the great anniversary festival. It ought to be commemorated as the day of deliverance by solemn acts of devotion to God Almighty; it ought to be solemnized with pomp and parade, with shows, games, sports, guns, bells, bonfires and illuminations from one end of this continent to the other, from this time forward forever more.

Why do we read? It is to call public awareness to the meaning of Independence Day, to celebrate its historical significance, to celebrate the principles we as criminal defense lawyers use every day in courthouses across the land, and to call attention to the value of public protest then and public protest now. It is to encourage our listeners to employ our heritage and the rule of law in their lives.

Why do we read? The readings are probably the best public relations tool for our great organization and its many affiliates and individual members. By reading the Declaration, we are educating the public that we, the criminal defense bar, are our Founders’ heirs. We alone fight to secure the liberty referenced in the Declaration. We are the living part of the continuum. We are the point of the spear, fighting daily to maintain the individual rights our Founders fought for.

And, we read because it is such great fun! It is an opportunity for us to feel good about ourselves and what we do for living, to show off in front of our families and our local folks, to get our picture in the paper.

With firm resolve, we will do it again next year.

Chuck Lanehart is a shareholder in the Lubbock firm of Chappell, Lanehart & Stangl, PC, where he has practiced law since 1977. He is a 1977 graduate of Texas Tech University School of Law. He is board certified in the field of criminal law by the Texas Board of Legal Specialization. Chuck, a former director of the Texas Criminal Defense Lawyers Association, is co-organizer of the annual TCDLA Declaration of Independence statewide readings and serves on TCDLA’s Ethics Committee and Strike Force. TCDLA awarded him the President’s Commendation for “Outstanding Service to the Citizen Accused” and also honored him with the President’s Award for his service to the TCDLA’s Strike Force. He is a charter member and former president of the Lubbock Criminal Defense Lawyers Association. Chuck served as director of the State Bar of Texas, District 16, and as president of the Lubbock Area Bar Association. In 2018, the Lubbock Area Bar Association presented Chuck the Distinguished Lawyer Award, the Bar’s highest honor. In 2008, Chuck was named among the “200 Most Influential People in the History of Lubbock” by the Lubbock Avalanche-Journal.

Note: The online version of the Voice contains pictures and stories of the readings, compiled by Chuck Lanehart. Go to voiceforthedefenseonline.com to read.
Friends,
Chuck Lanehart and I thank everyone who participated in this year’s Declaration readings. We thank the TCDLA staff—Melissa Schank, Chelsea Jones, and Craig Hattersley—for their unwavering support. We are very grateful to each local organizer, listed below, for bringing the words of the Declaration of Independence to life in your community.

—Robert Fickman
Co-organizer, statewide readings

1. Abilene—Jenny Henley
2. Amarillo—Joe Marr Wilson
3. Anderson—Brent Cahill
4. Angleton—Charles Pelowski
5. Anson—Stan Brown
6. Archer City—Dustin Nimz
7. Athens—Danna Mayhall
8. Austin—Bradley Hargis
9. Baird—Stan Brown
10. Bandera—Donald Fidler
11. Bastrop—Eric Torberson
13. Beeville—Jessica Canter & Michelle Ochoa
15. Belton—James Stapler
16. Benjamin—Dustin Nimz
17. Big Lake—Stephen Dodd
18. Boerne—Charles Wetherbee
20. Brownfield—Rocky Ramirez
21. Brownsville—Elizabeth Garza
22. Brownwood—Todd Steele
23. Bryan—Shane Phelps
24. Burnet—Michelle Moore
25. Cameron—Matthew Wright
26. Canyon—Vaavia Edwards
27. Center—Deck Jones
28. Centerville—Leslie Wallrath
29. Channing—Rick Russwurm
30. Clarksville—Mark Lester & Laura McCoy
31. Coldspring—Bob Mabry
32. Comanche—Judson Woodley
33. Conroe—Amanda Webb
34. Corpus Christi—Lisa Greenberg
35. Corsicana—Shana Stein Faulhaber
36. Crowell—Dustin Nimz
37. Cuero—Joseph Sheppard
38. Daingerfield—Mac Cobb & Brenton McQueen
39. Dalhart—Rick Russwurm
40. Dallas—Janie Martin
41. Decatur—Brian Alexander
42. Denton—Rudy Vrba
43. Dimmitt—Dwight McDonald
44. Dumas—Rick Russwurm
45. Eagle Pass—Alberto Ramon
46. Edinburg—Lennard Whitaker
47. Edna—Fatti Hutson
48. Eldorado—Patricia Stone
49. El Paso—Jim Darnell & Jeep Darnell
50. Fairfield—Christopher Martin & Michelle Latray
51. Fort Davis—Melissa Hannah
52. Fort Stockton—Kevin Acker
53. Fort Worth—George Huston
54. Fredericksburg—Tamara Keener
55. Gail—Laurie Key
56. Galveston—Ronald Rodgers
57. Gatesville—Allen Place & Francesca Scanio Stacy
58. George West—Jessica Canary & Michelle Ochoa
59. Georgetown—Robert Maier
60. Giddings—Wesley Keng
61. Goldthwaite—Keith Woodley & Judson Woodley
62. Goliad—Jessica Canary & Michelle Ochoa
63. Granbury—William Walsh
64. Greenville—Katherine Ferguson
65. Groesbeck—Michelle Latray
66. Hallettsville—Jessica Canary & Michelle Ochoa
67. Hemphill—Julie Conn
68. Henderson—Allison Biggs
69. Henrietta—Katie Woods
70. Houston—Neal Davis & Robert Fickman
71. Huntsville—Wyvonne Hill & J. Paxton Adams
72. Irving—Dennis Croman
73. Jefferson—Mac Cobb & Brenton McQueen
74. Jourdanton—Megan Harkins
75. Kaufman—Andrew Jordan & Raymond Shackelford
76. Kermit—Alvaro Martinez
77. Kerrville—Clay Steadman
78. Lampasas—Laurie Key
79. Lamesa—Laurie Key
80. Laredo—Roberto Balli
81. Levelland—Rocky Ramirez
82. Linden—Mac Cobb & Brenton McQueen
83. Littlefield—Rocky Ramirez
84. Livingston—Dana Williams
85. Llano—Tim Cowart
86. Lockhart—David Schulman
87. Longview—Ebb Mobley
88. Lubbock—Russell Gunter & Chuck Lanehart
89. Luikin—Albert Charanza
90. Marfa—Dick DeGuerin
91. Marlin—Matthew Wright
92. Marshall—Kyle Dansby
93. Mason—Tamara Keener
94. McAllen—Joseph Connors & Lennard Whitaker
95. McKinney—Justin Wilson
96. Mentone—Kevin Acker
97. Meridian—Matthew Wright
98. Mertzon—Patricia Stone
99. Midland—Aaron Eckman & Wayne Frost
100. Monahans—Kevin Acker
Welcome to New Members of TCDLA
(5/16/2019–7/15/2019)

