

TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

VOICE

FOR THE DEFENSE

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TCDLA CLE & Meetings: Schedule and dates subject to change. Visit our website at www.tcdla.com for the most up-to-date information. Register online at www.tcdla.com or call 512-478-2514

March

March 26-31

CDLP | 46th Annual Tim Evans Texas Criminal Trial College
Huntsville, TX

March 30-31

TCDLA | 29th Annual Mastering Scientific Evidence DUI/DWI w/ NCDD
New Orleans, LA

April

April 14

CDLP | Journey to Justice
Marfa, TX

April 14

CDLP | Juvenile
Austin, TX

April 15

CDLP | Juvenile Training Immersion Program
Austin, TX

April 20-22

TCDLA | Future Indigent Defense Leaders
Austin, TX

April 20

CDLP | Women Defenders & Representing Female Clients
Austin, TX

April 21

CDLP | Addressing Race, Gender, Money, & Equity in Criminal Justice
Austin, TX

April 21

CDLP | Journey to Justice
Tyler, TX

May

May 5

TCDLA | 16th Annual DWI Defense Project
Dallas, TX

May 15

CDLP | Mindful Monday
Webinar

June

June 13

CDLP | Chief PD Training
San Antonio, TX

June 14

CDLP | PD Training
San Antonio, TX

June 14

CDLP | Mental Health
San Antonio, TX

June 14

CDLP | Capital Litigation
San Antonio, TX

June 15-17

TCDLA | 36th Annual Rusty Duncan Advanced Criminal Law Course
San Antonio, TX

June Continued

June 16

TCDLEI Board, TCDLA Executive, & CDLP Committee Meetings
San Antonio, TX

June 17

TCDLA | Annual Members' Board Meeting
San Antonio, TX

July

July 12 - 16

TCDLA | Member's Trip
South Padre Island, TX

July 12

CDLP | Trainer of Trainers
South Padre Island, TX

July 13-14

CDLP | Journey to Justice
South Padre Island, TX

July 15

TCDLA & TCDLEI & CDLP | Orientation
South Padre Island, TX

July 17

CDLP | Mindful Monday
Webinar

August

August 11

TCDLA | 21st Annual Top Gun DWI
Houston, TX

August 17

CDLP | Building Blocks for a Next Level Criminal Defense Attorney
Webinar

August 17-18

CDLP | Innocence Work for Lawyers
Austin, TX

August 21

CDLP | Mindful Monday
Webinar

August 31

TCDLEI | Zoom Board Meeting

September

September 7-8

TCDLA | Criminal Defense
Dallas, TX

September 8

TCDLA Executive & Legislative Committee Meetings
Dallas, TX

September 9

TCDLA Board & CDLP Committee Meetings
Dallas, TX

October

October 5-8

TCDLA | Round Top
Round Top, TX

October Continued

October 5-6

CDLP | Corrections & Parole
Austin, TX

October 11

CDLP | Innocence for Students
Austin, TX

October 12-13

CDLP | 20th Annual Forensics
Austin, TX

October 26-28

TCDLA | Future Indigent Defense Leaders
Austin, TX

November

November 2-3

TCDLA | 19th Annual Stuart Kinard
San Antonio, TX

November 16

CDLP | Capital Litigation
Dallas, TX

November 17

CDLP | Mental Health
Dallas, TX

December

November 30 - December 1

TCDLA | Defending Those Accused of Sexual Offenses
Round Rock, TX

December 1

TCDLA Executive & Legislative Committee Meetings
Round Rock, TX

December 2

TCDLA & TCDLEI Board & CDLP Committee Meetings
Round Rock, TX

December 15

CDLP | Jolly Roger
Denton, TX

January

January 3

CDLP | Prairie Pups
Lubbock, TX

January 4-5

TCDLA | 43rd Prairie Dog
Lubbock, TX

January 26

TCDLA | 11th Annual Lonestar DWI
Austin, TX

Scholarship Information:

Texas Criminal Defense Lawyers Educational Institute (TCDLEI) offers scholarships to seminars for those with financial needs. Visit TCDLA.com or contact jsteen@tcdla.com for more information.

Seminars sponsored by CDLP are funded by the Court of Criminal Appeals of Texas. Seminars are open to criminal defense attorneys; other professionals who support the defense of criminal cases may attend at cost. Law enforcement personnel and prosecutors are not eligible to attend. TCDLA seminars are open only to criminal defense attorneys, mitigation specialists, defense investigators, or other professionals who support the defense of criminal cases. Law enforcement personnel and prosecutors are not eligible to attend unless noted "open to all."

President's Message

HEATHER J. BARBIERI



Jeff Blackburn: Born to Be a Warrior

I was just walking into my office when I first received the news that Jeff Blackburn was in his final throes of hospice care. In my lobby, I have wall of paintings of nine warriors who stand for the same mission and core values that I believe, that TCDLA believes, and most certainly that Jeff believed. Heroes of mine, who when things are at their toughest for me, I lean to for inspiration. Warriors like Ruth Bader Ginsburg, Rosa Parks, and Harriet Tubman.

But on that particular day, one of the heroes on my wall stood out the most. Almost as if she was trying to get my attention: Joan of Arc. And a favorite quote of hers kept ringing in my ear that entire day in a perpetual loop: *"I am not afraid; I was born to do this"*.

I am not afraid; I was born to do this. It took me a little while to connect the dots. But finally, it hit me. As if something greater than me was trying to send a message; I went back and re-read a letter that Jeff had written to the TCDLA Executive Committee in November. A final gift, a time capsule of sorts. And I want to share part of his message with you here.

In the words of Jeff Blackburn: "Who we are...the group of us that TCDLA truly represents...who choose the path of most resistance, who spend their lives fighting for the weak and powerless and who do it for a purpose higher than themselves...To us, this work is a job, a hobby, and a religion all rolled into one. It's a way of life, not just a gimmick to make money...What I'm talking about is a culture of warriors that extends back to the dawn of history and will stretch forward as long as there is a conflict between the strong and the weak and the powerful and the powerless. In the time and the place we're in right now, TCDLA is a living embodiment of that culture."

I must have read those words now a dozen times and they still give me chills. And for Jeff, they were authentic. For years he had studied the ways of the Samurai and warrior culture and adapted many of the strategies for his law practice and his life. Those terms like "warrior" and "battle" were not just hyperbole for Jeff. He really

saw criminal lawyers as serving a higher need to solve problems in the world, analogous to the way men and women join the military to serve a higher calling. Practicing law was his way of giving back. It was his way of serving humanity and his best and highest use. He almost felt sorry for those who practiced law just for the money. In the end, those men and women would be left feeling empty and sorrowful.

In his final days, Jeff was in a place of great peace. Peace and gratitude. The type of serenity that one is granted at the end of a life lived knowing that they have given everything in a genuine attempt to leave the world a better place than when they arrived. That is both an aspiration and an inspiration for all of us.

And much of Jeff's gratitude was directed towards TCDLA. During some of his roughest patches in life, relationships built through this organization were there to reach down and pull him back up. Opportunities were presented to him to dive into to remind himself of the true, the good, and the beautiful that life and people have to offer.

And in Jeff's own words, TCDLA "proved to me that the bond we share as honorable people, as warriors, and as fighters for the oppressed is unbreakable. It will last beyond any of us." And finally, the most poignant tribute to TCDLA were Jeff's closing words: "...I love you, and I love us, and I love what we mean to the world. I promise you it's what I'll be thinking about on the way out."

