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Voice for the Defense is published to educate, train, and support attorneys in the practice of criminal defense law.
## January
- **January 5**
  - CDLP | Nuts & Bolts cosponsored with LCDLA
  - Lubbock, TX
- **January 6-7**
  - TCDLA | 41st Prairie Dog
  - Lubbock, TX
- **January 14**
  - CDLP | Getting Game Day Ready!
  - Waco, TX

## February
- **February 3**
  - CDLP | Mental Health
  - Austin, TX
- **February 3**
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  - Austin, TX
- **February 4**
  - CDLP | Capital Litigation
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- **February 4**
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- **February 9**
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  - Dallas, TX
- **February 9-13**
  - TCDLA | President’s Retreat
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- **February 24-25**
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  - Houston, TX
- **February 24**
  - TCDLEI | Board Meeting
  - Zoom

## February Continued
- **February 28**
  - CDLP | Mindful Monday Webinar

## March
- **March 4**
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  - El Paso, TX
- **March 10-11**
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  - Houston, TX
- **March 20-25**
  - CDLP | 45th Tim Evans TCTC
  - Huntsville, TX
- **March 24-25**
  - TCDLA | 28th MSE with DUI/DWI with NCDD
  - New Orleans, LA
- **March 28**
  - CDLP | Mindful Monday Webinar

## April
- **April 1**
  - CDLP | Getting Game Day Ready!
  - Longview, TX
- **April 8**
  - CDLP | Women’s TBD
- **April 22**
  - CDLP | Race in Criminal Justice TBD

## May
- **May 6**
  - TCDLA | 15th DWI Defense Project
  - Arlington, TX
- **May 23**
  - CDLP | Mindful Monday Webinar

## June
- **June 14**
  - CDLP | Chief PD
  - San Antonio, TX
- **June 15**
  - CDLP | PD Training
  - San Antonio, TX
- **June 15**
  - CDLP | Capital Litigation
  - San Antonio, TX
- **June 15**
  - CDLP | Mental Health
  - San Antonio, TX
- **June 16-18**
  - TCDLA | 35th Rusty Duncan Seminar*
  - San Antonio, TX

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*Seminar funded by the Court of Criminal Appeals of Texas.*
President’s Message
MICHAEL C. GROSS

Happy Holidays!

“We are so grateful for all the sacrifices that you have made this year to support and serve others. May this Holiday season be a time for you to rest and recover, and to reflect on all that you have achieved.”

-Anonymous

I do not know about all of you, but everything seems to be so much more difficult in our law practice these days. What was once easy to obtain in discovery or in witness interviews or trial preparation now seems so much harder. It sometimes feels like we are in quicksand. Add to these difficulties the strange emergence of jury trials during the pandemic. Masks and plexiglass and Zoom permeate the courtroom. In 2019 and earlier, a court coordinator could accurately tell us whether or not our case was going to trial the following week. No more. Everything seems to be in flux. These stressors may lead some to feel that our service to our clients and others is not appreciated. Ours is not an easy profession. It is not easy, for example, to enter a courtroom filled with 80 venirepersons and conduct voir dire on a murder case or other difficult case. These many stressors can sometimes be overwhelming. We have attempted to survive the pandemic and countless Zoom settings. We have maintained our law practices in spite of the difficulties resulting from the pandemic. We should remember, however, that we have adapted and overcome these stressors and should not allow them to dampen our holiday season.

We should remember, however, that we have adapted and overcome these stressors and should not allow them to dampen our holiday season. We are a TCDLA family and know that we may rely upon each other to get through these difficult times.

As we enter this holiday season and prepare for New Years, I hope each of us takes a moment to reflect on how our sacrifices this past year have helped and supported not only our families and friends but also our clients, their families, and their friends. My hope is that each of us may take a moment this holiday season and enjoy our families and rest up for this coming year. We need this time to recover and reflect on all that we have achieved. I wish the best for you and yours this holiday season and in 2022.

Happy Holidays!
The holiday season is here! It’s been too long since I’ve traveled or taken a vacation due to the pandemic, so I’m excited to be going to see my out-of-state relatives. It seems like years! We will be taking a trip out west, reuniting with cousins and getting together with our extended family.

The operation is scheduled a few days after we return from our holiday trip. The recovery process itself will require six to nine months, due to two tears in her meniscus. When the doctor explained the surgery process, it was surreal, sounding like something from a sci-fi movie.

As a parent, I wish I could shield her from sickness, or pain, or whatever plagues her. In a way, I feel the same about our staff and our members. Those moments when we’re excited over new developments then face some terrible setback. Those life-impacting hardships force us to figure a way to move forward. To strive to be stronger or better. None of these things can—or should—be done alone.

While we can’t control what befalls us, we can challenge ourselves to conduct the way we respond.

But excitement over our plans was tempered when my daughter hurt herself—tearing her ACL and meniscus and straining the FCL and MCL. She was devastated that her basketball season was over before it even started. It broke my heart to see her work so hard this summer to prepare, only to be let down. This was to be her year. Now she is relegated to physical therapy for six weeks to allow the FCL and MCL to regain mobility and flexibility, then surgery.

For my daughter, the saying “walk before you run, crawl if you have to” rings so true. In youth, in particular, we want to get there without undergoing any trials or tribulations. Persistence, not giving up, will be key. As the holiday approaches, we will add in a bit of patience.

And as the season winds down, we tend to reflect on the past year. I challenge all to take a moment during the holidays and enjoy time with family and friends. Give the best gift you can, your presence and undivided attention. Go above and beyond—connect with friends, loved ones, fill your heart. Spread some joy to someone and show them you care. Together we can lessen each other’s burdens, so sprinkle some kindness, plant some love. Make these holidays extraordinary and share it with someone close.

Cheers to hope, overindulgence in food, and reenergizing (worry about getting back into shape next year—a small setback!). Happy holidays to you, and wishing you a peaceful, healthy, and prosperous year!

“Turn your setbacks into comebacks.”
—Anonymous
By the time you read this we will have finished Thanksgiving dinner and we may be moving out of our respective food-comas. I hope that each of you had a wonderful Thanksgiving, safe from COVID, and with the ability to enjoy all the family time that you can possibly handle. Now, on to Christmas, Chanukah, Kwanza, and other winter holidays that allow (require) each of us to do it all again. In case my tone is not clear via the typed word, too much family time is too much for me on occasion. I am known to reach my limit on extended family interactions somewhere around the first or second day of joyous festivities, and I suspect I am not alone in that need for space. But, shame on me.

We, as criminal practitioners, know better than just about anyone what a privilege it is to spend time with family on the holidays. So many of our clients, whether they are pre-trial or post-conviction clients, don’t get to experience what we take for granted or what, in my case, tends to drive me nuts. I can’t tell you the number of jail calls I get beginning around the week before Thanksgiving begging me to try one more time to get someone out of jail. I know as well as the next person that not every client is being truthful about wanting to be home for their respective holiday celebration, but I’ve got a soft spot in my heart for the old line, “I just want to spend Christmas with my kids.” Even when I know the dude is full of it, it makes me wonder how I would feel if I couldn’t see my boys’ smiles on Christmas morning. Even if picking up all the trash after opening presents and the inevitable breaking of a Christmas present on Christmas morning is aggravating, seeing and feeling the joy of watching them open presents fills my tank and helps me get going for another year.

When I was a baby lawyer, I had this yearly feeling by Thanksgiving that I was tired of it all and needed a break from the grind. I would try and coast as best as I could to the end of the year. (Let’s be honest, I still get that same feeling). Then, one year, I was set for trial in early December on an injury to a child case for an appointed client for whom I had been fighting for years. I knew the judge wouldn’t actually be calling any cases for trial that week and that all of the trials would be reset. I was grouchy and tired of the grind that Friday morning when I showed up at the courthouse just to reset my client’s case. My poor client had been beset by horrible health problems during the duration of her case, brought on in part by the anxiety of the pending charges. I walked into the court coordinator’s office to get my new setting and she instructed me I needed to conference the case with the prosecutor. Annoyed, I walked to the room where the prosecutors were waiting and grumpily informed them that I was told to conference with them before I got a reset and consider this grumpy message my conference and I was leaving. The lead prosecutor on my case, however, told me to wait a second. He told me that the case had been reset too many times and, although they knew they weren’t actually going to trial, they had subpoenaed many of the cases in order to determine if they actually had any witnesses to testify in the eventual trials. Mine was one such case. He said, let’s go check and see if I have a witness. We walked out, together, into the foyer on that floor of the courthouse where he called for his witnesses, and none appeared. He walked me back into the court offices and filled out and signed a dismissal. After getting the Judge’s signature, I walked a copy to my client, handed it to her with a smile and told her something to the effect that the perpetual annoyance of her case was over. She burst into tears in the middle of the crowded foyer. She hugged me and told me that I had saved her life.

I’m not re-living this story for an atta-boy. I’m telling y’all, and really reminding myself, that we all have a Christmas miracle in us that we can bring to one of our clients. And sometimes prosecutors surprise us near the end of the year, too. I don’t always get dismissals at Christmas time, but I might be able to get someone out of jail, or I might be able to do something as simple as going and visiting a client in jail, not to talk about the case, but just to visit and remind him or her that they aren’t alone. If we shrug off the tired at the end of the year, we can bring some semblance of joy to someone we represent and make this time of year a little happier. And who knows, that may make all the difference in the world to our client.

Be safe.
Several teenagers from a Houston community became interested in satanic rituals. This was unexpected because this group was raised in a middle-class, law-abiding environment. However, one night the group was together and the subject of what it would look like to watch someone die came up. There was a young male who was not well-liked, and his name was mentioned as a possible victim of a satanic-like sacrificial killing. The teens made plans to lure him to a cemetery at night and then strangle him to death.

Sadly, the plan was executed. Two of the group were young girls who watched but did not participate in the planning or the actual ritual killing. However, they made no effort to stop it. An investigation began once the body was discovered. When interest in Sharon became known, her parents realized she needed representation as the police were calling it a murder. Heavy stuff. We agreed to represent her. Not long after, the father informed us he had found a suitcase that may have contained items from the scene of the crime. We told him not to destroy it or contain items from the scene of the crime. The teens made plans to lure him to a cemetery at night and then strangle him to death.

We began to investigate and interview witnesses. We knew the other girl in the group at the scene was Brittany. We asked her for an interview. Our investigator, Gene Boyd, and I conducted a thorough interview of Brittany and determined neither she nor our client had participated in the deadly satanic ritual, but knew of it and were present at the time of the attack.

Meanwhile, the D.A.’s investigator had taken a statement from Brittany. Brittany agreed with them to wear a hidden recorder when she talked to us. We did not trust her, and we did not know she had a recorder when she came to our office. We brought out the suitcase, and she said it belonged to her. She identified a pair of tennis shoes as hers—and that Sharon was wearing them on the night in question.

I said, “Really, I didn’t even know they were in there” because we had not yet inventoried the suitcase and I was surprised they were even there. Meanwhile the D.A.’s investigator was parked down the street, recording the conversation.

We realized stains on the shoes could possibly be blood. We excused her for a short break, and I called my partner Jim Lavine to discuss the situation. We determined we did not know if the shoes really belonged to Brittany, if Sharon had really had them on that night, or if they were evidence. So, we decided we could not keep the shoes in our office, and Brittany owned them but could not keep them. We told her (and the attentive investigator parked down the street) that they may be evidence, and because they belonged to her, she needed to call the D.A.’s investigator and take them to him right away. We then prepared a receipt for the shoes and suitcase which she signed, and we sent her on her way.

The case against Sharon and the boys resulted in murder charges being filed and a motion to transfer Sharon to district court from juvenile court. In addition, the D.A.’s office decided to subpoena me as a witness to prove up the chain of custody of the shoes, possibly putting her at the scene.

However, we did not like the feeling we got by being placed in the chain of custody, especially if those spots turned out to be blood from the killing of the young man, linking the shoes to our client. We knew we were not going to testify willingly against our client.

We remembered hearing about the Texas Criminal Defense Lawyers Association Strike Force, which had been created not too long before this case occurred, to represent members who needed counsel in a legal dilemma like this. By good luck, the Strike Force Chair at the time was a long-time good friend of mine from San Antonio, Gerry Goldstein. When we called him, he could not believe the D.A. wanted to call me as a witness against my own client in a murder case—especially in one transferred from juvenile court.

Gerry filed a motion to quash with a brilliantly written memo in support. Fortunately, the law was clear in cases like this and we followed it: seeing to it that the evidence was delivered to authorities (immediately after leaving our office building, as it turned out) not altered in any way, and was available for...
A. The luster to its already shining reputation.

But the State thought it was going to have to call the defendant’s attorney to prove how the evidence was delivered un-tampered to law enforcement. A hearing was scheduled before the criminal district court judge who had been assigned the case after transfer. The prosecutor almost came to blows with Mr. Goldstein, but we prevailed. The subpoena was quashed and the TCDLA Strike Force added luster to its already shining reputation.

**Ethical Issues**

A. Can a criminal defense lawyer be subpoenaed and forced to testify against a client at trial? No.

B. Can a criminal defense lawyer keep potential evidence from the prosecution in a criminal case in Texas? No.

C. How does the defense lawyer explain this procedure to the client? See the discussion below.

D. What is the defense lawyer’s obligation to the court in such a situation? See the discussion below.

E. Was it prudent for defense counsel to enlist the assistance of the TCDLA Strike Force? Yes.

**Discussion**

A. In 1987, the law was not settled in Texas. A resolution was adopted unanimously by the Board of Directors of the Texas Criminal Defense Lawyer Association, that the Texas Supreme Court and the Texas Court of Criminal Appeals adopt a rule of ethics that it is unprofessional conduct for a prosecutor to subpoena an attorney at a grand jury without prior judicial approval where the prosecutor seeks to compel the attorney/witness. The then-president of the TCDLA cited authority from the states of Tennessee and Massachusetts, the United States Court of Appeals for the First Circuit. The trial court granted a motion to quash and a motion in limine. Note that the evidence was brought to us by a third-party agent of the client (father), not just a third party. This preserved the attorney-client privilege. See Rules 1.05, confidentiality of information, 1.06, conflict of interest, 1.14, safekeeping property, Texas Disciplinary Rules of Conduct, as of Sept 2021.

B. A lawyer cannot keep, destroy, or prevent the discovery of incriminating physical evidence in a criminal case, or counsel the client to destroy or prevent discovery of such evidence. See Rule 8.04, Texas Disciplinary Rules of Conduct.

C. The lawyer in this situation should advise that the lawyer cannot destroy or keep evidence, but that the lawyer cannot be subpoenaed to testify against the client about such evidence. See Rules 1.05 and 8.04, Texas Disciplinary Rules of Conduct.

D. The lawyer’s obligation to the Court under these circumstances is to file a motion to quash the subpoena and a motion in limine to prevent the prosecutor from bringing such information to the attention of a jury. See Rule 1.05, Texas Disciplinary Rules of Conduct.

E. Under the state law at that time, it was absolutely the proper thing to bring the matter to the attention of the Texas Criminal Defense Lawyers Association, especially the TCDLA Strike Force. The Strike Force chair at the time personally appeared at a hearing for us and we prevailed on a motion to quash and a motion in limine. Strategic conclusion of an author.

**Post-Script**

Of the five teenagers tried and convicted as adults, two males received life sentences, one male pleaded guilty and received a 60-year sentence, and the fourth male traded his testimony for a 20-year sentence. Sharon, the only female tried, went to the jury after being convicted on a parties theory. The prosecutor forcefully demanded of the jury a sentence of 60 years for Sharon and finding that she personally used or exhibited a deadly weapon, which would affect the timing of her parole.

We asked for a 10-year sentence, probated, and a finding that she did not use or exhibit a deadly weapon. The jury almost hung, but finally assessed a 15-year sentence and found that she did not use or exhibit a deadly weapon. The court released her immediately on an appeal bond. Ultimately, her appeal was unsuccessful, and she was paroled after serving five years. She went on to become a wife and mother. When compared to what could have happened, this outcome was definitely a defense victory.

**Jack Zimmermann** is the president of Zimmermann Lavine & Zimmermann, P.C. in Houston. He is board certified in Criminal Law by the Texas Board of Legal Specialization, and as a Senior Criminal Trial Advocate by the National Board of Trial Advocacy. He practices primarily criminal defense and military law at the trial and appellate levels in state, federal, and military courts nationwide. He is a graduate of the United States Naval Academy, Purdue University, and the University of Texas School of Law. In the Marine Corps in Vietnam he was awarded two bronze stars for valor and the Purple Heart for wounds in action. Before Mr. Zimmermann retired from the Marines as a colonel, he served as a Chief Defense Counsel, as a Chief Prosecutor, and then as a Military Judge, for which he was awarded the Meritorious Service Medal. He is the Past President of the Harris County Criminal Lawyers Association. He is a former member of the Texas Criminal Defense Lawyers Association Board of Directors. He can be reached at jack.zimmermann@zlzlaw.com and 713-552-0300.

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**TCDLA**

Feeling ethically challenged? Let us know!

