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**October 2019**
- October 9
  - CDLP | Innocence for Students
  - *Travel stipends*
  - Austin, TX
- October 10–11
  - CDLP | 17th Annual Forensics
  - *Travel stipends*
  - Austin, TX
- October 17
  - CDLP | Immigration | co-sponsored with DCDLA
  - Dallas, TX
- October 18
  - CDLP | Cross-Examination | co-sponsored with HCCLA
  - Houston, TX
- October 18
  - CDLP | We Make Champions
  - College Station, TX
- October 24–25
  - TCDLA | 15th Annual Stuart Kinard Memorial Advanced DWI Seminar
  - San Antonio, TX

**November 2019**
- November 1
  - CDLP | We Make Champions
  - Longview, TX
- November 13
  - CDLP | We Make Champions
  - McAllen, TX
- November 14
  - CDLP | Capital Litigation
  - South Padre Island, TX
- November 15
  - CDLP | Mental Health
  - South Padre Island, TX
- November 21
  - CDLP | Mental Symposium | co-sponsored with CCCDLA
  - Denton, TX
- December 6
  - TCDLA | Executive Committee Meeting
  - Dallas, TX
- December 7
  - TCDLA & TCDLEI Board and CDLP Committee Meetings
  - Dallas, TX
- December 13
  - CDLP | 12th Annual Hal Jackson Memorial Jolly Roger Seminar | co-sponsored with DCCLA
  - Denton, TX

**December 2019**
- December 5–6
  - TCDLA | Defending Those Accused of Sexual Offenses
  - Dallas, TX
- December 7
  - TCDLA & TCDLEI Board and CDLP Committee Meetings
  - 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 LCCLA
  - Lubbock, TX
- January 9–10
  - TCDLA | 39th Annual Prairie Dog Lawyers Advanced Criminal Law Seminar
  - Lubbock, TX
- January 17
  - CDLP | We Make Champions
  - Waco, TX
- January 24
  - TCDLA | 7th Annual Lonestar DWI
  - Austin, TX
- January 29–31
  - TCDLA | SFSTs
  - Lubbock, TX
- January 31–Feb. 1
  - CDLP | DNA
  - Houston, TX
- February 13
  - CDLP | Indigent Defense
  - Dallas, TX
- February 20
  - CDLP | Capital
  - Austin, TX
- February 21
  - CDLP | Mental Health
  - Austin, TX

**February 2020**
- February 20
  - CDLP | Veterans
  - Austin, TX
- February 20
  - CDLP | Writing
  - Austin, TX

Seminars sponsored by CDLP are funded by the Court of Criminal Appeals of Texas. Seminars are open to criminal defense attorneys; other professionals who support the defense of criminal cases may attend at cost. Law enforcement personnel and prosecutors are not eligible to attend. TCDLA seminars are open only to criminal defense attorneys, mitigation specialists, defense investigators, or other professionals who support the defense of criminal cases. Law enforcement personnel and prosecutors are not eligible to attend unless noted “open to all.” **Open to all members of the Texas bar:** You must be a member of the Texas bar to attend TCDLA seminars.

Texas Criminal Defense Lawyers Educational Institute offers scholarships to seminars for attorneys in need.
We had an incredible time in Austin for our Voir Dire seminar and board meetings! Under the leadership of Sam Bassett, Carmen Roe and John Hunter Smith, we created a fresh seminar format that involved breakout groups, demonstrations of effective voir dire and had our participants conduct voir dire! We are constantly striving to find new, innovative ways to offer our TCDLA lawyers to better represent the citizen accused. This was a great example of that, and I hope all our lawyer attendees and presenters left with a few more arrows in their quivers!

This year, we are focusing on mental health—ours as well as the mental health of our clients. Keep following the website, the Voice, and the listserv to learn of exciting opportunities for having an impact on your client’s signals regarding problems—whether it is addiction, depression, or any other condition that affects his or her ability to avoid legal problems. We need to also be mindful of our own issues affecting mental health. We continue to see our friends and colleagues in the legal community deciding to end their lives rather than dealing with the struggles. Lawyers are 3.6 times more likely to suffer from depression than nonlawyers, according to the American Psychological Association. Substance abuse rates within the legal profession are also much higher than for the general population. Clinical depression and substance abuse are highly correlated with suicide rates. The legal industry has the 11th-highest incidence of suicide among professions. I’d guess that number may be even higher for those of us who represent people who face not just the loss of money in a lawsuit, but also the reality of prison and the loss of everything and everyone they love.

Bottom line—be good to each other. Reach out to that lawyer who seems to be struggling or hurting or drowning in depression or drugs or alcohol. Be sensitive and make sure you’re also taking care of yourself. We will be offering some great opportunities to learn how to be better, healthier, financially stable lawyers.

You guys are all so important to me, and I thank God almost daily for the friendships and collegiality and sound legal advice I’ve gleaned because of so many of you. Can’t wait to see many of you at upcoming seminars—and of COURSE at our Sexual Assault seminar (commanded by the likes of Heather Barbieri and Jeff Kearney) and board meeting in Dallas in December!

Fall is in the air! Enjoy!
44th Annual
Tim Evans Texas Criminal Trial College Application
(Enrollment limited to 80)
March 29–April 3, 2020
Huntsville, Texas
Application Deadline Noon, January 14, 2020 (you will be notified by email & text)

Bar # __________________________ □ Male □ Female

Name _________________________________ Address _________________________________

City _________________________________ State ______ Zip _________________________________

Phone _______________________________ Fax _________________________________

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Must be a licensed Texas attorney. Complete entire application. [Note: After March 10, cancellations will be charged the actual cost of $750 per person if we can’t fill your spot.]

☐ $150 registration fee (refunds, less 10% processing fee, only for cancellations made before March 10, 2020). Registration price includes breakfast and lunch each day, dinner two nights, and hotel (double occupancy).

☐ this application plus a letter of intent on a separate sheet, tell us your level of trial experience. Additionally, please tell us why you want to attend the Texas Criminal Trial College.

☐ a letter of recommendation from a Texas judge (District, County, or Federal).

☐ a letter of recommendation from a criminal defense attorney.

You will be notified by January 30, 2020. Only complete applications will be considered. *Special needs or financially unable to pay contact TCDLA.

Credit card number: _______________________________ Expiration date: _______________________________

Signature __________________________________________

☐ I applied last year. ☐ I attended a Criminal Trial College in __________________________

I accept court appointments: ☐ Yes ☐ No

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Number of Trials (as first chair only):

# ______ Felony Jury # ______ Felony Bench # ______ Misdemeanor Jury

# ______ Misdemeanor Bench # ______ Civil Jury

Number of Trials (as second chair):

# ______ 2nd Chair Felony Jury** # ______ 2nd Chair Misdemeanor Jury**

**On a separate sheet explain your involvement.

Type of practice and years in practice (general description): __________________________________________

Other Training or Experience:

Law school: _______________________________ Date graduated: _______________________________

Other trial training courses taken: __________________________________________

Former Prosecutor: ☐ Yes ☐ No

If yes, how long, when did you leave, and what experience did you have? __________________________________________

Public Defender: ☐ Yes ☐ No

If yes, what office? __________________________________________

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Seminars sponsored by CDLP are funded by the Texas Court of Criminal Appeals.
TCDLA started off our fiscal year September 1st with seminars, board and committee meetings, and networking opportunities. The Voir Dire seminar gave a fresh new perspective on the topic. Attendees raved about how it was a huge success due to the innovative format. We had lectures and demos in the morning and then afternoon interactive group sessions, which entailed sharing case ideas and techniques and participating in exercises that could be applied immediately. Of special note, we hosted a group of 15 students studying criminal justice, and this experience turned their classroom studies to reality. During breaks, several attorneys met with students to share testimonials about criminal defense. As I observed, I realized everyone has a different story to tell about their journey.

To build on this momentum, TCDLA will explore opportunities to improve seminars to separate us from our competitors. We value our attendees’ opinions and welcome suggestions and new ideas. Our Champions theme seminars, sponsored by the Texas Court of Criminal Appeals, crank up this month. Visit our website for CLE we are offering and TCDLEI scholarship opportunities.

Saturday, September 15th, more than 70 board and CDLP Committee members and past presidents gathered for our quarterly meeting to continue working toward our goals and mission. From the outset, I was filled with pride, being a part of such a dedicated and talented group, who each volunteer their time and money to travel and attend a weekend meeting. The reality is we would not be successful without the perspective and experience...
each individual brings to the table. Join us! We are now accepting applications for board membership—visit the website for a form.

During the session, the board voted on a bylaws amendment that will be presented for a vote at the annual membership meeting in June in conjunction with Rusty Duncan. Save the date: June 18–20, 2020. The Hyatt is now taking reservations. Below is the amendment, with changes underlined:

Sec. 2. Executive Committee.
The Executive Committee shall consist of the officers of the Association, the editor of the Voice for the Defense, immediate past president, and two members of the board of directors appointed by the President. The President may select Ex-Officio(s) in a non-voting capacity, to serve on the Executive Committee. The Executive Committee shall have such powers and duties as are provided in these bylaws and as may be prescribed by the Board of Directors. The Executive Director is a non-voting member of the Executive Committee.

In addition to putting on meetings and seminars, our staff is also involved in continuing education, following TCDLA’s lead in staying abreast with new developments so we can contribute to the organization. These educational opportunities are only part of the process; equally important is the networking, idea sharing, and brainstorming that accompany. For my own part, I have come to realize I cannot fix past missteps. In the future, though, I can learn from my mistakes, sharing my lessons and understanding others’ experiences, and work never to repeat them. The networking and relationships built from the seminars prove invaluable in this regard.

To be successful in our chosen field, we all try to stay relevant, up to date. I’ve come to realize that my own viewpoint doesn’t always represent reality. Each person’s reality colors their perspective. The challenge is in how do we remain an all-inclusive organization when everyone holds separate mindsets? You do not need to compromise your positions to listen, even welcome, another’s. That’s what an association represents—bringing together various realities and incorporating them all in a whole. If your reality is as a part of TCDLA, we need your outlook to grow our Association, as we also need for you to include and invite others to be a part of our family.
Welcome to New Members of TCDLA
(8/16/2019–9/15/2019)

**Regular Members**
Aimee Bolletino, Houston
Cason Clayton Cagle, Denton
Dana A. Duffey, Ft Worth
MacKenzie Dunham, Houston
Chukwudi Egbuonu, Houston
Vanessa Isabel Garcia, San Antonio
Jose Antonio Gomez, Edinburg
Diamond J. Hayes, Houston
Valerie Hedlund, San Antonio
Collin A. Jordan, Wichita Falls
Daniel Louis, Heartland
James Matthews, Austin
Dax Pueschel, Abilene
Rocky Ramirez, Lubbock
Roy M. Rolong, Spring
Freddy B. Ruiz, San Antonio
Charles W. Skinner, Waxahachie
Kathy Marie Starling, San Antonio
Gerald G. Villarreal, Corpus Christi
Rebecca Lyn Yung, Beeville

**Affiliate Member**
Stephanie Shackelford II, Irving

**Investigator Member**
Jasmine Bond, Houston

**Expert Members**
Andrew Garrett, Decatur
Bruce A. Horn, Houston

**Paralegal Member**
Emily Squyres, Groveton

**Student Members**
Jessica Aycock, Lubbock
Elizabeth Balido, Lubbock
Jessica R. Bebawi, Lubbock
Monique Bridges, Friendswood
Johari Ahmed Burnette, Houston
Shuler China III, Cheltenham
Abraham S. Chopin, Houston
Jay’Neisha S. Davis, Lubbock
Felicia De Leon, Lubbock
Jeffrey Scott Delman, Lubbock
Dana Dinkens, Lubbock
Tracie Dionne, Lubbock
Christen Yvette Hill, Houston
Sara Jaeckle, Lubbock
Lynda Jetton, Houston
Scott Keffer, Lubbock
Catherine Langford, Lubbock
Zohra Mavani, Houston
Chase McCollough, Lubbock
Morgan McNabb, Lubbock
Eugenia Mendez, Houston
Alejandro Munoz II, Houston
Alexander P. Natarajan, Lubbock
Kyra L. Riggins, Houston
Michael David Rinehart, Lubbock
Chris Roach, Dallas
Sam Robbins, Lubbock
Tayler L. Salter, Houston
Steven J. Smith, Houston
Jazmine Smith, Houston
Hunter Sutterfield, Lubbock
Brianna Weis, Austin
Sidney Wiltshire, Lubbock

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Order your copy now, the Annotated Texas Penal Code and Code of Criminal Procedure!

**Member rates:** $74 book, $40 CD

The Penal Code and the Code of Criminal Procedure are set out in this book through the 86th Legislature (2019). Both codes are contained in one volume for complete and easy access to the statutes and rules governing Texas criminal practice. Code sections are followed by annotations current to September 1, 2019. This book can be easily used in the office as a research source and taken to the courthouse for immediate reference during trial.

**Call (512) 478-2514 for your copy or go online to www.tcdla.com.**
The chance of surviving an overdose, like any medical emergency, depends, in large part, on how quickly one receives medical care. In overdose situations people are often afraid to call 911, even when someone’s life is literally on the line, for fear of being arrested. Often, people are not alone when they overdose; there are others present who could call 911 for help but just don’t. Those people are very likely under the influence of drugs, too, and there is likely paraphernalia and perhaps additional drugs present—thus fueling the reluctance to call 911 and instead attempting any life-saving measures alone or just leaving the person overdosing to die.

While there is generally no preexisting legal duty to intervene in emergency situations, it can hardly be argued that Good Samaritan laws don’t serve a useful purpose. Indeed, Good Samaritan laws are aimed at encouraging people to call 911 in emergency situations by limiting or eliminating criminal penalties that may otherwise be associated with the situation. As of 2018, the District of Columbia and every state except Texas, Oklahoma, Kansas, Wyoming, and Maine had some version of an overdose Good Samaritan law.

Texas does have several Good Samaritan laws regarding substance use:

**Minor in Consumption—**Tex. Alc. Bev. Code Sec. 106.04(e)
Subsection (a) does not apply to a minor who:
1. requested emergency medical assistance in response to the possible alcohol overdose of the minor or another person;
2. was the first person to make a request for medical assistance under Subdivision (1); and
3. if the minor requested emergency medical assistance for the possible alcohol overdose of another person:
   A. remained on the scene until the medical assistance arrived; and
   B. cooperated with medical assistance and law enforcement personnel.

**Minor in Possession—**Tex. Alc. Bev. Code Sec. 106.05(e)
Subsection (a) does not apply to a minor who:
1. requested emergency medical assistance in response to the possible alcohol overdose of the minor or another person;
2. was the first person to make a request for medical assistance under Subdivision (1); and
3. if the minor requested emergency medical assistance for the possible alcohol overdose of another person:
(A) remained on the scene until the medical assistance arrived; and
(B) cooperated with medical assistance and law enforcement personnel.

Prescriber—Opioid Antagonists—Tex. Health & Safety Code, Sec. 483.102(c)
A prescriber who, acting in good faith with reasonable care, prescribes or does not prescribe an opioid antagonist is not subject to any criminal or civil liability or any professional disciplinary action for:
(1) prescribing or failing to prescribe the opioid antagonist; or
(2) if the prescriber chooses to prescribe an opioid antagonist, any outcome resulting from the eventual administration of the opioid antagonist.