No wonder another great warrior, Joan of Arc, was trying to talk to me that day in my office lobby. She was talking about Jeff, who like her, was not afraid and was born to do this!





CEO's Perspective

MELISSA J. SCHANK

"SOMEONE'S SITTING IN THE SHADE TODAY BECAUSE SOMEONE PLANTED A TREE A LONG TIME AGO."

- Warren Buffet

Strategic Planning

Earlier this month, TCDLA took a step forward to better prepare the organization to meet the needs of our hodgepodge group of attorneys who make up our ranks. An enthusiastic and diverse group of 30+ members met for two days working together, brainstorming to formulate the best course for TCDLA in the future and to position the organization to best serve our members and to fulfil our mission statement.

Previously, we had sent out a survey to the membership asking questions about what we do best, and asking what we can do better. The committee very much took the survey responses to heart in arriving at its report. The group was tasked to create both a one-year plan and a three-year plan. Once the staff has compiled the details from the report, the plan will be presented to the Executive Committee and Board for final approval and implementation. The goal is to have both the one-year plan and three-year final plans in place by April 1st, and the staff will then incorporate the same into our project management software and applying the steps necessary to achieve our goals.

We will keep the membership informed on our progress. Please contact me at the home office if you have any questions or comments about how we are doing. And, thanks again for the committee members who dedicated their time and put forth tremendous effort to help us keep TCDLA Strong!



In Attendance: Angelica Cogliano, Jeep Darnell, Nicole DeBorde Hochglaupe, Cesar De Leon, Aaron Diaz, Miriam Duarte, Mari Flores, John Gilmore, David Guinn, Paul Harrell, Sean Hightower, Nicolas R. Hughes, Amanda Hernandez, Kameron Johnson, Adam Kobs, Thuy Le, Patrick S. Metzke, David Moore, Rocky Ramirez, Sarah Roland, Melissa Schank, Monique Sparks, Clay Steadman, Alicia Thomas, Paul Tu, Rick Wardroup, Ted Wenske, Philip Wischkaemper, Grace Works



The Solo Road is Better with Company

Most of us know this line of work is difficult and that we're in it pretty much alone. We've got to pay support staff, take care of our clients, run our businesses, and try to find some time somewhere to be present with our families. As I've mentioned before, I am in a somewhat unique position because I work with my dad. Learning from him on how to do all of the above tasks has certainly helped shorten the learning curve and provide me with a little bit of a net to save me while I learned. However, he recently had a medical issue come up that forced him out of work for a hot minute. Seemingly overnight, I had to solve all the problems for all the people and do so without the net. It has been something less than fun and something more similar to scary.

However, I have been comforted by my brothers and sisters who are in this fight with me. None of them could come and help me deal with cases or help me make sure I made payroll, but the criminal defense practitioners in El Paso and across the State made me know that while I wasn't the only one who had to figure out hard times, I did have friends I could lean on to make sure I kept going forward with my head up. That's one of the things about our great Organization that makes me proud to be involved. Not only do the members rally around each other when needed, but our home office staff really are part of the family. I can't tell you the number of hours I spent on the phone with Melissa through all of this; receiving sage advice on how to get through each day and hearing the words of encouragement of a friend reminding me all would be okay in the end.

I've mentioned it once or two hundred times before in my columns that if you haven't involved yourself more in TCDLA then you really need to do so. I don't say it

Editor's Comment

JEOP DARNELL

as some sort of sales pitch for the Organization. I say it because I truly believe that the people who make up TCDLA care more about each other than just about any group I've ever known, and I don't want any of y'all to miss out on that benefit. We all struggle, we all have hard times, we all feel burned out, we all feel like we've hit our wit's end at times. Unfortunately, most of our spouses, kids, friends, and acquaintances don't understand what this life is like. As much as they'd like to, most of them cannot empathize with the hardships we face that are unique to small business owners who work in this field. But the rest of us can. On the flip side I'd like to challenge more members to share their cell phone numbers with colleagues who may need a pick me up. Make yourself available to help someone else when needed. Through continued friendship and mutual appreciation not only will each of us be better, but TCDLA will only be stronger as a result.

Be safe,

Jeep Darnell



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Ethics and the Law

MITCH ADAMS



Madmen and Lawyers

Texas hammers. Strong arms. Law hawks. A lot of lawyers advertise. Not the guys at Aiken Gump or Fulbright & Jaworski or Vinson & Elkins, at least, not in the traditional sense. But a lot of, if not most of the medium-sized and smaller law firms, and solo practitioner lawyers do some sort of marketing. And everyone who is not working for the government has a website, including those white-shoe guys. Come to think of it, most government agencies employing lawyers have at least a webpage, including your local district attorney's office and the various U.S. attorney's offices. So what exactly do our Texas Disciplinary Rules of Professional Conduct have to say about attorney advertising or information about legal services, as it is referred to in Chapter Seven? It's a topic I had not really thought much about since I sent off a proof of the first yellow pages ad I ran to the State Bar's Advertising Review Committee for its approval when I started out 24 years ago.

Basically, all attorney advertisements in Texas must have the approval of the Advertising Review Committee. TEX. R. DISC. PROF'L COND. 7.04. The lawyer must file a copy of the advertisement, along with a completed application and \$100.00, no later than 10 days after the initial dissemination of the advertisement. TEX. R. DISC. PROF'L COND. 7.04(a). If you want pre-approval for your advertisement, send it in no less than 30 days before it airs (or launches or runs or goes up). And if it doesn't exist yet, that is, if the finishing touches haven't yet been completed, you send in the proposed script, text, or what have you, including details about scenes, audio content, illustrations, background sounds, et cetera. TEX. R. DISC. PROF'L COND. 7.04(c).

There are some things that are excluded from 7.04 committee approval. Those include communication from a "bona fide" legal aid organization promoting free or reduced-fee legal services (TEX. R. DISC. PROF'L COND. 7.05(a));

information and links to factual information on your firm's website (not including the homepage) (TEX. R. DISC. PROF'L COND. 7.05(b)); a listing or entry in a regularly-published law list, such as Super Lawyers (TEX. R. DISC. PROF'L COND. 7.05(c)); announcements and notices of office relocations, additions to the firm, and other such changes (TEX. R. DISC. PROF'L COND. 7.05(d)); and information including, but not limited to, contact information, areas of practice, bar admissions, technical and professional licensure, foreign language abilities, and fees for routine legal services (TEX. R. DISC. PROF'L COND. 7.05(i)(1) – (13)).

Restrictions on and requirements of the content of lawyer advertisements are relatively hands-off. The advertisement must contain your name, and must state which expenses and costs of litigation a client must pay for if you advertise work on a contingency fee basis. TEX. R. DISC. PROF'L COND. 7.02(a), (c). The advertisement may specify an area or areas of practice, but you cannot say that you have special competence in an area of practice, unless it is to say that you are board certified by the Texas Board of Legal Specialization in whichever area of practice you have been certified. TEX. R. DISC. PROF'L COND. 7.02(b)(1). If you advertise a specific fee or fee range for a particular legal service, then you are bound to that fee or fee range for the period during which the advertisement is in circulation, with a cap of one year after the date of publication. TEX. R. DISC. PROF'L COND. 7.02(d).