Regular Members
Tanairi Alcaraz, Harlingen
Christopher Arce, San Antonio
Martín Argüello II, Houston
Parsa Baghalian, Houston
Christopher Andrew Bailey, Beaumont
Daniel Boyd, Kirbyville
Benjamin Duane Brushe, Sugar Land
John Clayton Caldwell, Pearland
Blake Autry Campbell, Gainesville
Adres Campion, San Antonio
Zakiya O. Carter, Houston
David Casso, Edinburg
Marc A. Chavez, Austin
James Clark, Austin
J. Dean Craig, Kingsville
Lauren Flathouse, Fulshear
Thomas Franklin, Jourdanton
Anthony I. Gonzales, El Paso
Michael Morris Lee, San Marcos
Amber C. Macias, San Antonio
Eleazar Maldonado Jr., Houston
Seth A. Manetta-Dillon, Austin
Paul Lawrence Manigrasso, Waxahachie
Annie Marion, Bellaire
Rudolf Moisiuc, Odessa
Daniel Benjamin Moskowitz, Dallas
James Lloyd Moss, Gainesville
Zacery Munoz, Universal City
George Alexander Napier, Houston
Armando Alan Nunez, McKinney
David Overhuls, Houston
Adam Palitz, Universal City
Gerardo P. Pereira, Houston
Albert Roberts, Fort Worth
William Christopher Roberts, Austin
Michael J. Rogers Jr., San Antonio
Zoe Elizabeth Russell, San Antonio
Arvin Saenz, Irving
Christopher Lee Sbrusch, Palestine
Andrew Dalton Stallings, Midland
Efrain Torres, San Antonio
Jacklyn Varela, Houston
Yovanna Vargas, Dallas
Felipe De Jesus Vielma Jr., Laredo
Gerardo Villegas, Dallas
Hunter White, Houston
Mitchell Williams, Floydada

Public Defender Members
Sharon Nicole Hancock, Austin
Sarah May, San Antonio
Brian Rodriguez, El Paso
Jesus E. Vigil, Laredo

Affiliate Member
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My client, John, walked out of Bell County district court with his “freedom papers”—his words, not mine. John’s road to freedom spanned some 13 years. Back in 2006, John was arrested for possessing cocaine during a raid on a drug house outside Fort Hood. He was another homeless, jobless Army veteran with an incipient addiction. He’d meritoriously served 3 combat tours in Kuwait, Iraq, and Afghanistan. He was never evaluated for PTSD. He’d never been arrested before 2006.

Back then, he couldn’t make bond and wanted to get out of jail, so he pled guilty and agreed to be placed on probation. The judge put him on deferred adjudication probation for 6 years. Probation is no cakewalk. He had to report once a month to the probation office. He had to pay fees, fines, and court costs adding up to a couple of hundred dollars a month. He had to work off 300 hours of community service, complete (and pay for) an outpatient treatment program, attend 12-step meetings, finish several other classes, observe a curfew, and find a job, a place to live, and a ride. He didn’t have a clue how to access his VA benefits.

It was a setup for failure for John but a better option than going to prison. He got out and he tried, but six years can seem like an eternity when you’re that far behind. Within six months he gave up, started using again, left Texas, and roamed from state to state. Meanwhile, the county filed a motion to revoke his probation, and an arrest warrant was issued. But Texas wasn’t really looking for him, and John was living in California.

Fast-forward to 2019. John’s caregiver, Susan, called my office in a panic. She told me that the VA stopped his benefits because he was a “fugitive from justice”—they’d found the arrest warrant. Over the years, VA rated John 100% disabled, but this was their opportunity to cut him off. They stopped his disability check. The VA refused to authorize future payments for his medication and counseling for severe, chronic PTSD with dissociative features, anxiety, and anger issues. He wasn’t a danger to others, but he was a danger to himself without the meds and treatment.

John and Susan had no idea that Texas issued an arrest warrant. Susan didn’t know he’d been on probation in Texas. John had forgotten about it. They tried to work with the VA, but how do you reason with a bureaucratic monolith?

Susan worked with me to obtain his DD214, military awards, commendations, character letters, VA disability rating letter, and letters from psychiatrists and providers describing his mental health diagnosis as well as treatment and medications.