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December 2021 VOICE FOR THE DEFENSE
Fifth Circuit provides a tool to contest Firearm Enhancements

Experienced federal practitioners are conditioned to wince upon the mention of a gun in proximity to a drug deal or even just near a stash of drugs intended for sale. Those combinations can produce a two-level enhancement under USSG §2D1.1(b)(1), the drug Guideline, for possession of a firearm in connection with a drug offense; a four-level enhancement under USSG §2K2.1(b)(6), the firearm Guideline for use of a firearm in connection with another felony; a cross reference from the firearm Guideline to the drug Guideline under USSG §2K2.1(c)(1); or, worse, a 5-year mandatory minimum under 18 U.S.C. §924(c).

Sometimes, it’s tempting not to fight the Guideline enhancements, even when the evidence seems to show nothing more than the mere presence of guns and drugs. The courts have hammered into us that firearms are “tools of the trade” when it comes to drug dealing, and the Application Notes to both USSG §2D1.1(b)(1) and USSG §2K2.1(b)(6) encourage their application when guns and drugs are together. But, a recent Fifth Circuit opinion reminds us not to concede the issue too readily.

In United States v. Sincleair, __ F.4th __, No. 20-10495, 2021 WL 5001783 (5th Cir. Oct. 28, 2021), a drug defendant suffered arrest at the home of a downstream customer, that is, a man who bought drugs from the defendant's own buyer. In fact, these two customers of the defendant were transacting two ounces of methamphetamine when police arrived. The police also found a gun in close proximity to all concerned. Although police ultimately found that the gun was registered to one of the customers (the resident), the district court nonetheless imposed a two-level enhancement for possessing a firearm in connection with the drug offense.

A divided panel of the Fifth Circuit vacated the sentence and remanded. The panel majority did not think the district court was sufficiently clear about the reason for the adjustment. That is, the district court did not clearly say whether the defendant had personally possessed the firearm, or whether, instead, he was vicariously responsible for another’s possession through principles of relevant conduct.

The panel said:

> It is not clear whether the district court determined that Sincleair personally possessed the firearm or that one of Sincleair’s “unindicted co-conspirators” possessed it during the commission of an offense. The PSR addendum presents both of these options as possibilities, and the district court did not explain which form of possession it attributed to Sincleair. In such a situation, our circuit precedent supports vacating the sentence and remand for the district court to make the appropriate findings.

Id. at *3. Sincleair thus confirms Fifth Circuit precedent. See United States v. Zapata-Lara, 615 F.3d 388 (5th Cir. 2010) (requiring district courts to make explicit findings in support of their Guideline calculations, including those underlying the gun enhancement to USSG §2D1.1).

Perhaps more significantly, the panel found insufficient evidence to support either a theory of personal possession or of vicarious sentencing liability through relevant conduct. It said:

> Moreover, there is not enough in the record to support the firearm enhancement based on Sincleair’s personal possession of the firearm because the PSR did not include sufficient facts establishing a temporal and spatial relationship between the gun, the drug trafficking activity, and Sincleair. The Government (and the probation officer) did not provide any evidence

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1 The law (or the jury!) can sometimes provide more to work with in challenging the nexus between a gun and drugs in cases arising from 18 U.S.C. §924(c). See United States v. Charles, 469 F.3d 402, 406 (5th Cir. 2006).
2 See United States v. Aguilera-Zapata, 901 F.2d 1209, 1215 (5th Cir. 1990) (citing United States v. Martinez, 808 F.2d 1050, 1057 (5th Cir. 1987), cert. denied, 481 U.S. 1032 (1987); United States v. White, 875 F.2d 427, 433 (4th Cir. 1989)).
3 See USSG §2D1.1, comment. (n. (11) (A)).
4 See USSG §2K2.1, comment. (n. (14) (B)).
establishing that Sincleair owned the weapon, brought the weapon with him to [downstream buyer]’s house, or had any other connection to it. Neither the PSR nor any other evidence supports a finding of temporal proximity between Sincleair’s drug trafficking activity and the weapon found in [downstream buyer]’s house. The only relevant facts in the PSR are that Sincleair was [direct customer]’s source for methamphetamine, and Sincleair and [direct customer] and their girlfriends were present at [downstream buyer]’s home for a social gathering around the time that [direct customer] sold an ounce of methamphetamine to [downstream buyer]. Thus, the only drug transaction that is documented in the PSR occurred in [downstream buyer]’s home between [direct customer] and [downstream buyer]. Even if it may be inferred that Sincleair sold the methamphetamine to [direct customer], there is no evidence of any temporal proximity between Sincleair’s sale and the presence of the weapon; there is no evidence that the sale occurred on the same day, same week, or even same month as [direct customer]’s sale to [downstream buyer]. There is also no evidence that Sincleair promoted or assisted in the sale in any way. The temporal connection between the firearm and any drug trafficking by Sincleair was thus tenuous at best.

Sincleair, __ F.4th at *4.

Though the opinion doesn’t say as much explicitly, it does seem to bolster a defendant’s argument against personal possession of a firearm – notwithstanding its proximity to both the defendant and the drugs – whether it might just as plausibly have been possessed by another person. It also supplies a good argument against the application of the gun enhancement based on possession by co-defendants. Specifically, it seems to hold that a co-defendant’s possession of a gun in connection with drugs will not justify the adjustment unless the defendant is involved in the particular transaction where the gun is present. Remarkably, this may be so even if he or she previously delivered the very quantity at issue.

Joel Page is the Appellate Supervisor for the Federal Public Defender of the Northern District of Texas, where he has worked for 17 years. He secured a favorable opinion from the Supreme Court in Davis v. United States, 140 S.Ct. 1060 (2020), and quite a lot more unfavorable opinions from the Fifth Circuit over the years.
BI search warrants for Google Location Service and Geofence data in the U.S. Capitol Hill siege investigation have attracted significant legal and media attention in recent months\(^1\). Less well known, however, is the fact that U.S. Government agency subpoenas and search warrants issued to Google have increased more than ten-fold in the past decade\(^2\). See Exhibit 1 below.

Exhibit 1. Requests by U.S. Government agencies to Google

In this article, we discuss the use of data from Google Location Services and other proprietary location services in court. The geographical location data provided by these services can be based on cell towers, Wi-Fi, global positioning systems (GPS), or any combination of these sources. Each of these technologies provide a valid source of location data; however, as with any data, it is important to understand the theory and technology upon which the ultimate conclusions are based, including model assumptions and the way the data is stored and subsequently retrieved. Furthermore, when such data is used in legal proceedings, we must adhere to existing standards for the admissibility of scientific evidence.

In 1993, the Supreme Court set the standard for expert testimony in the seminal case (Daubert v. Merrell Dow Pharmaceuticals, Inc., 1993)\(^3\). Under the Daubert standard, factors considered in determining whether scientific evidence is admissible now include:\(^4\)

1. whether the theory or technique in question can be and has been tested
2. whether it has been subjected to peer review and publication
3. its known or potential error rate
4. the existence and maintenance of standards controlling its operation, and
5. whether it has attracted widespread acceptance within a relevant scientific community

A key issue when using location services data is that the technology and algorithms involved are often proprietary, so clear and transparent responses to Daubert standards are not forthcoming. When a Government Agency obtains location history records from Google in response to a subpoena, the first line of the received document states “Google Confidential & Proprietary”. Right underneath, it describes the “Display Radius” value as “depend[ing] on a great many factors and is an approximation sufficient for its intended product uses.” The “Display Radius” is a critical parameter when assessing the potential error in Google location data: it is the uncertainty of the Blue Dot, a circular area that expands with uncertainty. Because of the proprietary nature of the software, it is not clear how this number is calculated, nor what the “intended product uses” are.

Proprietary issues relating to location services data are not confined to Google. Another location data source that is frequently subpoenaed by government agencies is Network Event Location System (NELOS) from AT&T, which goes beyond standard fixed cell tower records. Standard fixed cell tower records show the cell tower that a particular cellular phone connected to at a particular time. In most circumstances, this will be the cell tower with the strongest signal, not necessarily the closest proximity. Such data can be used to determine the general direction a cellular device is moving using a standard process that is well-known, well-tested, and has been subject to extensive peer-review.\(^5\)

NELOS, in comparison, adds additional sources of information to explicitly estimate the location of the cellular device at a singular moment. "Possible sources of information relied upon to create NELOS reports include GPS, Wi-Fi signals, single cell towers, or cell tower triangulation. But there is no indication within a NELOS record which of these sources provided any one location, or what database it was derived from and who controls that database. And even if the specific database and the locational source were known, it is not possible to verify the location of the source on the date in question over one year ago. Thus, it is impossible to verify the reliability, accuracy, or authenticity of the data.\(^6\) Recognizing reliability issues in its own NELOS records, AT&T adds the following disclaimer to the top of its document “The results provided are AT&T’s best estimate of the location of the target number. Please exercise caution in using these records for investigative purposes as location data is sourced from various databases which may cause location results to be less than..."

\(^1\) FBI Uses Google Location Data To Ensnare Alleged Capitol Hill Rooter, Forbes, 2021
\(^2\) https://transparencyreport.google.com/user-data/overview?hl=en
\(^4\) https://www.law.cornell.edu/wex/daubert_standard
\(^5\)SWGDE Recommendations for Cell Site Analysis, September 2017
\(^6\) Issues related to NELOS data were discussed in State of New York v. Imani Rene Williams, 2019
exact”. In a recent Daubert hearing, some of these NELOS issues were raised. In this hearing the proprietary nature of the estimation algorithm was addressed more explicitly, with particular focus on the black box nature of the location estimation and the absence of scholarly review and evaluation of the technology.

Similar legal concerns should be raised with Google Location Services data. Many of the pertinent issues involved with Google location data are discussed in the academic paper “Google timeline accuracy assessment and error prediction”, which is the only peer-reviewed journal paper to investigate Google Location Services data that we are aware of. The authors discuss the proprietary nature of the data: “Google withholds information about its algorithms on how the location estimation is computed, and which variables and parameters influence it.” This, like the NELOS algorithm, warrants careful consideration under the Daubert standard.

The researchers tested Google Location Services data because “In order to be able to harness this information in court or for justice purposes, an assessment of the accuracy has to be performed”. Unfortunately, any testing process is complicated by the fact that Google does not reveal its estimates of your location in real time on your device. This is a subtle but important point - we should be able to check that Google’s estimates on a specific device, at a specific time, match the data that is stored and subsequently retrieved from Google Location Services. By contrast, we can do independent real time field tests on cell tower, Wi-Fi, and GPS data. The researchers overcame this issue by time-stamping real time measurements from dedicated GPS devices, their “ground truth” measurements, and comparing them with Google Timeline data that they downloaded later. This absence of real time Google location data complicates testing limits peer review and publication, and raises questions over the existence and maintenance of standards controlling its operation.

The Dutch authors provide a very detailed and statistical account of their experiments, concluding that “Google locations and their accuracies should not be used in a definite way to determine the location of a mobile device”. With GPS, device accuracy was within Google’s “Display Radius” 52% of the time, and with Wi-Fi only that fell dramatically to 7%. As discussed earlier, we don’t know exactly how the “Display Radius” is calculated, but the Dutch research indicates the device was outside of Google’s own radius of uncertainty 93% of measurements when Wi-Fi was the location source. This isn’t just a speculative concern—in a recent case, a recent case, the defendant’s location history was sourced from Wi-Fi approximately half the time, which obviously raises serious concerns.

Google responds to Government Agency subpoenas with a location history spreadsheet that contains a “Source”, which can switch between “GPS”, “CELL” or “WIFI” at different times, as well as a “Timestamp”, “Latitude”, “Longitude”, “Display Radius”, “Device Tag” and “Platform”. However, it is not clear if the “Source” is a raw value, e.g., GPS only, or a blend of cellular, Wi-Fi, and GPS data that is most heavily weighted toward GPS. Ideally, we would have separate data for each of the raw location sources, as well as the final Google estimate. Without specific details it is hard to know how the “Latitude”, “Longitude”, and “Display Radius” data are calculated, as well as how and why the data switches between “Sources”. These are all black box functions of the Google Location Services algorithm.

In addition to issues relating to the proprietary nature of the technology and algorithms used to estimate location, there are also unknowns relating to data storage and retrieval. Google Location Services data is based on a Google account username rather than internationally recognized identifiers for electronic equipment. A Google user could log into Google Location Services on multiple devices and have multiple location histories in their account. By contrast, call detail records are based on a unique MSISDN, or cell number, and a unique IMEI, or international mobile equipment identifier, so at each timestamp we can be confident we know a specific device connected to a cell tower. In Google location data the latitude and longitude estimates are associated with a “Device Tag”, which appears to be Google’s proprietary device identifier. Mapping a “Device Tag” to a more conventional IMEI should return the device data, though it is not clear why such tags are used or whether mapping errors can occur.

After being subpoenaed by a Government Agency, location data is typically plotted in mapping software and used as evidence in court proceedings – a blue dot that marks the spot can be very compelling to a jury. As such, a proprietary spreadsheet from Google or AT&T can become pivotal evidence in legal proceedings. Careful consideration of the data, its limitations, and whether it even meets existing standards for the admissibility of scientific evidence is required. A common theme amongst all these technologies is that they are proprietary and have not been subject to extensive independent scholarly review and evaluation. We believe that cell tower, Wi-Fi, and GPS are very important sources of location data, and we welcome more transparent details from the location service providers, as well as further independent research and evaluation. We believe that the Daubert standard provides a logical starting point for discussions of location services data in legal cases – it is established, methodical, and scientific.

Steve Watson is a Forensic Consultant at Computer Forensic Services, Inc. He holds a PhD in Applied Forensic Mathematics, which focused on noise models in communication systems, and an MSc in Electrical Engineering. He has worked in various roles in academia, industry, and the financial sector, and has over two decades experience with hardware and software on various platforms and operating systems.

Lance Sloves conducts computer and cell phone exams to include cell tower analysis to date, qualifies as an Expert in the State of Texas in both Civil and Criminal matters, and Federal Court.

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8 Google timeline accuracy assessment and error prediction, Forensic Sciences Research, 2018
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A Great Criminal Defense Attorney is a Zealot, Despite its Negative Connotation

LARA BAZELON

The defense attorney-client relationship is like no other. It’s a tie that binds two very different people caught up in a high stakes battle—over money, custody, liability, freedom—even life. A client tells defense counsel sacred secrets carried to the grave.

The relationship also defies categorization. It isn’t familial or grounded in friendship. It isn’t sexual. And yet, it is inherently romantic; propelled by ardent need, it is at times surprisingly intimate. The bond asserts primacy, often to the detriment of others.

In law school, students are taught that a good defense attorney is a “zealous advocate.”

The noun version of zealous is zealot, defined as a fanatical believer in a greater calling. A zealot, with all of its negative connotations, is not what law students are told to be. A zealot is an extremist consumed by blind fervor who does dangerous and terrible things.

But after 20 years of practicing criminal law, I have come to believe that any defense lawyer who aspires to excellence is by necessity a zealot. A lawyer with the fire in the brain.

The fire drives the lawyer to take the hard cases. Up against the law, the facts and power of the state, the defense lawyer gets punched in the face, pinned to the mat and pulverized by a foe endowed with endless resources. There is vanishingly little they would not do for a client in dire straits, even at the expense of people and institutions they love dearly.

Sir Henry Brougham, a Scotsman, member of the House of Commons and a very able attorney, made this point to a dubious British Parliament in 1820. That year, George IV ascended the throne, becoming king of England. Almost immediately, he sought to strip his wife, Caroline, of her title as queen. King George despised his wife, and when she would not be bribed into leaving quietly, he pressed his allies in Parliament to introduce a Bill of Pains and Penalties to exile her from the monarchy because she had consorted with “a foreigner of low station” while living abroad. It was Brougham’s job to defend the queen.

Witness after witness came forward with titillating details of Caroline’s purported perfidy, all second- or third-hand reports. This testimony, elicited by the solicitor general for England and Wales, went on for days in the House of Lords. Caroline’s reputation was in tatters, her claim to the throne increasingly tenuous.

What no one had counted on, however, was Brougham’s savvy and ferocity. A supporter of the abolitionist movement and of reforms to the legal system that perpetuated unfairness and inequity, Brougham fought back. The real culprit, Brougham told Parliament, was the king himself, a man of few scruples and excessive appetites, who
had not only cheated on his wife with numerous women but had secretly married one of them.

When the prosecution rested and Brougham prepared to introduce these revelations, many prevailed upon him to hold his tongue. Disgracing the king in this way could imperil the monarchy. Better to stay silent than pose this existential threat. Refusing, he explained:

“An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.”

I often reflect on Brougham’s words. In my 20s and early 30s, when I was a deputy federal public defender living in Los Angeles, I spent most of my time at work. I thought about my clients’ problems constantly. When I left my job in 2008 to follow my then-boyfriend north, I transitioned into clinical teaching in a law school setting. That meant fewer clients and less time in court. I married my boyfriend, and we had two children. I assumed that these life changes and the greater domesticity associated with them would loosen my clients’ claim on my time and attention; that the fires they lit in my brain would be reduced to embers.

But that’s not what happened. In 2013, my law students and I fought to free a man who had been wrongfully convicted of murder. He spent 34 years in prison for a crime he did not commit. The weeks-long retrial took a year of preparation. The case was in Los Angeles; I lived with my husband in San Francisco, our children were 4 and 2. But I, like Brougham, knew only one person in the world. I left my family for long periods of time.

Today my client, who was exonerated, is home.

That client’s success story, however, is an anomaly. I’ve represented hundreds of people. Often, those cases end in abject failure: convictions, lengthy sentences, unsuccessful appeals to indifferent courts. That is what it means to represent people on the wrong side of the facts, on the wrong side of the law.