Pharmacist—Opioid Antagonists—Tex. Health & Safety Code, Sec. 483.103(c)
A pharmacist who, acting in good faith and with reasonable care, dispenses or does not dispense an opioid antagonist under a valid prescription is not subject to any criminal or civil liability or any professional disciplinary action for:
(1) dispensing or failing to dispense the opioid antagonist; or
(2) if the pharmacist chooses to dispense an opioid antagonist, any outcome resulting from the eventual administration of the opioid antagonist.

Administration of Opioid Antagonists—Tex. Health & Safety Code, Sec. 483.106(a)
A person who, acting in good faith and with reasonable care, administers or does not administer an opioid antagonist to another person whom the person believes is suffering an opioid-related drug overdose is not subject to criminal prosecution, sanction under any professional licensing statute, or civil liability, for an act or omission resulting from the administration of or failure to administer the opioid antagonist.

A person who in good faith administers emergency care is not liable in civil damages for an act performed during the emergency unless the act is wilfully or wantonly negligent, including a person who:
(1) administers emergency care using an automated external defibrillator; or
(2) administers emergency care as a volunteer who is a first responder as the term is defined under Section 421.095, Government Code.

The idea with these laws, of course, is to encourage people to do the right thing, not to punish. This only makes sense.

In the same vein, in 2015, Texas unanimously passed Senate Bill 1462 creating the opioid antagonist laws. See Tex. Health & Safety Sec. 483.101, et. seq. I previously wrote about these laws in one of my comments after they went into effect. 45 Voice 6 (July/Aug. 2016)

What’s missing among Texas’ Good Samaritan-type of protections becomes glaring held against the backdrop of the most recent provisional statics from the CDC showing there were over 67,000 overdose deaths last year, with over 3,000 occurring in Texas. https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm (last visited 9/14/19). Unintended drug overdose deaths are preventable but are increasingly affecting every segment of our society. It seems a no-brainer, then, that Texas should join the majority of the country and enact an overdose Good Samaritan law. Why not?
Robert Pelton

A Time to Keep Silent

The Bible reminds us—a time to keep silence, and a time to speak—
As lawyers there is a time to keep silent . . .

Case 1:
Defendant in criminal trial asserted his Fifth Amendment privilege against self-incrimination and did not testify. The prosecutor introduced evidence in the form of affidavits and police reports, and the court ruled that the defendant was guilty. During the sentencing and punishment phase of the trial, the judge asked defense counsel whether he intended to seek to qualify defendant for probation. Defense counsel advised the court that probation could be considered under applicable law regardless if the defendant testified or not as to the absence of any prior felony convictions. The judge then asked the prosecutor, “Does the defendant have any prior convictions?” The prosecutor mistakenly stated to the court that police records reflect that defendant has no prior convictions. Prosecutor turned to the defendant and asked, “Right?” The defendant and defense counsel make no statement, and the court granted probation of defendant’s sentence.

When the judge asked the prosecutor about prior convictions of defendant, defense counsel knew that the prosecutor’s statement to the court was inaccurate because defendant had previously informed defense counsel about his prior felony convictions. After the trial concluded, defense counsel advised defendant that if he is asked by probation officials about his prior arrests or convictions, defendant must answer and must answer truthfully. In fact, probation officials subsequently learn about defendant’s prior convictions as a result at a post-trial interview in which the defendant answered such questions truthfully about his prior convictions.

Case 2:
Lawyer has client charged with evading in a motor vehicle, a state jail felony. The facts of the case are not egregious, but when searched incident to arrest, defendant had a chargeable quantity of methamphetamine—i.e., less than a gram—that he/she was not charged with, even though the lab showed it was meth.

Client is offered two years deferred on the felony evading, 90 days on reduction to a misdemeanor. Client refuses both offers. State informs lawyer that if client does not plead, State will file the meth case. Client says he/she will take the deferred. State mistakenly writes up paperwork so that defendant will receive two years deferred on a misdemeanor. Judge takes
the plea, not reading the stipulation and plea agreement, believing it is a felony. Defendant receives misdemeanor probation.

**Query:** Is lawyer under any duty to inform the Court of the error?

See Ethics Opinion 504. While not entirely on point, I think it gives some good guidance. Under the opinion, the duty of candor does not require an attorney to correct a false statement made by the court regarding the Defendant (in that case, that he was never previously convicted of a felony, when, in fact, he had been). In this case, however, it’s not privileged information that the plea agreement was for something else. Nevertheless, I don’t think the rules go so far to require disclosure in this case.

**Discussion**

Ethical dilemmas arising under Texas Disciplinary Rule 3.03 present very difficult issues because ethics rules governing lawyers’ conduct attempt to balance, on the one hand, a lawyer’s duty of candor to the court and, on the other hand, a lawyer’s duty of loyalty to and zealously on behalf of a client, along with a duty to maintain confidential client information. Establishing the line between these competing obligations requires an examination of the specific facts in view of the standards for candor to the tribunal articulated in the Texas Disciplinary Rules.

Pursuant to Texas Disciplinary Rule 3.03(a)(1), a lawyer may not knowingly make a false statement of material fact or law to a tribunal; pursuant to Texas Disciplinary Rule 3.03(a) (2), a lawyer may not knowingly fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act; pursuant to Texas Disciplinary Rule 3.03(a) (5), a lawyer may not knowingly offer or use evidence that the lawyer knows to be false. These rules constitute exceptions to a lawyer’s duty to maintain client confidential information under Texas Disciplinary Rule 1.05.

The particular question presented in the Statement of Facts does not involve a lawyer knowingly making a false statement of material fact or law, or a situation where the client has permitted perjury or made a fraudulent statement in which the lawyer’s silence may be tantamount to assisting a criminal or fraudulent act. Rather, the situation presents the issue of whether a lawyer may remain silent when neither he nor his client has made a false statement to the tribunal, but the lawyer knows that the court is relying upon mistaken or inaccurate information stated in court to the benefit of his client.

Several situations related to the issue of a criminal lawyer’s silence about his client’s prior criminal convictions have been considered in ethics opinions previously issued by the American Bar Association Committee on Ethics and Professional Responsibility. In ABA Formal Opinion 287 (1953), dealing with the earlier ABA Canons of Professional Ethics, three very similar situations were considered. These situations included: (1) The judge asks the defendant whether he has a criminal record and the defendant falsely answers that he has none; (2) the judge asks the defendant’s lawyer whether his client has a criminal record; and 3) the judge is told in court by the custodian of criminal records that the defendant has no criminal record and the lawyer knows this information is incorrect based upon his own investigation or upon his client’s prior disclosure of information to him.

The ABA Committee concluded under the earlier Canons of Professional Ethics that in each of these three situations, the lawyer’s obligation under Canon 37 to preserve a client’s confidential information prohibits any disclosure to the court of information the lawyer has concerning his client’s prior criminal record. However, the lawyer must not make any false statement to the court.

After adoption of the Model Rules of Professional Conduct by the American Bar Association, the ABA’s Committee on Professional Ethics reconsidered the issues presented in Formal Opinion 287. In ABA Formal Opinion 87-353 issued in 1987, the ABA Committee stated that Model Rule 3.3(a) and 3.3(b), which are virtually identical to Texas Disciplinary Rules 3.03(a) (1) and (2), represent a major policy change with regard to a lawyer’s duty when his client testifies falsely. It is now mandatory under Texas Disciplinary Rule 3.03(a)(1) (as well as under Model Rule 3.3(a)) that when a lawyer knows that his client has committed perjury, the lawyer must disclose this knowledge to the tribunal if the lawyer cannot persuade the client to rectify the perjury. A lawyer’s silence under those circumstances will have the effect of corroborating or assisting fraudulent misstatements made by a client.

Likewise, under Texas Disciplinary Rule 3.03(a)(1) of the Texas Disciplinary Rules (and Model Rule 3.3(a)(1) and if a judge specifically asks the defendant’s lawyer whether his client has any prior criminal convictions, the lawyer may not make any false statements of fact to the court. If the question by the court to the defendant’s lawyer follows an inaccurate statement in court by another person such as in the Statement of Facts, the lawyer must correct the inaccurate information made in court by a person other than the lawyer or his client, or make some other statement to the court indicating that the lawyer refuses to corroborate the inaccurate statement, or the lawyer may ask the court to excuse him from answering the question. If the lawyer refuses to corroborate the inaccurate statement or to ask to be excused from answering the question, the court is at least alerted to a problem and presumably will inquire further to discover the truth.

Texas Disciplinary Rule 3.03(a)(2) requires disclosure to
the tribunal only when it is necessary for a lawyer to “avoid assisting a criminal or fraudulent act.” Hence, a lawyer’s silence in the absence of client fraud or perjury does not require disclosure of the client’s confidential information or correcting false information provided to the court by persons other than the lawyer or his client.

Texas Disciplinary Rule 3.03(a)(5) further provides that a lawyer shall not knowingly “offer or use evidence that the lawyer knows to be false.” Does silence by the lawyer and his client in the situation described in the Statement of Facts constitute the use of evidence that the lawyer knows to be false? The phrase “or use” evidence was added into Texas Disciplinary Rule 3.03(a)(5) primarily to address a circumstance where a client or other witness who testified truthfully under direct examination later provides false testimony under cross-examination by another party. See Schuwerk & Sutton, A Guide to the Texas Disciplinary Rules of Professional Conduct, 27A Houston Law Review 1, 264, 265 (October 1990). Comment 13 to Texas Disciplinary Rule 3.03 suggests that while a lawyer should urge his client to correct or withdraw false evidence given in cross-examination, disclosure of such perjured testimony or other false evidence given during examination by another party is discretionary rather than mandatory. Accordingly, silence by the lawyer under the Statement of Facts should not be deemed to be “use” of false testimony under Texas Disciplinary Rule 3.03(a)(5).

Conclusion to Scenario 1
The conclusion after discussion by several ethics team members is basically the same. Even though an error was made it was not made by client or defense lawyer so nothing needed to be disclosed.

Conclusion to Scenario 2
Since neither lawyer nor his client in the Statement of Facts made a false statement to the court, the lawyer has not violated Texas Disciplinary Rule 3.03(a)(1); since the client did not commit fraud or perjury, the lawyer’s silence does not constitute assisting a criminal or fraudulent act. The lawyer may remain silent without violating Texas Disciplinary Rule 3.03, and therefore is prohibited under the Texas Disciplinary Rule 1.05 from disclosing confidential information about his client’s prior convictions.

Special thanks to Terry Gaiser, Jack Zimmermann, Michael Mowla, Betty Blackwell, Joseph Connors, and Keith Hampton.

Now available for your reading pleasure, the Administrative License Revocation & Occupational License Manual.

Member rate: $49 book, $40 CD.

Often the most serious consequence of a DWI arrest is the loss or restriction of driving privileges. These consequences increase when the citizen is convicted. This manual walks the attorney, whether she is a practitioner with extensive experience or a new lawyer, through the maze that is ALR. Step-by-step instruction on handling the license revocation litigation is provided. The process for obtaining an Essential Needs/Occupational Driver’s License and dealing with the restrictions thereto are clearly set out in this manual. Forms and statutory references are also provided to facilitate obtaining an Occupational License. This easy to use manual is updated through the 86th Legislature (2019).

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TCDLA Awards Nomination Form  
(Criteria for each award is on page following)

Please use this form for all award nominations and add additional pages as needed. Email the completed Awards Nomination Form to mschank@tcdla.com or fax to the home office at 512-469-9107. The deadline is noon, March 1st.

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

Check One:
- TCDLA Hall of Fame
- TCDLA Charles D. Butts Pro Bono Lawyer of the Year
- TCDLA Percy Foreman Lawyer of the Year
- TCDLA Rodney Ellis Award

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

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

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

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

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

F. Name, address, phone, email address, Texas bar card of person submitting nomination, and reason, if relevant, for nomination
   Type Response Here
TCDLA Hall of Fame
Criteria

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

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

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

The criteria for the award are as follow:
1) Minimum of thirty (30) years has elapsed since engaging in active practice of law or the candidate is deceased
2) Substantial commitment to defense of persons accused of crimes on appeal or trial, not to be based solely on won-lost record or publicity, but in court excellence; and
3) Significant contributions to the profession.

Nominations for the award must be on the included form and submitted to TCDLA by noon on April 10th.

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

The Charles Butts Pro Bono Lawyer of the Year Award honors an individual attorney who has provided outstanding pro bono work. The recipient of the award must be a member in good standing of the Texas Criminal Defense Lawyers Association (TCDLA) and the State Bar of Texas.

The award is named after Charles D. (Charlie) Butts, President of TCDLA (1987–88) and member of TCDLA's Hall of Fame, in recognition of his over 64 years of service as an attorney.

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

The criteria for the award are as follow:
1) Recipient must be a member in good standing of TCDLA and the State Bar of Texas;
2) Paid court appointments do not qualify except in extremely exceptional cases where the work done far exceeded the pay;
3) Nominations for the award must be on the included form and submitted to TCDLA by noon on April 10th.

This award is not required to be awarded annually.

TCDLA Percy Foreman Lawyer of the Year
Criteria

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

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

The criteria for the award are as follow:
1) Recipient must be a member in good standing of TCDLA and the State Bar of Texas;
2) Nominations for the award must be on the included form and submitted to TCDLA by noon on April 10th.

TCDLA Rodney Ellis Award
Criteria

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

The criteria for the award are as follow:
1) Recipient must be a non-lawyer;
2) Exceptional commitment to advocacy; demonstration of specific endeavors related to criminal defense; spreading awareness of TCDLA initiatives and endeavors; having a positive impact on criminal defense attorneys.
White supremacist. When I see the term, I can see the faces of the angry white men as they marched in a torchlight parade in Charlottesville, Virginia. When I hear the term, I can hear the chants of these angry white men as they shouted, “Jews shall not replace us.” This could not have been happening in a city in the United States, but it was. What I saw and heard reminded me of the films that I had watched of the torchlight parades that took place in Nuremberg, Germany, 80 years ago.

This explains why I smiled when I came across United States v. Erik C. Schmidt, 930 F.3d 858 (7th Cir. 2019) [Panel: Circuit Judges Ripple, Kanne, and Rovner. (Opinion by Judge Ripple)]. In Schmidt, a panel of that Circuit held that the district court could consider the defendant’s white supremacist beliefs at sentencing, as bearing on his future dangerousness, a permissible sentencing factor, and on his disrespect for the law.

Schmidt was not before the court on a hate crime; rather, he had pled guilty before Chief Judge William C. Griesbach of the Eastern District of Wisconsin, to a violation of 18 U.S.C. §922(g)(1), possession of a firearm by a convicted felon.

Judge Ripple’s opinion reads, in part, as follows:

[The Presentence Report]
In preparation for Mr. Schmidt’s sentencing, the probation office prepared a presentence report, which calculated a guidelines range of 51 to 63 months’ imprisonment based on a total offense level of 17 and a criminal history category of VI. According to that report, Mr. Schmidt had 17 adult criminal convictions, including 3 felony convictions under Wisconsin law for bail jumping, child abuse, and taking and driving a vehicle without the owner’s consent. His other prior convictions included unlawful use of the phone to threaten harm, criminal damage to property, carrying a concealed weapon, and multiple convictions for disorderly conduct and resisting an officer. None of his prior convictions involved hate crimes.
[From Schmidt’s Interview With the Probation Officer] During his interview with the probation officer, Mr. Schmidt told the officer of his belief in white supremacy and of his desire to return to Germany to embrace his Nazi heritage.

[The Probation Officer’s Recommendation] Consequently, in his sentencing recommendation, the probation officer wrote:

[Mr. Schmidt] is a self-avowed white supremacist, who readily and reprehensibly articulated his bigoted hatred for minority races during the presentence interview, despite advice to the contrary from counsel. Mr. Schmidt further indicated a strong desire to leave the United States, a country he repeatedly professed his hatred for due to its allowance of these same minorities to have civil rights, and proclaimed a strong desire to relocate to Germany to retrace his Nazi ancestral heritage [emphasis added].