I initiated contact with the District Attorney’s office to try to get the warrant removed and the probation discharged, but as the prosecutor would later tell the judge, “Ms. Harrell has her job to do and I have mine.”
I gave the prosecutor the lengthy packet documenting John’s service, awards, disability rating, and severity of his mental health issues. The prosecutor verified that John had not—not—been arrested again during his 13-year absence from Texas. But the prosecutor pointed out that John did not complete any of the probation requirements and was classified as an “absconder.” He said his hands were tied and he didn’t feel good about it.

My client was now between a rock and a hard place. Stay in California with an open warrant and no VA benefits or return to Texas, go to jail, and leave his fate to the judge.

My client chose to return to Texas. So, Susan drove John back and he turned himself at the county jail on a Sunday. They brought what was left of his five different medications. The jail was administering them once a day, though he was supposed to get his anxiety meds four times a day. Still, John was holding it together.

Four days after his return, we held his probation revocation hearing. My client would break under the stress of testifying, so I called Susan to testify. She’s a lovely woman. She’d gone to Goodwill when she got to town to buy an outfit for court. She brought it by the office seeking our approval the day before the hearing. She looked sharp.

It’s important to understand that Bell County is home to Fort Hood, the largest military installation in the U.S. Our soldiers have been serving in armed conflicts since 2001. Rather than engendering sympathy, our judges and prosecutors have become inured to the “PTSD defense.” Sympathy has been replaced by skepticism and frustration. I had to prove to the judge that John wasn’t “playing the PTSD card” as an excuse.

Susan took the stand. She told the court that she and John were adopted into the same family in California but were years apart in age—about 15 years. John was born to a drug-addicted mother whose parental rights had been terminated. She described her brother as a good kid, even a happy kid, who was eager to join the Army. She said that after John got out of the Army he wandered for a while, and they lost touch. But finally, John made his way back to California, and she knew right away he was in trouble. She got him into VA for evaluation, diagnosis, and treatment. Susan even completed the National Caregiver Veteran Training Program offered by VA so she could better assist John. He’s been living with Susan for 4 years.

She said treatment and medication made a huge difference for John, though he still has outbursts from time to time. She explained to the court that on one occasion family and friends were gathered for a backyard barbecue and something triggered John's PTSD. He started yelling and turning over tables. They called the police, who took him to the hospital to get help. Susan testified that John has not used drugs or alcohol while he’s been with her, and that he goes to all his VA appointments and takes his meds.

Susan testified through her tears that “the Army broke him.” Susan is an army veteran, too. Susan is very proud of her military career as a cook and her service to her country. But she testified that “the Army broke him.” The packed courtroom sat silently through her testimony.

I simply asked the judge for mercy. A lot to ask. In my remarks to the judge, I couldn’t help commenting—out loud—that California must be a liberal state because when their wounded vets act out, the local police take them to the hospital not jail.

I asked the judge to dismiss the probation revocation and release my client from jail that day. I made the obvious arguments, but of course it had to be said. It benefits no one to keep John in jail for any length of time and would grievously set back his mental health recovery. I gave the same packet to the judge that I’d given to the prosecutor documenting John’s meritorious military service and severe mental health issues.

The judge struggled with his decision. He did not want to appear to be rewarding “bad behavior” since there were plenty of other defendants in the courtroom, many of them veterans. After all, my client possessed cocaine then fled the state while on probation. He did do that; he violated the law. John had been dealing with his undiagnosed PTSD by using cocaine. After he stopped using and got the help he deserved and earned through his military service, he turned himself in on the warrant and was prepared to face the consequences.

In the end, the judge did dismiss the probation revocation and dismissed the underlying felony drug charge. John was released from jail that day and did not have a felony drug conviction on his record. Susan drove John back to California to get his VA benefits and care reinstated.

Susan kept hugging me with tears in her eyes before she left the courthouse. John uttered a huge sigh of relief and thanks before they led him out of the courtroom.

While they live on a modest budget, they made a point of sending chocolate and cake to the office as thanks. God knows they needn’t have done it. My associates, assistants, and I sure did appreciate it and the affection that came with it, though.

Mary Beth Harrell has been a criminal defense lawyer for over 20 years and practices in 5 counties in addition to federal court. Her law firm is headquartered in Killeen, Texas. Mary Beth is a proud Army wife and mom. Her husband retired after 23 years’ active duty. Both sons and a daughter-in-law retired after serving in Iraq, Afghanistan, Kuwait, and Bosnia. She can be reached at harrellattorney@gmail.com.
Texas Criminal Defense Lawyers Association

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The 86th Legislature adjourned sine die on May 27th, 2019. Since the Governor, Lieutenant Governor, and Speaker of the House have indicated the Legislature passed every “critical” bill during the regular session, it is not anticipated Governor Abbott will call a special session. Although the primary focus of the 86th Legislature was school finance and property tax reform, legislators found time to pass a number of criminal justice reforms.

In the area of criminal justice, numerous bills related to human trafficking were filed. The Legislature increased penalties and created some new offenses under the guise of fighting trafficking. A bill giving the Attorney General concurrent jurisdiction with local District Attorneys on trafficking cases did not pass. Numerous attempts to change the Texas Rules of Evidence on sexual assault and trafficking cases failed.