As a lawyer is to be afflicted by a single-minded ruthlessness and overriding sense of obligation in pursuit of a victory that is, at best, unlikely and fleeting.

That is the only kind of lawyer I know how to be. A zealot.

Lara Bazelon is a professor at the University of San Francisco School of Law, where she is the Phillip and Muriel C. Barnett chair in trial advocacy and directs the Criminal Juvenile Justice and Racial Justice Clinical Programs. She is the author of the legal thriller, A Good Mother.

This article was first published in the ABA Journal online on Oct. 27, 2021.
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**Texas Criminal Defense Lawyers Association**
Raymond Townsend, a handsome young prosecutor stands before twelve jurors. Raymond’s suit fits him perfectly, and his white shirt and blue tie accentuate his pearly white teeth and sparkling blue eyes.

“So ladies and gentlemen, when you look at the evidence in this case, with the Defendant being caught with almost four pounds of ecstasy.”

Raymond points to his table, where four square shaped bundles lay.

“And these drugs are physically strapped to his body, and he’s caught at customs returning from his trip to Amsterdam...”

Enthralled, the Jurors look glassy eyed at Raymond, almost as if he were a God.

“Then you must find him guilty.”

Raymond points to Stan Bladsill, a tattoo ridden, grungy looking middle-aged Defendant. Sitting next to him is Peter Baggett, known as “Pistol Pete” to his friends, few though they are. Baggett looks like a shot out middle-aged criminal defense attorney barely hanging on to life. The Jury stares at both of them angrily.

“To do anything else would be simply throwing the law, the evidence, and any sense of justice out the window.”

Raymond walks back to the prosecution table and sits down. Judge Bill Anderson, a silver haired, distinguished looking judge, peers down sternly at Pistol Pete.

“Mr. Brewster, you may present your closing argument.”

“Yes sir, just one moment.”

Pistol Pete whispers in Bladsill’s ear. “I think we should ask for a recess.”

“No way man. I want this to be over with.”

Pistol Pete looks worried. “I’m just saying, I could talk to the prosecutor about a plea bargain for less than ten.”

“I can’t go to prison, you feel me?”

“I know but that jury’s gonna’ hang us. Look at ’em.”

They look at the Jury, who look like angry villagers with torches. Bladsill looks at Pistol Pete.

“You said if I gave you five hundred bucks, you’d make sure I wasn’t convicted.” “But—”

“If you don’t get me outta’ this, I’m goin’ to the bar and complain!”

Pistol Pete looks horrified.

“But one more client complaint and I’ll be disbarred.”

“Then earn your money.”

The Judge looks at him impatiently. “Come on counsel. The Jury’s waiting.”

Pistol Pete looks up at him. “Yes sir.”

Pistol Pete looks around and sees the Court Reporter giving him a smug look. Pistol Pete thinks a beat, then rises. He walks over to the Prosecutor’s table and picks up a bundle of drugs. He walks over to the Jury, casually tossing it back and forth between his hands.

“Ladies and Gentlemen, the most important thing to remember about this case is that ecstasy, though illegal, is a harmless drug.”

Pistol Pete tosses the bundle from his right hand to his left hand sharply. He deliberately misses it and it flies hard into the eye of the Court Reporter. It hits him with a loud THUNK!

The Court reporter screams “Ahhh” and bends over in pain.

The Jury looks at Pistol Pete with a toxic brew of disgust and outrage. Infuriated, the Judge looks at Pistol Pete.

“Ladies and Gentlemen, we need to take a short recess while we attend to this
to each other and whisper. Pistol Pete and Bladsill, who hunker over pissed off. So does everyone else except Pistol Pete and Bladsill, who hunker over to each other and whisper.

“I thought that would work.”
“What?”
“Taking out the court reporter.”
“What would that accomplish?”
“No court reporter, no trial.”
“But I want a not guilty!”
“I promised you wouldn’t be convicted. I never promised you an acquittal.”
“What?”
“You always gotta’ read the fine print.”
“We never even had a contract.”
“It’s a figure of speech.”
“Well, whatever you’ve got in mind, do it fast.”
The Judge looks down at them impatiently.
“Counsel, continue your closing argument, now!”
Pistol Pete looks at the Judge.
“Yes sir.”
Pistol Pete gets up and walks over towards the jury. He picks up a bundle of drugs. The Jury winces slightly and they lean back. He looks at them and smiles innocently. He thinks for a moment, then sets the drugs back down. The Jury relaxes.
“What I was trying to say, ladies and gentlemen is that ecstasy is not a dangerous drug.”
Raymond whispers under his breath, but loud enough for the jury to hear “Unless you’re holding it.”
The Jurors snicker and look approvingly at Raymond. He winks at them and looks back at Pistol Pete smugly. Pistol Pete looks around anxiously.
“Mean, really, what’s the difference between ecstasy and say, marijuana, or alcohol?”
Raymond covers his mouth and coughs “Twenty years”.
The Jury looks at Raymond and chuckles. Pistol Pete looks at the Judge to see if he’ll take any remedial action. The Judge smiles and condescendingly motions for him to continue.
“I mean, shouldn’t it be up to the individual to decide what to put into their own body?”
Pistol Pete walks over and grabs the American flag out of its stand. He picks it up and waves it around vigorously. Jurors lean back and shield their faces.
“When you think about it, it’s downright un-American to prosecute someone for pursuing life, liberty, and the pursuit of happiness.”
Pistol Pete waves the American flag at Raymond and lacerates his arm with the sharp, pointy end. Raymond collapses in agony.
“Ahhhh!”
Raymond grabs his arm in pain. Blood spills out from his blue suit. His now red face contorts in pain. The Jury gasps and several jump down to help him. The Judge looks like he could leap off the bench and strangle Pistol Pete.
“What in the hell do you think you’re doing?"
“It was an accident!”
Raymond looks painfully at Pistol Pete.
“You did that on purpose!”
“I swear Judge, I was just trying to make a point.”
The Judge looks menacingly at Pistol Pete.
“The court will stand in recess, yet again.”
Pistol Pete looks at him innocently. The Judge’s eyes narrow. Pistol Pete looks at him and smiles casually.

Later that afternoon...
Raymond sits with his arm in a sling. He looks incensed. So does the Jury. So does the Court Reporter, who glares at Pistol Pete with his one unbandaged eye. The Judge stares daggers at Pistol Pete and Bladsill, who sit conspiring at counsel table. Pistol Pete shakes his head in disbelief.
“Damn these government employees are tough.”
“So what are we gonna’ do now? Take out somebody else?”
“I think the Judge is wise to that bit. We’re gonna’ have to think outside the box.”
Pistol Pete looks around. He looks at the Court Reporter’s stenotype. He thinks for a moment. He looks at Bladsill.
“How fast are you?”
“Pretty fast. If cops are chasing me. Why?”
“Because when I say the word pomegranate, I want you to jump up and take that stenotype. Then throw it through the window.”
“Huh?”
“We’re thirty feet off the ground. That thing ‘ll be demolished.”
“What’s a stenotype?”
“That thing the court reporter’s typing on.”
“Who’s the court reporter?”
“The one typing on the stenotype.”
Bladsill looks at him blankly.
“The one I hit in the eye with your dope. We can get a mistrial”
“But I don’t want a mistrial. I want an acquittal!”
Pistol Pete looks at him. He thinks for a moment, then snaps his fingers.
“Then grab all that dope and throw it out the window too.”
“Won’t I get in trouble?”
“We’ll worry about that later. But you’ll get twenty years if we finish this trial.”
The Judge bangs his gavel with a SMACK!
“Counsel finish your closing argument right now!”
Pistol Pete stands up and smiles.
“Yes sir. And just for the record, I sincerely apologize for the unfortunate incidents with the court reporter and the prosecutor.”
Pistol Pete looks at the Jury
“I just hope that each of you good citizens will not take this out on my client.”
The Jury looks at him as if he were half rat, half cockroach.
“Now, in summation of the state’s case I submit to you that there simply is too much circumstantial evidence to find probable cause that my client even remotely did a writ of habeas corpus. It’s simply all hearsay.”
The Judge, Prosecutor, and Jury all look at each other confused.
“You could no more convict my client than a pomegranate.”
Pistol Pete looks at Bladsill anxiously.
Bladsill looks tranquil and smiles at him. “I say, you could no more convict my client than you could a pomegranate!” 

Pistol Pete looks at Bladsill, who smiles and nods.

“Pomegranate! Pomegranate!”

Bladsill stops smiling, looks at Pistol Pete, then the Prosecutor, then the Court Reporter, then back to Pistol Pete. Bladsill jumps up, runs to Raymond’s table and grabs the drugs.

Raymond looks at Bladsill in horror. “Hey, you can’t touch that!”

Bladsill turns and runs over to the court reporter, and grabs his stenotype. The irate, wet stenotype. Raymond sits wet and angry in his chair, without the absent bench. The Court Reporter sits wet and angry from the ceiling.

There is a huge CRASH! and a car alarm goes off. The Judge, Raymond, the Bailiff, and several jurors rush over and look out the window. The Bailiff looks at Raymond.

“Counselor, isn’t that your BMW?” Raymond exhales and looks at the ceiling.

“It sure broke that guy’s fall.”

Pistol Pete sits innocently at counsel table looking at papers. As the smoke from the gunfire drifts to the ceiling a fire alarm turns on, followed by the ceiling sprinklers. The Judge, Raymond, the Bailiff, and the Jurors look at Pistol Pete, who still sits innocently at counsel table looking at papers. As the smoke from the volley of gunfire.

Two Bailiffs rush in with guns drawn. They fire a barrage of shots. After a dozen misses, one finally hits Bladsill as he clears the window. Bladsill, the drugs, and the stenotype all crash out the window. The room is filled with smoke from the volley of gunfire.

The Judge jumps up and bangs his gavel. “Let’s go off the record.” The Court Reporter looks at the empty space once occupied by his stenotype.

“The record’s all over Main Street, Your Honor.”

The Judge looks at Pistol Pete. “Listen you son of bitch, if it’s the last thing I do, I’ll have you disbarred, tried, convicted, and sent to prison.”

Pistol Pete looks at him calmly. “I’m sure once the dust settles, you’ll find this was all just a big misunderstanding.”

The Judge throws his gavel at Pistol Pete, who ducks. It flies past him and hits a framed oil painting of a statesman-like Judge hanging on the wall. The painting falls to the ground and breaks.

“You...I...” The Judge hesitates for a moment as Pistol Pete looks at him calmly. After a few beats, the Judge storms off the bench in disgust. The Jury starts to file out. Pistol Pete watches them as they stroll past him.

“Thank you for your service.” The Jurors ignore him and angrily walk away. Raymond collects his books and files, all of which are soaking wet. Pistol Pete walks over to him.

“Better luck next time, Raymond.” “Don’t talk to me.” “Come on, don’t be a sore loser.” Pistol Pete puts his hand on Raymond’s shoulder. Raymond winces in pain.

“You ever touch me again, and...” Pistol Pete raises his eyebrows, anticipating a possible criminal threat.

“Never touch me again.”

Raymond storms off. Pistol Pete watches him leave. When he’s out of sight, Pistol Pete walks over to the broken window. He looks down and shakes his head. He reaches in his coat pocket and pulls out his cell phone. He dials and listens.

“Honey, guess what? I won my trial.” He listens. “No, I really did. I thought maybe we’d go to Arby’s and celebrate.” Pistol Pete picks up his soaking wet file.

“Yeah, it was a really tough case.” He listens. “No, the law was against us.” He listens. “No, the facts were against us too.” He listens. “Nah, the Defendant was a total scumbag.” He listens. “What happened?” Pistol Pete looks down through the broken window.

“In the end, it all went out the window.” He picks at the broken glass as he listens. “Okay, see you at eight.” Pistol Pete closes his cell phone. He looks at his file folder. He thinks for a beat, shrugs his shoulders, then tosses the file out the window. He watches it fall for a moment, then smiles and walks off.

The End

Dean Watts
earned his B.A. from George Washington University, and his J.D. from the Southern Methodist University School of Law. He has been a TCDLA member since 1998. He was been board certified in criminal law since 2004. He was recently selected to Super Lawyers as a Top Rated Criminal Defense Attorney. He lives and practices in Nacogdoches, Texas.
The Texas Future Indigent Defense Leaders program (FIDL) connects promising young lawyers with nationally renowned training and mentorship that will help guide them through their crucial early years and beyond.

FIDL is an innovative partnership between the Texas Criminal Defense Lawyers Association (TCDLA), Gideon’s Promise, the Harris County Public Defender’s Office (HCPDO), and the Texas Indigent Defense Commission (TIDC).

Previously, young Texas lawyers in the FIDL program traveled to Atlanta, Georgia to attend the Gideon’s Promise CORE 101 intensive training. Now, with the help of TCDLA, that training is coming home to Texas, taking the young lawyer bootcamp created by MacArthur Genius Award Winner Jon Rapping and tailoring it for Texas law and practice.

This year, 30 young lawyers will have the opportunity to be a part of history, as the inaugural Texas FIDL class. This three-year program begins with a two-week intensive bootcamp in San Antonio and returns for weekend trainings every six months for three years.

In addition to the CORE 101 training, FIDL fellows will also receive a scholarship to the Annual Rusty Duncan Advanced Criminal Law, the seminal criminal defense conference presented by TCDLA.

The 30 Fellows selected will be expected to participate for the full three years of the program and will receive a scholarship covering their room, board and travel.

Deadlines for applications is December 24th. Young lawyers with less than four years’ experience are invited to apply.

Apply now:
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For questions, email fidl@tcdla.com
Shout Out to Emily Miller who received a NOT GUILTY verdict after a three day trial in Mills county on retaliation against a Peace Officer. Emily referenced information found on the listserv. Way to be resourceful! Amazing work, Emily!

Kudos to Steven Green, who celebrated two NOT GUILTY verdicts on a sexual assault of a child case in Van Zandt county. Way to go, Steven!

Great work to Srav Muralindhar, who received a NOT GUILTY in Van Zandt County on an atypical felony stalking case. The alleged victim was the county court at law judge, and involved facts that included a randy bull and the judge’s harlot cow, cutting barbed wire fences, and courthouse confrontations. And all of this while Srav coped with a hostile visiting judge who denied his request for a jury shuffle and gave the incorrect information to the jury. Congratulations Srav!

Congratulations to Will Vaughn! He received a NOT GUILTY verdict on a continuous family violence felony case, plus three lesser misdemeanors in Washington county. Great job, Will!

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It goes without saying that the right to trial by jury is a cornerstone of fundamental rights in this country. It was among the grievances cited in the Declaration of Independence and enshrined in both the Sixth Amendment to the United States Constitution and Article I of the Texas Constitution.

But how is that jury selected? There are as many opinions on the correct style and art to conduct voir dire (I won’t insult you by pointing out this is French for “To Speak the Truth”) as there are attorneys selecting juries. There are, however, specific rules on the qualification and disqualification of the persons who will be deciding our client’s fate. “The voir dire process is designed to insure – to the fullest extent possible – that an intelligent, alert and impartial jury will perform the duty assigned to it by our judicial system.” DeLaRosa vs. State, 414 S.W.2d 668, 671 (Tex. Crim. App. 1967).

No matter how you decide to talk to your venire, the attorney that knows the rules has the upper hand.

Qualifying the Juror

Qualifications for jurors are governed both by the Texas Government Code Chapter 62 as well as the Texas Code of Criminal Procedure Chapter 35. While the two can appear redundant, look back at the Government Code qualifications in conjunction with the Code of Criminal Procedure for additional authority to support your arguments.

Basic Qualifications

The goal of jury selection is to select a jury of twelve persons in a felony case and six persons in a misdemeanor. Tex. Code Crim. Pro. §33.01. The Government Code lays out the general qualifications for a juror, while the Code of Criminal Procedure provides the mechanism to reject a juror who does not meet those qualifications. Tex. Gov’t. Code §62.102 & Tex. Code Crim. Proc. §35.16. General requirements for a juror are:

1. At least 18 years of age;
2. A citizen of the United States;
3. Is a resident of this state and the county in which the person is to serve as a juror;
4. Is qualified under the constitution and laws to vote in the county in which the person is to serve as a juror;
5. is of sound mind and good moral character;
6. is able to read and write;
7. Has not served as a juror for six days during the preceding three months in the county court or during the preceding six months in the district court;
8. Has not been convicted of a misdemeanor theft or of a felony; and
9. Is not under indictment or other legal accusation for a misdemeanor theft or felony.


Three of those standards are absolute: if convicted of or under indictment for a misdemeanor theft or felony, or if they are insane, they cannot serve. Tex. Code Crim. Proc. §35.19. Every other qualification can be waived by the parties. Id. Yup, if everyone agreed, you could have a six-year-old on your jury.

Disqualifications

Some things which you might assume would disqualify a juror are actually not disqualifications. A juror is not required to be registered to vote. Tex. Gov’t. Code §62.1031. Blindness and deafness are not a bar to jury service, unless a judge finds specifically that the disability renders them unfit to serve. Tex. Gov’t. Code §62.104 & §62.1041. Section 1041 even specifically requires reasonable accommodation for a deaf or hard of hearing juror, allowing an interpreter to accompany a juror during all proceedings and deliberations in a case. Id.