The probation officer added that Mr. Schmidt “has shown repeated disrespect and disregard to individuals in positions of authority, to include law enforcement officers; and has readily embraced and openly expressed viewpoints of prejudice and intolerance, and a gregarious hatred for the United States.” Mr. Schmidt also admitted having a tattoo of a swastika on his back.

[The Sentencing Hearing in the District Court] On January 26, 2018, the district court conducted a sentencing hearing. The Government recommended a sentence of 36 months’ imprisonment; Mr. Schmidt requested a sentence of probation. After adopting the presentence report’s guidelines recommended range of 51 to 63 months, the district court observed that the guidelines range was a “starting point” and that “the real sentencing determination is made . . . from considering two factors, the nature and circumstances of the offense and the history and character of the Defendant.”

Regarding the seriousness of the offense of conviction, the court observed that Mr. Schmidt is a three-time convicted felon. Further, the court noted, “Congress is trying to send a very clear message that people that have engaged in . . . the type of conduct that lands a person in prison . . . are not to possess firearms because of the very dangerous nature of those particular types of devices and weapons.”

Moving to Mr. Schmidt’s history and character, the district court began by stating: “I think the ideas that are reflected in the Presentence Report and particularly in the introduction are dangerous and they make a person who holds them and with a history like this dangerous.” The court further elaborated that “when asked to assess the seriousness of an offense and the character of the Defendant,” the sentencing judge “appropriately looks at the motivating ideas or the ideas that a person has in trying to assess that person’s character” and “whether that person represents a danger to the public.” In this case, the court indicated that it did not “put a great deal of weight” on Mr. Schmidt’s white supremacist beliefs “because this offense . . . does not involve the use of the gun for this purpose.” The court observed, however, that it was alarmed “that a person holding these ideas has so little respect for the law” [emphasis added in the Court’s opinion].

Next, the court considered Mr. Schmidt’s criminal history, which began at age 18 and involved 17 criminal convictions over the past 15 years. Further, the court observed that Mr. Schmidt’s white supremacist beliefs were evidence of his continued dangerousness:

He’s now 32. These aren’t the words of a youthful offender. . . . [T]hese are the words of someone who has—at this point in life ought to know better and they represent a threat and if he holds those ideas and people—as I said, ideas matter. People do things based on their ideas and if these are his ideas, he is a very dangerous person [emphasis added].

Now, as I said, I’m sentencing him for an offense, not for his ideas but I am—it seems to me I appropriately can consider those in deciding an important factor which is whether he represents a threat . . . to the community and whether he is a future danger.

Based on the nature of the offense, Mr. Schmidt’s history and character, and the need for deterrence, the district court imposed a sentence of 48 months’ imprisonment, followed by a three-year term of supervised release. The court summarized its determination by saying:

I have not put great weight on the guidelines but I certainly think that the nature of this offense, a possession of a firearm as a convicted felon—three-time convicted felon and with a history of violence and the kinds of threats that have been issued by this person to others throughout the course of his life and the absence of ties, really, to a community—make the sentence appropriate and a reasonable approach.
I think it’s necessary also for deterrent purposes. These are the types of crimes, the possession of firearms by people convicted is something every community tries to stop. We have a Constitutional right to possess firearms assuming we have not forfeited that right by virtue of criminal conduct and this is—the possession and—of a gun in this fashion is a serious matter. I also think it’s—so I think it serves deterrence, it’s punishment and, of course, protection of the public.

Following the entry of final judgment, Mr. Schmidt timely appealed.

[Schmidt’s Argument on Appeal]
Mr. Schmidt contends that the district court violated his First Amendment rights because it sentenced him “in part based upon his abstract belief in white supremacy that bore no relation to the offense of conviction.”

* * *

[The Court’s Analysis]
The propriety of Mr. Schmidt’s sentence turns on whether his white supremacist beliefs were “relevant to the crime or to legitimate sentencing considerations.” . . . The court sentenced Mr. Schmidt for being a felon in possession of a firearm, a crime that can implicate a variety of underlying offense conduct. Moreover, none of the felonies subjecting him to this restriction, nor his purpose in carrying a handgun into the forest on this specific occasion, involved or was otherwise motivated by his white supremacist beliefs. Indeed, the sentencing judge acknowledged as much, stating that he did not “put a great deal of weight” in Mr. Schmidt’s ideas “because this offense ... does not involve the use of the gun for this purpose” [emphasis added].

[The § 3553 Factors]
Because Mr. Schmidt did not commit a “bias-motivated crime,” . . . we must examine next whether the district court’s discussion of his white supremacist ideas was based on another legitimate sentencing consideration. . . . Section 3553(a) of Title 18 sets forth the factors relevant to the imposition of sentence. These include “the nature and circumstances of the offense and the history and characteristics of the defendant” and “the need for the sentence imposed” to “reflect the seriousness of the offense,” “promote respect for the law,” “afford adequate deterrence,” and “protect the public from further crimes of the defendant.” Id. § 3553(a) (1), (2).

[Chief Judge Griesbach Express a Concern About Future Dangerousness]
In examining these factors, the district court was well aware that Mr. Schmidt had a firmly established pattern of violence, anger, threatening behavior, and an inability to control his impulses. On the basis of these observations, the district court expressed particular concern about Mr. Schmidt’s threat of future dangerousness. It commented that “the ideas that are reflected in the Presentence Report and particularly in the introduction are dangerous and they make a person who holds them and with a history like this dangerous.” Noting Mr. Schmidt’s 17 criminal convictions in the past 15 years and observing that, at age 32, Mr. Schmidt is no longer a “youthful offender,” the court continued:

Now as I said, I’m sentencing him for an offense, not for his ideas but I am—it seems to me I appropriately can consider those in deciding an important factor which is whether he represents a threat . . . to the community and whether he is a future danger.

The court’s comments make clear that that the district court did not sentence Mr. Schmidt based on his “mere abstract beliefs.” . . . Rather, . . . the court properly considered Mr. Schmidt’s white supremacist ideas and hatred for the United States as evidence that he “present[s] a threat of future dangerousness to the community.” . . . Mr. Schmidt’s radical belief in the superiority of one race over all others, and his communication of that belief to the probation officer, against the advice of counsel, during his presentence interview, revealed the danger of returning him to society. The district court therefore considered Mr. Schmidt’s beliefs not for the impermissible purpose of demonstrating general moral reprehensibility, but for the legitimate sentencing purpose of determining his likelihood of future dangerousness [emphasis added].

[Chief Judge Griesbach’s Expressed a Concern About Promoting Respect for the Law]
In addition to its consideration of Mr. Schmidt’s future dangerousness, the district court expressed concern with the need, in light of Mr. Schmidt’s earlier actions, to “promote respect for the law.” . . . The court noted the probation office’s sentencing recommendation, which indicated that Mr. Schmidt “repeatedly professed his hatred” for the United States “due to its allowance of . . . minorities to have civil rights” and “proclaimed a strong desire to relocate to Germany to retrace his Nazi ancestral heritage.” The court
noted its “great alarm that a person holding these ideas has so little respect for the law.” Indeed, quite aside from his future dangerousness to others, the expression of these desires, combined with a record of repeated violations of law, evinced a willingness to continue on a path of lawlessness in the absence of significant correction.

[Conclusion]

In the end, Mr. Schmidt's statements, when viewed in light of his criminal history and his continued disrespect for the law, raised a serious question in the sentencing judge’s mind as to whether he posed a threat of violent or anti-social conduct to the community. There was no error, plain or otherwise, in the district court’s assessment that Mr. Schmidt’s beliefs were reasonably related to a legitimate sentencing purpose [emphasis added].

My Thoughts

This is one of those cases that shows that our system of justice really works. Schmidt was, in my opinion, a disgusting human being. In spite of this, though, he deserved to be treated fairly—and he was. Chief Judge Griesbach could have imposed a harsher sentence than he did, and it would probably have been affirmed on appeal—but he didn’t. Considering Schmidt’s prior criminal record and the comments that he had made to the probation officer, a 48-month sentence seems most appropriate. Not too much; not too little; but, just right.

We have all had clients who just didn’t know when to shut up. Schmidt was one of those clients. He chose to ignore the advice of his attorney and talk and talk and talk about white supremacy. He made his bed and now he has to lie in it.

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 234th column or article. He practices in Tyler with the law firm of Bain, Files, Jarrett and Harrison, PC, and can be reached at bfiles@bainfiles.com.
A big shout out to Dean Watts of Nacogdoches for his recent win in the 12th Court of Appeals, who affirmed his motion to suppress. D was stopped for failing to change lane on a roundabout, then subsequently was arrested for DWI. The trial court granted the motion and the State appealed. The 12th said they agreed with the trial court’s finding that the officer in question turned on his lights to pull D over before he committed a traffic violation. Dean says the big challenge for him was making sure his brief said “the trial court did not err” instead of the usual “the trial court erred.” Congratulations, Dean!

Kudos to Assistant Bowie County PD Amanda Gunn of Texarkana on her 20-minute NG verdict in an Assault with Bodily Injury–Family Violence trial in Bowie County. The alleged victim had signed two Affidavits of Non-Prosecution and refused to contact the DA or appear at trial. The DA filed a motion requesting the Court find that D forfeited his 6th Amendment right to confrontation based on his efforts making the alleged victim unavailable. The State called three witnesses at the hearing, but they had no evidence D did anything to keep the alleged victim away from the trial. Amanda presented evidence the AV voluntarily appeared in the DA office and signed an ANP in their presence. Yet the Court granted the State’s motion allowing them to present hearsay evidence—evidence violating his right to confrontation. The State called two police officers, who both presented hearsay evidence on what the AV stated happened. The AV had no marks or bruises on her body, but D had scratches on him. He asked to press charges against her, but the police officers refused and arrested him. Over counsel objection, the Court also allowed an unauthenticated audio recording played to the jury of an argument between the two. There was no evidence who recorded the event, who turned it over to the DA, or when the recorded argument occurred—but it was still allowed into evidence. Way to hang in there, Amanda, and see justice done.

Kudos go out to our own Larry McDougals, both of Richmond, with the senior Larry writing: “Our Aggravated Sexual Assault of a child trial is over—not guilty on all counts. Special congratulations to Larry McDougal Jr for his amazing cross of the state’s experts, making them our experts.” Larry was quick to share the credit: “We had a great support team, David Green II doing lots of the behind-the-scene work, Mandy Miller sitting with us and researching all the law on all the objections, and our paralegals, Marissa Fuentes, Sarah Elizabeth Montalvo, and Tara Pirsch, who sat with us.” Congratulations, team, on a job well done.

A shout out to former prez Rick Hagen of Denton for an odd win in a strange case. D was accused of first-degree felony theft of over $300,000. Defense maintained that the complaining witness committed tax fraud and accused his bookkeeper after the IRS levied his account. After D’s opening statement, the Judge appointed a lawyer for the CW because the Judge was concerned he would be required to admit to multiple felonies during cross-examination. Lawyer then advised CW to plead the 5th. “In 29 years of practicing law,” Rick says, “I’ve never heard of a case being dismissed after a defense opening statement.” Good work, counselor, on this bit of oddity.

Sometimes a “win” can be described in different terms, and for this tale a shout out to DWI co-chair and board member Mark Thiessen of Houston. In his words: “Our Harris County jury showed tremendous heart and compassion today. Our client was a 26-year-old man that hadn’t been drinking in 6 months—and was way over-served. He didn’t remember anything but somehow ended up traveling 16 miles the wrong way on the highway. It ultimately ended in a tragic accident, with the victim sustaining a broken ankle. The client was incoherent. We pled guilty and begged the jury for mercy. He went to treatment and has been sober since the accident. The State’s case was tried by very talented DAs who put on a
great case with a lot of extraneous offenses and conduct. We begged for mercy and the jury showed it, sentencing him to 5 years to be probated. (The State’s pretrial offer was 5 years prison in Texas Department of Corrections.) Thank you to the jury for showing us your heart and exercising mercy when they had ultimate power. He’s a good young man, he will earn his life and freedom back. Thank you to my second chair/wife, Taly Thiessen—you’re my rock! And thank you to Judge Brian Warren, who ran a very fair trial with tons of complicated and emotional issues. Not every case can be a Not Guilty. Sometimes all we can do is try and save you from years in prison. Thanks to God for bringing all the moving parts together.”

A win by any other name—to go along with wins in three different DWI trials in the month, with one a personal-best .342 blood test. Congrats for walking the walk, counselor.

Taly Thiessen can be excused for a bit of prejudice in mentioning that hubbie Mark was one of only two criminal defense lawyers named to the 100 Top Super Lawyers in Texas in 2019—the other being David Gerger of Houston. Congratulations, you two, for being so honored.

Got Ethics?

Special shout out to the Ethics Committee and Chair Robert Pelton, recipients of these plaudits, the first one from a TCDLA member:

“I just wanted to let you know the response I got to my unusual ethics inquiry was practically overwhelming. Not only was it prompt. Several lawyers joined the conversation, putting legal heads together. It was nice to have as an alternative to the State Bar of Texas ethics hotline.”

In response, several board members piled on with kudos, one Houston member writing:

“Very comforting to see Robert frequently at the Harris County Courthouses, where he ALWAYS stops whatever he is doing to talk with any attorney, about whatever problem the attorney is having.

“And when I say attorney, I sometimes mean me!”

Robert was quick to share the praises with his committee members: “I selected great, smart, caring lawyers to help. We work as a team. No man is an island.”

This exclusive member benefit is available 24/7, a working alternative to the SBOT hotline. Don’t air your problems on social media, where they can come back to bite you.

Now available, the 2019–2020 Basics of Immigration Law.

Member rate: $64 book, $40 CD.

The tension between foreign nationals and the U.S. has probably never been worse. The Federal Government continues to attempt to not only exclude potential immigrants but to deport residents who have lived in the states peacefully for years. This manual has been expertly updated by Zelda Vasquez and David Strange of the Whittenberg Firm.

Also in stock now, Chapter 42A: Community Supervision.

Member rate: $64 pamphlet, $40 CD.

Community Supervision became effective in January 2017, replacing the old Art. 42.12. This cheat sheet is designed to give you a quick reference to the key articles you need to know from the new Chapter 42A. Updated through the 86th Legislature, this pamphlet is a must for the active litigator.

Call (512) 478-2514 for your copy or go online to www.tcdla.com.
We need volunteers to fill vacancies on the TCDLA Board or as secretary (entering the officer chain)

Any member of TCDLA in good standing who desires to make application to serve on the TCDLA Board of Directors should fill out the form at www.tcdla.com—or call the home office for a copy and forward it to TCDLA at 6808 Hill Meadow Dr., Austin, TX 78736, email to mschank@tcdla.com, or fax it to 512-469-9107 before 12 noon on November 1, 2019.

The nominations committee will meet in Austin to consider applications nominating new board members on Saturday, December 7, 2019. TCDLA Bylaws, Art. IX §2: “Prior to January 31st of each year, the President-Elect shall appoint a Nominations Committee consisting of one member from each of the Association’s membership areas and all officers. . . . The Nominations Committee shall meet, and the members present shall select its nominee(s) for those positions in the Association which are open for election or reelection.”