Your advertisement must be truthful and not misleading about your legal services; this includes a deception by omission. Misleading statements are those that would make a reasonable person come to a particular conclusion about your services that isn't supported by facts, or that leads to an unjustified expectation about what you can do for a client. TEX. R. DISC. PROF'L COND. 7.01(a). This applies to any advertisement (a communication motivated

by profit made to the general public that promotes legal services) and targeted solicitations (letters some of us might send to those on the weekend jail book-in lists). TEX. R. DISC. PROF'L COND. 7.01(b) (1) – (2). We can practice under trade names, or we can include in a law firm's name those of its current members, and retired and deceased members. 7.01(c). But whatever you do, don't state or imply that you can achieve results using violence or by otherwise breaking the law. 7.01(e).

What this boils down to for us is that we must have the Advertising Review Committee's blessing for our websites, our Facebook, Google, Instagram, and other social media ads, and our phone book ads. That can be had by filling out a simple application and sending it, along with a copy of (or a link to) your ad and a check for \$100 to the Committee. Do this within 10 days of the ad premiering, and you should be fine, unless your ad or website is obviously misleading. Remember, if the other guys can wear a wrestling mask or kick in a car window in their commercials, then your advertisement should be fine.

Mitch Adams is a criminal defense lawyer in Tyler, Texas. He graduated from the University of Texas in 1994 with a B.A. in English, and from the Texas Tech School of Law in 1998. While in Lubbock, he clerked for Chappell, Lanehart & Stangl, P.C., where he caught the bug to practice criminal defense law. He is the lucky husband of Kerry, and the proud father of Sarah and Charlie.



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CDLP Chair and Voice for the Defense Editor

Jeep Darnell



Constitutional Restrictions on the Second Amendment

United States v. Rahimi, No. 21-11001, (5th Cir. 2023), opens with a constitutionally direct statement:

“The question presented in this case is not whether prohibiting the possession of firearms by someone subject to a domestic violence restraining order is a laudable policy goal. The question is whether 18 U.S.C. § 922(g)(8), a specific statute that does so, is constitutional under the Second Amendment of the United States Constitution. In the light of *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S.Ct. 2111 (2022), it is not.¹

If this is not a challenge by the 5th Circuit Court of Appeals, what is it?

United States v. Emerson, 270 F.3d 203 (5th Cir. 2001), is a case that raised eyebrows. It was the first case that directly stated that an individual, who was not in the militia, had a “right to keep and bear arms.”² However it also took a stance that the individual right could be limited. It is case that had approximately 25 amicus briefs filed by the author’s count. With regard to guns, and prior to *District of Columbia v. Heller*, 554 U.S. 570 (2008), it *was the only opinion*. There the Court:

“[H]eld that the Second Amendment guarantees an individual right to keep and bear arms—the first circuit expressly to do so. 270 F.3d at 260. But we also concluded that § 922(g)(8) was constitutional as applied to the defendant there. *Id.* at 263. “Emerson first considered the scope of the Second Amendment right ‘as historically understood,’ and then determined—presumably by applying some form of means-end scrutiny *sub silentio*—that § 922(g)(8) [wa]s ‘narrowly tailored’ to the goal of minimizing ‘the threat of lawless violence.’»

¹ Opening quote from *United States v. Rahimi*, No. 21-11001, 2023 U.S. App. LEXIS 2693 (5th Cir. Feb. 2, 2023). *Rahimi* originates from the Northern District of Texas.

² <https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1311&context=lawreview>

The Federal Corner

BROCK BENJAMIN

However, in *Rahimi*, the Court began its direct position of “enter *Bruen*...” Uniquely, in *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022), the United States Supreme Court articulated a new standard for evaluation of laws that interfere with the Second Amendment. *Bruen*, 142 S.Ct. at 2129-30. The Court stated that the Constitution presumptively protects the Second Amendment. But more importantly stated that in any effort to restrict Second Amendment conduct, “the [G]overnment must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.” *Id.* at 2127. This effectively repudiates *Emerson* and all other cases with its reasoning.

The Court in *Rahimi* in summary stated that “the Government’s argument fails because (1) it is inconsistent with *Heller*, *Bruen*, and the text of the Second Amendment. (2) it inexplicably treats Second Amendment rights differently than other individually held rights, and (3) it has no limiting principles.” *Rahimi* at *9. The Court continued examining each factor. More importantly though, the Court then broke down the historical argument that the Government was required to make looking at each of its arguments and stating that “these preferred analogues fall short for several reasons.” *Rahimi* at *24.

The Court in *Rahimi* ended its opinion with the holding:

“The Government fails to demonstrate that § 922(g)(8)’s restriction of the Second Amendment right fits within our Nation’s historical tradition of firearm regulation. The Government’s proffered analogues falter under one or both of the metrics the Supreme Court articulated in *Bruen* as the baseline for measuring “relevantly similar” analogues: “how and why the regulations burden a law-abiding citizen’s right to armed self-defense.” *Id.*

As a result, § 922(g)(8) falls outside the class of firearm regulations countenanced by the Second Amendment.

Future issues

This holding in *Rahimi* is sure to be expanded changed

and molded. In another article, Todd Greenwood and Patrick McCann discussed other cases *United States v. Perez-Gallan*, No. PE:22-CR-00427-DC, 2022 U.S. Dist. LEXIS 204758 (W.D. Tex. Nov. 10, 2022) and *United States v. Quiroz*, No. PE:22-CR-00104-DC, 2022 U.S. Dist. LEXIS 168329 (W.D. Tex. Sep. 19, 2022). Those cases come from the same judge in the Western District of Texas – Judge David Counts. However, as practitioners, we need to begin seeing beyond 18 U.S.C. 922. The National Firearms Act, 26 U.S.C. § 5860, regulates by taxing, however “as the legislative history of the law discloses, its underlying purpose was to curtail, if not prohibit, transactions in NFA firearms.”³ This becomes important as the government uses this statute frequently in federal gun prosecutions. Challenging this legislation will require the Government to affirmatively prove that its regulations are rooted in history, and not just the 20th Century’s case law that began weapon restrictions with *United States v. Miller*, 307 U.S. 174 (1939). All of the gun cases before *Breun* logically built on each other. An example that directly relates to *Rahimi* is *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976).

In *Warin*, the defendant was convicted of willfully and knowingly possessing a firearm in violation of the Gun Control Act of 1968. The defendant argued that the statute violated his Second Amendment rights. That Court held that the fact he was subject to enrollment in the militia of Ohio conferred upon him no right to possess the submachine gun in question under the Second Amendment and defendant had no private right to keep and bear arms. A case that questioned that was *United States v. Chapman*, No. 3:10-00034, 2010 U.S. Dist. LEXIS 58680 (S.D. W. Va. June 14, 2010). This court acknowledged that these militia-dependent interpretations of the Second Amendment were soundly rejected by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L. Ed. 2d 637 (2008). That case, though, dismissed the defendant’s motion to dismiss his challenge to 18 U.S.C. 922(g)(8) possession of a weapon while subject to a protective order. Is that still good law after *Rahimi*?