While there were many more bills altering the Penal Code and Code of Criminal Procedure, the following 25 bills are the ones most likely to have an effect on the day-to-day practice of criminal law beginning September 1, 2019:

1. **SB 2136**: Expands the “nature of the relationship” evidence by the defense. This amendment to CCP Article 38.471, which formerly applied to just cases of domestic violence, now applies to all offenses and still applies to both parties. In cases where a defendant is arrested for actions in response to something that happened earlier (but often precluded from admitting this evidence), this statutory change allows for the types of defenses where the nature of the relationship is critical to understanding what prompted the behavior. A good example of this would be a battered woman’s defense in a murder prosecution. The statute broadly states that “each party may offer testimony or other evidence of all relevant facts and circumstances that would assist the trier of fact in determining whether the actor committed the offense described by Subsection (a), including testimony or evidence regarding the nature of the relationship between the actor and the alleged victim.”

2. **SB 346**: Changes the allocation of court cost revenue to fund indigent defense. Less of the money paid by defendants will go to breath alcohol testing, law enforcement management, and retirement, Texas Commission on Law Enforcement, and crime victims’ compensation, leaving approximately 20% of all court cost revenue going to the fair defense account.
3. HB 2048: Repeals the Driver Responsibility Program. This bill eliminates the DRP as of 9/1/2019, meaning any unpaid surcharges on the effective date will no longer be an obligation, and every driver with a suspension on the effective date will have it lifted. It is estimated a million Texas drivers will have surcharge suspensions lifted on their license then, and no reinstatement fee will be required to be paid by the driver. As written, the bill provides for what is basically a new “fine” for DWI-type convictions on or after September 1; however, no insurance tickets and DWLI are included in this new “fine.” There is no provision for a driver’s license suspension going forward in any circumstance, and the bill provides for an indigency determination to be made by the sentencing judge. There are obvious questions regarding the constitutionality as well as the application and collection of this new “fine” structure.

4. HB 1279: Clarifies and corrects the references to the effect of parole in jury charges. The current charge is factually incorrect in that it indicates a sentence may be reduced by parole—as opposed to the bill correctly stating that the term of imprisonment may be reduced. This bill eliminates all references to good conduct time.

5. HB 3106: Sexual Assault “investigations” must be entered into the Violent Criminal Apprehension FBI database, listing the suspect’s name, DOB, specific offense, description of manner in which committed, and any other information required by the FBI for inclusion.

6. HB 1399: Mandatory DNA sample from defendants now applies post-arrest instead of post-indictment.

7. HB 8: Starting in 2021, DNA evidence from sexual assault cases must be analyzed in 90 days.

8. HB 8: The Statute of Limitations is eliminated for sexual assault cases where biological matter is collected and the material has not yet been subject to forensic testing or where there is no DNA match.

9. HB 2758: Indecency with a child by exposure to a child under 14 is added to the list of offenses for which the defendant is not eligible for probation from a judge or a jury. (Indecency by contact was previously on this list.) Human trafficking, continuous human trafficking, aggravated promotion of prostitution, and compelling prostitution are added to this list and are not eligible for deferred adjudication.

10. HB 1343: This bill requires an attorney for the State to file an application for a protective order on certain offenses following conviction or placement on deferred adjudication, unless one has already been filed by the alleged victim.

11. HB 1325: Establishes the Hemp Farming Act to regulate the commercial production of hemp and clarifies the Legislature’s intent that the state have primary regulatory authority over the production of hemp and hemp products in Texas. Any promulgated rules regarding cultivation of hemp must comply with federal law. Hemp is defined as follows: the plant Cannabis sativa L. and any part of that plant, including the seeds of the plant and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis (Title 5, Agriculture Code, Chapter 121, Section 121.001). Section 481.002 of the Health and Safety Code now states hemp or the THC in hemp is not included under the Section (5) definition of a controlled substance, and Section (26) excludes hemp from the definition of marihuana. This bill is effective as of June 10, 2019.

12. HB 1342: Eliminates the blanket prohibition on professional licenses due to a past criminal conviction. This bill removes as grounds for disqualification for a professional license a conviction within the past 5 years for an offense not directly related to the licensed occupation. The intent of the legislation is to enhance opportunities for a person to obtain gainful employment following conviction and discharge of the sentence.

13. HB 1631: Prohibits the use of red light cameras of Texas. This bill is effective as of June 2, 2019.

14. SB 21: Raises the age to purchase tobacco to 21 except for military personnel. Everyone under 30 must show ID for purchase.

15. HB 3582: For the last 16 years, the Legislature has been considering a bill to allow Deferred Adjudication for DWI cases. The 86th Legislature passed a version that operates as follows: Deferred is available only for first-time offenders with a BAC of under .15, and this may be non-disclosed upon receiving a discharge and dismissal. For enhancement purposes, a DWI deferred is treated like a conviction similar to assault–family violence cases. The bill provides an ignition interlock device is required on DWI deferred unless the judge waives it following an alcohol/controlled substance evaluation. In comparing HB 3582 and HB 2048 (3 above), HB 2048 assesses the new “fine” against individuals who have been finally convicted of a DWI offense, which is arguably not the case for a person who opts for a deferred adjudication under HB 3582.

16. HB 1760: Lowers the age regarding the right to seal records to age 17 (or after one year has elapsed from final discharge) in juvenile cases.

17. SB 194: A new offense of indecent assault has been created, carrying Class A misdemeanor punishment. Legislative intent is unwanted groping of someone 17 years and
older cannot be adequately addressed with the maximum penalty of a Class C misdemeanor. Bill includes language “without the other person’s consent and with the intent to arouse or gratify the sexual desire of any person.” This bill is effective January 1, 2020.

18. HB 2789: Another new offense creates a Class C misdemeanor when one unlawfully transmits sexually explicit visual material, which is described as “any person engaging in sexual conduct or with the person’s intimate parts exposed; or covered genitals of a male person that are in a discernibly turgid state and not sent at the request of or with the express consent of the recipient.”