Nominations Committee

Grant M. Scheiner, Chair
Kerri Anderson Donica, President
Michael C. Gross, 1st Vice President
Heather J. Barbieri, 2nd Vice President
John Hunter Smith, Treasurer
David Guinn Jr., Secretary
Sarah Roland, Voice Editor
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Ricardo R. Flores, District 9
Anne More Burnham, District 10
Patrick O’Fiel, District 11
Roberto Balli, District 12
Lisa Marie Gonzalez, District 13
Jani J. Maselli Wood, District 14
Overview of the Defense and Ground Zero

The DWI practitioner is familiar with the concept of the disconnect defense—the idea that if most, or all, of the evidence in a DWI case fails to match up with a really high alleged BAC (.16 or higher), there must be a problem with the reliability of the breath or blood result and the jury should, therefore, acquit the accused.\(^1\) While in theory this sounds like a feasible, logical, and commonsense defense, the reality is that persuading jurors to accept the disconnect defense is a monumentally difficult task. We lawyers spend countless hours attending CLEs, scouring treatises, expert witness transcripts, scientific peer-reviewed articles, appellate decisions, CLE materials, and the like. However, having a mastery of the legal and scientific concepts that arise in a DWI trial, alone, won’t be enough to get us there in disconnect cases. Specifically, we need to be able to take off our lawyer hats and put on our private-citizen hats in order to be able to effectively persuade jurors to reject the State’s purported science. We need to be able to connect with jurors on a basic...
human, visceral level in order to move them towards that NOT GUILTY verdict. This requires the dedicated trial lawyer to pursue a greater understanding of human nature, psychology, and the psychology of decision making. Combining knowledge of the psychology of influence and persuasion with the knowledge of the legal and scientific intricacies involved in a DWI case will give us all the best chance at success when we present our disconnect defense to the jury.

So why do we need to make this investment of time learning about things not directly in the legal or scientific arena? Look no further than the comments following our local news coverage of any criminal case, in general, and high-BAC DWI cases, in particular. There we will find incredible, unfiltered statements that should give us a sense of the pulse of our community’s jury pool. We can make the mistake of chalk ing this up to the interviewees being fanatics or internet trolls, or we can face the reality that these same folks are gladly appearing for jury duty, looking to further their agenda. If even one of these people gets on our jury, our disconnect case likely just turned into a “connect-the-dots-for-the-state” case.

Ultimately, in order to persuade a jury to accept our disconnect defense, we’ve got to be selling it to the right jury, and by that I mean a group of individuals that will at least be receptive to our message, even if just for a limited window of time. Dr. Cialdini’s research teaches us that the best communicators capitalize on what he calls privileged moments for change in which an audience becomes receptive to a message before they actually experience it—“pre-persuasion.” While we can’t hope to change a person’s attitudes, beliefs, or feelings about a subject, we can alter a person’s focus of attention just before requesting something from them, thereby increasing our chances of successfully persuading them. Let’s turn to how this concept can play out in jury selection.

Voir Dire—Discarding the Role of Underdog by Establishing Rapport, Trust, and Credibility

Prior to beginning our portion of the voir dire, we are underdogs to say the least. Heading into trial on my .161 blood draw with a T-bone accident, I knew it would be an uphill battle no matter how favorable the video. Because of the high BAC and accident, we aren’t supposed to win a case like this, which means we really have nothing to lose. But we have to have the mindset that we are absolutely going to win. I suggest getting into the prosecutor’s head leading up to the trial date. Check in to see what the court’s trial docket looks like ahead of time. Let the prosecutor know that you’re really excited to try this case. Put them on their heels a bit. They’re the ones with all the pressure to win.

Listen extremely carefully during the government’s voir dire. If they in any way misstate the law, we should not hesitate to object. If the judge sustains the objection, the prosecutor’s credibility has taken a big hit. Whether their misstatement of the law is incompetence or a ploy to gain an unfair advantage, the potential jurors will not appreciate it. Meanwhile, we’ve elevated ourselves as credible authorities on the law, shrouding us with more persuasive power and appeal. At all times during the trial, defense counsel must strive to be the most credible person in the courtroom.

We’ve all seen the State’s first PowerPoint slide. It has its fancy seal and it says “The State of Texas vs. John Doe—DWI.” We need to battle for that authoritative credibility. Our slide shouldn’t mention the State of Texas at all. It should instead say “The Jury Trial of Mr. John Doe” and have our firm logo on it. I believe this at least places more of their focus on themselves, our client, and us instead of it being all about the State of Texas.

To establish rapport, we should talk like a prospective juror rather than like a lawyer. For example, there is no need to impress potential jurors with legal jargon like “voir dire.” We should simply refer to it as “jury selection” when conducting our voir dire. When it’s our turn, we should take a brief moment to re-introduce ourselves and our client, placing both hands on the client’s shoulders, letting the panel know that we are honored and proud to be here representing Mr. John Doe. Impress upon the potential jurors that the next couple of days will be some of the most important days in your client’s life. The jury needs to know there is a real human being sitting there at the defense table.

Before getting into the substance of our voir dire, how do we emotionally disarm the potential jurors in order for them to be completely open with us? After all, without doing this, how can we possibly expect to get the internet trolls out using strikes for cause, thereby allowing us to not squander our precious peremptory strikes? Perhaps during the judge’s or government lawyer’s voir dire, some of the jurors were open and honest about biases and are already locked down for cause. If so, great; but often there is a lot of head nodding and people going through the motions and not really being open about their feelings. People going along to get along aren’t going to fight for your client’s freedom. Most persons with biases haven’t said a word at this point. This is the moment when you have to use the rule for reciprocation to your advantage.

It’s a simple enough principle: Those who have given benefits to someone are entitled to benefits from them in return. Dr. Cialdini explains that “requesters who hope to commission the pre-susasive force of the rule for reciprocation have to do something that appears daring: they have to take a chance and give first without a formal guarantee of compensation.” The idea is that if we’re completely open and vulnerable with the panel, they will feel obligated to reciprocate and be open and honest with us. The psychological studies show that a person’s need to reciprocate is intensely strong. We should, therefore, let the panel know that before getting into their personal feelings about
serious topics, we think it’s only fair that we be completely open and honest with them about us. In the spirit of total transparency, share with them the worst thing and best thing going on in your life right now.7

As an example, I tell the potential jurors about how we recently lost my father after a 2-year battle with AML leukemia as the worst thing, and how my wife and I finally got pregnant after several years and 5 IVF cycles as the best thing. This completely changes the atmosphere in the courtroom. You’ve humanized yourself, whereas the government’s lawyer probably got up there like a robot and didn’t say anything meaningful about themselves. In less than 90 seconds, at the very least, we have made the panel much more receptive to our subsequent narrative of the issues involved in the case. And at best, they’re now flat out rooting for us to win. This is the moment where we discard the role of underdog and move forward knowing that we’re now the favorites. We have become relatable.

Brainstorming what you will say in your introduction will take a lot of emotional energy and introspection. It forces you to connect with yourself and to find your unique voice, which is so hard to do in the modern, distracted world we live in today. In order to persuade a jury of the righteousness of our cause, we must find our true, authentic voice. This will make us a relatable human being instead of a paid mouthpiece or a slick lawyer. Get in touch with the real you and be vulnerable enough to show the jury the real you. As a caveat, this all has to come from an authentic place; otherwise, the jurors will smell it a mile away and sense an attempt at manipulation.

Once you get jurors openly discussing their feelings about the important issues, and sharing personal life experiences, make sure to connect on a personal level with the potential juror that just opened up to you. For example, if someone shares that they lost their son or daughter in a drunk driving accident and they can’t be fair, take a few moments to acknowledge their strength and courage in sharing, and to feel their pain. Don’t just quickly move on from them because you’ve locked them down for cause. Be a human being rather than a calculating lawyer. In this manner, hopefully, we’ve stricken all of the jurors that could not possibly consider the disconnect defense, and are now left with peremptory challenges that we can use to further solidify our final jury.

I hate to admit it, but I was resistant to adopting the use of PowerPoint in trials. I feared that it could interfere with connecting with the panel. Now I couldn’t imagine not using it. As we all know, everyone is attached to their phones and tablets. We live in a world where people are literally addicted to screen time. Let’s give potential jurors what they want: screen time while they’re in court! I notice most prosecutors using slides with lots of text on them. That’s because they’re using their PowerPoints as a crutch. Potential jurors aren’t interested in reading legal concepts. Instead, our goal with PowerPoint should be to use mostly cartoons, charts, and pictures to help them understand and reinforce key concepts. The few slides that do have text should consist of no more than three scaled questions, touching on sensitive topics in the case that concern you. Everything else should be mostly pictures accompanied by short phrases. The three questions should all have a consistent grading—i.e., favorable answers would be A or B and problematic or even strike-for-cause-type answers would be C or D. This way, when you’re deciding on how to exercise your peremptory strikes, all other things being equal between potential jurors, you have something objective on which to base your decision.

Heading into my .161 blood draw/T-bone accident trial, I was obviously concerned about the prospect of a juror voting guilty automatically if the evidence showed my client drank some amount of alcohol, then drove, and was subsequently involved in an accident. I recommend asking the entire panel to raise their hands if they’ve ever been involved in a car accident. You should get 95% of their hands up. Then follow up with how many have been involved in an accident where alcohol was not in any way involved. You’ll probably still have 95% of the panel with their hands up. It’s an easy way to point out that being involved in an accident doesn’t necessarily mean someone is intoxicated. (You can reinforce this concept when you cross-examine the officer. He will readily admit that alcohol is NOT a contributing factor in most accident scenes.) You can follow up with several jurors regarding what caused the accidents they were involved in. After this “pre-suasive” discussion, you can then present a couple of slides that ask how the potential jurors feel about the following statements:

I think you are automatically guilty of DWI if you drink ANY amount of alcohol and then get behind the wheel of a vehicle.

A) Strongly disagree
B) Disagree
C) Agree
D) Strongly Agree

I think you are automatically guilty of DWI if you drink ANY amount of alcohol and then get behind the wheel of a vehicle and cause an accident.

A) Strongly disagree
B) Disagree
C) Agree
D) Strongly Agree

If the prosecutors object, argue it’s not an improper commitment question, but rather a question to test the jurors’ understanding of the presumption of innocence. Obviously, at the end if you’re struggling with whom to strike, you want to err on the side of the As and Bs being on your jury. They’ve demonstrated
by their responses that they are much more likely to be receptive to the disconnect defense. Of course, you also want to look for innocent explanations for how this accident happened—i.e., awkward intersection layout, texting, GPS, sleep deprivation, distracting passengers, etc.

Remind jurors that our client’s innocence is the only presumption in any criminal case. In other words, there can be no presumption that a breath or blood test is always reliable, valid, and accurate, or that the result necessarily corresponds to John Doe (switched vial theory in a blood case). Further, it’s not up to us to prove that a result is inaccurate and/or falsely attributed to our client. Rather, the Government has the burden to prove beyond a reasonable doubt that the result is accurate and is, in fact, indicative of our client’s blood and not someone else’s. In other words, at the end of the case, a juror should never be telling defense counsel, “You didn’t prove that the result was inaccurate.”

In a disconnect defense case, everything comes down to whether the jury believes the government’s “science”—i.e., the BAC result. Therefore, the credibility of the government’s expert witness will be a huge factor that goes into the jury’s decision-making process. Because of this, I recommend using three different PowerPoint slides to prime the jury to closely scrutinize what an expert testifies to and not just take what they say at face value simply because they’re an expert. Try to come up with something in the news or pop culture than can be analogized to the breath or blood expert in order to reinforce the idea that just because an expert says something does not necessarily make it so. We shouldn’t just ignore our common sense and let someone else think for us because of their credentials. After all, expert witnesses are there to help the trier of fact understand the evidence or determine a fact in issue, not completely replace the jury as the factfinders. The jurors must be empowered by reminding them they are the sole judges of the facts proved.

An example that proved effective for me was putting up an image of the gigantic plume of chemicals covering the greater Houston area following the ITC chemical plant fire in Deer Park with the short caption “ITC’s Expert: Air Quality Poses No Danger.” If you live in Deer Park and have been training for a marathon, are you going to listen to that expert and go for a six-mile run in those conditions, or are you going to question the narrative and the expert’s motivations and biases? You’d want proof. A lot of people have been watching “Chernobyl” on HBO. Many of the responses to that disaster of the Soviet Union’s government experts would be great fodder for this type of example. By focusing attention on experts early and often—i.e., what Dr. Cialdini calls the frontloading of attention—we’re creating an environment where jurors will be empowered to closely scrutinize the state’s star witnesses later during the trial rather than blindly accepting everything they say as truth.

Regarding the constitutional principles that apply in all criminal cases, including the various burdens of proof, I highly recommend Brent Mayr’s PowerPoint slides on the ring-the-bell analogy. The images on the slides are fantastic because they equate proof beyond a reasonable doubt with ringing a bell at a carnival, a near-impossible feat. Once again, we’re giving potential jurors a visual aid that will help them better learn these concepts.

Also, within the PowerPoint, you can change the text as needed to fit your case theory. For example, in my case with the switched-vial theory, under the column for beyond a reasonable doubt, I inserted “I have no reasonable doubt in my mind that the test was valid and accurate, and that it’s Mr. Doe’s blood.” By doing so, I’ve already focused the panel’s attention on the idea that the reported blood result may not even correspond to my client’s blood.

Okay: I Agree There Is a Disconnect, But Why?

As trial lawyers, we must be a surrogate for the jury. Know that the above question will be in their minds as they sift through the evidence. At this summer’s Rusty Duncan seminar, Troy McKinney shared some tips on presenting a disconnect defense. He took something as simple as a picture of a Great Dane and a Chihuahua standing next to one another to create a big dichotomy. The slide has an arrow pointing to the Great Dane with the caption saying: “I have a government DNA test report that says this is a Chihuahua. Do you believe it?” It then says, “Do you have to know why the report is wrong to know that it must be wrong?” This example can be a very powerful way to present a disconnect defense, especially where there isn’t anything specific in the breath or blood discovery that you can use to discredit the result.

While this is a great default position when one has an exculpatory video performance (and still allows for a viable disconnect defense), in order to further increase our chances of securing an acquittal we should strive to give the jurors cold, hard facts that they can hang their hats on to give the reported BAC result no weight in their decision-making process. Otherwise, the government will argue the excellent video performance is due to tolerance rather than innocence.

In my experience, jurors place a lot of weight on issues surrounding breaks in the chain of custody of the blood sample. Just because case law says that breaks go to the weight of the evidence rather than its admissibility doesn’t mean we shouldn’t be making a huge deal of the issue on cross-examination. While the lab typically is extremely thorough in documenting chain of custody once received, the police department that handled the sample prior to it getting to the lab normally is not so thorough. By establishing that the lab’s analysis is only as good as the integrity of the sample they receive from the police agency,
we can successfully undermine the result.

For example, if the sample was stored at the police department for a few days before being sent out, where exactly was it? Under what conditions was it stored? Was it refrigerated? If it was mailed to the lab, was it sent in a cooler? The blood analyst will readily admit that they have no knowledge or control over the quality of the sample they receive from law enforcement. Garbage in, garbage out.

Also look at the entire batch run to see if there are .000s or other BACs around .08 or under. In my .161 case, 7 of the 30 citizen samples tested reflected a BAC of .000, while 2 others were at or below .08. If you have a truly exculpatory video/disconnect case, arguing that your client's sample was accidentally switched suddenly becomes much more plausible with this one document in evidence. In fact, you can argue it's the only logical explanation for why there is such a huge disconnect between what we can see and hear on video versus the lab's number.