³ <https://www.atf.gov/rules-and-regulations/national-firearms-act>

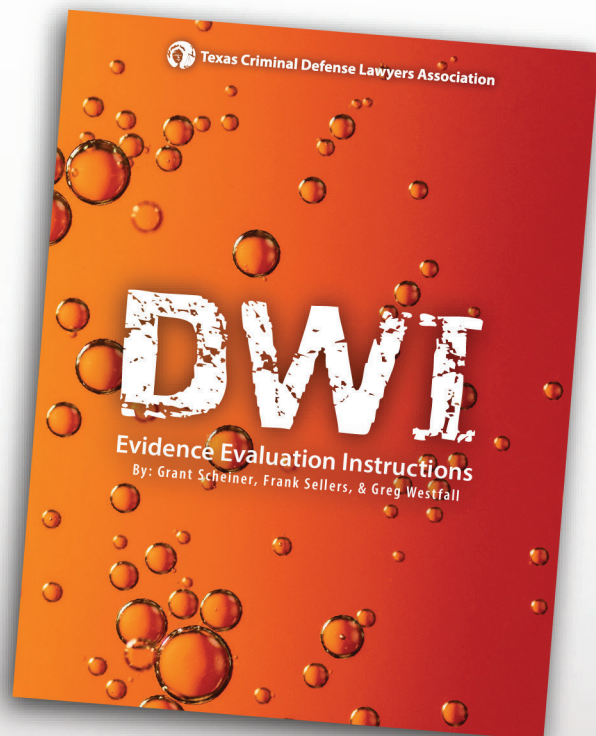
Brock Benjamin is the owner of the Benjamin Law Firm in El Paso that focuses on federal criminal defense in New Mexico and Texas and state criminal defense in Texas. He is a director for NMCDDLA. Prior to opening the firm, Brock was an assistant District Attorney in El Paso, Texas and immediately following law school was an associate doing legal malpractice plaintiff’s representation. His former life consisted of jumping out of planes in the 2d Battalion, 75th Ranger Regiment. He’s an active private pilot and enjoys trips with his family. He can be reached at brock@brockmorganbenjamin.com or 915-412-5858.

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From the Front Porch

DEAN WATTS



Beware the Ides of March

How Depression Can be a Ruthless Saboteur for the Criminal Defense Practitioner

I don't know about you, but this time of year is always tough. The days are short, the weather's grey and cold, and you spend a lot of time yearning for that bright yellow object in the sky that can elude us for days on end. As lawyers, we work in a profession that makes us prone to depression, and this time of year doesn't help.

Sometimes it's easy to lose sight of the fact that spring is right around the corner, and we just need to hang in there. Winter gloom can be depressing, and it made me think of a powerful CLE presentation by Terry Bentley Hill, the Texas Lawyers Assistance Program Chairperson.

If you haven't heard her speak, I encourage you all to do so. She was kind enough to take the time to give an interview that discusses the problem of depression and how to handle it if you or someone you know has problems with depression.

Q. Thank you so much, Terry, for taking the time to do this interview. Could you please tell us about your background and how you became involved with helping lawyers overcome issues with depression?

Years ago, I experienced the tragic loss of an attorney who succumbed to the pressures of his job – an elected official who thought he was a disappointment to his constituents, family, and profession. Struggling with depression and anxiety, which he treated with alcohol, he took his life in the home where his four young daughters slept. That attorney was my former husband.

Following his death, as I tried to make sense of the isolation and despair he felt, I presented at a wellness CLE along with two highly regarded attorneys who shared their battles with substances and mental illness and the road to recovery that set them free. They were volunteers for the Texas Lawyers Assistance Program in Austin. Moved by their stories, I vowed to be a TLAP volunteer because I wondered: had my former husband known about TLAP and availed himself of its services, would things have turned out differently?

Q. Why do you think criminal defense attorneys are especially prone to depression?

Only criminal defense attorneys sit next to a person who might live or die, or who might miss twenty years of their children's lives, or who struggles to find a job after a felony conviction, or is stripped of their rights to own a gun, or is barred from voting. Only criminal defense attorneys single handedly take on the amassed power of the State. The stakes are high and the pressure is astronomical.

Q. You talk about the language of depression. Can you explain what that is?

For years my former husband "spoke" the language of depression but because I didn't understand the language, I missed the significance of what I was hearing and seeing. Depression "talks." Sometimes with words, sometimes with behavior, sometimes with both. Verbal red flags include catastrophizing, black and white thinking, all-or-nothing thinking, fatalisms, hopelessness, and/or despair. Behavioral signs include isolation, loss of interest in previously pleasurable activities, paralysis – meaning unable to answer the phone or open mail, insomnia or hypersomnia, low energy, excessive crying and/or self-harm. None of these signs should be ignored any more than the symptoms of a heart attack or stroke. Medical intervention is often needed, but unlike heart attack or stroke symptoms, which are void of social stigma, depression symptoms often go untreated because of unjustified shame associated with mental health issues. That can be deadly.

Q. I think people may have a hard time understanding that lawyers can be so depressed they can't open a letter from the grievance committee to respond to a complaint. Can you tell us what is physically going on in the brain of a lawyer battling serious depression?

When a person is severely depressed, they can become "frozen." They have no energy and even opening the mail

is exhausting. Couple that with an ominous letter from the State Bar of Texas with the possibility of bad news, for many it is too hard to face. After speaking to members of the grievance committee, they are astounded by the number of attorneys who fail to respond to letters. In their eyes, a matter can easily be resolved if the attorney addresses the issue. However, that is easier said than done for people engulfed with debilitating depression.

Q. You compare depression to physical nausea. What do you mean by that?

Have you had motion sickness? When activated, is it possible to will the nausea away? A young boy sat behind me on a flight to NY and the minute the wheels left the ground, he began vomiting and it lasted the entire flight. If I had turned around and demanded he stop, it would have been a waste of breath, he didn't stop until his feet hit the ground.

Depression is like psychological nausea. Without an intervening event like medication, therapy, peer-support, exercise, mindfulness, sleep and/or good nutrition, it is virtually impossible to will the depression away. It is a medical condition which causes cognitive distortion, which leads to thinking errors, or what I call 'stinking thinking'. To simplify: when depressed, don't believe

your brain. It can lead down a dark path that, for some, is irreversible.

Q. You say that a suicidal crisis is like a balloon. Can you tell us more about that?

Numbers don't lie. Out of 105 professions, attorneys experience the highest rate of depression and are three times more likely to have depression than other professions. Eleven percent of attorneys experience suicide ideation at some point in their career, and suicide is the third leading cause of death for attorneys behind heart disease and cancer.

Suicidal crisis can result from multiple factors including medical (depression/anxiety), environmental (job/home), emotional (loss/grief/abandonment), behavioral (process/substance use disorders) and spiritual issues. Think of the suicidal crisis like helium filling a balloon. The balloon stretches and stretches. The obvious goal is to relieve the pressure before the balloon pops. One way to figuratively release air out of the balloon is to proactively engage the person who is struggling. Listening is a powerful tool and it can relieve the suicidal crisis by validating the person's feelings. The disease isolates and triggers indescribable loneliness; compassion and understanding from a friend or colleague can buy time to get the person help.

Q. How do you know when you have crossed the line between feeling blue and having a depression problem?

Below are characteristics that if experienced every day for two weeks then major depression is an issue:

- Depressed mood most of the day
- Loss of interest or pleasure
- Weight loss or gain
- Insomnia or hypersomnia
- Psycho motor signs – bouncing leg, finger tapping, unable to sit still
- Fatigue or loss of energy
- Feelings of worthlessness or excessive guilt
- Indecisiveness, unable to concentrate
- Recurrent thoughts of death or suicide

Q. What should lawyers do when they feel like that?

Go to the doctor! Preferably a psychiatrist who is an expert in this field. Studies show that recovery from depression is like a three-legged stool: medication, cognitive behavioral therapy, and peer support. I'll include behavioral strategies like meditation, exercise, deep breathing, etc., but remember – a severely depressed person may not have the energy to engage in behavioral remedies.