19. SB 20: Creates the new offense of Online Promotion of Prostitution. The penalty is a 3rd-degree felony but can be a 2nd upon prior conviction under this section or if conduct involves a person under the age of 18.

20. SB 20: Creates the new offense of Aggravated Online Promotion of Prostitution. The penalty is a 2nd-degree felony but can be a 1st upon prior conviction under this section or if conduct involves a person under the age of 18. “Aggravated” in this context refers to the intent to promote the prostitution of five or more persons or facilitating five or more persons to engage in prostitution.

21. SB 719: Adds Section (9) to Penal Code Section 19.03 and makes it a capital offense to murder an individual 10 years of age or older but younger than 15. However, the death penalty may not be assessed upon conviction.

22. HB 37: Creates a Mail Theft statute in Penal Code section 31.20. A “porch pirate” amendment was added to this bill on the House floor, which states the person appropriates mail from a mailbox or a premises. Note: Consider 18 U.S.C Section 1708 for preemption strategy.

23. HB 98: This bill is an attempt to rewrite Penal Code Section 21.16(b), which is commonly known as the “revenge porn” statute. The 12th Court of Appeals struck down this law, and it is pending at the CCA. The new language specifies a person commits a civil or criminal offense if, without consent, an individual intentionally discloses intimate visual material with the intent to harm the depicted individual.

24. HB 121: Creates a new defense for a person with a CHL who promptly departs a premises prohibiting handguns. The bill is intended to address the situation where a CHL carrier mistakenly carries a handgun onto a premises prohibiting such, but who promptly departs after receiving notice to depart.

25. HB 2524: Amends Penal Code Section 31.04 to create a presumption of theft of service. However, the bill provides that the term “written rental agreement” does not include an agreement permitting an individual to use personal property for personal or household purposes, which is automatically renewable with each payment and permits the individual to become the owner.

This list of 25 bills is not every bill affecting the Penal Code or Code of Criminal Procedure. TCDLA members will have access to a complete and detailed explanation of every such bill during the summer of 2019. The undersigned TCDLA lobby team would like to thank the TCDLA Legislative Committee, Executive Committee, and every TCDLA member who helped us during this session.

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www.tcdla.com
Digital Forensics can be a difficult boat to master. There are many ropes to learn, several courses to choose from, and without local knowledge, you don’t know what lurks in the unchartered seas ahead. What must one do in these days of digital ubiquity to ensure the safety and success of your client, boat, and yourself? Please listen up.

Where once the Digital Forensics (DF) examiner would process 20 computers per cell phone, those numbers have inverted. Now, to be the best criminal defense attorney you can be means always considering cell phones. They can be critical.

In 2014, 18-year-old Greg Kelley was charged with a child molestation crime, found guilty, and sentenced to 25 years with
no parole. Three days after his conviction, his appellate attorney, Keith Hampton, sent us his iPhone. We learned that neither the defense nor the prosecution examined his phone prior to trial, so we decided to examine it that same day. From our initial findings it was clear that Greg’s phone was 180 degrees opposite a pedophile’s phone. His phone was not riddled with the “child love” advertisements and suspicious chats we normally see. There were not hundreds of hours of YouTube videos portraying young children. In fact, we saw the opposite and immediately notified Keith. While no one knew it then, that information became the “kickoff” for Greg’s new trial three years later. In August 2017 the new judge found Greg to be “Actually Innocent.” After 18 months, the Texas Criminal Court of Appeals still must rule to affirm, or perhaps deny, the lower court’s ruling. Meanwhile Greg and his fiancé tell us that they are planning their wedding and trusting in God.

Of course, not all cell phones have an immediate impact. Still, being mindful of the immense amount of data that phones contain, you should preserve that data for future use. Allow your DF expert to create forensic evidence files and store the phone in accordance with NIST-certified procedures. Today’s solid-state memory chips will store their data for at least five years after the batteries have been fully discharged.

Another aspect of cell phone usage needs preservation. They are “Call Detail Records” (CDRs), which provide details such as dates, times, numbers of the called and calling parties, as well as additional critical data. They offer a great amount of important data.

CDRs are a billing and usage record. As such, they usually only note events that cost money. For example, if a Voice Over Internet Protocol (VOIP) call is made over a business system offering free VOIP calls, then that call may not be listed on the CDR. If it is not listed, then that data must be retrieved forensically from the VOIP system.

Each carrier has its own procedure for preserving CDRs, but they all involve transmitting a preservation request to the phone’s carrier. Do it early before the carrier automatically purges that data. Some carriers purge early on, some later, but don’t take a chance. We often send preservation requests in our cases. Furthermore, the admin of a business service VOIP system can provide their own VOIP CDRs if allowed. If the admin is not allowed, then subpoena.

If you have saved or otherwise retained the digital data, your DF expert will also be able to perform a link analysis to tie everyone together. Names, phone numbers, calls, texts, and more will be analyzed and linked, allowing you to visualize relationships that were previously hidden within the background chatter. CDRs can also contribute greatly to creating a link analysis.

There are two different messaging formats that interact via your phone carrier on your cellular phone. One format is the familiar Short Message Service (SMS), and the other is the Multimedia Messaging Service (MMS)—both in use since the 1980s. Another, newer format is the Over The Top (OTT) messaging applications.

OTT messages travel via the internet. If someone does not pay their bill, and thus loses cellular service, he can still send messages by utilizing OTT apps and a wifi connection. OTT apps include “WhatsApp,” “WeChat,” “Viber,” “Telegram,” “BBM,” and many more.