Other disqualifications to a specific case include if the potential juror:
1. Is a witness in the case;
2. Is interested, directly or indirectly, in the subject matter of the case;
3. Is related by consanguinity or affinity within the third degree, as determined by Texas Government Code Section 573, to a party in the case;
4. Has a bias or prejudice in favor of or against a party in the case; or
5. Has served as a petit juror in a former trial of the same case or in another case involving the same questions of fact.

Exemptions

Aside from disqualifications, there are also exemptions from serving on a jury. A person who is otherwise qualified may establish an exemption if the person is:

1. over 70 years of age;
2. has legal custody of a child younger than 12 that cannot find adequate supervision of;
3. is a student at a public or private secondary school;
4. is enrolled in and in attendance at an institution of higher education;
5. is elected to or employed by the legislative branch of state government;
6. has served on a jury in the last 24 months in a county with a population of at least 200,000;
7. is the primary caretaker of a person unable to care for themselves;
8. has served on a jury in the last three years in a county with a population over 250,000; or
9. is a member of the US Military on active duty and deployed out of their county of residence.


A person can also establish a temporary or permanent exemption based on physical or mental impairment or an inability to understand English. Tex. Gov't. Code §62.109.

Excuses

Everyone wants to do jury service, right? No. And if you haven’t already, you will hear some amazing excuses at times. The court is allowed to excuse a juror with a sufficient excuse. Tex. Gov’t. Code §62.110. While these can be claims of exemption or lack of qualification discussed previously, they don’t have to be. The court or their designee may, for any reason except an economic reason, excuse or reschedule any juror who submits a statement of the exemption, lack of qualification, or excuse. Id. Prospective jurors can be excused for economic reasons, but only if each party of record is present and approves the release. Tex. Gov’t. Code §62.110(c).

Challenging the Array

What do you do if the entire panel was summoned against your client? “Either party may challenge the array only on the ground that the officer summoning the jury has willfully summoned jurors with a view to securing a conviction or an acquittal.” Tex. Code Crim. Proc. §35.06. A challenge to the array must be in writing and, if filed by the Defendant, must be supported by affidavit. Id. A challenge to the array is heard before any other qualification determinations. Tex. Code Crim. Proc. §35.06. If sustained, a new array is summoned. Tex. Code Crim. Proc. §35.09.

Seating & Shuffling your Venire

All of these qualification determinations are before we even get to talk to our venire. The disqualifications or exemptions are filed with the court or their designee or tested under oath by the court or their designee. Tex. Gov’t. Code §62.110 & Tex. Code Crim. Proc. §35.10. Depending on how your jurisdiction manages their jury summons, these qualifications may be done in the courtroom by the judge, in a central jury room, or even online before your potential juror even reports to the courthouse. Tex. Code Crim. Proc. §35.03.

After qualification questions by the Judge, but before the attorney’s questioning of the venire, either party can request that the jury panel be “shuffled”. The “Jury Shuffle” is not clear from the statute, but very well established in Texas jurisprudence. See Tex. Code Crim. Proc. §35.11; Alexander v. State, 523 S.W.2d 720, 721 (Tex. Crim. App. 1975) citing Woerner v. State, 523 S.W.2d 717 (Tex. Crim. App. 1975) “The right to have a jury panel assigned to a case redrawn is clearly provided for in Art. 35.11.” A “Jury Shuffle” may be demanded by either the State or Defense, but only one shuffle is required. Jones v. State, 833 S.W.2d 146, 148 (Tex. Crim. App. 1992 En Banc.). Failure to grant a motion to shuffle is reversible error, and no harm need be found. Id.

Once the venire is qualified, the disqualifications, exemptions, and excuses filed, your jury shuffled and is seated, and assuming there is no challenge to array, you may now begin your voir dire.

Conducting the Voir Dire


That does not mean there are no limitations on how voir dire is conducted. “Texas trial courts have broad discretion over the jury-selection process.” Barajas v. State, 93 S.W.3d 36, 38 (Tex. Crim. App. 2002). Both the trial court’s discretion and established case law will limit what and how you can question your venire.

Time Limitations

The first hurdle you may have to get over is how much time you will have to question your venire. Although it is unclear why anyone would need more than thirty minutes to question eighty-five people regarding guilt and innocence and punishment in a case involving sexual abuse, DNA, co-defendants, and police misconduct, some attorneys may find they want more time.

Time limits on jury selection deal with two competing rights: the constitutional right to question prospective jurors and a trial judge’s right to impose reasonable restrictions. Mc-Carter v. State, 837 S.W.2d 117 (Tex. Crim. App. 1992) citing...
It's well established that a trial court can impose reasonable limits on questioning and time. Id. citing McManus v. State, 591 S.W.2d 505, 520 (Tex. Crim. App 1979).

Some time limits are too much. See E.g. Morris v. State, 1 S.W.3d 336 (Tex. App – Austin 1999) (45 minute time limit in aggravated assault case inappropriate); Cartmell v. State, 784 S.W.2d 183 (Tex. App – Fort Worth 1990) (20 minute time limit in DWI unreasonable). The central question is did counsel have enough time to intelligently question the venire? Look a little later in the paper for how to preserve error if your time is cut short.

**Question Limitations**

In addition to the trial court's discretion, the Court of Criminal Appeals has defined limits of what questions may be asked during Voir Dire. “A question is proper if it seeks to discover a juror's views on an issue applicable to a case.” Barajas, 93 S.W.3d at 39, citing Smith v. State, 703 S.W.2d 641, 643 (Tex. Crim. App 1985). Questions which would be appropriate can become objectionable when they are either too vague or too specific.

**Overly Broad**

With the touchstone of attempting to intelligently strike jurors, either preemptively or for cause, we need to make our voir dire questions specific enough to touch on the issues of our case. “[A] trial judge can exercise his discretion to prevent an improperly phrased question from being asked when it threatens to duplicate earlier questions, or presents so broad a question as to constitute a global fishing expedition.” Smith v. State, 703 S.W.2d 641,645 (Tex. Crim. App 1985 overruled on other grounds).

The Smith case provides great examples of asking too broad or too narrow of questions. Mr. Smith's attorney was relying entirely on the insanity defense at trial. Counsel's question of the jurors about “their thoughts” on the insanity defense was found to be too broad. The Court found that to be a “general topic for discussion” and did not attempt a more restrictive question or direct the question to specific jurors based on prior answers. See Id. However, counsel's question to the jury panel of “their idea of punishment” and “what they think its purpose should be” where his client was charged with murder and had filed for probation was proper. See Id.

Unfortunately, Smith was overruled by Easley v. State, which relegated limitations on juror questioning to non-constitutional harm analysis. Easley v. State, 424 S.W.3d 535 (Tex. Crim. App 2014). Nonetheless, craft your questions to the theme and points in your case and object when the other side does not.

**Commitment Questions**

Too tight of a scope of question can draw and objection just as quickly as one that is too broad. Trying to nail a juror down to a specific answer may draw that terrible and confusing objection: a commitment question.

What is a commitment question? “Commitment questions are those that commit a prospective juror to resolve, or refrain from resolving, an issue a certain way after learning a particular fact.” Standfer v. State, 59 S.W.3d 177 (Tex. Crim. App 2001). Not all commitment questions are objectionable. Id. at 182. To be objectionable, a commitment question must either (1) ask a commitment where the law does not require one or (2) provide facts in addition to what is needed to establish a challenge for cause. Id.

**The Inappropriate Commitment**

In the first scenario the problem is asking the juror to commit when it's not appropriate. The question “Can you consider the entire punishment range in a murder case?” is a proper commitment question. However, the question “Can you consider my client's age in mitigation?” is not. A juror cannot be challenged for cause for failure to consider specific mitigation evidence. Raby v. State, 970 S.W.2d 1, 3 (Tex. Crim. App 1998), cert. denied, U.S., 525 U.S. 1003 (1998).

The key is does a possible answer to the question lead to a valid challenge for cause? See Id. In the example above, no matter what the answer is considering your client's age, you cannot challenge the juror for cause.

Remember that as long as you're not seeking commitment, you are not prohibited from exploring any number of issues. Consider these two questions: “Do you believe age can influence a person's choices and actions?” vs. “Can you consider my client's age when looking at his actions?” The first question is a information gathering question. It does not demand a commitment. Question two however...

**Committing To Too Much**

The second scenario is when the question adds too much to your commitment question. Look at a permutation of our appropriate commitment question on a range of punishment: “Can you consider the entire range of punishment in a murder case when the victim was a clown?” Now we have an additional fact: the identity of the victim.

“To be proper, then, a commitment question must contain only those facts necessary to test whether a prospective juror is challengeable for cause.” Standfer, 59 S.W.3d at 182. The Court in Standfer uses the example of the decision in Atkins v. State. There, the prosecutor asked prospective jurors if they could convict a person of possession of a controlled substance if the crack pipe in their pocket during arrest had...
residual amount of cocaine in it. *Atkins v. State*, 951 S.W.2d 787, 789 (Tex. Crim. App. 1997). The additional facts of the arrest, the crack pipe, and the fact that it was in defendant’s pocket “rendered improper what otherwise would have been a proper question designated to assess whether a prospective juror was challengeable for cause.” *Id.*

To keep it in perspective, then, remember it’s ok to ask a juror to commit, as long as the law requires them to.

**Juror Questionnaire**

Not all examination of the venire has to be done orally. A well-crafted juror questionnaire can not only help with identifying specific jurors you want to zero in on and challenge for cause, but frequently will give you some information on that juror in the back you never got to while you’re doing your strikes.

There is no requirement that a judge allow or include the use of any questionnaire or a specific questionnaire. Remember that the trial court has very broad discretion in conducting voir dire that trial courts are given. *Barajas*, 93 S.W.3d at 38 (Tex. Crim. App. 2002). If you get shut down, make your record as to how your inability to use the questionnaire inhibits your ability to effectively question the venire and exercise your preemptory challenges. Also make the case to your judge that the questionnaire will make voir dire go faster, since you’ll have to ask all those questions in person if you can’t do it on paper.

Even if a questionnaire is allowed BEWARE! You cannot rely on a questionnaire alone to challenge for cause. *Gonzales v. State*, 3 S.W.3d 915 (Tex. Crim. App. 1999). You must follow up with oral questions to establish a jurors answer. “[W]ritten questionnaires, while often helpful tools in conducting voir dire, do not constitute a formal part of the voir dire proceeding.” *Garza v. State*, 7 S.W.3d 164, 166 (Tex. Crim. App. 1999). A questionnaire can be an amazing tool for jury selection but can only go so far.

**Preserving Error**

What do you do if you feel like your questions were inappropriately excluded, either by time or direct objection? To preserve error concerning the manner of voir dire, the record must reflect a question which the trial court has not allowed to be answered. *Caldwell v. State*, 818 S.W. 29d 790, 794 (Tex. Crim. App. 1991). It has to more than just a general question. “A question that is so vague or broad as to constitute a global fishing expedition is not proper, and fails to preserve error because it is impossible for a reviewing court to determine if the question is relevant and properly phrased.” *Id.*

The abuse of discretion test for voir dire is three pronged: (1) whether the party attempted to prolong the voir dire; (2) whether the questions that the party was not permitted to ask were proper voir dire questions, and; (3) whether the party was not permitted to examine prospective jurors who actually served on the jury. *Ratfill v. State*, 690 S.W.2d 597, 600 (Tex. Crim. App. 1985). To preserve the error, the reviewing court will need enough information to answer those questions.

As a practical matter, to do this you will need to identify the person or persons you were unable to question, the specific questions that would have been asked, and that these persons actually served on the jury. This can be done either by dictating that information to the court reporter or by filing a bill of exceptions. But be careful! The timeliness requirement of objections requires that the trial court is made aware of objections or complaints at a time when there is an opportunity to cure or respond to the complaints. The “contemporaneous objection rule” is that an objection must be made at the first opportunity to do so. Tex. R. App. Proc. 33.1; *Lagrone v. State*, 942 S.W.2d 602, 618 (Tex. Crim. App. 1997). Filing your bill of exception or dictating objections after a Jury is sworn will probably be too late. *Turner v. State*, 805 S.W.2d 423, 431 (Tex. Crim. App. 1991).

**Challenging the Juror**

Let’s step back and remember why we are asking these questions: to intelligently exercise our peremptory challenges. See Smith, supra. There are three ways a prospective juror may be dismissed. The first is by agreement of the parties. Tex. Code Crim. Proc. §35.05. Second is to establish for the court that a potential juror is not qualified. Tex. Code Crim. Proc. §35.16. Finally, is to use one of the limited number of preemptory challenges afforded each side.

**Challenges for Cause**

A challenge for cause is established from a juror not meeting the basic qualifications discussed above or by showing some objectionable level of bias or prejudice. The sole finder of fact on the disqualification of jurors is the Judge. “The court is the judge, after proper examination, of the qualifications of a juror, and shall decide all challenges without delay and without argument thereupon.” Tex. Code Crim. Proc. §35.21.

**Basic Qualifications**

Any juror may be dismissed for failing to meet one or more of the basic qualifications from the Texas Government Code or Code of Criminal Procedure noted above. “A challenge for cause is an objection made to a particular juror, alleging some fact which renders the juror incapable or unfit to serve on the jury.” Tex. Code Crim. Proc. §35.16(a). Additionally, the State may dismiss any juror within the third degree of consanguinity or affinity of the Defendant. Tex. Code Crim. Proc. §35.16(b). The Defendant may do the same for any person injured by the alleged offense, or to any prosecutor in the case. Tex. Code Crim. Proc. §35.16(c).

Bias or Prejudice

In addition to the qualification issues for each juror “a prospective juror is challengeable for cause if he or she has a bias or prejudice against the defendant or against the law which upon which either the State or the defense is entitled to rely.” Buntion v. State, 382 S.W.3d 58, 83 (Tex. Crim. App 2016), citing Tex. Code Crim. Proc. §35.16(a)(9) & (c)(2); Gardner v. State, 306 S.W.3d 274, 295 (Tex. Crim. App. 2009). A prospective juror is disqualified if their bias or prejudice would substantially impair their ability to follow their oath to uphold the law. Id., citing Wainwright v. Witt, 469 U.S.412, 424 (1985).

Bias does not have to be proven with unmistakable clarity. Id. For a prospective juror to be excused for cause, the law must be explained to them, they must understand the requirements of the law, and they cannot overcome their prejudice well enough to follow the law. Davis v. State, 329 S.W.3d 789, 807 (Tex. Crim. App. 2010). The proponent for the challenge for cause has the burden to show their challenge is proper. See, e.g., Howard v. state, 941 S.W.2d 102, 128 (Tex. Crim. App. 1996); Harris v. State, 784 S.W.2d 5, 25 (Tex. Crim. App. 1989).

The flip side of a direct answer establishing bias is an evasive or vacillating venireman. Getting different answers or having a juror who is unable or unwilling to say that they can follow the law is a basis for cause. Riley v. State, 889 S.W.2d 290, 300 (Tex. Crim. App. 1993).

The central test for juror bias isn’t whether a person is influenced by their background or pre-conceived notions. If a prospective juror is consistent that they can put aside bias, even if it would be difficult or “violate their moral conscious,” they are not challengeable for cause. See Id. The test if they are unwilling or unable to follow the law. See Id.

Remember the foundation of who is making the final decision. The trial court is given extreme deference since they are “in the best position to evaluate a venire member’s demeanor and responses.” Colburn v. State, 966 S.W.2d 511, 517 (Tex. Crim. App. 1998). An appeals court will review all the evidence for a challenge for cause, and only reverse on a clear abuse of discretion. Davis, 329 S.W.3d at 808.

Rehabilitating Jurors

Once a potential juror reveals a bias or prejudice, can they be brought back from being caused? The answer is maybe. The general rule is that once a bias or prejudice is established, the juror must be dismissed. Tex. Gov’t. Code §62.105(4); Tex. Code Crim. Proc. §35.16(a)(9). It is not discretionary.

The previous rule was once established, a juror could not be rehabilitated. Sullemone v. U.S. Fidelity & Guaranty Co., 734 S.W.2d 10, 14 (Tex. App – Dallas 1987, no writ). Even if a juror is “rehabilitated through the efforts of counsel or the court by stating that he would decide the case on the evidence and could be fair to both sides, the trial court must excuse the juror.” White v. Dennison, 752 S.W.2d 714 (Tex. App. – Dallas 1988), citing Gum v. Schafer, 683 S.W.2d 803, 808 (Tex. App. – Corpus Christi 1984, no writ).

While not specifically overruling that standard, the Texas Supreme Court in 2005 essentially left the determination with the trial court’s discretion. Cortez ex rel. Estate of Puente v. HCCI – San Antonio, Inc. 159 S.W3d 87 (Tex. 2005). In disapproving of the hard and fast rule of no rehabilitation, the Supreme Court in Cortez held that “trial courts exercise discretion in deciding whether to strike venire members for cause when bias or prejudice is not established as a matter of law, and there is error only if that discretion is abused.” Id. at 92. “If the initial apparent bias is genuine, further questioning should only reinforce that perception…” Id. at 93

Preserving Error

So what to do if the Judge denies your perfect challenge for cause? “To establish harm for an erroneous denial of a challenge for cause, the defendant must show on the record that he used a preemptory strike to remove the venireperson and thereafter suffered a detriment from the loss of the strike.” Buntion v. State, 482 S.W.3d 58 (Tex. Crim. App. 2016). Preserving error in jury selection is a five step process: 1) make a clear and specific challenge for cause; (2) use a preemptory challenge on the complained of venire; (3) exhaust your preemptory challenges; (4) request and be denied additional strikes; and (5) identify an objectionable juror you were forced to accept. Id., citing Chambers v. State, 866 S.W.2d 9, 22 (Tex. Crim. App. 1993). Make a cheat sheet. Check your list. Don’t skip your steps.