Q. What should lawyers do when their sixth sense tells them someone around them may be dangerously



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depressed?

Stop minding your own business and step out of your comfort zone and ask the question: Are You Ok? It can save a life. Follow up with 1). Are you thinking of harming yourself? and 2). Do you have a plan? Be proactive:

- Recognize the signs of distress
- Approach with love not judgment
- Do not minimize
- Listen carefully – Let them talk
- Assure them they are not alone. People will help them through this
- Acknowledge the challenges
- Stay with them – refer them to a doctor or crisis line: 9-8-8 (National Crisis Line)

Q You talk about the 10x10x10 rule? What is that, and how can it help someone who may be depressed?

I practice the 10x10x10 rule most days. It puts things in perspective. We all experience embarrassments, disappointments, regrets, humiliations. Instead of ruminating on the negative messages spinning in our head, ask:

- How will I feel about this in 10 minutes?
- How will I feel about this in 10 months?
- How will I feel about this in 10 years?

Q. Where can lawyers go to get help if they need it?

The Texas Lawyers Assistance Program. It is a **confidential** resource for attorneys, judges, and law students who are either struggling with substance use disorders, mental health issues, cognitive decline, or who knows someone experiencing those issues. The number is 1-800-343-TLAP or tlaphelps.org. The phone is answered 24/7/365 by a trained lawyer/counselor.

Again, I want to thank you, Terry, for taking the time to do this interview. Being a criminal defense attorney, I will ask, what would it be if this were a trial and you had a closing argument on this matter?

A 17-year-old boy decided to die. He was miserable. He thought everyone would be better off without him and that he was a burden to his family. His broken brain was tired, and he battled a foe he knew nothing about – undiagnosed bipolar I disorder. The Golden Gate Bridge loomed 15 minutes from his home, and it was there that he would take his final breath. However, he made a pact with himself, if ONE person asks if he is OK, then he wouldn't jump that day. Not one person asked the question despite sitting next to him on a bus for 10 minutes while he sobbed. Nor did the tourist who saw him staring into the cold blue waters of the San Francisco Bay. His placed his hands on the bright orange railing of the bridge and launched himself, falling 36 stories

into water hard as concrete that took exactly 4 seconds. Regret and sadness entered his mind. "Please God, don't let me die." "I don't want to die, and my family not know that I wanted to live." He smashed into the water and crushed his back. Without the use of his legs, he was going to drown. He felt something bouncing against his hip. "Oh no", he thought, "I'm going to die by shark attack." It wasn't his day to die. A sea lion saved him by keeping him above water until the coast guard rescued him. He is one of 43 people to survive jumping off the Golden Gate Bridge. If only ONE person had asked if he were ok, he wouldn't have jumped. We can all ask that question: Are You Ok? It can save a life! Stop minding your own business.

If this article helps one person dealing with depression, then it's worth it. Feel free to contact Terry at terry@terrybentleyhill.com or terrybentleyhill.com or 214-740-9955. if you or a lawyer you know is struggling with depression. As always, I wish you good luck, take care, and try your best to have fun practicing law.

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THE NEW WILD WEST OF FIREARMS POSSESSION REGULATION IN THE AFTERMATH OF NEW YORK STATE RIFLE AND PISTOL ASSOC. V. BRUEN

TODD GREENWOOD & PAT MCCANN

New York State Rifle and Pistol Assoc. v. Bruen, decided in June by the United States Supreme Court, with a majority opinion drafted by Justice Clarence Thomas, may have effectively vacated the landscape of firearms regulations to which we have grown accustomed.¹ State legislatures are now faced with severe hurdles to regulation of firearms possession. Previously they could regulate guns as they saw fit.

Bruen, following *District of Columbia v. Heller* and *McDonald v. City of Chicago*, is the latest in the court's reformation of Second Amendment rights, recognizing a fundamental right to bear arms.² In *Bruen* the court has gone to great length to make clear that any condition, exception or carve out to the unqualified right to keep and bear arms, faces a considerable hurdle.³ That hurdle is so high because, the court apparently now requires evidence of proof of a historical antecedent for a restriction to withstand constitutional scrutiny.⁴

As a result people present in Texas without exception – whether felons, those without criminal records or aliens – now *may* be able to have firearms on their person outside the home.⁵

***Bruen* and the Right to Carry a Firearm in Public**

In *Bruen*, SCOTUS held a New York state statute

1 *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2117, 2156 (2022).

2 The court previously recognized a right to keep and bear arms present in the *Second Amendment* in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

3 See *Bruen*, 142 S. Ct. at 2111, 2117, 2156.

4 *Id.* at 2134.

5 *Heller*, 554 U.S. 570; *McDonald*, 561 U.S. 742.

violated the Second Amendment of the federal constitution that required a license to carry a firearm outside the home.⁶ A license could be sought to “have and carry” a concealed “pistol or revolver” if an applicant could demonstrate “proper cause.”⁷

The *Bruen* court noted that both the district court and Second Circuit Court of Appeals relied on the Second Circuit's prior decision in *Kachalsky v. County of Westchester*, which had sustained New York's proper-cause standard as “substantially related to the achievement of an important governmental interest.”⁸ *Bruen* held that for a statute to restrict the Second Amendment right to keep and bear arms, the restriction must be “consistent with the Nation's historical tradition of firearm regulation.”⁹

In so doing, the court collapsed the two-prong test formerly articulated in *Heller* and *McDonald* into a single standard.¹⁰

The “Nation's Historical Tradition of Firearm Regulation”

The *Bruen* court emphasized in *dicta* the plaintiffs were “lawabiding citizens.”¹¹ However, the court's in-depth discussion of three historic categories of prohibitions on carrying firearms -- restriction from the common law, *in terrorem* laws, and surety laws – did not incorporate a restriction based on prior criminal adjudication.¹²

6 *Bruen*, 142 S. Ct. at 2111, 2117, 2156.

7 *Id.*

8 *Id.* at 2117, 2156 citing *Kachalsky v. County of Westchester*, 701 F.3d 81, 96 (2012).

9 *Id.*

10 *Id.* at 2125-26.

11 *Id.* at 2134.

12 *Id.* at 2134-58.

Rather, the court emphasized that even after the Civil War, in the throes of and following Reconstruction, the right to carry firearms was recognized even among that segment of the population of the American South made most subject to the focus of the criminal justice system -- African Americans.¹³ The court observed a right of all peoples to an “otherwise enduring American tradition permitting public carry.”¹⁴

The *Bruen* court also singled out conduct calculated to create a “breach of the peace” by the manner in which firearms were carried, citing to *in terrorem populi* laws.¹⁵ The court observed these laws prohibited conduct based on the intimidation sought by the manner, location, and context in which the right was exercised.¹⁶ They did not limit the right based upon categorization of sub-group of the population for any past conduct, criminal or otherwise.

Texas received special attention in the discussion as having imposed the greatest restrictions on carrying a weapon in public, particularly concealed.¹⁷ The court noted that in the 1875 holding in *State v. Duke* the Supreme Court of Texas recognized a right to bear arms in public but reasoned the right could be conditioned on a showing of “reasonable grounds fearing an unlawful attack on [one’s] person.”¹⁸ One can imagine a hip holster commonplace in a saloon in Abilene but prohibited by ordinance in Austin.

Still Good Law?