OTT message content and metadata does not appear on CDRs and must be acquired from the phone or the specific application’s own servers. Some OTT apps allow for retention of the message content on the device, but many OTT apps retain the message content only on the OTT app’s servers.

Additionally, for most OTT apps, users may decide to retain the message content by saving the message to their own phones. If the user elects to do so, then we can recover those messages as well. If the user’s OTT message content is retained on the OTT app’s servers, then recovery requires a subpoena.

We recently closed a case involving a young man accused of sending violent and threatening text messages to his former girlfriend. In her effort to obtain a TRO, the ex-girlfriend contacted law enforcement. She then swore out an affidavit for the arrest of her ex-boyfriend. During that process she showed the LEO her cell phone with the violent texts. They all indicated the ex-boyfriend’s number as the sender. The TRO was issued and, due to the threats of violence, the judge required our client to wear a GPS device. When we began this case, he had been wearing it, and bearing the associated expenses and embarrassment, for two years.

Our investigation almost immediately proved that the ex-
boyfriend could not have sent the SMS text messages. His phone had its carrier’s cellular capabilities “disconnected” about six months before the threats began because he could not pay his bill. He did send her three messages via an OTT app, but these messages were telling her to stay away from him. The image shown above is from DF software by Magnet Forensics. It is an industry standard product and NIST certified.

When the ex-girlfriend was confronted with our evidence, she admitted to using a spoofing app to send herself the threatening text messages from another phone. Our client, after more than two years, got his GPS bracelet removed the following week. His attorney was successful in getting all the charges dismissed.

Ours is a science relying heavily on the foundation of the scientific method. Any DF expert you choose must be well-qualified, certified, and licensed in Texas. Some of the leading forensic software tools are produced by companies like Magnet, Cellebrite, Access Data, EnCase, FTK, Blacklight, Autopsy, Oxygen, and others. Make sure that your expert is certified on the tools they use.

Also, be sure that your expert is using hardware and software tools certified by the National Institute of Standards and Technology (NIST). NIST tests and certifies write blockers, disc duplicators, and multiple packages of DF software tools. If not, you might have trouble on your doorstep. Everyone should remember one of the original computer science acronyms—“GIGO.” It stands for “Garbage In, Garbage Out,” and while it is not as prevalent as it once was, it remains just as relevant.

There is one DF software tool all defense attorneys must be familiar with. It is the most commonly used DF tool for LEOs and agencies worldwide. It is called “Cellebrite.” While Cellebrite is not best at recovering all data, especially the new chat and message apps that continue to enter the cell phone market, it is undoubtedly best for recovering the most deleted data. If your DF expert can combine Cellebrite with Magnet’s Axiom, or IEF software, then you will have truly done your complete DF due diligence.

I’ve seen Cellebrite work against my own efforts, and it’s difficult to underestimate the dangers of being uninformed—enough so that we happily spent $15,000 to acquire it. If your DF expert does not own Cellebrite, then consider bringing in a consultant who can provide your expert with a Cellebrite report. It may raise the cost, but when your client is innocent, it is a bargain.

We hope this helps you as you begin to navigate through some of DF’s unknown waters and dangerous shoals. As all seas evolve over time, so does this ocean we call digital forensics. We will post additional articles this year to help keep keep your boat righteously sailing in tropical winds with following seas. We would love to have your questions. Please send them to admin1@pfforensics.com.

Mike Adams, EnCE, and his wife of 37 years, Flo Adams, RN, reside in the Austin area and are both PIs. They have owned and operated Prime Focus Forensics, LLC, since it opened in 1999. “We believe in, and utilize, the scientific method to reveal the actionable data within digital devices. We strive to provide you with ‘the whole truth and nothing but the whole truth.’”

The PFF team of examiners and investigators are certified and licensed (A17351) in forensic software packages ranging from Cellebrite PC-4 to Magnet’s Axiom, Internet Evidence Finder, and several others, utilizing mobile forensics, SSD forensics, Chip Off, JTAG, and more. Mike can be reached at admin1@pfforensics.com.
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February 2-9, 2020
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


The residual clause of 18 U.S.C. §924(c)(3)(B) (defining a crime of violence as an offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense) is unconstitutionally vague.


Where all relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State’s peremptory strike of a minority juror is not motivated in substantial part by discriminatory intent, reversal is required.

Under Batson, once a prima facie case of discrimination has been shown by a defendant, the State must provide race-neutral reasons for its peremptory strikes. The trial court must determine whether the prosecutor’s stated reasons were the actual reasons or instead were a pretext for discrimination.


The Double Jeopardy Clause of the Fifth Amendment protects individuals from being twice put in jeopardy “for the same offence” and not for the same conduct or actions, so the dual-sovereignty rule is not an exception to double jeopardy. An “offence” is defined by a law, and each law is defined by a sovereign. So where there are two sovereigns, there are two laws, and two “offences.”

Editor’s note: if you enjoy reading long law-review-style articles that are heavy on historical perspectives, including learning about ancient cases heard before the English Court of Chivalry, this opinion is a good read. Otherwise, the holding above is all you need to know.

Mitchell v. Wisconsin, No. 18-6210, 2019 U.S. LEXIS 4400 (U.S. June 27, 2019) (plurality op.) [A statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement]

Under Missouri v. McNeely, 569 U.S. 141, 149 (2013), the exigent-circumstances exception allows warrantless searches to prevent the imminent destruction of evidence (there is compelling need for official action and no time to secure a warrant). However, the exception does not cover BAC testing of suspects considering that blood-alcohol evidence is always dissipating due to the natural metabolic processes.