Remember that we don't have to prove human error happened. In fact, how could we ever prove it happened? The analyst will always testify that they've never accidentally switched vials. Rather, the government must prove beyond a reasonable doubt that this didn't happen. Note that jurors don't have to agree as to why they are choosing to not give weight to the reported BAC result. Some can say they don't know why it's wrong, they just know it must be wrong, given all the evidence of sobriety. Some can say they are unsure whether the sample the lab received was viable for analysis (chain of custody, short draws, bad venipuncture technique). Others can say the sample must have been accidentally switched—i.e., human error in the lab. Each juror can have different reasons for their reasonable doubt, so long as they each have at least a reasonable doubt that goes toward whether the government proved intoxication.

In closing argument, acknowledge that what you're asking the jury to do is hard and it will require a lot of courage, but it's the right thing to do. Imagine that all your jurors live next door to police officers, and after the trial they will eventually talk to them about the work they did in that courtroom. They must be empowered to have the guts and independence to stand up for the people. There should be no shame in them telling their cop neighbors that they had to find the client NOT GUILTY because the government's evidence just didn't add up. Show a slide of one of the disconnect pictures used in voir dire and add the caption “The government wants you to believe Mr. Doe’s BAC was a .18 at the time of driving, even though he had the normal use of his mental and physical faculties and didn't smell like alcohol?”

Remind them that they, individually and collectively, are the exclusive judges of the facts proved and the weight to give the evidence, including the government’s purported BAC results. We don’t do trials by police officer or trials by expert witnesses for a reason. The accused is entitled to a trial by jury, because the jury is the accused citizen's last line of defense. For the final slide, put up a picture of the statue of liberty, the constitution, or the American flag. When the State's “science” is riddled with commonsense, reasonable doubt due to the overwhelming majority of the other evidence being consistent with sobriety, the law demands a verdict of NOT GUILTY, because we err on the side of freedom in America.

Notes

2. Thank you to Mark Bennett for recommending we all read Influence: The Psychology of Persuasion and Pre-Suasion: A Revolutionary Way to Influence and Persuade, both by Robert B. Cialdini, PhD.
3. In this case, the client did extremely well on SFSTs. His speech was not slurred, his eyes were not bloodshot, and no one on scene smelled alcohol on him.
4. Thanks to Jed Silverman for this tactic.
5. Pre-Suasion, page 153.
6. Id. at 154.
9. To this end, I recommend using an expert like Amanda Culbertson to review the discovery in order to help find issues that you can use to strengthen your disconnect defense.

Joseph Ruiz was born in Spain and raised in Houston, Texas. He and his wife of 6 years are expecting their first child in November. He graduated from Vanderbilt University in 2001 before obtaining his JD from the St. Maris University School of Law in 2004. He began his career working in civil litigation before transitioning towards his true calling—criminal defense. He is a member of the Harris County Criminal Lawyers Association, the Texas Criminal Defense Lawyers Association, and the DUI Defense Lawyers Association. He has published articles on trial tactics in HCCLA’s The Defender magazine. Joseph tried 300 jury trials in traffic, municipal, and JP courts before moving into the state court arena, where he’s tried over 40 cases to verdict. He has secured numerous acquittals and has obtained over 500 dismissals for his clients. Most recently, he secured a not guilty verdict in Harris County for a young man in a .16 blood draw/accident, which led to a .266 blood draw dismissal on the eve of trial the following week. Before that, he won a contentious trial in Brazoria County for a client charged with deadly conduct after accidentally shooting someone with an AR-15. When he’s not competing in the courtroom, he enjoys competing on the basketball court.
A good trial lawyer is one who watches for and takes advantage of valuable opportunities. Trial lawyers are opportunists. Spotting the opportunity takes the skill of a hawk. Recognizing the exact moment to exploit the opportunity requires quick action. If you miss the moment, you lose your prey. The most successful trial lawyers are the ones who know the most and who are the most prepared. They put themselves in a position to crush their opponent by being prepared for that one opportunity. When it exposes itself, they swoop in for the kill.

How many times have you gone to trial on a case that you thought was unwinnable but then an unexpected opportunity presented itself; you were ready and watching for it; you seized it swiftly and effectively and were able to walk your client out the front door of the courthouse? As one of my mentors always says, good things happen when you announce ready for trial. There is no easy way to do this job the right way. Be a trial lawyer. Go to trial.

These opportunities present themselves in and out of trial every day. While we need to pay close attention to them in trial, many times we can avoid trial and obtain favorable outcomes for our clients if we are on our game at all times. Consider the following examples from the different phases of the life of a case.

1. **Plea negotiation with the right person and the right judge.**
   How many times have you felt like you were pounding your head against a brick wall over and over when you were trying to negotiate a reasonable plea bargain for a client? You knew the case was not a trial case, and you were practically

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*The quality of decision is like the well-timed swoop of a falcon which enables it to strike and destroy its victim.*

—Sun Tzu
begging for a normal, run-of-the-mill plea that any other prosecutor in the court would give you except for the one assigned to your case. It’s frustrating, and it feels unfair. It feels like you are being singled out. Then low and behold, on one court setting, that specific prosecutor is on vacation or is out sick and you get the deal you want, plea the case, and never look back. The timing was right, and you seized the opportunity. The same holds true for certain “obstacle” judges. Be patient and the opportunity will come at the right time.

2. The State drops the ball. Have you ever been in trial and the state overlooked a crucial element they must prove? For example, in a DWI Consent Blood Draw case, Tex. Trans. Code 724.017 must be proved up for the blood result to be admissible. Many times, the states fails to provide actual proof of the blood drawer’s qualifications as well as the blood being drawn in a sanitary place. This type of evidence cannot be offered through a police officer over a valid hearsay objection or without the state proving up his qualifications to offer such an opinion (which I’ve never had them do). Yet, I see this happening in almost every trial I watch. There are real opportunities here to keep the blood out of evidence. You have to know the statute backwards and forwards, know the case law, wait for the state to drop the ball, and then you’ve got them. But keep quiet and wait for trial.

When I see this happen, I keep my mouth shut, realizing that the state is not going to call any other witness to try to prove up the requirements of Section 724.017. They have not subpoenaed the blood drawer, either out of over-confidence, simply misunderstanding their burden, or because the blood drawer is no longer available.

When argued correctly, this fumble by the state is that opportunity you were waiting for. Now . . . this is a two-step victory so don’t mess it up by excitedly and prematurely jumping out of your seat to object to the admissibility of the blood result right when the state passes the witness. Be patient. Wait. The opportunity presented itself, but the timing isn’t right yet. If the state releases the witness from the stand and he leaves the room, the timing is still not right. Wait, be patient. When the blood analyst is called to the stand next and the state starts asking background questions and starts going into the theory of Headspace Gas Chromatography . . . Wait, be patient. The timing is still not right.

Now . . . after the state has just put the jury to sleep with talk about dual columns, retention time, and acetone peaks, they are finally ready to try to admit the almighty BAC lab report that could potentially destroy your case.

NOW is the time to object. You have remained silent and maintained a good poker face up until this point. Ask the judge if you may approach, object to the admissibility of the lab report, and ask for a hearing about it outside the presence of the jury. If the judge questions if you are raising a motion to suppress and asks why you didn’t have a written motion on file, just cite Roberts v. State, 545 S.W.2d 157, 158 (Tex. Crim. App. 1977) (“The defendant’s counsel may either file a pretrial motion to suppress evidence or he may wait until the trial on the merits and object when the alleged unlawfully obtained evidence is offered”). The importance of the timing here is that you want to make sure (1) that the officer is long gone from the courthouse by now and can’t easily be called back to fill in any gaps in the state’s testimony, and (2) you certainly don’t want to give the state any time to call an additional witness at the last minute to fix their problems. You want to press the issue at that moment when you argue your objection and ask the Court to rule. If you had objected earlier on, right after you became aware of the opportunity, you would likely have lost because the timing wasn’t right. Being an effective trial lawyer requires a good poker face and lots of patience.

3. Timing of a motion to suppress. The timing of when to raise a motion to suppress can make the difference between a one-word and a two-word verdict. Many lawyers choose to file extensive written motions to suppress before trial. Some courts around Texas require it to be done that way. While Roberts states that it is defense counsel’s choice as to raising suppression issues orally during trial or by filing written motions ahead of time, I would argue that the best policy is to help create winning opportunities for yourself in trial by raising the motion orally during trial. Whatever you are objecting to and moving to suppress, politely (and timely) object and ask to approach. State your legal objection and ask for a hearing on the motion outside the presence of the jury. This accomplishes two goals: (1) It can catch the state off guard (even though they should know their case well

The field mouse looked away for a split second and the hawk swooped in for the kill.
enough to anticipate any suppression issues); and (2) if the judge denies your motion, the jury was not in the room to see you get shot down and have the state’s evidence merely bolstered by the Court’s explanation of its ruling.

A word of caution: Some judges, even in light of the strong authority in Roberts, will NOT allow you to raise ANY motions to suppress during trial unless they were filed in writing beforehand in accordance with CCP 28.01. Article 28.01 deals with deadlines for filing pretrial motions. It requires motions to suppress be filed seven days before an official 28.01 pretrial hearing set by the court. If not filed accordingly, the judge may exclude any motions to suppress after that date even if raised during trial. If there is never an official Article 28.01 hearing, the rule arguably doesn’t apply at all, though. Also, the judge still has discretion to allow a motion to suppress to be raised after the deadline for good cause. The takeaway is this: Pay attention to your pretrial settings; if none of them are official 28.01 hearings, then you are on solid ground for raising an oral motion during trial. If you practice in a jurisdiction that follows the code in this manner, file a written motion, but remember: You don’t have to give away the house. All Article 28.01 requires is a written motion. It does not dictate how specific it must be or how much of your argument you must disclose to opposing counsel. I suggest a generic motion citing that the evidence was illegally obtained under state and federal laws and constitutions.

4. **Trial with the right judge.** Always, always, always go in advance of your trial day and ask around about who will be presiding over your trial. Then come back right before and ask again. You plan your case with the judge in mind. You should already be familiar with the judge’s tendencies on rulings and inclinations on potential punishment. This is the only way you can properly prepare and advise your client on the best course of action. Nothing can screw up your plan and your advice to your client more than walking into the courtroom on trial day and seeing a different face in that black robe. Sometimes you are delighted, but many times your stomach sinks and you are knocked off balance and scrambling to figure out a solution at the last minute. As defense attorneys, we are usually the last to know important information about what’s going on with our case. We must know more than the other side, and we should perform thorough “pretrial recon” to ensure we are not blindsided with a different judge on trial day. We must know this information ahead of time so that we may adjust our opportunity radar and avoid pitfalls that we may have fallen into otherwise. If not, we are unable to take advantage of opportunities, and our timing will be thrown off. It won’t be the right time, and we may lose out on opportunities we could have had.

5. **Expired blood vial presentation in trial.** One good example of being patient, realizing the opportunity, and properly timing that opportunity can happen in DWI Blood Draw cases. This scenario occurs when the lab has gone through several analysts (due to them quitting or being fired), and then by the time they retest the blood to be used as evidence in trial, the blood vials have been expired for months. When this happens, we should always be aware of the issue. The state is typically not. For example, in one case we did not ask a single question on cross about whether the expiration of the vial would have caused a higher BAC. We knew the state’s lab witness would not give us a good answer. So be it. Don’t ask a question that you know (or should know) will give you a bad answer. All we had to do was make sure at least one photo was admitted into evidence that showed the vial expiration date. When the state offered the photos, we did not object and acted completely unconcerned. We did not want to draw any attention to the picture and let the state catch onto our impending closing argument. When the time came in closing, our argument went something like this:

> “In opening, I asked that you please wait until the very end of this case, until now, to make up your mind. I told you that there would be something important I wanted to show you at the end that would change your mind. The blood vials used in this case had been expired for nine months before the lab tested them. How is that okay? That is like a person going to a doctor and the doctor telling you that you may have cancer and need to have part of your organs removed to stop it from spreading. They tell you that they will do a blood test, and based on the results of that blood test he will decide what surgery to perform. You find out that they took your blood in old or defective vials and then let the vials sit around for even a couple months longer before it was analyzed. Now he comes back and tells you that you should trust the results of that blood test completely . . . from THOSE vials (point to the exhibit). How many of you are okay with that? Now in this case, the state is asking you to saddle John Smith with a criminal conviction for the rest of his life, based on the results from THOSE vials!”

That two-word verdict was all about Opportunity and Timing!

6. **Other opportunity and timing tips for success:**
   a. Be conscientious about the timing of appearing in
THAT jurisdiction. Know the practices of the court, know the staff, the prosecutor, and the judge before you start any proceedings. You won’t get many opportunities, and the timing won’t be right if the first time you see any of the faces in the court is day one of your trial. You probably don’t want to raise a novel issue in the wrong place at the wrong time with the wrong judge in the wrong jurisdiction. Make sure the timing works for you and your client. Also, with respect to plea bargains, sometimes you must wait, wait, and wait some more until the stars align and all the right people are in court one day. Timing is key!

b. Know when it’s time to stop talking. I’m constantly amazed at opposing counsel, colleagues, and even at myself when we don’t know to keep our mouth shut—whether things are going our way or not. When more argument is just making things worse, or we have already won, and you can tell that the judge’s mind is made up—that’s the time to stop talking. Nothing more needs to come out of our mouth. Talking too much doesn’t always create more opportunities for yourself, and the timing of your additional arguments may just kill your chances.

c. Knowing when to argue and jump up and down about a state’s continuance. One last comment on timing and opportunity. Remember, we work in an adversarial arena. From time to time, however, we need favors from the state—and the state needs favors from us. When you have asked for a few continuances on a trial case and the state has asked for none, don’t jump up and down and scream and holler the first time the state comes to court on trial day and they have an officer out in training. You certainly don’t have to announce that you are “unopposed,” but now is not the time or the opportunity to try to take advantage of state witness problems. Oppose the motion on behalf of your client and let the judge decide. Sometimes the judge will surprise you and start grilling the state about their continuance, and it may end up going your way. Now, if you have always announced ready and the state continues to show up on trial day with excuse after excuse, that is the time to take advantage of an opportunity to try to have the state’s continuance denied. Too many lawyers argue and oppose things when the timing just isn’t right and there is no opportunity. Sun Tzu teaches us: “Even the finest sword plunged into salt-water will eventually rust. He will win who, prepared himself, waits to take the enemy unprepared.” You can rarely force a good opportunity into existence.

There have been numerous cases won during trial because the trial warrior announced ready and then seized that one opportunity at just the right time. This only comes through tremendous planning and preparation.

There have also been numerous trial cases dismissed on or just before trial day because the lawyer’s timing was right on, and he took advantage of an opportunity that presented itself. Remember the teachings of Sun Tzu as they relate to our art and subduing opposing counsel: “Supreme excellence consists of breaking the enemy’s resistance without fighting.”

Fate whispers to the Warrior, you cannot withstand the Storm. The Warrior whispers back, I am the Storm!

—old Viking battle cry

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

Don’t be fooled!
There’s only one true Facebook page for the Texas Criminal Defense Lawyers Association. Accept no substitute for the real thing.
Michael Wayne Ramsey, age 79, a loving husband, father, and brother, died on Saturday, the 27th of July 2019, in Channelview, Texas.

Mike was born in Galveston on the 18th of February 1940 to Vestal Vernon Ramsey and Dorothy Arlene Ramsey. He was preceded in death by his parents. He is survived by his loving wife Betty Sharon Ramsey, who he met in high school and married while attending law school; his two children, Christopher W. Ramsey and Mark Lynn Ramsey; his sister, Wendy Williams, and her husband Johnny Williams; niece Heather Cook and her husband Matthew and their children, Charles and Christian; and niece Holly Jarman and her husband Michael and their children, Katherine and Grace.