A broad reading of *Bruen* suggests a number of statutes which restrict firearm possession may be subject to challenge. Tex. Pen. Code § 46.02 prohibits possession of a firearm by persons engaging in criminal activity “other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic or boating,” with certain prior convictions, or who is not at least 21 years of age.¹⁹ Tex. Pen. Code § 46.04 prohibits possession of firearms by convicted felons and anyone convicted of Class A misdemeanor Assault Family Violence for a

13 *Id.* at 2152-53. Laws of that era in the southern states often went to great lengths to criminalize activities of African Americans, native peoples and peoples of color as a backlash against the constitutional prohibition of slavery following the Civil War. See Alexander, Michelle. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York, The New Press, 2010. pp. 29-33.

14 *Id.* at 2154.

15 *Id.* at 2144-45.

16 *Id.*

17 *Id.* at 2153.

18 *Id.* citing *State v. Duke*, 42 Tex. 455-60 (1875)(holding “legitimate and highly proper” regulation of the right of handgun carriage subject to the requirement to demonstrate “reasonable grounds fearing an unlawful attack on [one’s] person”).

19 Tex. Pen. Code Ann. § 46.02 (2022).

term of years.²⁰ Tex. Pen. Code § 46.05(a)(1)(C) prohibits “short-barreled firearms,” defined by Section 46.01(10) as “a rifle with a barrel length of less than 16 inches or a shotgun with a barrel length of less than 18 inches, or any weapon made from a shotgun or rifle if, as altered, it has an overall length of less than 26 inches.”²¹

With the abrogation of *Kachalsky*, legislatures now lack the “substantially related to the achievement of an important governmental interest” basis to restrict what had been characterized as a fundamental right.²² Consequently, can any of these regulations be “consistent with the Nation’s historical tradition of firearm regulation” within the meaning of *Bruen*? Further, restrictions on possession of firearms by location would presumably also have to be justified by the historical antecedent requirement. For example, Tex.Pen.C. § 46.03 codifies a laundry list of locations where firearms may not be possessed but carves out exceptions, to include for members of private and public security and law enforcement.²³ A number of these locations, such as airports, did not exist during the historical era examined by the *Bruen* court.

As of this writing, three challenges have been decided by panels of the United States District Court for the Western District, all asserting *Bruen* in challenges to federal statutes regulating firearms.²⁴ In *United States v. Perez-Gallan* the court held unconstitutional 18 U.S.C. § 922(g)(8), which makes it a crime to possess a firearm while subject to a court order, reasoning that after *Bruen* the statute did not “align[] with this Nation’s historical tradition of firearm regulation”²⁵ Similarly, in *Quiroz*, the court held unconstitutional for the same reason 18 U.S.C. § 922(n), which prohibits defendants under felony indictment from receiving a firearm.²⁶

However, the *Charles* court upheld 18 U.S.C. 922(g)(1), which prohibits possession of a firearm by a convicted felon, reasoning the national historical tradition excluded certain classes of persons from the body politic such that they were deemed to have been understood within the meaning of “the people,” among them convicted felons.²⁷

20 Tex. Pen. Code Ann. § 46.04 (2022).

21 Tex. Pen. Code Ann. § 46.01(10)(2022), Tex. Pen. Code Ann. § 46.05 (2022).

22 *Kachalsky*, 701 F.3d at 96.

23 Tex. Pen. Code Ann. § 46.03; Tex. Pen. Code Ann. § 46.03(5) (“in or into a secured area of an airport”).

24 See, e.g., *U.S. v. Perez-Gallan*, PE:22-CR-00427-DC, 2022 U.S. Dist. LEXIS 204758, 2022 WL 16858516 (W.D. Tex. Pecos Div. - Nov. 10, 2022); *U.S. v. Charles*, MO:22-CR-00154-DC, 2022 WL 4913900 (W.D. Tex. Midland-Odessa Div. - Oct. 3, 2022); *U.S. v. Quiroz*, PE:22-CR 00104-DC, 2022 WL 4352482 (W.D. Tex. Pecos Div. - September 19, 2022).

25 2022 WL 16858516 at *15.

26 2022 WL 4352482 at *6.

27 2022 WL 4913900 at *12.






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Where Do We Go from Here?

We can attempt to predict what the U.S. Supreme Court or the various circuit courts of appeals will do when faced with a case. Being lawyers, undoubtedly we will. However, until we actually have decisions from the Court of Criminal Appeals or the Fifth Circuit Court of Appeals – we perhaps best advocate for our clients by raising the question of constitutionality at every opportunity, regardless of our expectation of success at the trial court level.

Whether one is attacking an “anti-gun statute” via post-conviction *habeas*, via pre-trial *habeas* on facial grounds, or via motion to quash, we hope to offer a starting point from which to craft their own challenges. Any offense that entails possession of any firearm should be considered subject to challenge due to the broad scope of *Bruen*. Further, it may behoove us to rethink the continued viability of “illegal” weapons restrictions such as sawed-off shotguns, “ghost guns” manufactured without traceable serial numbers or even fully automatic weapons as well as time, place, and manner restrictions such as those codified throughout Chapter 46 of the Code of Criminal Procedure.

Putting *Bruen* to Use

Whatever instrument you decide to employ in your pleading practice, keep in mind some simple rules: Facial

constitutionality of a statute can be raised through pre-trial *habeas* under *Ex parte Lo*.²⁸ A motion to quash can be employed to challenge defects in the indictment such as lack of notice due to an absence of facts pleaded in the indictment or to raise federal / state constitutional arguments other than a facial challenge. Remember that only pre-trial *habeas* is appealable prior to trial by the defense. If the defense prevails at trial on its motion to quash, the State can appeal.

In cases in which the only matter before the court is alleged criminal activity predicated on the firearms offense, another tactic may be to attack jurisdiction as, without some type of criminal activity pleaded, *Bruen* has created an argument that simply possessing or carrying such items is no longer a crime. Share your results so we can learn from one another.

CAUSE NO. 1234567
UNITED STATES [STATE OF TEXAS]
V.
JANE DOE
OR EX PARTE JANE DOE

1. A person, including non-citizens, has a right to carry firearms for self-defense in public or at home. See *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. Chicago*, 561 U.S. 742 (2010). In its

²⁸ See 424 S.W.3d 10 (Tex. Crim. App. 2013).

recent decision under *New York State Rifle and Pistol Assoc. v. Bruen*, 142 S.Ct. 2111 (2022) the Supreme Court invalidated any intrusion into the individual right to carry a weapon in public for self-defense unless it is firmly rooted in the history of our nation. It specifically rejected any other analysis in deciding whether a statute or regulation meets the standard of protection of this right.

2. [Motion to Quash option] There is no allegation/evidence of criminal activity in this matter, simply possession. [Insert factual description if required.]²⁹
3. Jane Doe was charged with [insert statute here under TPC or 18 US 944 etc]. Under *Bruen*, this statute is facially unconstitutional as it prohibits the lawful act of carrying a firearm in self-defense, and permits regulation of an act wholly authorized by the United States Constitution. See Amend. II, US Const. See also Texas Constitution, Article I, Sec 23. Therefore this is unconstitutional on its face. There is no balancing or step by step analysis which can save it.
4. The Supreme Court stated in *Bruen*: “*Despite the popularity of this two-step approach, it is one step too many. Step one of the predominant frame work is broadly consistent with Heller, which demands a test rooted in the Second Amendment’s text, as informed by history. But Heller and McDonald do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.*” Applying this analysis to the statute in question, it cannot prohibit a person from carrying in public so long as that conduct itself is lawful. Ms. Doe was simply traveling to her family’s home in a nearby city. As a person undertaking a lawful activity, and not using the weapon for anything except self-defense, the State of Texas/United States may not charge her with any crime relating to her exercise of her personal right to self-protection under the Second Amendment. See *Bruen*, above.