Peremptory Challenges

Juror number twelve is giving your client the stink eye, but knows how to answer all of your brilliant cause questions and not get kicked. What to do? Bring out the peremptory challenge. “A peremptory challenge is made to a juror without assigning any reason therefor.” Tex. Code Crim. Proc. §35.14. These are your strikes to dismiss jurors who are not otherwise disqualified.

How Many You Get and How To Get More

The number of challenges given to each side is governed by level of offense being tried. A capital case receives fifteen strikes, non-capital felonies ten, misdemeanors tried in District Court five, and misdemeanors tried in the County Court, or County Court at Law, three. Tex. Code Crim. Proc. §35.15. If two or more co-defendants are tried together, a capital defendant receives eight strikes, non-capital felony six, and misdemeanors three each. Id. The State then receives equal strikes (e.g. two defendants with three strikes
each equals six strikes for the State). *Id.*

If alternate jurors are to be used, both the State and Defense get one additional peremptory challenge if one or two alternates are to be used, two additional peremptory challenges if three or four alternates are used. Tex. Code Crim. Proc. §35.15(d). Those additional strikes can only be used on alternates, and your other strikes cannot be used on alternates. *Id.*

Additional peremptory strikes are discussed above with challenges for cause. An additional peremptory strike is granted to allow the judge “the opportunity to correct his error by granting additional peremptory strike to make up for the one that was wrongfully denied.” *Comeaux v. State*, 445 S.W.3d 745, 751 (Tex. Crim. App. 2014). Rule of thumb, you’ll never get more if you don’t ask.

**Discriminatory Use (Batson)**

Peremptory challenges are used any way one wants to, within limits. Either party “may strike any member of the venire panel for any reason (except a prohibited reason such as race or sex) or no reason at all.” *Id.* at 749. Strikes based on gender or race violate the equal protection clause of the fourteenth amendment. *Batson v. Kentucky*, 476 U.S. 79 (1986); *Ladd v. State*, 3 S.W.3d 547, 563 (Tex. Crim. App. 1999 overruled on other grounds).

To establish a *Batson* challenge, the party objecting must make a prima facie showing of discriminatory motives behind peremptory strikes. *Herron v. State*, 86 S.W.3d 621, 630 (Tex. Crim. App. 2002). Strikes in a pattern against a specific race or gender, along with statements during voir dire, may support or refute the inference of a discriminatory purpose. *Batson*, 476 U.S. at 97.

If the court determines a prima facie showing of discriminatory use of peremptory challenges, the burden shifts to the other party to provide a discriminatory neutral explanation for the use of their challenge. *Id.* The trial court will then make a determination if intentional discrimination has been shown. *Id.* The trial court must consider the entire record. *Watkins v. State*, 245 S.W3d 444 (Tex. Crim. App. 2008). The final determination is a fact question, and the trial court is given extreme deference in their findings. *Id.*

In addition to race, gender cannot be the basis for exclusion from jury service. *JEB v. Alabama*, 511 US 127 (1994); *Fritz v. State*, 946 S.W.2d 844 (Tex. Crim. App. 1997). Not all classes are protected from a biased peremptory strike. *Batson*’s foundation is equal protection analysis. Harkening back to law school days, some classes and groups receive more protection than others. “A violation of the Equal Protection Clause may occur when the government discriminates against the members of a class of individuals who have historically suffered discrimination, i.e., a “suspect” class, or when the government impairs the members of a class from exercising a fundamental right.” *Casarez v. State*, 913 S.W.2d 468, 473 (Tex. Crim. App. 1995).

Equal protection analysis does not apply to peremptory challenges of prospective jurors on the basis of religion. *Id.* at 472-74. Striking a juror for age is not prohibited. See *Gerber v. State*, 845 S.W.2d 460, 465 Tex. App.—Houston [14th Dist.] 1993, pet. ref’d.) While a juror may not be dismissed simply because of their disability, a rational explanation stemming from a disability is not prohibited. *U.S. v. Harris*, 197 F.3d 870 (7th Cir. 1999) (Dismissal of a juror with multiple sclerosis was proper due to medication making her tired).

The prohibition against peremptory challenges based on race is codified at Tex. Code Crim. Proc. §35.261. But don’t stop just at race. *Batson* does not apply to a challenge for cause. When a potential juror cannot follow the law, they can be precluded from jury service. See *Staley v. State*, 887 S.W.2d 885 (Tex. Crim. App. 1994). If, however, there is a discriminatory purpose behind the use of preemption challenges it must be rationally related to a legitimate governmental interest. *Casarez*, 913 S.W.2d at 474. Watch how voir dire is conducted and preserve that discriminatory challenge if it appears to be harming your client.

**Conclusion**

So how do you do this? That is a question of style and far beyond my area to lecture on. If by the Colorado Method or psychodrama, rhetorical or scaled questions, lecture or looping, everyone has their own style. If I have learned anything, it’s that while you can learn from every attorney you watch, you cannot be any of them. You need to find your style.

But while you’re doing that, keep the central tenants in mind: 1) The trial court is going to make the ultimate determination with wide deference; 2) The exclusion of a juror isn’t because they have a bias or prejudice, but because they cannot put it aside; and 3) harm for appeal only comes about if you have an objectionable juror on your case either because you had to waste a peremptory on anther, or got cut off and didn’t get to question that objectionable juror.

The rules of voir dire are not short and sweet. And every voir dire should be different for every case. Set your theme, convey your foundations, and seek out the jurors sympathetic to your case. It is the court’s job to find a neutral and unbiased jury. It is ours to advocate for our clients.

**Clifford Duke** has been with the Dallas County Public Defender’s Office for the last thirteen years after a short miserable term practicing personal injury and worker’s compensation law. He is a graduate of Gonzaga University, a Past President of the Collin County Young Lawyers Association and the Dallas County Criminal Defense Lawyers Association, and currently serves on as a Director for TCDLA. He enjoys occasionally volunteering with Legal Aid of Northwest Texas, as well as speaking for TCDLEI and TCDLA. He and his wife are both avid hockey fans and players, and are enjoying getting their six year old son into the best game on earth.
Pre-Trial Investigations

JEREMY ROSENTHAL

Why Investigate?


Linear or Theory Based Investigation

It is clear our mandate is to be zealous advocates for our clients. Further, our role within the framework of the criminal justice system requires us to conduct competent and thorough investigations. But your investigation ought to have a goal or a point. The whole point of investigating is not merely to retrace the State’s steps or affirm our own client’s guilt. The point is to test alternate theories and see which, if any of them, are viable defenses. Often thorough investigations as to alternate theories may only confirm the State’s theory of the case. In this event it assists you still in allowing your client to make an informed decision. Investigating can either be 360 degree and all-encompassing or linear calculated to prove a single point or theory. When the state proves up a shoplifting case, for instance, the investigation is usually linear – that is they merely check the box for each element toward the one viable theory. Murder or sexual assault, by contrast ought to be more comprehensive, thorough, or ‘rounded’ and thus are a “360 degree” investigation.

In a perfect world, we ought to do a 360 investigation as defense lawyers. In reality our resources and other constraints make linear investigations towards alternate theories more practical. Don’t investigate for the sake of investigating. Develop a theory or theories and hone your investigation.

Developing Your Theory

The Jury Charge

Your theory of the case begins with the jury charge. It ought to go without saying but you need to be able to make a straight faced argument for acquittal based on the law and the evidence. The Texas Pattern Jury Charges are sold by the Texas State Bar and are an excellent resource. Always consider applicable defenses.

Interview Your Client First

Always interview your client to get their story. The real world is often stranger than fiction and interviewing your client first tells you where to look in your investigation. Your client doesn’t know the elements of the offense nor are they typically aware of the law on defenses. Even if your client provides you nothing but a detailed confession – it can still provide you with insight into what, if any, avenues for investigation remain or were unchecked by the State that remain plausible alternate theories. Keep an eye on mitigation as well and be sure to lay the groundwork for character witnesses, mental health mitigation, or other mitigatory angles.

Review the Discovery

Based on your jury charge and your client’s interview hopefully you’ve been able to identify some avenues of attack. Does the written discovery or the media provided in the case eliminate your potential theories? What, if any, defensive theories remain?

The Fire Hose of Resources

Sources you can use are seemingly endless. Here are as many of them as I can think of or have seen cited in other similar papers:

Internet and web pages

General Reference

- Google
- Yahoo and Bing (duh!)
- Wikipedia, Wikiquote, Wikidata & Wikisource
- Google Earth
- Google Scholar
- Google Books

Public records

- Attorney General: www.texasattorneygeneral.gov
- Digital Media Law Project: www.dmlp.org – this cite is created to help researching for public information;
- Texas Commission on Law Enforcement: www.tcole.texas.gov;
- DPS: www.dps.texas.gov/
- Texas department of criminal justice: www.tdcj.state.tx.us/index.html
- Window on Texas State Government – a general site for the Texas Comptroller of Public accounts: https://comptroller.texas.gov/
Expert on as early as possible because toxicology, psychology, or DNA.

Now that you’ve narrowed your case down to hopefully a few defensive theories it’s time to investigate your theories and find evidence which corroborates it.

Investigative Techniques

Experts

Many defensive theories will hinge on something highly technical or complex to the degree it might require an expert to assist in resolving the issue. Examples might include computer forensics, toxicology, psychology, or DNA.

Experts can be invaluable in guiding your investigation and pointing you to resources which can help them help you. It’s also important to bring an expert on as early as possible because they can also talk you out of bad theories before you’ve wasted too many resources on them.

Indigent defendants are legally entitled to funding for expert witnesses!

Not having money is not an excuse not to get expert assistance. Even on cases where you might be retained – your client can still attempt to make a showing of indigency. See Tex. Code Crim. Proc. Art. 26.05(d) and Ake v. Oklahoma, 470 U.S. 68 (1985). Attached are model motions for appointments of experts. Those pleadings are ex parte – because the State is not entitled to see what defenses, if any, you’re contemplating.

Investigators

Indigent defendants are also legally entitled to funding for investigators in addition to experts.

An investigator can be crucial for the reasons they can go into the field just like law enforcement. Reluctant or hostile witnesses will often not return phone calls or emails – but may very well give detailed statements to someone who knocks on their door. It’s important to give your investigator guidance as to your theory so they know what they’re looking for. Interviewing witnesses and not asking them critical questions can be frustrating.

At a minimum your investigator should always attempt to interview the complaining witness even if it seems a fool’s errand. Sending an investigator into the field to interview a child witness may often seem daunting but a practice tip is to always make sure your investigator respects the child’s parent or guardian and asks for permission or for the parent/guardian to be present during the interview.

Documents

Documents and other public records can be invaluable as well. Documents can be attained a number of different ways depending on their nature and who has them. Public records such as court documents and death certificates can be easy to find. Some records can be subject to strict privacy controls such as hospital records or CPS records. Below I will discuss how to attain some of those. Public documents can be imputed to the State’s possession and practitioners can try and get the State to attain and produce them under Tex.Code.Crim.Proc.Art. 39.14.

Here’s a quick list of possible documents or records which may be attainable:

- Employment records
- Offense reports of other relevant cases
- Medical records
- Probation records
- Social security
- IRS records
- Property records
- Appraisal records
- Court documents and files
- CPS records
- Attorney General records
- Prison Records (TDCJ)
- County Jails
- Police officer records (TCOLE)
- Military records
- Medical examiner or autopsy reports
- Social media

Subpoenas

Compulsory process – or the ability to use the court’s authority to attain evidence for your defense – is a valuable tool or weapon which can often be over-looked. Counsel has the ability to subpoena records such as cellular data or actual physical items such as cell phones or other property. Subpoenas and compulsory process are governed by Tex.Code.Crim.Proc. Art. 24.02.

The Bottom Line

Can a zealous and effective investigation into alternate theories put our clients on the same ground as the State of Texas and equalize their vast advantage in resources? If done diligently, strategically and with surgical precision – then yes. But remember your investigation may be the only chance they’ve got to a truly level battlefield as the framers of the Constitution envisioned.

Jeremy Rosenthal

is a senior partner at Rosenthal, Kalabus & Therrin, the largest criminal defense law firm in Collin County. Jeremy has tried over 250 cases and is a former Prosecutor in Collin County. He is the past president of the McKinney Bar Association, is a Board Member for TCDLA where he also serves as Co-Chairman of the Technology Committee. He was graduated from SMU School of Law in 2000 and earned his undergraduate degree from Texas Tech in 1997.
Award Nominations
Deadline:
5 pm on February 26th

Please visit tcdla.com and navigate to the awards page under the About tab to view qualifying criteria for the awards listed below:

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 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.

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, TCDLA Charter Member, and his almost 60 years of service as an attorney.

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.

Email your completed form to mschank@tcdla.com or fax to the home office at 512.469.9107 by 5 pm on February 26th.

Late applications will not be accepted.
When you’re running behind on the SDR and think to yourself “I might need to skim a few of these cases,” but then you stumble upon this gem from the Eighth Court of Appeals Opinion: “When a tribal police officer has probable cause to believe that a non-Indian motorist has violated state or federal law on tribal lands, the tribal police can detain the motorist for a reasonable period of time until state or federal law enforcement arrives.” If you guessed that I took the heat for a late submission and read the heck out of that case, then you guessed correctly, folks. Summary below.

TCDLA thanks the Court of Criminal Appeals for graciously administering a grant which underwrites the majority of the costs of our Significant Decisions Report. We appreciate the Court’s continued support of our efforts to keep lawyers informed of significant appellate court decisions from Texas, the United States Court of Appeals for the Fifth Circuit, and the Supreme Court of the United States. However, the decision as to which cases are reported lies exclusively with our Significant Decisions editor. Likewise, any and all editorial comments are a reflection of the editor’s view of the case, and his alone.

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

This publication is intended as a resource for the membership and I welcome feedback, comments, or suggestions: kyle@texasdefensefirm.com (972) 369-0577.

Sincerely,

United States Supreme Court

The United States Supreme Court did not hand down any published opinions since the last Significant Decisions Report.

Fifth Circuit

United States v. Gardner, 15 F.4th 382 (5th Cir. 2021)

Issue. Must a trial court grant an evidentiary hearing on a motion to withdraw a guilty plea when the defendant alleges that he lost an opportunity to file a meritorious motion to suppress evidence after relying on counsel’s incorrect representation that said motion could be filed later, after entering an unconditional guilty plea?

Facts. Defendant entered a guilty plea without a plea agreement. On the day of sentencing counsel made an oral motion for continuance to file objections to the presentence investigation report (“PSR”). This was several months after objections were due. Defendant then filed a pro se motion to appoint
new counsel alleging that counsel misled him into believing that counsel had previously filed PSR objections and that counsel gave inconsistent information regarding the availability of audio and video footage of the search leading to his arrest. Defense counsel moved to withdraw citing “irreconcilable differences.” The district court granted counsel’s motion and appointed new counsel two days before sentencing. New counsel filed a series of continuances to get his footing in the case. Ultimately new counsel filed a motion to withdraw defendant’s guilty plea as involuntary by virtue of ineffective assistance of former counsel. In his motion to withdraw guilty plea, Defendant alleged that previous counsel informed him a motion to suppress could be litigated after entering a guilty plea. The trial court denied defendant’s motion to withdraw his plea without a response from the government and without an evidentiary hearing.

**Holding. Yes.** A trial court’s denial of an evidentiary hearing is reviewed for abuse of discretion. A trial court must permit a defendant to withdraw his guilty plea if he “can show a fair and just reason for requesting the withdrawal.” Factors in making this determination include “(1) whether the defendant asserted actual innocence; (2) whether the withdrawal of the plea would prejudice the government; (3) the extent of the defendant’s delay, if any, in filing the motion to withdraw; (4) whether withdrawal would substantially inconvenience the court; (5) whether the defendant was benefitted by the close assistance of counsel; (6) whether the guilty plea was knowing and voluntary; and (7) the extent to which withdrawal would waste judicial resources.” Here many factors weigh against the defendant, but not so heavily as to overcome a valid claim that his plea was rendered involuntary by ineffective assistance of counsel. Here, the allegations amount to ineffective assistance of counsel if proven. If proven, erroneous advice on the court’s ability to consider a motion to suppress after entering an unconditional guilty plea would fall below an objective standard of reasonableness. Therefore, defendant alleged sufficient facts to justify an evidentiary hearing and the trial court was in error to deny one.

**Comment.** The court points out that it is not ruling on the effectiveness of counsel but merely on the appropriateness of the trial court’s ruling without an evidentiary hearing.

**Texas Court of Criminal Appeals**

**Maciel v. State**, No. PD-0753-20  

**Issue.** Necessity is a confession-and-avoidance defense. It requires a defendant to essentially admit the charged conduct. Does a DWI defendant sufficiently trigger a confession-and-avoidance defense when she testifies that she does not believe her attempt to move an inoperable vehicle satisfied the element of operation?