Mike was raised on the Gulf Coast and, during the war years, in Shelby County, particularly Teneha and Center while his father served as a naval officer in the Southern Pacific. His earliest memories were the sound of guns off the beaches of Normandy and Roosevelt’s prayer for the welfare of the men involved. Mike’s family moved to Channelview when he was a young child and lived there the rest of his life. Though Mike was known to many as one of the finest, if not the finest, criminal defense attorneys in Houston, in his heart he was always very proud to call Channelview home. He graduated from Robert E. Lee High School in Baytown, Texas, then attended college and law school at Southern Methodist University, receiving a JD in 1965.
He went to work for William F. "Bill" Walsh, one of Percy Foreman's old partners, immediately after graduation. Two years later, he was traded by Bill Walsh to Richard "Racehorse" Haynes for a second lien on a 1949 Chevrolet and broken set of Corpus Juris Secundum. He worked for $37.50 a week until about 1973, when he set up his own law practice in Houston.

Mike was exposed to high-profile cases from the beginning. Along with Walsh, Mike served as special prosecutor in the case against Frank Briscoe, the district attorney of Harris County. Frank was represented by every major law firm in town, amounting to some 400 lawyers, against Mike, who had never tried a case, and Walsh. Mike also participated with Walsh in the defense of the first black man elected to a county-wide office in a felony theft case. When he went to work with Haynes, where he was paid but a pittance, he was given an opportunity to choose which cases he to pick up and go to court with—and there were many of them. One year Mike tried over 40 jury trials. Soon, he began to win cases and developed his own reputation and identity.

He and Haynes developed a method of trying cases together: They would do sort of an Abbott and Costello routine. Mike would commence argument to the jury, and at some point, usually predetermined, Haynes would stand up and contradict him over some minor point. They would exchange recollections and Mike would gradually fade away while Haynes would seize the argument and close the case. In one memorable occasion where they were defending a former lawyer colleague, Mike opened by saying, among other things, "If you are going to convict a lawyer because of the size of fee, you ought to start with that short little band-legged lawyer sitting next to me, who you would give a death penalty for the size of his fee."

That was Haynes’ cue to stand up and object to the remark, and after the exchange move into argument. In one well-publicized case Haynes and Ramsey tried together the first time, the jury hung 11–1 for conviction. This was the Arelleno Silva case involving the brutal beating death of a beautiful blonde real estate agent with a medieval mace. It had been publicized so much in the Hispanic community that Mike started to refer to it as the prosecution of the last Mexican on the scene. The bishop sold his ring to help raise money to pay Haynes for the first trial. The second time around, money was not available and Mike was compelled to try it alone. He won a not guilty verdict and gained momentum enough to open his own office.

In 1976, Mike opened a law practice with George Tyson, and they practiced together until Mike retired in 2012. Along with George, Mike developed a substantial and star-studded referral base: Warren Burnett, Jim Kronzer, Joe Jamail, and managing partners at Vinson & Elkins. Another of Mike’s many notable cases included the alleged murder by Houston police officers of a young Mexican, Joe Campos Torres, by drowning him in Buffalo Bayou (it made the cover of Rolling Stone magazine). Mike, along with Bob Bennett, tried a murder case and received a simple assault resulting in a six-month unsupervised probation.

Among Mike’s most notorious victories were the murder trials of Robert Angleton and Robert Durst, both of which resulted in acquittals. The Durst acquittal was recognized as “verdict of the year” by the National Law Journal.

Mike mentored many young lawyers during his career, most notably Chip Lewis, who was like a son to Mike. Chip practiced with Ramsey & Tyson from the mid-’90s until Mike’s retirement. Beyond the attorneys, Mike’s most trusted and indispensable adviser over the last 30 years was his loyal office manager, Derissa Cheatham, who took care of most of Mike’s business, especially during the last seven years of his life when he became ill.

Mike received countless honors during his legal career and was considered by many to be one of the finest criminal defense attorneys not only in Houston, but throughout the country. He received every national, state, and local accolade that a lawyer can receive. In 2010, he was inducted into the TCDLA Hall of Fame. Mike was very much a gentleman lawyer and had a very pleasing manner that served him well in the courtroom. He was known to be the very best attorney at cross-examination of witnesses.

Mike was very proud of his roots in Channelview, and he loved defending the underdog and underprivileged. The description on Mike’s urn aptly reads “Who God Abandoned, Mike Defended.” Mike authored a book entitled Uncle Bit, which recalled his humble upbringing in East Texas.

Mike’s family is very grateful for the many caretakers who helped him during the last few years of his life, including Gertie Marshall, Joyce Jones, Nikki Daugherty, and Arlean Richardson.

Chip Lewis, a graduate of Houston Law Center (where he served as an adjunct professor for five years after winning numerous awards), began his career in prosecution. Since transitioning to criminal defense law in 2000, Chip has been regularly recognized as a Super Lawyer (as well as a 2004 Rising Star). He has been involved in a number of high-profile cases, including those of Ken Lay, Robert Durst, and Beaumont Mayor David Moore. A member of NACDL, HCCLA, as well as TCDLA, Chip has regularly been a featured speaker at many CLE seminars across the country. He is the proud father of twin boys, Parker and Rees. Chip also proudly served as a Board Member for K9s4Cops—a nonprofit charity that provides law enforcement agencies with K-9 officers. He can be reached at chip@chiplewislaw.com.
Significant Decisions Report

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.

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.

Supreme Court of the United States

The SCOTUS is on summer break until the October 2019 Term, which begins on October 7, 2019.

United States Court of Appeals for the Fifth Circuit


Under 18 U.S.C. §1952(a), the Travel Act prohibits traveling in interstate or foreign commerce or using the mail or any facility in interstate or foreign commerce with intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity and then performing or attempting such act. A “business enterprise” involving narcotics or controlled substances is an “unlawful activity” under the Act. A business enterprise is a continuous course of conduct (rather than sporadic casual involvement) in a proscribed activity. The government need not prove that the defendant personally engaged in a continuous course of conduct but needs to prove only that there was a continuous business enterprise and that the defendant participated in the enterprise. Knowing promotion of one transaction in the broader enterprise is promotion of the enterprise.

Under 18 U.S.C. §1956 (money laundering), it is unlawful to conduct or attempt to conduct a financial transaction knowing that the property involved in the transaction are proceeds of unlawful activity with the intent to carry on specified unlawful activity—or knowing that the transaction is designed to conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity. “Transaction” means purchase, sale, loan, pledge, gift, transfer, or other disposition. “Financial transaction” is one that affects interstate or foreign commerce involving the movement of money. Drug trafficking is a specified unlawful activity. There must be a financial transaction that follows the underlying criminal activity that generates the proceeds so the laundering transaction must be distinct from the criminal conduct generating the proceeds to be laundered, because otherwise any criminal activity involving money would double as a laundering offense. Money does not become “proceeds” until the underlying criminal transaction is complete.

To be guilty of attempt, the defendant (1) must have been acting with the culpability otherwise required for the commission of the attempted crime and (2) must have engaged in conduct that constitutes a substantial step toward commission of the crime.

Under 18 U.S.C. §875, extortion using interstate communications, a person commits a crime if he: (a) transmits in interstate or foreign commerce any communication containing a demand for a ransom or reward for the release of any kidnapped person (up to 20 years in BOP); (b) with intent
to extort from any person or entity money or other thing of
value, transmits in interstate or foreign commerce any com‑
mutation containing a threat to kidnap or injure the person of
another (up to 20 years in BOP); (c) transmits in interstate
or foreign commerce any communication containing a threat
to kidnap any person or any threat to injure the person of an‑
other (up to 5 years in BOP); or (d) with intent to extort from
any person or entity money or other thing of value transmits in
interstate or foreign commerce any communication containing
a threat to injure the property or reputation of another (living
or deceased) or any threat to accuse another of a crime (up to 2
years in BOP).

Under 18 U.S.C. §880, a person who receives, possesses,
conceals, or disposes of money or property that was obtained
from extortion knowing that the money or property was unlaw‑
fully obtained shall be imprisoned not more than 3 years and
fined.

Under 18 U.S.C. §371, conspiracy requires evidence of:
(1) an agreement between two or more persons to pursue an
unlawful objective; (2) knowledge of the unlawful objective and
voluntary agreement to join the conspiracy; and (3) an overt act
by one or more of the members of the conspiracy in furtherance
of the objective of the conspiracy. An agreement may be inferred
from concert of action, voluntary participation may be inferred
from a collocation of circumstances, and knowledge may be
inferred from surrounding circumstances.

Ayestas v. Davis, No. 15‑70015, 2019 U.S.App.LEXIS
22780 (5th Cir. July 31, 2019) (designated for publica‑
tion) [trial counsel’s performance is to be evaluated
based on the professional norms prevailing when the
representation took place]

Remand is not required if the judgment is sustainable for
any reason.

Under Bobby v. Van Hook, 558 U.S. 4, 7 (2009), trial coun‑
sel’s performance is to be evaluated based on the professional
norms prevailing when the representation took place.

though courts may not indulge post‑hoc rationalization for
counsel’s decisionmaking that contradicts the available evi‑
dence of counsel’s actions, neither may they insist counsel
confirm every aspect of the strategic basis for his actions.

Editor’s note: because the opinion omits critical facts contained
in the SCOTUS opinion that remanded the case, here are those
facts:

Facts:
• In 1997, Ayestas was convicted of capital murder in Texas.
• The evidence showed he and two accomplices invaded the
home of 67‑year‑old Paneque, bound her with duct tape and
electrical cord, beat and strangled her, and burglarized her
home.
• Two weeks after Paneque’s death, while drunk, Ayestas told
Nuila that he had recently murdered a woman. Petitioner
brandished an Uzi and threatened to murder Nuila if he did not
help him kill the accomplices.
• Petitioner kept talking until he eventually passed out.
• Nuila called the police, who arrested petitioner.
• As 404(b) evidence, during punishment, the State presented
evidence that a few days after the murder, petitioner pulled out
a machinegun and forced Martinez into a room where two of
petitioner’s friends were holding Martinez’s friend at knife‑
point. Martinez begged for his life while petitioner and his
friends haggled about who would kill them. Petitioner relented
but threatened to kill Martinez and his family if he contacted
the police. Petitioner stole Martinez’s truck.
• Trial counsel presented very little mitigation evidence due in
part due to petitioner’s refusal for months to allow him to con‑
tact his family in Honduras, who might have testified about
his character and upbringing. On the eve of trial, petitioner
gave in, and his lawyers attempted to contact his family, but
were unsuccessful in getting any of them to testify.
• The jury found petitioner guilty and sentenced him to death,
37.071 §2(b), (d)(2), (e) & (g): (1) he poses a continuing
threat to society; (2) he personally caused the death of the
victim, intended to kill her, or anticipated that she would be
killed; and (3) there were not sufficient mitigating circum‑
stances to warrant a sentence of life without parole instead of
death.
• In the habeas petition under 28 U.S.C. §2254, his attorney
alleged IATC for failure to conduct an adequate search for
mitigation evidence concerning mental illness and history of
drug and alcohol abuse.
• This claim was not raised by state habeas counsel, so the dis‑
trict court held that the claim was barred by procedural de‑
fault,
• The SCOTUS reversed for reconsideration under Martinez
v. Ryan, 566 U.S. 1 (2012), and Trevino v. Thaler, 569 U.S. 413
(2013), which held that a state prisoner seeking federal habeas
relief could overcome the procedural default of an IATC claim
by showing that the claim is substantial and that state habeas
counsel was also ineffective in failing to raise the claim in a
state habeas proceeding.
• To help develop these claims, petitioner filed an ex parte mo‑
tion asking the District Court for $20,016 in funding to con‑
duct a search for evidence supporting his petition, relying on
• The District Court refused the funding request, and the Fifth
Circuit affirmed.
• When the District Court denied petitioner’s funding request
and his habeas petition, he took an appeal to the Fifth Circuit
under 28 U.S.C. §§1291 and 2253, which grant the courts of
appeals jurisdiction to review final “decisions” and “orders”
of a district court.
• When the Fifth Circuit affirmed, petitioner sought review in the SCOTUS under 28 U.S.C. §1254, which gives the SCOTUS jurisdiction to review cases in the courts of appeals.

Editor’s note: because the opinion omits critical findings of the SCOTUS opinion that remanded the case, here are those findings from Ayestas v. Davis, 138 S.Ct. 1080 (2018):

• Under Hohn v. United States, 524 U.S. 236, 245 (1998), not all decisions made by a federal court are “judicial” in nature; some decisions are “administrative,” and are not subject to the review of the SCOTUS. Administrative decisions are those about things like facilities, personnel, equipment, supplies, and rules of procedure.
• A District Court’s ruling on a funding request under 18 U.S.C. §3599(f) is not an “administrative” decision.

• Under 18 U.S.C. §3599(f), “Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant’s attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor.”
• The Fifth Circuit held that individuals seeking funding for such services must show that they have a “substantial need” for the services, and this is error because it is arguably more demanding. The Fifth Circuit exacerbated the problem by invoking precedent to the effect that a habeas petitioner seeking funding must present “a viable constitutional claim that is not procedurally barred.”
• Although the Fifth Circuit adopted the rule before Trevino, after Trevino the rule is too restrictive because Trevino permits a Texas prisoner to overcome the failure to raise a substantial ineffective-assistance claim in state court by showing that state habeas counsel was ineffective. It is possible that investigation might enable a petitioner to carry the burden. In cases where which funding stands a credible chance of enabling a habeas petitioner to overcome the obstacle of procedural default, it may be error for a district court to refuse funding.
• Determining whether funding is “reasonably necessary” is a decision as to which district courts enjoy broad discretion.
• A funding applicant must not be expected to prove that he will be able to win relief if given the services he seeks. The “reasonably necessary” test requires an assessment of the likely utility of the services requested, and 28 U.S.C. §3599(f) cannot be read to guarantee that an applicant will have enough money to turn over every stone.

This is the summary of the Fifth Circuit’s opinion:

**Trial counsel’s performance is to be evaluated based on the professional norms prevailing when the representation took place**

• Review of the denial of a motion under 28 U.S.C. §3599(f) is for an abuse of discretion. A district court abuses its discretion if it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence. The underlying conclusions of law are reviewed de novo and conclusions of fact are reviewed for clear error.
• Remand is not required if the judgment is sustainable for any reason.
• Under Bobby v. Van Hook, 558 U.S. 4, 7 (2009), trial counsel’s performance is to be evaluated based on the professional norms prevailing when the representation took place.
• Scrutiny of mitigation investigations did not take shape until after Ayestas’ state-habeas application was filed in 1998, at which time the ABA guidelines spoke only briefly to the duties for postconviction counsel. Ayestas’ request for funding closely tracks supplementary ABA guidelines, but their probative value is diminished by the fact that they were adopted a decade after the state-habeas application was filed.
• Ayestas’ state-habeas attorney in 1998 would not have found much in case law for claims based upon mitigating evidence of substance abuse and mental illness. In 1998, the most relevant authority was likely Strickland itself, which held that trial counsel could reasonably surmise from his conversations with his client that character and psychological evidence would be of little help.
• Under Harrington v. Richter, 562 U.S. 86, 109 (2011), although courts may not indulge post-hoc rationalization for counsel’s decisionmaking that contradicts the available evidence of counsel’s actions, neither may they insist counsel confirm every aspect of the strategic basis for his actions.
• With respect to Ayestas’ mental illness, neither trial counsel nor state-habeas counsel could have been expected to explore it given that there was no evidence he was schizophrenic until 2000, two years after his state-habeas application was filed. State-habeas counsel cannot have been ineffective for failing to investigate mental illness because the record establishes that there was nothing to factually put counsel on notice of any reasonable likelihood that any such condition existed at trial or when the state-habeas application was filed.
• This is not a Wiggins fact-pattern because counsel’s failure to present evidence of mental illness did not result from pure inattention, and this is not a case like Porter, where counsel wholly ignored multiple avenues of investigation, nor is it like Rompilla where there was a readily available file that the prosecution tipped-off to defense counsel.