There is nothing in the Second Amendment or the relevant Texas sections which authorizes the legislature or Congress to intrude on such a vital personal right, even for felons/former criminals/people carrying prohibited weapons. The historical basis for such intrusion is neither established nor permitted. [You can feel free to wax poetical here on the history of Texas’ long tradition of using firearms, but just raise the point and let the OAG or DAO fight you about it in their briefing] It is not the status of a person or their choice of weapon; it is the act

²⁹ Note: enhancements for use of a firearm during a crime will still probably survive due to 18 U.S.C. § 1951 (the “Hobbes Act”) and in the case of use of a firearm to make a crime “aggravated.”

of self-protection that matters. The simple act of having a weapon “unlawfully” is no longer enough as persons under the Second Amendment in *Bruen* have exactly that historical freedom.

As the intent of the founders and the subsequent history do not allow for any other interpretation of this right, and since the Second Amendment is a personal right of self-defense and always has been, this law is retroactive to all prior convictions and all matters in the past. It is held applicable by the states under *Bruen* and the Fourteenth Amendment.

For these reasons, this Court should grant relief/grant this application/motion, and dismiss this charge/issue the writ and order Doe freed.

Respectfully submitted,
/s/ Owadda Lawyer, Esq.
[signature block]
[Certificate of Service/compliance]
[Order attached]

Update: On February 2 in *United States v. Rahimi*, the Fifth Circuit held that in light of *Bruen*, Title 18 U.S.C. § 922(g)(8) prohibiting possession of a firearm while under domestic violence restraining order, violates the Second Amendment. The Court will also hear oral argument this month in *United States v. Quiroz* regarding whether 922(n), receiving a firearm while under felony indictment, remains constitutional. On February 3, in *United States v. Jared Michael Harrison*, the United States District Court for the Western District of Oklahoma held that U.S.C. § 922(g)(3), possessing a firearm with knowledge that the defendant was an unlawful user of marijuana, facially unconstitutional.

Patrick McCann has been in solo practice in Houston since 1994. He is a former President of the Harris County Criminal Lawyers Association, a former President of the Fort Bend County Criminal Defense Attorneys Association, a former legislative liaison for both organizations, former Chair of the Fort Bend Mental Health Defenders Advisory Board, and a member of the Governor’s Specialty Courts Advisory Council. He was a founding team member of both the Harris County and Fort Bend County Veterans Courts. He is certified to handle death penalty cases at trial, on appeal, and in state and federal habeas cases. He is a retired Navy officer with service in Europe, at Central Command, in Bosnia, and GTMO, Cuba. He can be reached at 713-444-2826 any time.

Todd Greenwood is a former print journalist and sergeant of Marines. Offices in Wichita County at 900 Eighth Street - Suite 716; Wichita Falls, TX 76301, Phone: (940) 689-0707; toddgreenwood@lawyer.com

Shout-Outs!

Fantastic work by Keith Hampton on a Not Guilty in a solicitation of a minor case. Hampton defended an adult coach accused of attempting to solicit sex from his teenaged student. The State proved the coach “groomed” his student with gifts and attention before telling him that he’d engage in sex. Defendant admitted it all on a “controlled call” and during his videotaped interrogation. The coach was only joking, not attempting to solicit sex, as a series of convincing defense witnesses established. **Congratulations!**

Kudos to Thad Davidson! In Rusk County, he resolved what began as a felony murder case in November 2020. The 29-year-old defendant had been at a family social get-together and had consumed what those at the get-together believed to be a not intoxicating amount of wine. On his way home, the defendant drove at or near triple digit speeds on a twisting curvy hilly road. On wet roads, the defendant lost control going around a curve and crashed into a car containing a couple who had been married for 35 years. The wife of that couple died of injuries. The police charged the defendant, and the State indicted him, with felony evading, felony murder, and felony intoxication assault. Davidson was his third attorney. The defendant, who had no prior record, eventually agreed a trial was not in his best interests. He did an open plea and, after a long, difficult and painful hearing involving many punishment witnesses for both sides, the judge sentenced the defendant to 15 years on the intoxicated manslaughter case and 8 years on the intoxicated assault case, concurrent. **Amazing job!**

Shoutout to Chuck Lanehart and Fred Stangl, third-chair attorney Audrey Allen, trial consultant/mitigator Lindsey Craig, and TTUSL students Megan Gower and Travis Wiebold! In a high-profile Lubbock manslaughter case alleging their client drove drunk the wrong way on a major highway causing a head-on collision that killed another driver, age 18, they convinced a jury to assess a ten-year probated sentence for their client in early February. **Way to go!**

Congrats to Rick Oliver, with help from Trinidad Zamora and Christine Cockrell. He tried a murder case in Harris County. His client had been home asleep when his girlfriend called him from a house

party claiming one of the partygoers tried to sexually assault her. The client grabbed a shotgun and a Glock and rushed to the party. Seconds after his arrival, there was an altercation between the defendant and four partygoers. During the fracas, three shots were fired; one of them killing the complainant. The State alleged the defendant intended to murder the creep that tried to assault his girlfriend, but by transferred intent, killed the complainant. Rick argued it was most likely an accidental discharge, based on the evidence. The jury was also charged on self-defense, alternatively. The only pretrial plea bargain offer made by the State in this case was 60 TDC. After the jury convicted Rick’s client, the State asked, “with the consent of the family,” for 40 TDC. After an emotional punishment hearing, the court sentenced his client to 12 TDC. **Amazing!**

Great work by Ryan Deck and co-counsel Russ Hunt on a NOT GUILTY on a murder charge in Williamson County. Their client was a wife who shot her abusive and controlling husband. At trial, the defense argued that their client pointed the gun in self defense, but did not intend the gun to fire. The jury was asked to consider if she was guilty of murder, manslaughter or not guilty by way of self-defense. The jury acquitted their client of all charges and she walked out of the courtroom. **Outstanding!**

Stellar work by Jeff Haas and Jeff Herrington! They won their capital murder trial in Cherokee County yesterday in *State v. Cameron Shead*. In this trial, Shead was charged with capital murder and aggravated kidnapping of Tyress Gipson from 2020. The evidence of trial was weak -- no body (of victim), no murder weapon, no forensics, and ultimately law enforcement even testified that there was no physical evidence connecting Mr. Haas and Mr. Herrington’s client to the alleged murder of Gipson. The Defense highlighted the lack of evidence and the inconsistent accounts of the State’s only cooperating witness. The jury deliberated three hours and returned a NG on the indicted charges and lessers. **Fantastic job!**

Excellence achieved by David Guinn & Reagan Wynn! They secured a Not Guilty verdict in a theft trial of a police officer in the 30th District Court of Wichita County. They also go a dismissal of 1st Degree Money Laundering. **Well done!**



Have you or someone you know:

- Won an evidentiary hearing, trial, or appeal;
- Helped make improvements in the criminal justice system;
- Received an award relating to criminal defense; or
- Gone above & beyond for exemplary service to criminal defense?

Send in a few sentences to athomas@tcdla.com for a chance to be recognized in print!



RECENT TEXAS EXONERATION: MALLORY NICHOLSON

GARY A. UDASHEN

On June 2, 2022, Mallory Vernon Nicholson was officially declared “actually innocent” of two convictions for aggravated sexual abuse and one for burglary based on a 1982 case from Dallas County. Mr. Nicholson’s exoneration followed an exhaustive investigation of his case by the Innocence Project, in collaboration with the Dallas County District Attorney’s Office’s Conviction Integrity Unit.