**Facts.** Defendant was too drunk to drive so she got a ride home from her brother. While the two were en route, defendant’s brother stopped the car in the middle of the road and began vomiting. Defendant climbed into the driver seat to try and drive the car out of the middle of the road. She could not get the car to move. She testified “I couldn’t get the car to move, so I wasn’t driving. I don’t think I was operating it.”

A Texas A&M University Police officer discovered the vehicle in a lane of traffic with smoke coming from under the hood. Defendant was in the driver seat and the engine was running. The officer arrested defendant for DWI. At trial, defendant requested a necessity defense. The trial court denied the request because it believed defendant failed to trigger the confession-and-avoidance defense by denying her operation of the vehicle.

**Holding. Yes.** A defendant is entitled to a defensive instruction if raised by any evidence, weak or strong. If the defendant’s theory of the case does not controvert circumstances which would establish guilt, the defendant has not flatly denied the charged conduct. “While the term ‘operate’ is not statutorily defined, this Court has held that, under a sufficiency review, the totality of the circumstances must demonstrate that the defendant took action to affect the functioning of his vehicle in a manner that would enable the vehicle’s use.” The arresting officer’s testimony and body camera footage established sufficient evidence of operation. Defendant’s own testimony essentially admitted to every element of the offense charged—she admitted to getting into the driver seat and trying to move the car to a parking lot. “[O]ur jurisprudence regarding the confession-and-avoidance doctrine does not require an explicit admission from the defendant that she committed the crime.” It is sufficient that defense evidence admits conduct sufficient to establish a crime. Here it did.

**Concurrence** (Newell, J.). It was unnecessary to remand this case back to the court of appeals to conduct a harm analysis. This court could have done that.

**Comment.** I like the precedent for this rare fact pattern. I don’t like that operating includes “not operating.”

**Lozano v. State**, No. PD-1319-19  

**Issue.** When some evidence suggests a reasonable person might have been justified in the use of deadly force, but no evidence establishes the defendant’s subjective belief that it was, is the defendant entitled to a deadly force self-defense instruction (such that the trial court’s erroneous inclusion of a duty to retreat instruction warrants reversal)?

**Facts.** Defendant engaged in an altercation with a man he thought was hitting on his girlfriend at the bar. When everyone left the bar, defendant drove his car menacingly near the man and the group he was with. Defendant rolled down his window and
stared at the man’s girlfriend. The man threw a beer can inside of defendant’s truck which exploded. As defendant retrieved a gun from his back seat the man charged defendant’s open window and hit him in the face 1-3 times. Defendant shot and killed the man. The trial court charged the jury on self-defense together with an instruction on the duty to retreat. The court of appeals found that the inclusion of a duty to retreat instruction egregiously harmed defendant and reversed his conviction.

**Holding.** In 2007 the legislature eliminated the duty to retreat where deadly self-defense is raised by the evidence and where a person has the right to be present at the location where deadly force is used and has not provoked the altercation. The inclusion of an inappropriate general duty to retreat instruction constitutes an improper comment on the weight of the evidence. While the inclusion of the duty to retreat instruction was erroneous, so was the inclusion of a self-defense instruction in the first place. There was no evidence that Appellant acted in self-defense when he shot and killed the victim. Deadly self-defense requires both a subjective belief that deadly force is necessary and an objective determination that the defendant’s belief was reasonable. A defendant’s subjective belief is presumed reasonable if the defendant used deadly force to repel a person forcibly entering his occupied vehicle who he did not provoke (and assuming the defendant was not himself committing an offense greater than a Class C traffic offense). Here, a jury could have found the presumption of reasonableness applicable to repelling forcible entry into an occupied vehicle. But this does not obviate the necessary showing that the defendant actually believed deadly force was necessary. Defendant either brandished a firearm after the victim threw a full can of beer in his truck because he was legitimately felt the need to use deadly force or because he wished to intentionally escalate an altercation. Defendant either shot the victim because he was legitimately felt the need to defend with deadly force or because he overreacted. He either shot the victim a second and third time because he thought it necessary in a fight for his life, or he did it gratuitously. The evidence does not establish, one way or another, how the defendant felt about the necessity of force. Because defendant was provided a windfall by the inclusion of an improper self-defense instruction, he could not have been egregiously harmed by the improper inclusion of a duty to retreat instruction.

**Comment.** I’m not sure what this does to the “self-defense is triggered by some evidence from any source” rule. I can see a prosecutor using this case to argue that circumstantial evidence of the defendant’s subjective belief is not enough, and that a defendant must testify. However, given this goes against considerable precedent, if this is what the Court of Criminal Appeals meant to do, they probably would have been more explicit.

**State v. Brent, No. PD-0020-21**
*(Tex. Crim. App. 2021)*

**Issue.** In the case of a convicted defendant who receives a discharge from probation, Article 42A.701(f) of the Code of Criminal Procedure provides a trial court with authority to set aside a verdict, withdraw the defendant’s plea, and dismiss the complaint, information, or indictment (a.k.a. grant “judicial clemency”). Does a trial court have never-ending jurisdiction to grant this judicial clemency?

**Facts.** More than two years after the trial court discharged her from probation, defendant requested, and the trial court granted judicial clemency.

**Holding.** No. A trial court has 30 days of plenary power to grant judicial clemency after discharge. “That understanding was embraced by all the courts of appeals to consider the issue between 2011 and 2018, and the Legislature never countermanded it. . . . Prolonged inaction by the Legislature in the face of a judicial interpretation of a statute implies approval of that interpretation.” In the face of this judicial interpretation, the legislature reenacted the judicial clemency provision without change in verbiage. Contrary to the opinion of the court of appeals, discharge from probation and judicial clemency are not separate forms of relief—clemency depends on discharge, and they must occur together. The fact that a former probationer may become completely rehabilitated and worthy of judicial clemency on a later date is not a basis to extend the court’s jurisdiction. Arguably the authority of the trial court should be shorter than the 30-day plenary power normally applied to motions for new trial. “For one thing, judicial clemency grants more relief than does an order granting a new trial or arresting a judgment because clemency not only claus back the verdict and/or guilty plea, it dismisses the charging instrument” and the State has no opportunity to re-convict.

**Concurrence (Yeary, J.).** “Superficially, at least, the very concept of ‘judicial clemency’ threatens to unduly encroach upon the prerogative of the Executive Department, in violation of the separation of powers mandate of Article II, Section 1 of the Texas Constitution.” A holding that affords indefinite jurisdiction to the trial court would amplify the risk that the statute may be struck down as unconstitutional.

**Comment.** The defendant argues that many rehabilitated former probationers don’t learn about their ability to request judicial clemency until long after their discharge. The Court frames this argument as follows: “Along the way she endorses an out-of-date assertion that defendants are not given notice about the possibility of judicial clemency. Cf. Tex. Code Crim. Proc. art. 42A.058 (requiring written notice to defendants about the possibility of judicial clemency when they are placed on community supervision). The Court’s analysis here highlights the value that could be added to the Court of Criminal Appeals by the addition of more de-

Issue. Are the offenses of continuous sexual abuse and prohibited sexual conduct (incest) the same offense for purposes of a multiple-punishments double-jurisdiction analysis?

Facts. A jury convicted the defendant of continuous sexual abuse of a child and prohibited sexual conduct. The conviction for prohibited sexual conduct was a single instance of sexual abuse against the same victim and during the same timeframe as the conduct underlying the conviction for continuous sexual abuse. The complainant testified specifically about a single incident giving rise to the prohibited sexual conduct conviction. It occurred on the last date of the timeframe alleged in the continuous sexual abuse allegation. The complainant also testified generally about sexual abuse occurring throughout alleged timeframe of the continuous sexual abuse charge. Defendant challenged his convictions on double jeopardy grounds. The court of appeals reversed.

Holding. No. Section 21.02 supplies various predicate offenses that, if committed on multiple occasions, can form the predicate offense for a continuous sexual abuse conviction. Prohibited sexual conduct is not among the predicate offenses listed in Section 21.02. The starting point for double jeopardy analysis is Blockburger: “two separately defined statutory offenses are presumed not to be the same so long as each requires proof of an elemental fact that the other does not.” In Texas, that presumption is rebuttable. Rebutting the presumption requires consideration of several factors: whether provisions are in the same statutory section, whether offense are phrased in the alternative, whether offenses are named similarly, whether offenses have common punishment ranges, whether offenses have common focus or gravamen, etc. See Ervin v. State, 991 S.W.2d 804 (Tex. Crim. App. 1999). Here, the two offenses are not the same under Blockburger. A person commits prohibited sexual conduct regardless of whether the victim is a child (as required by the continuous sexual abuse statute) and regardless of whether the victim is younger than 14 years of age (as required by the continuous sexual abuse statute). “The Ervin factors—including the focus/gravamen factor—ultimately militate in favor of a conclusion that continuous sexual abuse of a child and prohibited sexual conduct are not the same offense for purposes of a multiple-punishments double-jeopardy analysis.” The provisions do not appear in the same statutory section. They are not phrased in the alternative. They are not named similarly. The two offenses carry wildly different punishment ranges. The elements which differ between the two offenses are nothing alike. One offense requires proof of two acts of sexual abuse, the other requires proof of intercourse with a stepparent. Finally, legislative history reveals “[t]he two statutes are of entirely different vintages.” The purpose of the continuous sexual abuse statute is to protect children from predatory adults and the purpose of the prohibited sexual conduct statute is to protect the sanctity and integrity of the family unit. The court of appeals erroneously interpreted the gravamen of the offenses to be the same. But continuous sexual abuse is a hybrid nature-of-conduct and circumstances-surrounding-conduct offense. The victim must be under the age of 14 and the abuse must occur over a period greater than 30 days. Prohibited sexual conduct does not punish sexual intercourse in the abstract, it punishes it when the actor knows the person is a relative.

Comment. Is it odd to refer to a sex offense statute as a “vintage?” Do you swirl the statute and take in its aroma before using it to punish a person a second time for the same conduct?


Issue. The Confrontation Clause guarantees the right to cross-examine a laboratory witness whose work is testimonial in nature. Is work done by a lab technician who prepares evidence for analysis, generates raw DNA data, and conducts initial presumptive testing testimonial in nature?

Facts. A jury convicted defendant of raping a woman based on a match between the DNA sample collected from the victim in 2000 and a sample voluntarily provided by the defendant 17 years later. In 2000, a SANE nurse collected samples from the victim which law enforcement preserved due to the complainant’s inability to identify her attacker. In 2017, when a laboratory tested defendant’s sample, it was determined that the DNA collected from the complainant in 2000 belonged to the defendant. Defendant objected at trial to the testimony of the analyst as a surrogate for the testimony of other expert opinions contained in the final lab report. Over defendant’s objection, the trial court permitted the testifying analyst to explain how another analyst processes evidence before a DNA profile is developed; how another person locates areas of interest on the evidence, how another person conducts presumptive testing, extracts material, and amplifies genetic markers. The testifying analyst also explained the controls used by his
laboratory to ensure reliability and how errors in processing cannot result in the erroneous generation of the wrong person’s DNA profile. Finally, the analyst testified that he was able to independently verify the profile developed by the person who performed work before him.

**Holding. No.** There are scenarios where a lab supervisor might testify as a surrogate for the testimonial analysis performed by another lab technician and violate the Confrontation Clause. There are other scenarios where a lab supervisor uses non-testimonial data prepared by another person/computer to reach a testimonial conclusion of her own and does not violate the Confrontation Clause. Here, the lab supervisor reviewed non-testimonial data and rendered her own conclusions. The relevant cases for comparison are *Burch v. State* and *Paredes v. State*.

In *Burch v. State*, 401 S.W.3d 634 (Tex. Crim. App. 2013), a laboratory supervisor testified in place of the analyst who performed the testing. The laboratory supervisor double-checked everything but could not confirm that the non-testifying analyst reached the correct result. The Court of Criminal Appeals ruled that the defendant had the right to cross-examine the non-testifying analyst because her report contained testimonial statements, and the supervisor was a mere surrogate for her conclusions.

In *Paredes v. State*, 462 S.W.3d 510 (Tex. Crim. App. 2015), a laboratory supervisor testified in place of the analyst who generated raw DNA data resulting in a lab report identifying the victim's blood on the defendant's shirt. The Court of Criminal Appeals ruled that there was no Confrontation Clause violation because the DNA profile was computer generated and "stood for nothing without [the] further analysis" provided by the laboratory director who "performed the crucial analysis determining the DNA match and testified to her own conclusions." Also relevant was the fact that the reports were not entered into evidence, that potential human-error was cured by the director's ability to verify that her conclusions were properly generated, and that safety measures were implemented to detect errors.

The court of appeals concluded that *Paredes* controlled, notwithstanding: (1) the fact that *Paredes* involved a computer-generated DNA profile instead of a human-generated DNA profile, and (2) the fact that the instant lab supervisor testified only in generalities as to the laboratory's quality controls. The court of appeals analysis was correct. The preparation of DNA samples here [presumptive tests, epithelial-cell fraction collection, quality control measures, and raw data about a DNA profile] was not inherently testimonial. This work stands for nothing on its own without additional analysis. The lab supervisor here was not a mere surrogate and his lack of personal knowledge about the specifics of lab quality control measures are unimportant. It was sufficient that he could explain that "if there is an error in processing evidence, no profile suitable for comparison would be generated." Moreover, the lab supervisor checked the work of analysts who prepared the profile and was able to develop the same profile using the same underlying raw data.

**Comment.** The area of concern is the lack of any personal knowledge about quality controls observed by the laboratory. If an expert is going to testify to a one in quadrillion chance of innocence, it isn't too much to ask that the witness be able to at least say something like "we lock the door of the laboratory at night." Give me something . . .

**Issue. (1)** When a defendant successfully overturns a prior criminal conviction used for enhancement purposes many years after-the-fact (and during the pendency of the enhanced case), can the State rely on the doctrine of laches to defeat his now timely illegal sentence claim by pointing to the delay in challenging and overturning the prior criminal convictions? (2) When the State enhances a defendant's sentence with a defective prior conviction, is the problem appropriately analyzed as an illegal sentence (as opposed to defeated as a defective enhancement)? (3) Is a defendant harmed by a mandatory life sentence in one case when he would have received a life sentence in another case?

**Facts.** Defendant was convicted of second-degree sexual assault of a child and indecency with a child by contact. The State enhanced his sentences with a prior conviction for aggravated sexual assault. The effect of the enhancement was automatic (in the sexual assault of a child), and up-to-life-imprisonment (in the indecency by contact). Before the instant appeal, the Court of Criminal Appeals vacated defendant's sentences used for enhancement (enhancing sentences).

**Holding. (1)** No. The State should have raised laches when Defendant challenged his prior convictions – "not now when Applicant is raising different claims less than six months after they became available challenging sentences that he has never challenged." Moreover, "there is no record evidence to support that the State would be materially prejudiced. . . . no evidence that memories have faded or evidence has been lost or is otherwise unavailable because of the passage of six months' time." (2) Yes. *Ex parte Rich*, 194 S.W.3d 508 (Tex. Crim. App. 2006) governs if the court treats the instant case as an illegal sentence. In *Rich* a defendant pleaded guilty to an enhanced felony and later realized one of his prior sentences had been reduced to a misdemeanor. Defendant's claim was not forfeited because such claims are regularly raised for the first time on postconviction, and the appellate record did not reveal the problem with the defendant's sentence. *Hill v. State*, 633 S.W.2d 520 (Tex. Crim. App. 1981) controls if the court treats the instant case as an im-
proper enhancement. In *Hill* a defendant directly appealed his enhanced theft and argued that one of his prior theft convictions was defective. The Court of Criminal Appeals held in *Hill* that a defendant cannot raise for the first time on direct appeal an improper-enhancement claim unless he objected at trial. This case is governed by *Rich* and not *Hill*. The Court of Criminal Appeals has not relied on *Hill* or its progeny in 23 years. “[W]e need not overrule *Hill* and its progeny because they do not apply to illegal-sentence claims based on an improper enhancement.” In analyzing the legality of a sentence, the court must look to “the legality of the punishment as it now stands not as it stood at some other time.” Defendant’s sentences “are now known to be illegal.” Here, both of defendant’s sentences are illegal because they exceed the maximum sentences for second-degree felonies (his sentencing range on the underlying offenses un-enhanced).

(3) No. In assessing harm, the court looks to a defendant’s actual criminal history to assess what enhancements might still have applied. Here defendant’s automatic life sentence for sexual assault is without question harmful. On the other hand, defendant’s life sentence for indecency with a child is not because “his actual criminal history supports the first-degree felony punishment range in which he was sentenced.”

**Concurrence / Dissent** (Keller, P.J.). Laches.

**Concurrence / Dissent** (Yeary, J.). At the time the sentence was imposed there was nothing wrong with it.

**Comment.** I might have tired-head from reading this opinion, but my question is this: if *Hill* and its progeny do not apply to illegal-sentence claims based on improper enhancement, what does it apply to? Why doesn’t the Court of Criminal Appeals overrule it explicitly?

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**West v. State**, No. PD-0236-20

**Issue.** Does an indictment alleging prescription fraud of Substance A toll the statute of limitations to later allege a prescription fraud of Substance B?