Under Jackson v. Virginia, 443 U.S. 307, 319 (1979), when reviewing the sufficiency of the evidence, a court views all evi-
dence whether circumstantial or direct in the light most favor-
able to the government, with all reasonable inferences and cred-
ibility choices to be made in support of the jury’s verdict. The
jury retains the sole authority to weigh any conflicting evidence
and to evaluate the credibility of witnesses. Evidence is sufficient
to support a conviction if any rational trier of fact could have
found the essential elements of the crime beyond a reasonable
doubt. The inquiry is limited to whether the jury’s verdict was
reasonable, not whether the reviewing court believes it to be
correct. A preserved sufficiency claim is reviewed de novo but
with substantial deference to the jury verdict.

Under 18 U.S.C. § 371, conspiracy requires evidence of:
(1) an agreement between two or more persons to pursue an
unlawful objective; (2) knowledge of the unlawful objective and
voluntary agreement to join the conspiracy; and (3) an overt act
by one or more of the members of the conspiracy in furtherance
of the objective of the conspiracy. An agreement may be inferred
from concert of action, voluntary participation may be inferred
from a collocation of circumstances, and knowledge may be
inferred from surrounding circumstances.

Under 8 U.S.C. § 1325(c), to prove marriage fraud, the gov-
ernment must show that the person (1) knowingly entered into a
marriage (2) for evading any provision of the immigration laws.
A person who knowingly enters into a marriage for evading any
provision of the immigration laws shall be imprisoned for not
more than five years or fined not more than $250,000 or both.
All elements of marriage fraud are satisfied when the defendant
enters into the marriage.

Under 18 U.S.C. § 2 (aiding and abetting) and Rosendal v.
United States, 572 U.S. 65, 70 (2014), a person who aids, abets,
counsels, commands, induces, or procures a federal offense is
punishable as a principal. A person is liable for aiding and abet-
ting a crime if he (1) takes an affirmative act in furtherance of
that offense (2) with the intent of facilitating the offense’s com-
mission. This includes all assistance rendered by words, acts,
couragement, support, or presence even if that aid relates to
only one or some of a crime’s phases or elements.

Challenges to jury instructions are reviewed for an abuse
of discretion. The trial court has substantial latitude in describ-
ing the law to the jurors. The Fifth Circuit examines whether
the entire charge was a correct statement of the law and clearly
instructed the jurors on the principles of the law applicable to
the factual issues. A district court reversibly errs in refusing to
give a defendant’s proposed instruction if the requested instruc-
tion: (1) is substantially correct; (2) is not substantially covered
in the charge; and (3) concerns an important point in the trial
so that the failure to give it seriously impaired the defendant’s
ability to effectively present a given defense.

(D), district courts have wide discretion in imposing terms and
conditions of supervised release. A district court may impose
any condition of supervised release it considers appropriate
provided that the condition: (1) is reasonably related to one of
these factors: (i) nature and circumstances of the offense and the
history and characteristics of the defendant; (ii) adequate deter-
rence of criminal conduct; (iii) protection of the public from
further crimes of the defendant; and (iv) needed educational or
vocational training, medical care, or other correctional treat-
ment to the defendant; (2) does not involve a greater deprivation
of liberty than is reasonably necessary for the purposes of the
last three statutory factors; and (3) is consistent with pertinent
policy statements issued by the Sentencing Commission. A dis-
trict court must set forth factual findings to justify special con-
ditions, but even without factual findings, the special condition
may be affirmed if the Fifth Circuit can infer the district court’s
reasoning after an examination of the record.

LEXIS 23234 (5th Cir. Aug. 2, 2019) (designated for pub-
lication) [SORNA; categorical approach per Descamps;
circumstance-specific inquiry into victim’s age when
classifying sex-offender tier-levels]

Per 34 U.S.C. § 20913(c), the Sexual Offense Registration
and Notification Act of 2006 (SORNA) requires sex offenders
to update their registration after a change in residence. Under
18 U.S.C. § 2250, failing to do so is a federal crime when the
offender travels in interstate commerce.

Under U.S.S.G. § 2A3.5, three base-offense levels apply
when a sex offender is found guilty of failing to register. The lev-
els correspond with the sex-offender tiers in 34 U.S.C. § 20911. A Tier II sex offender is one whose offense is comparable to or
more severe than certain offenses when committed against a
minor.

The categorical approach per Descamps v. United States, 570
U.S. 254, 261 (2013), is applied when classifying the SORNA tier
of a defendant’s state-law sex offense: The court must consider
the elements of the statute of conviction rather than specific
conduct. If the statute of conviction sweeps more broadly than
the federal offense, the state offense cannot serve as a proper
predicate.

SORNA requires courts to perform a circumstance-specific
inquiry to determine whether the victim was a minor when
applying the categorical approach to classify sex-offender tier
levels.

Under Nijhawan v. Holder, 557 U.S. 29, 37–40 (2009), fed-
eral statutes may impute the categorical approach by referring
to generic or cross-referenced crimes but require circumstance-
specific inquiries to determine whether specific conditional or
modifying requirements are met. This “hybrid” approach turns
on how the circumstance-specific conditions modify the generic
or cross-referenced offenses.

Under 34 U.S.C. § 20911(3), a state sex offense is Tier II for
SORNA sentencing purposes when it is comparable to or more
severe than abusive sexual contact under § 2244 when commit-
ted against a minor. Abusive sexual contact under 18 U.S.C.
§ 2244 sexual abuse of a minor under 18 U.S.C. § 2243(a) requires
that the victim be 12–15 years old and the offender be 4 years older than the victim.

SORNA requires a circumstance-specific inquiry into the victim’s age when classifying sex-offender tier levels to determine whether the victim was a minor or in the case of a Tier III categorization under 42 §20911(4)(A)(ii), whether the victim was younger than 13.

SORNA does not permit a court when applying the categorical approach to determine sex-offender tier levels to conduct a circumstance-specific inquiry into an offender-victim age differential that is built into one of the corresponding cross-referenced offenses as an element of the crime.

**United States v. Fields, No. 18-10928, 2019 U.S.App.LEXIS 22454 (5th Cir. July 29, 2019) (designated for publication) [Using prior conduct not resulting in a conviction in a sentencing calculation]**

A district court may impose a sentence outside the U.S.S.G. range if after considering factors identified in 18 U.S.C. §3553(a) and making an individualized assessment based on the facts presented, the court determines that an outside-U.S.S.G. range is warranted. Prior conduct not resulting in a conviction may be considered in a sentencing calculation as long as the court finds by a preponderance of the evidence that the conduct occurred.

District courts may consider any information that “bears sufficient indicia of reliability to support its probable accuracy,” which means that the court may not rely on a “bare arrest record,” and even if a PSR provides a more detailed factual recitation of the conduct underlying an arrest, if that recitation lacks sufficient indicia of reliability then it is error for the district court to consider it at sentencing regardless of whether the defendant objects or offers rebuttal evidence. But if the factual recitation possesses sufficient indicia of reliability, the court may consider it unless the defendant objects and offers rebuttal evidence challenging the truthfulness, accuracy, or reliability of the evidence supporting the factual recitation in the PSR. Mere objections are generally insufficient unless they sufficiently alert the district court to questions regarding the reliability of the evidentiary basis for the facts contained in the PSR.

A district court may rely on a PSR’s factual recitation of conduct underlying an arrest even if the defendant was acquitted of charges underlying the arrest. Acquittal on criminal charges does not prove that the defendant is innocent but proves only reasonable doubt as to guilt. It is impossible to know why a jury found a defendant not guilty since an acquittal can be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Thus, the jury cannot be said to have “necessarily rejected” facts when it returns a general verdict of not guilty and the verdict does not prevent the district court from considering conduct underlying the acquitted charge so long as that conduct has been proved by a preponderance of the evidence.
equate. Under Mathews v. Eldridge, 424 U.S. 319, 335 (1976), to decide what procedures should apply in a case, the court weighs the: (1) private interest that is affected by the official action; (2) risk of an erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and (3) government’s interest including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

**United States v. Pawlak, No. 17-11339, 2019 U.S.App. LEXIS 24366 (5th Cir. Aug. 15, 2019) (designated for publication)** [Obstruction of justice enhancement under U.S.S.G. §3C1.1 applies even if no actual obstruction occurs]

Under U.S.S.G. §3C1.1, if the: (1) defendant willfully obstructed or impeded or attempted to obstruct or impede the administration of justice with respect to the investigation, prosecution, or sentencing of the offense of conviction; and (2) obstructive conduct is related to the defendant’s offense of conviction and any relevant conduct or a closely related offense, a two-level enhancement is applied. This occurs where there is destroying or concealing evidence that is material to an official investigation or judicial proceeding or attempting to do so.

*Editor’s note:* This opinion addresses several issues, including alleged error of the denial of a motion to dismiss the indictment, motion to suppress, and sufficiency of the evidence. Because the other issues have been summarized recently, the only issue summarized is the obstruction of justice.

**Facts:**
- When he learned that the feds were searching his home for sharing child porn on PlayPen, a child-porn website, Pawlak attempted to delete the contents of a hard drive and downloaded software designed to wipe a computer hard drive but did not use it.
- This resulted in a two-level enhancement for obstruction of justice.

The mere attempt to obstruct justice allows a 2-level enhancement
- Pawlak argues that the attempt to erase his hard drive occurred contemporaneously with his arrest, so the enhancement should not apply.
- Under U.S.S.G. §3C1.1, if the: (1) defendant willfully obstructed or impeded or attempted to obstruct or impede the administration of justice with respect to the investigation, prosecution, or sentencing of the offense of conviction; and (2) obstructive conduct is related to the defendant’s offense of conviction and any relevant conduct or a closely related offense, a two-level enhancement is applied. This occurs where there is destroying or concealing evidence that is material to an official investigation or judicial proceeding or attempting to do so.

- Pawlak’s attempted to wipe his hard drive shortly after he learned that federal agents were searching his house. And, his downloading the software that would wipe his hard drive was obstruction even though he didn’t use it.

**United States v. Waguespack, No. 18-30813, 2019 U.S.App.LEXIS 24327 (5th Cir. August 15, 2019) (designated for publication)** [Obstruction of justice enhancement under U.S.S.G. §3C1.1 may apply even if the defendant is not aware that an investigation is ongoing]

Under U.S.S.G. §3C1.1, if the: (1) defendant willfully obstructed or impeded or attempted to obstruct or impede the administration of justice with respect to the investigation, prosecution, or sentencing of the offense of conviction; and (2) obstructive conduct is related to the defendant’s offense of conviction and any relevant conduct or a closely related offense, a two-level enhancement is applied. This occurs where there is destroying or concealing evidence that is material to an official investigation or judicial proceeding or attempting to do so. Obstructive conduct that occurred prior to the start of the investigation of the offense of conviction may be covered if the conduct was purposefully calculated—and likely to thwart the investigation or prosecution of the offense of conviction. This includes situations where the defendant may not be aware that an investigation is ongoing.

*Editor’s note:* This opinion addresses several issues, including a Brady violation and sufficiency of the evidence. Because the other issues have been summarized recently, the only issue summarized is the obstruction of justice, as above.

**Facts:**
- Waguespack was identified as a suspect in an undercover investigation of peer-to-peer networks for child porn.
- Investigator Ratcliff used Torrential Downpour to download over 400 images of child porn from an IP Address in Baton Rouge, which was on a computer in the home of Waguespack’s father.
- The father confirmed that only Waguespack used the computer.
- The computer contained software searching for and downloading files with names indicative of child porn. After a forensic examination, the computer was found to have installed encrypted space and anti-forensic software, CCleaner & Eraser. There were paths with names indicative of child-porn that led to an “E-drive,” but examiners were unable to locate it in the unencrypted space of the drive. The examiners were unable to find any user-accessible child porn on the computer. However, examiners found 2,800 images and four videos of child porn in a thumbnail cache in a deleted zip file in an unallocated
space of the drive. The names in the unallocated space were not indicative of child porn.

- After Waguespack was convicted of possession and distribution of child porn, the PSR recommended a two-level obstruction of justice enhancement under U.S.S.G. § 3C1.1 because there was anti-forensic software installed on the computer. Waguespack objected because he never attempted to delete or conceal evidence after he learned of the investigation. The district court overruled the objection.

**Obstruction of justice enhancement may apply even where the defendant may not be aware that an investigation is ongoing**

- Under U.S.S.G. § 3C1.1, if the: (1) defendant willfully obstructed or impeded or attempted to obstruct or impede the administration of justice with respect to the investigation, prosecution, or sentencing of the offense of conviction; and (2) obstructive conduct is related to the defendant’s offense of conviction and any relevant conduct or a closely related offense, a two-level enhancement is applied. This occurs where there is destroying or concealing evidence that is material to an official investigation or judicial proceeding or attempting to do so. Obstructive conduct that occurred prior to the start of the investigation of the offense of conviction may be covered if the conduct was purposefully calculated—and likely to thwart the investigation or prosecution of the offense of conviction. This includes situations where the defendant may not be aware that an investigation is ongoing.
- A finding of obstruction of justice is a factual finding that is reviewed for clear error.
- Although there was no evidence that Waguespack engaged in obstructive conduct during the Government’s investigation of his activities or even that he was aware that an investigation was about to commence. However, based on the plain language of guidelines, the enhancement may be applied for conduct that occurred prior to an investigation if the conduct was purposefully calculated—and likely to thwart the investigation or prosecution of the offense of conviction.

**Texas Court of Criminal Appeals**

No published opinions were handed down by the TCCA since the last SDR.

**Texas Courts of Appeals**

*Ex parte Barton, No. 02-17-00188-CR, (Tex.App.—Fort Worth Aug. 8, 2019) (designated for publication) [Tex. Penal Code §42.07(a)(7) is facially unconstitutional as vague and overbroad]*


A person who communicates with the intent to harass, annoy, alarm, abuse, torment, or embarrass can have intent to engage in legitimate communication of ideas, opinions, information, or grievances. Thus, Tex. Penal Code §42.07(a)(7) is facially unconstitutional because it is vague and overbroad.

Under *May v. State*, 765 S.W.2d 438, 439 (Tex.Crim.App. 1989), vague laws violate the Constitution by allowing arbitrary and discriminatory enforcement by failing to provide fair warning and by inhibiting the exercise of First Amendment freedoms. A law imposing criminal liability must be sufficiently clear to: (1) give a person of ordinary intelligence a reasonable opportunity to know what is prohibited; and (2) establish determinate guidelines for law enforcement. A law that implicates First Amendment freedoms requires greater specificity to avoid chilling protected expression.

Under *Morehead v. State*, 807 S.W.2d 577, 580 (Tex.Crim. App. 1991), a statute is overbroad in violation of the First Amendment if in addition to proscribing activity that may be constitutionally forbidden, it sweeps within its coverage a substantial amount of expressive activity that is protected by the First Amendment. Under *State v. Johnson*, 475 S.W.3d 860, 865 (Tex.Crim.App. 2015), the statute’s oppressive affect cannot be minor but must prohibit a substantial amount of protected expression, and the danger that the statute will be constitutionally applied must be realistic and not based on fanciful hypotheticals.