Exigency exists when: (1) BAC evidence is dissipating; and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when a drunk-driving suspect is unconscious. With such suspects, too, a
warrantless blood-draw is lawful.

A statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.

Editor’s note: This is a plurality opinion. Under Marks v. United States, 430 U.S. 188, 193 (1977); “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’” So for example in Pennsylvania v. Muniz, 496 U.S. 582 (1990) (Miranda issue): Four justices agreed on the “majority” opinion, and five justices agreed on a single rationale explaining the result. Plurality opinions are generally not binding in Texas:

- Cooper v. State, 67 S.W.3d 221, 224 (Tex.Crim.App. 2002): a plurality opinion has limited or no precedential value.
- State v. Hardy, 963 S.W.2d 516, 519 (Tex.Crim.App. 1997): “we may look to ‘plurality’ opinions for their persuasive value.”


Under the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e), a 15-year minimum sentence applies to a felon who unlawfully possesses a firearm and has 3 prior convictions for a serious drug offense or violent felony, which includes burglary. Per Taylor v. United States, 495 U.S. 575, the generic term “burglary” means “unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.”

For purposes of the ACCA “violent felony” prerequisite, “remaining-in burglary occurs when a person forms the intent to commit a crime at any time while unlawfully remaining in a building or structure.


Under Staples v. United States, 511 U.S. 600, 605 (1994), and United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994), whether a statute requires the Government to prove the defendant acted knowingly is a question of congressional intent. In determining such intent, there is a presumption that Congress intends to require a defendant to possess a culpable mental state regarding each element of the offense that criminalize otherwise innocent conduct even if Congress does not specify any scintere in the statute.

“Knowingly” applies both to the defendant’s conduct and to the defendant’s status. To convict under 18 U.S.C. §924(a)(2) for violating 18 U.S.C. §922(g), the Government must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it.

United States Court of Appeals for the Fifth Circuit


Under U.S.S.G. §2K2.1(b)(4), a four-level enhancement is added to the base offense level if a firearm had an altered or obliterated serial number. U.S.S.G. §2K2.1(b)(4) applies when a serial number on the frame is obliterated even if serial numbers on other components of the firearm remain unaltered. This rule “may serve as a deterrent to tampering even when incomplete.” Further, this single-obliteration rule could facilitate tracking each component that bears a serial number given that various parts of firearms may be sevarable.

A firearm’s serial number is “altered or obliterated” when it is materially changed in a way that makes accurate information less accessible.


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 that 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. Rosales-Mireles v. United States, 138 S.Ct. 1897, 1907 (2018), a U.S.S.G. error that satisfies the first three Olano factors ordinarily also satisfies the fourth and warrants relief under Rule 52(b) because such plain error usually establishes a reasonable probability that a defendant will serve a sentence.
that is more than necessary to fulfill the purposes of incarceration. Additional factors favoring correction are: (1) resentencing is relatively easy; and (2) U.S.S.G. miscalculations result from judicial error rather than a defendant’s strategy. Where the record is silent as to whether the district court might have done had it considered the correct U.S.S.G. range, the district court’s reliance on an incorrect range in most instances will suffice to show an effect on the defendant’s substantial rights.

Under U.S.S.G. §4A1.2, which governs whether prior sentences count for criminal history purposes, a prior sentence of imprisonment exceeding a year and a month is counted if it: (1) was imposed within 15 years of committing the present offense, or (2) resulted in the defendant being incarcerated during any part of the 15-year period. Other prior sentences imposed within 10 years of committing the present offense is counted. Any other prior sentence is not counted.


Under 18 U.S.C. §3161(b), the Speedy Trial Act, any indictment charging an individual with an offense shall be filed within 30 days from the date on which the individual was arrested or served with a summons in connection with such charges. Certain periods are excluded from the calculation of the 30 days, including delay resulting from pretrial motions, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion. The Act does not lay out a method for computing time, so under Fed. Rule Crim. Proc. 45 (computing time periods in any statute that does not specify a method of computing time), the day of the event that triggers the period is not counted, but the last day of the period is counted, but if the last day is a Saturday, Sunday, or legal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.

Editor’s note: I summarize only the speedy trial issue. The other issues either have been covered recently or are not relevant for this SDR.

Texas Court of Criminal Appeals


Editor’s note: I summarize only the change-of-venue issue. The other issues either have been covered recently or are not relevant for this SDR.

• The effect of a change of venue is to remove the cause absolutely from the jurisdiction of the court awarding the change and to confer to the court to which removal is had with the same jurisdiction held by the court of original venue.

• A trial court could rescind an order changing venue where no steps had been taken to carry out or to comply with the order changing venue and the record reflects that the order was improperly entered.

• Under Tex. Code Crim. Proc. Art. 31.03(a)(1) (2019), a change of venue may be granted in any felony case on the written motion of the defendant, supported by his own affidavit and the affidavit of at least two credible persons, residents of the county where the prosecution is instituted, for either of the following causes, the truth and sufficiency of which the court shall determine that there: (1) exists in the county where the prosecution is commenced so great a prejudice against him that he cannot obtain a fair and impartial trial; and (2) is a dangerous combination against him instigated by influential persons, by reason of which he cannot expect a fair trial.

• An order changing venue to a county beyond an adjoining district shall be grounds for reversal if upon timely contest by defendant the record of the contest affirmatively shows that any county in his own and the adjoining district is not subject to the same conditions which required the transfer. Widespread publicity alone is not inherently prejudicial. News stories that are accurate and objective are generally not considered to be prejudicial or inflammatory.

• A trial court may use the jury selection process to help gauge the community climate.

• A trial court’s ruling on a motion for change of venue is reviewed for abuse of discretion.