**Facts.** The State alleged three counts of possession occurring in 2015. In 2016 the State charged Defendant with possession of Oxycodone by misrepresentation, fraud, forgery, deception, or subterfuge. In 2018, after the statute of limitations ran, the State refiled an indictment substituting Oxycodone for Tramadol. The trial court dismissed the 2018 indictment for failure to include tolling paragraphs. Months later, in 2018, the State filed a third indictment identical to the second indictment fixing the problem with tolling paragraphs. The trial court dismissed the third indictment as barred by the statute of limitations. The court of appeals reversed and reasoned that the State had properly tolled the statute of limitations on the Oxycodone prosecution by filing a Tramadol case.

**Holding.** No. An indictment or information tolls the computation of time for purposes of calculating the period of limitation. However, a prior indictment only tolls the statute of limitations for a subsequent indictment when both indictments allege the same conduct, same act, or same transaction. . . . A subsequent indictment is barred by the statute of limitations if it broadens or substantially amends the charges in the original indictment. In *Hernandez v. State*, 127 S.W.3d 768 (Tex. Crim. App. 2004) the Court determined that a prior indictment for possession of amphetamine tolled the statute of limitations for possession of methamphetamine because both indictments charged the defendant with possession of controlled substance and “the facts involved with the conduct alleged in the first indictment would be nearly identical to those involved with the conduct alleged in the subsequent indictment.” The instant case differs from *Hernandez* because it alleges a variety of different means for committing the offense (knowingly possessing, attempting to possess, by misrepresentation, by fraud, by forgery, by deception, by subterfuge).

“This distinction could theoretically allow for greater permutations in the combination of facts constituting the particular actions committed. . . . [For instance] [p]ossessing Tramadol after deceiving a doctor into writing a prescription for the drug describes completely different conduct, acts, or transactions from attempting to possess Oxycodone by forging a doctor’s prescription and presenting that forgery to a pharmacist.” In the instant case there is no way to conclude from the face of the indictment that there would be overlap in the evidence required to prove either indictment.

**Dissent** (Yeary, J.) What matters is whether the substances are sufficiently similar. And they are. “I would simply hold . . . that the running of the statute of limitations is tolled during the pendency of any “indictment, information, or complaint” against the defendant.”

**Comment.** I agree with the outcome. I am scratching my head about the Court basing its opinion in notice-based analysis of whether you can tell from the face of the documents that the State is referring to the same conduct in both indictments. I feel like (and admittedly I’m not going to Westlaw this) if the Defendant had moved to quash either indictment on inadequate notice grounds, he would have gotten the ‘ol “come on you know what they’re talkin’ about” treatment. Maybe not . . .

**Diaz v. State**, No. PD-0712-20

**Issue.** When an officer’s warrant affidavit misinforms a magistrate that his source of information is an unnamed informant instead of correctly identifying the source as a confidential informant (or snitch), does the warrant affidavit fail to establish probable cause.
due to materially false information?

**Facts.** A jury convicted defendant of burglarizing a police officer’s home. Defendant moved to suppress a search warrant under *Franks v. Delaware*, claiming the probable cause affidavit used to obtain the warrant to search his phone contained materially false statements. The warrant affidavit claimed that the investigating officer received a tip from an anonymous source who relayed the name and two phone numbers for the individual who burglarized the police officer’s home. The investigating officer further swore that he approached a DEA agent and requested the agent run the numbers through DEA databases and find an identity. The testimony before the trial court showed the anonymous tipster was actually a confidential informant for the DEA, that the confidential informant provided a tip to a DEA agent and not the investigating officer, that the DEA agent ran the phone numbers on his own volition, and that the DEA agent contacted the investigating officer.

**Holding.** No. An anonymous tipster is treated the same as a confidential informant in the analysis of their credibility on the face of a warrant affidavit: “their reliability depends on facts from which an inference may be drawn that they are credible or that their information is reliable.” Because an anonymous tipster is not treated less skeptically than a confidential informant, the omissions in the investigating officer’s affidavit were not material. The corroborating evidence in the affidavit would have sufficiently corroborated either an anonymous tipster or a confidential informant such that a magistrate could find probable cause. Similarly, the investigating officer’s lie about who contacted who is immaterial. Whether the DEA contacted the investigating officer, or the investigating officer contacted the DEA has no bearing on probable cause.

**Comment.** Don’t lie. Make liars regret lying. Then less lies.

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**Ex parte Rion, No. PD-1096-19**


**Issue.** Where a defendant successfully defeats a charge of manslaughter by arguing he was suffering from a mental health episode when he collided with another vehicle, does the jury’s verdict of acquittal represent a finding that the defendant did not recklessly cause any injury whatsoever, such that the State is collaterally estopped from re-prosecuting defendant for aggravated assault with a deadly weapon?

**Facts.** Defendant crashed his vehicle into another vehicle. The passenger of the other vehicle died. The State prosecuted the defendant for reckless manslaughter. In his first trial, defendant defended his case by arguing that he did not act recklessly because the accident occurred amid a mental health episode. Defendant did not dispute that the collision was the cause of the victim’s injuries and ultimate death. Defendant’s first jury found him not guilty of manslaughter and not guilty of the lesser included offense of criminally negligent homicide. The State then prosecuted defendant for aggravated assault. Defendant challenged the second prosecution as barred by collateral estoppel. The court of appeals reversed.

**Holding.** Collateral estoppel is a component of double jeopardy. “Before collateral estoppel can apply, a court must be able to say that it would have been irrational for the jury to acquit in the first trial without finding in the defendant’s favor on a fact essential to a conviction in the second.” Here, the court of appeals was incorrect to deduce from the jury’s verdict a belief that the defendant lacked the mens rea of recklessness as it pertains to causing the accident. This is the wrong focus. Manslaughter and criminally negligent homicide are “result of conduct” offenses and the mens rea attaches to the result: the defendant recklessly causes death. The focus is not on causing the accident. Here, the jury could not have found the defendant lacked mens rea as to the accident because the jury was not asked about the defendant’s mens rea as to the accident. The first jury simply found that he was not aware of a risk that death could occur as a result of his conduct. “But this is not to say that collateral estoppel can never apply where one trial is for manslaughter and the other trial is for reckless aggravated assault causing bodily injury. Because death itself is a form of bodily injury.” As it would appear on the LSAT, it goes like this:

- If the defendant is aware of a risk of death; then he is aware of a risk of bodily injury.
- If the defendant is not aware of a risk of death; then he is or is not aware of a risk of bodily injury.
- If the defendant is aware of a risk of bodily injury; then he is or is not aware of a risk of death.
- If the defendant is not aware of a risk of bodily injury then he is not aware of a risk of death.

**Comment.** I think this opinion only pays lip service to the collateral estoppel requirement that the court examine “the entire trial record, as well as the pleadings, the charge, and the arguments of attorneys.” Defense counsel argued that he was suffering a mental health crisis when he collided with the victim. Counsel for the State argued that this was bologna. There is little distinction in the mind of a lay person between conduct which causes a car accident and conduct that causes the death after a car accident. I seriously doubt jurors in this case spent a lot of time discussing the nuances of “result of conduct” versus “nature of conduct.” The State’s new position on appeal is disingenuous, too. To defeat defendant’s argument that the jury necessarily determined the issue of recklessness against the State, the State argued that a reasonable juror considering this evidence could have based his or her verdict in causation. So, on appeal the State says it is reasonable to conclude the Defendant’s conduct is not the cause of death.
But at trial the State argued that they had proven causation: “[b]ut for the Defendant’s actions, this woman would still be alive.” Can the State be estopped by their estoppel-defeating estoppel argument?

1st District Houston

Ex parte Lowry, No. 01-20-00858-CR
(Tex. App.—Houston [1st Dist.], Oct. 26, 2021)

Issue. Is the Texas statute on child erotica, Texas Penal Code § 43.262, unconstitutionally overbroad?

Facts. The State charged the defendant with possession of lewd visual material of a child under Texas Penal Code § 43.262. The statute prohibits possession of material which depicts the lewd exhibition of clothed or unclothed minors. It does not include as part of the definition that the material be “patently offensive” as is required by the Supreme Court’s definition for obscenity and as is typically included by the legislature when outlawing obscene materials. Defendant filed a writ of habeas corpus challenging the facial validity of the statute (regulating substantial amount of protected speech and constitutionally overbroad). Defendant argued that Section 43.262 outlaws speech which is neither child pornography nor obscene and referenced for example social media influencers under the age of 18 who post provocative but clothed pictures of themselves.

Holding. Content-based regulations are presumptively invalid and subject to strict scrutiny. However, obscenity and child pornography enjoy no protection under the First Amendment. What Section 43.262 outlaws is not “obscenity” because it omits from its definition that the material be “patently offensive.” The statute outlaw child pornography. Another statute outlaw child pornography; this statute was crafted with the intent to supplement the child pornography statute by also outlawing “child erotica.” Section 43.262’s targeting of lewd exhibition that appeals to the prurient interest makes it content-based. Thus, to survive a First Amendment challenge it must survive the strict scrutiny requirements of serving a compelling government interest through narrow tailoring. The government has a compelling interest in curtailing the sexual exploitation of children is compelling, but this statute merely curtails a purported harm arising from depicting children in a sexually suggestive manner. The Supreme Court requires a direct causal link between the material and the harm sought to be prevented and the State has shown none here. Nor is the statute narrowly tailored. Defendant’s examples of outlawing young social media influencers or Netflix’s depiction of young children performing gymnastics are well taken. The statute does not distinguish between teenagers taking selfies and those taking pictures with more sinister motives. It simply prohibits substantially more free speech than is necessary, is not narrowly tailored, and is overly broad.

Comment. I suspect the Court of Criminal Appeals will take this up, but the analysis is sound.

King v. State, No. 01-19-00793-CR
(Tex. App.—Houston [1st Dist.], Oct. 28, 2021)

Issue. (1) In a motion to suppress, should a trial court disregard portions of a warrant affidavit as materially misleading for failing to portray arduous process of identifying the defendant? (2) Is unlawful restraint a lesser-included offense of attempted kidnapping (in this case)? (3) Does a person have an objective and subjective expectation of privacy in his possessions stored in a semi-truck when he is the operator but not the owner of the semi-truck (and when he did not ask the police to gather his possessions and secure them while being arrested)?

Facts. A jury convicted the defendant of injury to a child causing serious bodily injury and aggravated kidnapping. Defendant lured a young girl away from her school route, strangled her, then fled when her school bus arrived. Paramedics initially believed the victim’s injuries were not life-threatening, but nonetheless transported her to the emergency room. At the hospital her injuries proved more critical. Her lungs were full of fluid, and medical staff placed her in the intensive care unit where she was intubated and required life-saving treatment. She ultimately required a heart transplant with accompanying serious complications. The lead detective in the case acquired surveillance videos of the attack. He identified defendant as a suspect by running the registration of the vehicle his wife used to pick him up. The lead detective located the defendant and his wife in Oklahoma and obtained a search warrant for his DNA which matched with DNA taken from the victim. An Oklahoma detective obtained a search warrant to search defendant’s semi-truck owned by his employer. After the search of the semi-truck, and after return had been made, investigators realized they left behind a cell phone. The lead detective asked defendant’s employer to retrieve it and mail it to him, which he did. The phone contained child pornography. Defendant alleged the DNA warrant was obtained through a materially false or misleading affidavit, but the trial court denied his motion to suppress. Defendant also moved to suppress the photographs of child pornography and argued that, although investigators possessed a valid search warrant, it had expired at the time they retrieved the cell phone. The State successfully convinced the trial court that the defendant had no expectation of privacy in his semi-truck because it was owned by his now-former employer and he had abandoned it by failing to request it when he was arrested. The State presented to the jury during the punishment phase the fact that defendant possessed child pornography together with defendant’s extremely violent past relationships.

Holding. (1) No. When determining whether an affidavit sufficiently
establishes probable cause to obtain a search warrant a trial court should disregard materially false or misleading statements or omissions. Defendant relies on cases in which detectives indicate they personally observed matters they in fact did not. This is not the case here. Here, detectives left out many of the intricacies of how they identified the defendant as a suspect—but they explain the basics. Defendant’s argument that the affidavit portrayed the identification as easy is unpersuasive. The warrant affidavit establishes probable cause without that information. The warrant affidavit would continue to establish probable cause with that information. There was no error here. (2) No. Whether a lesser-included offense instruction is appropriate requires a two-step analysis: (1) are the elements of the lesser offense established by proof of the same or less than the facts required to prove the charged offense? (2) could a rational juror find that, if the defendant is guilty, he is only guilty of the lesser offense? Unlawful restraint is a lesser-included offense to the completed offenses of kidnapping and aggravated kidnapping. “Kidnapping and aggravated kidnapping require an abduction, which includes the completed actus reus of restraint.” However, the completed offense of attempted kidnapping does not require a completed act of restraint. The acts alleged in the indictment did not entail the defendant moving the victim from one place to another or confining her, nor were they the functional equivalent of restraint. This includes the allegation that the defendant “grabbed” the victim. (3) Yes. The State asserts incorrectly that the defendant’s expectation of privacy attaches to his employer’s semi-truck only while using the vehicle. Defendant was arrested near the semi-truck at a truck stop after he had been driving it and his cell phone was inside at the time of arrest. Defendant had a possessory interest in the semi-truck and by virtue its contents. Defendant had lawful control over the semi-truck at the time of his arrest. Ownership is merely one factor and here defendant’s non-ownership does not outweigh other evidence indicating subjective and objective expectations of privacy. The State’s theory that defendant abandoned the property by not requesting it upon his arrest is also unpersuasive. The record does not reflect affirmative evidence of defendant’s intent to abandon property. Abandonment will not be presumed from a silent record. Moreover, defendant lost possession of the truck and its contents not because the true owner took steps to divest him of it, but because the police arrested and incarcerated him.

Comment. I saw an 89-page opinion and thought to myself “maybe I should just declare this one insignificant.” Then I heard fake Antonio Banderas in my head: “but I must…” See “The How Do You Say? Ah, Yes, Show” Saturday Night Live. Created by Lorne Michaels National, NBC (Chris Kattan as Antonio Banderas). Somewhere in a thick stack of pages, this case raises an interesting question: if unlawful restraint is not a lesser-included of attempted kidnapping, is attempted unlawful restraint?


Issue. Does a trial court improperly comment on the weight of the evidence (when ruling on admissibility) when it admits an application and order for testimonial immunity given to a witness who has invoked her Fifth Amendment privilege against self-incrimination?

Facts. Defendant got in a fight with his girlfriend. He called the police because, according to his story, she attacked him. Police decided it happened the other way around. The State prosecuted defendant for continuous family violence assault. Defendant’s girlfriend did not want to testify at trial. She asked if she could plead the fifth. The State applied to the trial court for testimonial immunity from the use of the girlfriend’s testimony “as evidence against her in any criminal proceeding other than a prosecution for perjury, aggravated perjury, or contempt.” The trial court granted the State’s application in a written order. The girlfriend then testified she could not remember anything and later testified that she had lied to the police on the night of the altercation. The trial court admitted the State’s application for immunity along with its own order granting it.

Holding. No. Article 38.05 of the Code of Criminal Procedure prohibits a trial court from commenting on the weight of evidence in ruling on its admissibility. Defendant “argues that the very act of admitting [the application and order for immunity] into evidence was a comment on the evidence.” However, under the plain language of Article 38.05, the trial court cannot violate the statute unless “it engages in discussion or commentary beyond the announcement of its decision.” Here the trial court’s remarks on admissibility were made outside the presence of the jury. Defendant attempts to bootstrap the statements made by the prosecutor in its motion made in the presence of the jury before the jury was excused. Defendant’s position is that the State’s motion and the subsequent ruling and order admitted into evidence “conveyed to the jury that the trial court was guaranteeing that the alleged victim’s testimony would be truthful, affording credibility to the alleged victim and ultimately fortifying the State’s case” is unpersuasive. According to the defendant, the combination of the State’s motion and the trial court’s order admitted into evidence conveyed that this particular witness had something to share with the jury “necessary to the public interest” and should be therefore granted immunity “so that justice may be served.” This argument does not square with Article 38.05. The application and order constitute evidence and Article 38.05 only applies to comments made while admitting evidence “not remarks made within the evidence sub-
ject to the ruling.” The trial court did not characterize the girlfriend as the victim nor did the trial court guarantee her truthfulness. It merely concluded in its order that the girlfriend was “a material witness” and concluded that her testimony “may be necessary to the public interest and so that justice may be served.”

Comment. This witness was definitely put on a pedestal by the way the trial court went about this. This is a good lesson in tying appellate arguments to constitutional error. The Court’s laser-focus on the explicit language of Article 38.05 does not do justice to the defendant’s argument. It is true that the application and order were admitted without any commentary in the jury’s presence. But the problem here is due process and probably even the right to confrontation (of the judge and prosecutor). The defendant is correct – the court placed a stamp of imprimatur on this witness’s importance. The court of appeals acknowledges this much when it states “the application and order are evidence.” If they are evidence, then who is the declarant?

2nd District Fort Worth

The Second District Court of Appeals in Fort Worth did not hand down any significant or published opinions since the last Significant Decisions Report.

3rd District Austin

The Third District Court of Appeals in Austin did not hand down any significant or published opinions since the last Significant Decisions Report.