*Bertram v. State, No. 01-17-00940-CR, 2019 Tex.App.—Houston [1st Dist.] May 30, 2019* (designated for publication) [Standard of review for motion for a directed verdict; aggravated kidnapping]

Under *Williams v. State*, 937 S.W.2d 479, 482 (Tex.Crim. App. 1996), a motion for a directed verdict and a challenge from the motion is the same as a challenge to the legal sufficiency.

Under *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), and *Brooks v. State*, 323 S.W.3d 893, 895 (Tex.Crim.App. 2010), to determine legal sufficiency, after viewing the evidence in the light most favorable to the verdict, a reviewing court considers whether the factfinder was rationally justified in finding the essential elements of the crime beyond a reasonable doubt. The reviewing court does not substitute its judgment for that of the factfinder by reevaluating the weight or credibility of the
evidence but defers to the factfinder’s resolution of conflicts in testimony, weighing of evidence, and drawing reasonable inferences from the facts. The evidence is measured by the elements of the offense as defined by the hypothetically correct jury charge. Malik v. State, 953 S.W.2d 234, 240 (Tex.Crim. App. 1997). Circumstantial evidence and direct evidence can be equally probative in establishing guilt of a defendant, and guilt can be established by circumstantial evidence alone. Under Hart v. State, 89 S.W.3d 61, 64 (Tex.Crim.App. 2002), proof of mental state will almost always depend upon circumstantial evidence, and knowledge may be inferred from the person’s acts, words, and conduct. The standard of review is the same for direct and circumstantial evidence. Hooper v. State, 214 S.W.3d 9, 13 (Tex.Crim.App. 2007). The reviewing court considers events occurring before, during, and after the commission of the offense and may rely on actions of the defendant that show an understanding and common design to do the prohibited act. It is not required that each fact “point directly and independently to the guilt of the appellant” if the cumulative force of all the incriminating circumstances is sufficient to support the conviction.

To prove attempt under Tex. Penal Code §15.01, there must be sufficient evidence that a defendant did an act amounting to more than mere preparation with the specific intent to commit the target offense.

Under Tex. Penal Code §20.04, a person commits aggravated kidnapping if he intentionally or knowingly abducts another and commits an aggravating element. “Abduct” means to restrain with intent to prevent liberation by: (A) secreting or holding him in a place where he is not likely to be found; or (B) using or threatening to use deadly force. The defendant must have restrained (actus reus) with the specific intent to prevent liberation (mens rea). Secreting or holding another where he is unlikely to be found is part of the mens rea and not the actus reus. The State is not required to prove that the defendant secreted or held another but only that he restrained with the specific intent to prevent liberation by secreting or holding. The offense is completed when at any time during the restraint the defendant forms intent to prevent liberation by secreting or holding another in a place unlikely to be found.

Under Tex. Penal Code §20.04(a), a kidnapping is aggravated when a defendant intentionally or knowingly abducts another with the specific intent to: (1) hold for ransom or reward; (2) use as a shield or hostage; (3) facilitate the commission of a felony or the flight after the attempt or commission of a felony; (4) inflict bodily injury or violate or abuse sexually; (5) terrorize the victim or a third person; or (6) interfere with the performance of any governmental or political function.

Editor’s note: This is the complete relevant law on legal sufficiency:

• Under Jackson v. Virginia, 443 U.S. 307, 319 (1979), and Brooks v. State, 323 S.W.3d 893, 895 (Tex.Crim.App. 2010), to determine whether the factfinder was rationally justified in finding the essential elements of the crime beyond a reasonable doubt. The reviewing court does not substitute its judgment for that of the factfinder by reevaluating the weight or credibility of the evidence but defers to the factfinder’s resolution of conflicts in testimony, weighing of evidence, and drawing reasonable inferences from the facts. The evidence is measured by the elements of the offense as defined by the hypothetically correct jury charge. Malik v. State, 953 S.W.2d 234, 240 (Tex.Crim. App. 1997). Circumstantial evidence and direct evidence can be equally probative in establishing guilt of a defendant, and guilt can be established by circumstantial evidence alone. Under Hart v. State, 89 S.W.3d 61, 64 (Tex.Crim.App. 2002), proof of mental state will almost always depend upon circumstantial evidence, and knowledge may be inferred from the person’s acts, words, and conduct. The standard of review is the same for direct and circumstantial evidence. Hooper v. State, 214 S.W.3d 9, 13 (Tex.Crim.App. 2007). The reviewing court considers events occurring before, during, and after the commission of the offense and may rely on actions of the defendant that show an understanding and common design to do the prohibited act. It is not required that each fact “point directly and independently to the guilt of the appellant” if the cumulative force of all the incriminating circumstances is sufficient to support the conviction.


Under United States v. Jacobsen, 466 U.S. 109, 113 (1984), Fourth Amendment protections generally do not extend to the conduct of private persons who are not acting as government agents or with the knowledge and participation of a government official.

Under Walter v. United States, 447 U.S. 649, 656 (1980), even a wrongful search or seizure by a private citizen does not deprive the government of the right to use evidence obtained from the wrongful search. But the government may not encourage conduct by private persons that the government cannot do. If the government encourages a search or the private citizen searches solely for the purpose of aiding law enforcement, the search is illegal.


Under Stoker v. State, 788 S.W.2d 1, 11 (Tex.Crim.App. 1989), to determine whether a person is acting as an instrument or agent of the government, a court considers whether
the: (1) government knew of and acquiesced in the intrusive conduct, and (2) party performing the search intended to assist law enforcement efforts or instead to further his own ends. The defendant bears the burden of proving that a private party acted as an agent of the government.

**Fulton v. State**, No. 04-18-00529-CR, 2019 Tex.App.—Austin July 31, 2019 (designated for publication) [Evading arrest with a vehicle under Tex. Penal Code §38.04(b) is an F-3]


Under Ex parte Jones, 440 S.W.3d 628, 629 (Tex.Crim.App. 2014), evading arrest with a vehicle under Tex. Penal Code §38.04(b) is an F-3.

**Ex parte J.A.G., No. 04-18-00218-CV, 2019 Tex.App.—San Antonio June 26, 2019 (designated for publication) [Expunction of cases in which the statute was declared unconstitutional]**

Under Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992), a trial court’s ruling on a petition for expunction is reviewed for an abuse of discretion. Questions of law are reviewed de novo because a trial court has no discretion in determining what the law is or applying the law to the facts. A trial court abuses its discretion if it misapplies or misinterprets the law.

One requirement that must be shown to be entitled to an expunction under Tex. Code Crim. Proc. Art. 55.01(a)(2) is that there was no court-ordered community supervision under Chapter 42A.

Under Reyes v. State, 753 S.W.2d 382, 383 (Tex.Crim.App. 1988), an unconstitutional statute is void from its inception. Under Smith v. State, 463 S.W.3d 890, 896 (Tex.Crim.App. 2015), when a statute is declared facially unconstitutional, there is no valid law upon which to base a prosecution or to justify the imposition of community supervision.

Legal consequences under void statutes are void from inception, so community supervision imposed under a void statute is a legal nullity.


Under Wagner v. State, 539 S.W.3d 298, 306 (Tex.Crim. App. 2018), courts construe statutory text according to its plain meaning unless the text is ambiguous or the plain meaning leads to absurd results the Legislature could not possibly have intended. To determine a statute’s plain meaning, courts read words and phrases in context and construe them according to the rules of grammar and usage. Every word is presumed to be used for a purpose, and each word, phrase, clause, and sentence is given effect if reasonably possible.

Under Tex. Transp. Code §550.025(a), the operator of a vehicle involved in an accident resulting only in damage to a structure or landscaping adjacent to a highway shall: (1) take reasonable steps to locate and notify the owner or person in charge of the property of the accident and of the operator’s name, address, and (ID of the vehicle); and (2) if requested and available, show the operator’s DL to the owner or person in charge of the property. Under §550.025(b), a violation is a class-C misdemeanor if damage is < $200 and a class-B misdemeanor if $200 or more. Reporting duties under Tex. Transp. Code §550.025(a) include public and private structures.

**Moon v. State**, No. 06-18-00128-CR, 2019 Tex.App.—Texarkana May 15, 2019 (designated for publication) [Confrontation clause re prior sworn testimony]

Facts:

- Moon was released on bond from Fannin Co. Jail after being arrested for aggravated assault of a peace officer (F-1).
- The bond was conditioned on Moon appearing in court.
- Moon appeared for jury selection and the first day of the State’s case.
- The next day, Moon’s attorney informed the trial court that Moon had fallen the night before and was unresponsive. Moon had been taken to the Texoma Medical Center was unable to communicate.
- The trial court declared a mistrial.
- A month later, the State retried Moon. The jury convicted him.
- A few weeks later, Moon was indicted for bail jumping. Shortly before the trial, his wife Lori, who had testified against him during the punishment-phase of the aggravated assault trial, died of cancer.
- During the guilt/innocence stage of the trial, over Moon’s objection the trial court admitted that portion of Lori’s testimony from the aggravated assault trial.

To satisfy the Confrontation Clause, prior testimony from a different case may be used provided the witness is unavailable and the defendant had an opportunity to cross-examine the witness.

- Under Montgomery v. State, 810 S.W.2d 372, 391 (Tex.Crim. App. 1990) (op. on reh.), review for a trial court’s decision on admission of evidence is for an abuse of discretion, which occurs if the decision is so clearly wrong as to lie outside the zone of reasonable disagreement.
- Under Holmes v. South Carolina, 547 U.S. 319, 324 (2006), and California v. Trombetta, 467 U.S. 479, 485 (1984), a trial court’s discretion on admission of evidence is constrained...
by constitutional protections including the Confrontation Clause, which guarantee a meaningful opportunity to present a complete defense.

- Under State v. Ballard, 987 S.W.2d 889, 893 (Tex.Crim.App. 1999), a trial court’s misapplication of the law to the facts of a case is a per se abuse of discretion.
- Under Crawford v. Washington, 541 U.S. 36, 68 (2004), and U.S. Const. Amend. VI, the Confrontation Clause allows a defendant the right to be confronted with witnesses against the defendant. If testimonial evidence is at issue (like testimony from a prior proceeding), the Sixth Amendment requires the unavailability of the witness and a prior opportunity for cross-examination.
- To satisfy the Confrontation Clause, prior testimony from a different case may be used provided the witness is unavailable and the defendant had an opportunity to cross-examine the witness.
- The trial court did not abuse its discretion in admitting Lori’s prior testimony. Nor was the Confrontation Clause implicated.

In re The State of Texas, No. 08-18-00102-CR, 2019 Tex. App.—El Paso July 10, 2019 (designated for publication) [Mandamus and video recording of the psychiatric examination of a defendant]

Under In re State ex rel. Weeks, 391 S.W.3d 117, 122 (Tex. Crim.App. 2013), to be entitled to mandamus relief, the relator must show: (1) no adequate remedy at law; and (2) what he seeks to compel is a ministerial act that requires a clear right to the relief requested, which is shown when the circumstances dictate one rational decision under unequivocal, well-settled statutory, constitutional, or case law. A party is entitled to mandamus relief to correct judicial action that is clearly contrary to well-settled law.

Under Soria v. State, 933 S.W.2d 46 (Tex.Crim.App. 1996), and Lagrone v. State, 942 S.W.2d 602 (Tex.Crim.App. 1997), when a defendant initiates a psychiatric examination and introduces psychiatric testimony based on that examination, the defendant constructively testifies through the defense expert and waives his Fifth Amendment rights to a limited extent. When the defendant in a death penalty case presents psychiatric testimony on future dangerousness, the trial court may compel an examination of the defendant by an expert of the State’s choosing, and the State may present rebuttal testimony of that expert based upon the expert’s examination of the defendant. The rebuttal testimony is limited to the issues raised by the defense expert. Trial courts may order a defendant to submit to a state-sponsored psychiatric exam on future dangerousness when the defense introduces or plans to introduce expert psychiatric testimony. The Soria-Lagrange rule has not been extended to non-death penalty cases.

There is no statute or case law that prohibits the video recording of the psychiatric examination of a defendant.

Tilghman v. State, No. 03-17-00803-CR, 2019 Tex.App.—Austin June 7, 2019 (designated for publication) [Expectation of privacy in a hotel room; exigent circumstances]


Under Stoner v. California, 376 U.S. 483 (1964), a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures and the protection would disappear if it is left to depend upon the unfettered discretion of an employee of the hotel. If there is evidence showing that the guest has been evicted from the hotel or his term of occupancy has expired, the reasonable expectation of privacy in the room diminishes or disappears.

Under Gutierrez v. State, 221 S.W.3d 680, 685 (Tex.Crim. App. 2007), to validate a warrantless search based on exigent circumstances, the State must show: (1) probable cause to enter or search a specific location (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 . . . or evidence of a crime will be found); and (2) an exigency that requires an immediate entry to a place without a warrant must exist. The exigency must make the needs of law enforcement so compelling that a warrantless search is objectively reasonable.

Under Weems v. State, 493 S.W.3d 574, 578 (Tex.Crim.App. 2016), and Missouri v. McNeely, 569 U.S. 141, 148-149 (2013), exigency provides for a reasonable yet warrantless search because there is compelling need for official action and no time to secure a warrant. Whether officers face an emergency that justifies acting without a warrant calls for a case-by-case determination based on the totality of circumstances. The exigency must exist at the time of the warrantless intrusion and not on exigencies discovered once inside.

Under McNairy v. State, 835 S.W.2d 101, 107 (Tex.Crim. App. 1991), exigent circumstances justify a warrantless intrusion to: (1) provide aid or assistance to persons officers reasonably believe need assistance; (2) protect officers from
persons they reasonably believe to be present, armed, and dangerous; and (3) prevent the destruction of evidence or contraband.


Under Stairhime v. State, 463 S.W.3d 902, 906 (Tex.Crim. App. 2015), when assessing the meaning of an attorney’s statement that he has “no objection” about a matter that was previously ruled upon, courts should ask: (1) whether the entire record demonstrates that the defendant did not intend and the trial court did not construe the “no objection” to be an abandonment of a claim of error that was earlier preserved; then (2) if after applying this test it remains ambiguous whether abandonment was intended, the ambiguity must be resolved in favor of finding waiver.

Under Bullock v. State, 509 S.W.3d 921, 924 (Tex.Crim. App. 2016), and Tex. Code Crim. Proc. Art. 37.09, to determine whether the trial court was required to give a requested charge on a lesser-included offense: (1) determine whether the requested instruction is a lesser-included offense of the charged offense; and (2) assess whether the record-evidence supports an instruction on the lesser-included offense (there must be some evidence in the record that would permit a jury to rationally find that if the defendant is guilty he is guilty only of the lesser-included offense). Anything more than a scintilla of evidence is adequate. Some evidence must refute or negate other evidence establishing the greater offense or the evidence is subject to different interpretations. If the jury is charged on alternate theories, the record-evidence supports an instruction only if there is evidence that, if believed, refutes or negates every theory that elevates the offense from the lesser to the greater.

Under Masterson v. State, 155 S.W.3d 167, 171 (Tex.Crim. App. 2005), the harm from denying a lesser-offense instruction stems from the potential to place the jury in the dilemma of convicting for a greater offense in which the jury has reasonable doubt or releasing entirely from criminal liability a person the jury is convinced is a wrongdoer.

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