Fisk v. State, No. PD-1360-17, 2019 Tex.Crim.App. LEXIS 541 (Tex.Crim.App. June 5, 2019) (designated for publication) [whether the elements of an offense under the laws of another state are substantially similar to the elements of a Texas offense]

To determine whether the elements of an offense under the laws of another state are substantially similar to the elements of a Texas offense, there must be only a high degree of likeness between the offense but they may be less than identical.

Elements of sodomy with a child under UCMJ Art. 125 are substantially similar to the elements of sexual assault as defined by the Tex. Penal Code.


Probable cause exists when reasonably trustworthy facts and circumstances within the knowledge of the officer on the scene would lead a man of reasonable prudence to believe that the instrumentality of or evidence pertaining to a crime will be found.
In determining whether probable cause exists to support the issuance of a search warrant, the magistrate to whom the probable cause affidavit is presented is confined to considering the four corners of the search warrant affidavit as well as to logical inferences the magistrate might draw based on the facts contained in the affidavit.

Generally, a reviewing court applies a presumption of validity regarding a magistrate’s determination that a search warrant affidavit supports a finding of probable cause. When reviewing a magistrate’s probable-cause determination, a reviewing court must ordinarily view the magistrate’s decision to issue the warrant with great deference and must uphold the decision so long as the magistrate had a substantial basis for his finding.

Under Franks v. Delaware, 438 U.S. 154, 171–172 (1978), the presumption of validity regarding the magistrate’s probable-cause determination may be overcome if the defendant can show the presence of false statements in the search-warrant affidavit that were made deliberately or with reckless disregard for truth. Such statements must be purged from the affidavit and it is up to the judge to determine whether probable cause exists absent the excised statements.

Under McClintock v. State, 444 S.W.3d 15, 19 (Tex.Crim. App. 2014), after statements have been purged from an affidavit under Franks, the reviewing court should not give deference to the magistrate’s initial probable-cause determination and should abandon the substantial-basis analysis because the court is now examining a new, different affidavit. The question is the same as it would be for a magistrate conducting an initial review of a search-warrant affidavit: whether the remaining statements in the affidavit establish probable cause. Reviewing courts are still required to read the purged affidavit in accordance with Illinois v. Gates and must undertake a totality-of-the-circumstances approach. State v. Le, 463 S.W.3d 872, 877 (Tex.Crim.App. 2015). The standard is not a heightened probable-cause standard.

Texas Courts of Appeals

Martin v. State, No. 02-18-00333-CR, 2019 Tex. App. LEXIS 4011 (Tex.App.—Fort Worth May 16, 2019) [Fireman’s knowledge of plain view contraband imputes to police]


A warrantless police entry into fire-damaged property is presumptively unreasonable unless it falls within the scope of an exception to the warrant requirement unless the fire is so devastating that no reasonable privacy interests remain in the ash and ruins.


Exigent circumstances created by a fire are not extinguished the moment the fire is put out but continue for a reasonable time after the fire has been extinguished to allow fire officials to fulfill their duties, including making sure the fire will not rekindle and investigating the cause of the fire. The determination of “reasonable time to investigate” varies with the circumstances of a fire.

Under Michigan v. Clifford, 464 U.S. 287, 294 (1984), if evidence of criminal activity is discovered by firefighters during a lawful search under exigent circumstances, firefighters may seize it under the plain-view doctrine.

Under State v. Betts, 397 S.W.3d 198, 206 (Tex.Crim.App. 2013), the requirements for seizure of an object in plain view are: (1) law enforcement must lawfully be where the object can be plainly viewed; (2) the incriminating character of the object in plain view must be immediately apparent; and (3) the officials must have the right to access the object.

Law enforcement officers may enter premises to seize contraband that was found in plain view by firefighters or other emergency personnel if the exigency is continuing and the emergency personnel are still lawfully present.

Where a lawful intrusion by a firefighter has occurred and the firefighter observed contraband in plain view, the invasion of privacy is not increased by allowing an officer to enter the residence without a warrant and observe or seize the contraband.

Police officers often fill many roles, including paramedic, social worker, and fire investigator. When those roles overlap the role of criminal investigator, it is not unreasonable to allow officers “to step into the shoes of” the firefighter to observe and to seize the contraband without first obtaining a warrant. Allowing this limited entry by an officer constitutes no greater intrusion upon the defendant’s privacy interest than does a firefighter’s entry.

Congratulations to Jessi Freud, Paul Looney & Skip Reaves

Safety Code §365.012 as reasonable suspicion for a traffic stop

Under Tex. Health & Safety Code §365.012(a), a person commits an offense if the person disposes or allows or permits the disposal of litter at a place that is not an approved solid waste site, including a place on or within 300 feet of a public highway regardless of whether that litter causes a fire.

Under Sims v. State, 569 S.W.3d 634, 642 (Tex.Crim.App. 2019), if there is a conflict between a general provision and a specific provision, the specific provision prevails as an exception to the general provision.

Under Harris v. State, 359 S.W.3d 625, 629 (Tex.Crim.App. 2011), and Tex. Gov. Code §311.011, a statute is construed with the plain meaning of its text unless the text is ambiguous or the plain meaning leads to absurd results that the legislature could not possibly have intended. In ascertaining the plain meaning of a word, we read words and phrases in context and construe them according to the rules of grammar and usage. Courts interpret statutes together and harmonized to give effect to all of the statutory provisions. Courts presume that every word has been used for a purpose, and that each word, phrase, clause, and sentence should be given effect if reasonably possible. If the plain language is clear and unambiguous, the analysis ends because the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute.
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