4th District San Antonio


Issue. (1) Does the failure to collect a vehicle from the impound lot constitute an abandonment and relinquishment of reasonable expectations of privacy such that the police may conduct a search of the vehicle with impunity? (2) Does the fact that trained crash investigators regularly rely on vehicle black box data make such evidence sufficiently reliable and accurate and therefore admissible under Texas Rule of Evidence 702?

Comment. Black box data is reliable because they use it. Why do they use it? Because it’s reliable. See also Mike Judge, director. Idiocracy. 20th Century Fox, 2006 (“But Brawndo has what plants crave! It’s got electrolytes!” “Okay—what are electrolytes? Do you know?” “Yeah. It’s what they use to make Brawndo.” “But why do they use them in Brawndo? What do they do?” “They’re part of what plants crave.” “But why do plants crave them?” “Because plants crave Brawndo, and Brawndo has electrolytes.”).

5th District Dallas


Issue. Is the Texas stalking statute unconstitutionally overbroad and vague on its face (when it alleges as a predicate repeated electronic harassment)?

Facts. The State charged the defendant with stalking by way of repeated electronic harassment: “engaged in [repeated] conduct under section 42.07 and/or conduct that [Griswold] knew or reasonably should have known [the complainant] would regard as threatening bodily injury for [the complainant] and/or bodily injury or death, and did cause [the complainant] to feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended and would cause a reasonable person to feel the same.”

Holding. Yes. The court agrees with sister courts who also find the electronic harassment statute unconstitutional. “It suffers from a fatal flaw of vagueness because the disjunctive series of the terms ‘harass, annoy, alarm, abuse, torment, embarrass, or offend’ leaves the electronic communications subsection open to various uncertainties of meaning and the term ‘reasonably likely’
does not create a ‘reasonable person’ standard sufficient to cure the failure of the subsection to specify whose sensitivities were offended.” Citing Ex parte Barton, 586 S.W.3d 573 (Tex. App.—Fort Worth 2019). The court also adopted the rationale of the Fourteenth Court of Appeals in declining to apply the logic of telephone harassment to electronic harassment, distinguishing telephone calls as uniquely invasive but describing electronic communications as encompassing “a far broader array of activities.” Notably, purported victims of electronic harassment are not a captive audience, but instead require “affirmative actions by the user to access the content at issue.” Citing State v. Chen, 615 S.W.3d 376 (Tex. App.—Houston [14th Dist.] 2020). The electronic harassment statute sweeps too broadly and renders too many uncertainties of meaning. Penal Code 42.072(a) is facially unconstitutional.

Comment. Pending at the Court of Criminal Appeals since March 18, 2020 is Ex parte Barton, No. PD-1123-19. Eventually the court will resolve this issue for all courts in Texas, but until then the score is: unconstitutional in the Second, Fifth, Fourteenth; constitutional in the Third, Fourth, Seventh, Eighth, Ninth, Eleventh, and the Thirteenth.


Issue. (1) Is the statutory instruction frequently used in murder cases which encourages the jury to consider the “relationship existing between the defendant and the deceased” an improper judicial comment on the weight of the evidence? (2) Is a trial court required to properly charge the jury on the law of parties as an alternative theory to capital murder by solicitation? (3) Is the State entitled to challenge a juror for cause on the basis of that juror indicating he would consider defendant’s failure to testify in his deliberation?

Facts. A jury convicted defendant of capital murder for her role in hiring two hitmen to kill her ex-boyfriend’s girlfriend. Shortly after the murder, investigators identified a suspect vehicle in surveillance footage. Defendant’s friend identified the car as belonging to him. He had loaned it to defendant, but not to use for murder. Defendant’s friend testified that defendant later tried to scare him into hiding and potentially changing the paint color of the vehicle. One of the hitmen testified at trial in exchange for a plea deal. The testifying hitman explained that she and the defendant plotted to kill the victim over multiple meetings and described their mutual activities leading up to the murder. The group acquired a handgun and planned to acquire a silencer. Investigators acquired corroborating evidence, including: (1) a video on defendant’s phone recording a conversation about acquiring a silencer, (2) evidence that defendant had loaded her ex-boyfriend’s iPhone account onto another device and tracked his movements, (3) cell phone GPS data putting her in the same location as the hitmen leading up to the murder, (4) an ATM withdrawal receipt for the amount paid to the testifying hitman, (5) surveillance video of defendant and the hitmen picking up the vehicle used in the murder, and (6) defendant’s partial corroboration of being at least one of the group’s meeting places prior to the murder. At trial defendant’s friends and acquaintances testified about her violent obsession with the victim. After she was interviewed by investigators, Defendant fled to Mexico.

Holding. (1) No. The instruction tracked the language of Texas. Code of Criminal Procedure article 38.36 which alerts the jury that the relationship between the defendant and the deceased is a relevant fact in a trial for murder. “Instructions based on article 38.36 are traditional parts of murder jury charges.” Save for limited circumstances, singling out a particular item of evidence in the jury charge does constitute a comment on the weight of evidence. But here the trial court did not single out a particular item of evidence, but rather instructed the jury to “consider all relevant facts and circumstances.” (2) No. Here the defendant complaints about the omission of the culpable mental state to accompany the law of parties instruction (the State’s alternate theory of conviction). But the jury was properly instructed on the crime of capital murder by solicitation. “[T]he ‘parties’ or ‘solicitation’ aspect of the crime is built into the statute.” There being sufficient evidence to convict for capital murder by solicitation, there is no issue here. (3) Yes. A juror who considers a defendant’s failure to testify as an admission of guilt is disqualified from jury service. “That such a bias might have been in favor of the State does not prevent the State from making a challenge on that basis.”

Comment. The Article 38.36 argument here is interesting. It is true that the statute authorizes the instruction, but the legislature frequently authorizes or even compels things that do not comport with the Constitution. Also interesting is the argument that the State cannot challenge a juror for cause on the basis of a defense issue (here: the consideration of a defendant not testifying). The defendant frames the issue as one of selective waiver of her own rights. The court of appeals frames it as one of disqualification. Article 35 of the Code of Criminal Procedure specifically sets out grounds for disqualification - this scenario is not one of them. The juror was challengeable. But by the plain language of the statute, challengeable only by the defendant. The State may challenge a juror “that has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction.” The State does not rely on the Fifth Amendment privilege against testimony for a conviction.

6th District Texarkana

Issue. (1) Does an out-of-state
judgment and sentence for a four-year sentence in the Oklahoma Department of Corrections sufficiently establish a qualifying prior sentence for enhancement purposes when it omits the specific charge and statute under which the defendant was convicted? (2) Has the State established sufficient proof of manufacturing or delivering by showing possession of a large amount of methamphetamine in rock form in a high drug-trafficking area and nothing to smoke it with?

**Facts.** A jury convicted the defendant of first-degree manufacture or delivery of methamphetamine (4-200 grams). Officers arrested defendant after a short foot chase during which he threw bags of drugs in an effort to conceal them. The arresting officer testified at trial that he located the drugs and, based on the weight combined with his training and experience, he did not believe it to be a “user amount.” Another officer, also with lots of training and experience, testified that the totality of circumstances determines whether a person is a user or a dealer. This officer testified to how many uses a person could get out of a gram of methamphetamine and that a person in possession of “rocks,” like the defendant, typically breaks the rock down and sells small baggies of methamphetamine. Officers testified they discovered two half-ounce rocks discarded by the defendant and that the arrest took place in a high drug-trafficking area and nothing to smoke it with.

The exhibit omitted the language regarding the specific statute of conviction, the type of substance involved, and the weight of drugs involved. However, the judgment identifies defendant’s prior sentence as a four-year sentence in the Oklahoma Department of Corrections and witnesses testified that meant “prison.” While these facts do not necessarily translate to a qualifying Texas enhancement felony, the Code of Criminal Procedure instructs that any out-of-state felony involving potential confinement in a penitentiary is treated as a felony of the third degree. Tex. Penal Code § 12.41. (2) Yes. The following factors are circumstantial proof of manufacturing and delivering: (1) the nature of the location at which the defendant was arrested; (2) the quantity of controlled substance in the defendant’s possession; (3) the manner of packaging; (4) the presence of drug paraphernalia . . . ; (5) the defendant’s possession of large amounts of cash; and (6) the defendant’s status as a drug user.” Here the logical force of these factors established sufficient proof of manufacturing.

**Cook v. State, No. 06-20-00001-CR**

(Oct. 20, 2021)

**Issue.** May another witness give his or her opinion as to a complaining witness’s credibility?

**Facts.** A jury convicted the defendant of Aggravated Sexual Assault. The trial court permitted a police officer to testify about the credibility of the complainant’s allegations. The State asked whether the investigator believed the statements given by the victim during the interview were “sufficient to go forward.” The investigator replied that she felt “a victim, of his age, gave a credible statement.” Defendant objected.

**Holding.** No. “A direct opinion as to the truthfulness of a witness crosses the line under Rule 702 because it does more than assist the trier of fact to understand the evidence or to determine a fact issue; it decides an issue for the jury.” Yount v. State, 872 S.W.2d 706, 709 (Tex. Crim. App. 1993). Here, “though legally sufficient,” the evidence of guilt was far from overwhelming. The jury heard no other significant evidence of truthfulness or corroboration. Given these factors, together with the fact that it was a police officer vouching for the complainant’s credibility, Defendant was harmed by the trial court’s error.

**Comment.** Rule 608 permits opinion of truthfulness if it is first attacked. The Yount case specifically stated it was not addressing the impact of Rule 608.

**7th District Amarillo**

The Seventh District Court of Appeals in Amarillo did not hand down any significant or published opinions since the last Significant Decisions Report.

**8th District El Paso**

**State v. Astorga, No. 08-20-00180-CR**


**Issue.** When tribal police officers arrest a non-Indian for a non-arrestable tribal code violation and fail to contact state law enforcement for five hours, have they exceeded their inherent authority to detain non-Indians for suspected criminal offenses?

**Facts.** The State prosecuted the defendant for possession of methamphetamine discovered by officers of the Ysleta del Sur Pueblo Tribal Police Department. Defendant is not an Indian but was detained by tribal police when he violated a tribal traffic law. Tribal officers discovered open containers and a clear glass pipe in the vehicle (civil infractions under the Tribal Code). Tribal officers handcuffed the defendant and conducted a search incident to arrest but located nothing. Tribal officers then transported defendant back to tribal police headquarters. At the Headquarters defendant’s female passenger informed tribal officers that defendant was concealing methamphetamine in his “groin” or “genital area.” Tribal officers ordered him to strip and then located a baggie of methamphetamine. Then tribal officers turned the matter over to the El Paso Police Department. Defendant moved to suppress his unlawful arrest. The trial court granted
defendant’s motion and indicated that the open container and paraphernalia offenses were civil infractions which provided the tribal officers had no authority to arrest.

**Holding. Yes.** "Although Indian tribes are considered distinct, independent political communities exercising sovereign authority, due to their incorporation into the United States, their sovereignty is of a unique and limited character." Indian tribes lack “inherent authority to exercise criminal jurisdiction over non-Indians, even for offenses committed on tribal land.” The Ysleta Pueblo tribe agreed via treaty to allow the State of Texas to “exercise criminal jurisdiction over state law violations committed on the Pueblo . . . .” The tribe retains jurisdiction to impose civil sanctions “on both Indians and non-Indians who violate the Tribe’s Traffic and Peace Codes.” Those codes do not address a tribal officer’s authority to detain or arrest for infractions, but tribal officer’s have an inherent right to detain and search non-Indians they suspect of committing a criminal offense on tribal land. The Supreme Court has held that Indian law enforcement have inherent authority to detain a non-Indian for a criminal offense for a period of time long enough for the appropriate authority to arrive on scene or to transport the offender to the proper authorities. The authority to search such person is “ancillary to this authority” but only to the extent necessary for officer safety. *U.S. v. Cooley*, 141 S.Ct. 1638 (2021). Here officers observed a paraphernalia offense which is a discretionary arrestable offense under Texas law. Officers could have contacted El Paso Police Department to determine if they wished to take custody of the defendant, but they did not. Here, tribal police took matters into their own hands and did not contact El Paso Police Department until five hours into their detention and arrest—and only after they conducted a strip search. Even if tribal officers were detaining the defendant at the request of El Paso Police Department, they could not justify the length of time it took them to confirm or dispel their suspicions of criminal activity.

**Comment.** This is fascinating. Also, it appears I missed the *Cooley* case from June of this year. Sorry.

**9th District Beaumont**

The Ninth District Court of Appeals in Beaumont did not hand down any significant or published opinions since the last Significant Decisions Report.

**10th District Waco**

The Tenth District Court of Appeals in Waco did not hand down any significant or published opinions since the last Significant Decisions Report.

**11th District Eastland**

The Eleventh District Court of Appeals in Eastland did not hand down any significant or published opinions since the last Significant Decisions Report.

**12th District Tyler**

The Twelfth District Court of Appeals in Tyler did not hand down any significant or published opinions since the last Significant Decisions Report.

**13th District Corpus Christi/Edinburg**


**Issue.** Does a parent have standing to challenge the constitutionality of a warrantless non-consensual search of his minor child?

**Facts.** Defendant hid evidence of his drug dealing in the pants and underwear of his two daughters during a traffic stop. A jury convicted him of third-degree tampering with evidence and the trial court sentenced him to 99 years imprisonment based on two prior felony enhancements. Defendant challenged the search of his minor daughters. At a hearing on the motion to suppress, officers testified that one of defendant’s daughters was cooperative and admitted to having contraband in her underwear (“cooperative daughter”). Later at trial cooperative daughter testified that she chose to hide the marijuana inside her vagina when the defendant asked her to conceal it. The other daughter was uncooperative (“uncooperative daughter”) and officers had to order her to remove her jacket in order to discover the marijuana defendant had hid in her waistband. Uncooperative daughter also testified that her father did not hand her or uncooperative daughter anything. Instead, uncooperative daughter testified that the drugs belonged to cooperative daughter. During punishment the State introduced evidence of fourteen prior criminal offenses all involving female complainants. Defendant’s ex-girlfriend also testified about defendant’s abuse and shared pictures of severe injuries inflicted by the defendant.

**Holding. No.** This is a case of first impression. “We acknowledge that a parent, in many contexts, has a right to make decisions of substantial legal significance concerning their child.” But defendant’s attempt to derive his own personal right to privacy from that belonging to his minor child overly broadens the recognized fundamental parental rights “concerning the care, custody, and control over their child.”

**Comment.** The court disposed of defendant’s Eighth Amendment challenge to his 99-year sentence as not properly preserved.

**14th District Houston**


**Issue.** Is a prosecutor’s promise to dismiss a case and not re-file subject to specific performance enforced by the trial court when the prosecutor re-files the case at the insistence of his supervisor?

**Facts.** The State charged the defendant with felony assault on a public servant arising out of a driving while intoxicated offense for which she was also charged. During the pendency of these charges, defendant picked up a second DWI charge. The State dismissed the felony charge “based on the understanding that [defendant] would plead guilty to the misdemeanor charges. But the misdemeanor charges
The dismissals became unconditional when defendant's misdemeanor defense attorney became uncooperative (seeking dismissal on faulty blood vials). Defendant filed a "Motion for Specific Performance" requesting the trial court to enforce the dismissal agreement. At the hearing the prosecutor corroborated defense counsel's claim, indicated it was not his decision to refile, and explained that the complainant-police officer insisted on the refiling. The trial court granted the motion and dismissed the felony charge. The State appealed.

**Holding.** Yes. When the trial court granted the motion to dismiss with the underlying handshake agreement that defendant would be immune from future prosecution, the trial court granted its approval of not only the dismissal but the underlying handshake agreement. Even if the defendant failed to perform some part of the agreement, the trial court was not required to be aware of the defendant's promise of performance at the time it sanctioned the dismissal agreement. The dismissal and the immunity agreement became binding when the trial court granted the State's motion to dismiss notwithstanding any future expectations of the parties.

**Dissent.** There is no immunity agreement. The cases cited by the defendant pertaining to specific performance involve plea agreements. There is no plea agreement. There is no agreement. "What the majority characterizes as an 'agreement' is at most a unilateral promise by the prosecutor." There was no consideration exchanged for the unilateral promise. The trial court did not sanction an immunity agreement. There is no evidence the court was aware of the prosecution's unilateral promise at the time it initially dismissed the prosecution.

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Restitution Anyone? ................................................ Michael Gross
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Terrorism, Foreign & Domestic ................................... Cynthia Hujar Orr
PreTrail Motions ......................................................... Mike Heiskell
Mental Disabilities .................................................... Elizabeth Kelley
Public Corruption Panel ............................................ Billy Gibbons and TBD
Professionalism & CJA Vouchers, Budgeting & Resources .... Margaret Alverson
Forfeitures ............................................................... John Carroll
Health Care Fraud .................................................... Mary Stillinger
Plea Bargaining ....................................................... Michael McCrum
Improving Sentencing Presentations .......................... Claude J. Kelly
White Collar Cases, 5th Circuit & Supreme Court .......... Hon. Henry Bemporad

DON'T MISS OUT ON THE FUN AND CLE!
Dinner at Commander’s Palace ........................................... Wednesday at 7:00 pm
Dinner at Galatoire’s ................................................... Thursday at 7:00 pm
Dinner at Antoine’s .................................................... Friday at 7:00 pm
Brunch at Brennan’s Corridor ........................................ Saturday at 10:00 am
Group Tour at WWII Museum ......................................... Saturday at 1:00 pm