Background of Case

On June 12, 1987, a nine-year old boy and his seven-year-old cousin were playing outside when they were approached by a black male who offered them five dollars to help him enter a nearby apartment. Once inside the apartment, the black male took a television, clock radio, articles of clothing, and meat from the refrigerator and put the items in a plastic bag. He made several trips outside the apartment carrying these items.

After removing all the items, the black male returned to the apartment and sexually assaulted both boys. The boys later escaped and reported the assault to their aunt, who called the police.

Dallas police patrol officers responded and took the boys to Parkland Hospital for sexual assault exams, where they reported that their assailant was a 14-year-old neighbor who went by the nickname of “CoCo.” The initial police reports listed “CoCo” as the suspect. Many years later, “CoCo” was, in fact, confirmed to be a real person who the District Attorney’s Office determined was killed in 1989.

During the investigation, police investigators were with one of the boys and his mother going to the crime scene. On the way, while riding in the patrol car, the boy reportedly saw a man later identified as Mallory Nicholson sitting on a porch talking to a friend. The boy said that Mr. Nicholson was the perpetrator. Mr. Nicholson was 35 years old at the time.

The police placed Mr. Nicholson’s photo in a six-photo lineup and presented this to the other young victim. The other victim did not identify Mr. Nicholson as the perpetrator. After the photo lineup, the second boy’s mother called the detective and said the boy had recognized Mr. Nicholson as the perpetrator, but was afraid to identify him. Mr.

Nicholson was arrested, tried and convicted based on this “eyewitness” testimony, despite there being no other evidence to connect him to the crime.

At trial, Mr. Nicholson presented evidence that he was at his wife’s funeral in Waxahachie at the time of the offense. Nevertheless, the jury convicted him, and he was sentenced to 55 years in prison. Significantly, the defense presented no evidence concerning the victims’ initial statements that the person who committed these offenses was a 14-year-old young man named “CoCo.”

Suppression of Exculpatory Evidence

Beginning in 2019, the Innocence Project and the Dallas County District Attorney’s Office’s Conviction Integrity Unit began their investigation into the case. This led to the discovery of the following suppressed exculpatory evidence:

1. Five police reports that identified 14-year-old “CoCo” as the person who assaulted the two boys were not revealed to the defense.
2. The Parkland Hospital records where the assailant was identified as a 14-year-old young man named “CoCo” was not revealed to the defense.
3. Evidence that one of the victims said the assailant had “very short hair” was also not revealed to the defense. Mr. Nicholson had an Afro, both at the time of trial and at the time he was identified as the perpetrator of the offense.

This information was part of the trial prosecutor’s file. Although defense counsel was deceased at the time of this reinvestigation, nothing in the record indicated that this information was provided to defense counsel at trial. Moreover, the fact that defense counsel pursued a defense of misidentification, yet no evidence was presented concerning “CoCo,” was found to be strong proof that defense counsel was not informed that the victims had initially identified “CoCo” as their assailant.

Ultimately, the Dallas County District Attorney’s Office entered into agreed findings with Mr. Nicholson’s attorneys that Mr. Nicholson’s due process rights had been violated based on the State’s suppression of exculpatory evidence. The trial court judge signed the agreed findings and recommended that these convictions be vacated. On November 10, 2021, the Court of Criminal Appeals granted Mr. Nicholson habeas relief and the three convictions were vacated.

On May 26, 2022, Dallas County District Attorney John Cruzot, CIU Chief Cynthia Garza, and CIU prosecutor Holly Dozier, filed the “State’s Motion to Dismiss Indictment,” on all three cases. In this motion, the District Attorney’s Office wrote:

“Over a period of several years, the Dallas County District Attorney’s Office’s Conviction Integrity Unit (CIU) re-investigated this case, working collaboratively with the Innocence Project and the Innocence Project of Texas.

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- Applicants must be a member of the Criminal Justice Section of the SBOT, or, in the alternative, may join when they apply for the scholarship.

Deadline for applications is Friday, April 7, 2023, and recipients will be notified by April 15, 2023. Questions? Email Dwight McDonald at Dwight.Mcdonald@ttu.edu.

This re-investigation yielded new evidence indicating that Mallory Nicholson is actually innocent in this case.

Most notably, Nicholson did not meet the original description of the assailant provided to the police and medical personnel on the evening of the offense. Specifically, the original description of the assailant was a 14-year-old, black male who went by the nickname “CoCo.” By stark contrast, Nicholson was 35 years old at the time of trial.

The CIU discovered that CoCo was a juvenile, J.M., who was a known burglar to Dallas police officers who worked in the area. J.M. lived in the apartments directly across the street from the offense location at that time. According to the facts of the offense at issue, the assailant reportedly took items from the apartment, including raw and cooked meat, clothing, a television set, and a clock radio. In order to transport the items out of the apartment, the assailant took multiple trips in and out of the apartment, taking different items during each trip. The close proximity of the offense location to J.M.’s apartment across the street would have been very convenient for taking multiple trips in and out of the apartment transporting the stolen items.

...
Additionally, patrol officers who listed J.M. as the original suspect were not called to testify at Nicholson’s trial and no evidence was presented to show that J.M. was suspected prior to Nicholson’s arrest. To this end, during the re-investigation, the lead detective acknowledged that, given that eyewitness identification was believed to be the gold standard at the time, it is unlikely she followed up on CoCo as a suspect. Similarly, the lead trial prosecutor acknowledged that since this case hinged on eyewitness identification, it is likely that information related to CoCo was ignored or not recognized as Brady evidence because the children identified Nicholson as the perpetrator of the offenses.”

On June 2, 2022, a hearing was held in Dallas County’s Criminal District Court No. 7 where the State presented its motions to dismiss the indictments.

Mr. Nicholson appeared in court with his attorneys, Adnan Sultan from the national Innocence Project and Gary A. Udashen from the Innocence Project of Texas. The trial court signed the orders dismissing the indictments and declared Mr. Nicholson to be actually innocent.

Lessons Learned

Mallory Nicholson was wrongfully convicted for the following reasons:

1. The prosecution suppressed exculpatory evidence. If the jury had heard that the two victims, initially and immediately, stated that the perpetrator of this offense was a 14-year-old young man they knew named “CoCo,” Mr. Nicholson would not have been convicted. The suppressed exculpatory evidence was found in the prosecutor’s trial file after this file was reviewed by the CIU and the Innocence Project attorneys.
2. The eyewitness testimony presented at trial of the two victims identifying the 35-year-old Nicholson as their assailant was clearly incorrect. Eyewitness testimony is notoriously unreliable as demonstrated by the numerous DNA exonerations where the initial conviction was based on eyewitness testimony. In fact, mistaken eyewitness identification contributed to approximately 69% of the more than 375 wrongful convictions in the United States overturned by post-conviction DNA evidence. The passage of 40 years makes a precise determination of the events that led to this faulty eyewitness testimony difficult. However, as District Attorney Creuzot stated at Mr. Nicholson’s exoneration hearing, it is impossible to reconcile the statements of the victims that their attacker was 14-year-old “CoCo” with a later claim that 35-year-old Mallory Nicholson was their attacker.
3. Tunnel vision and a poor investigation by the police and prosecutors also played a significant role in this case. Despite the fact that the victims gave the police the name of their actual attacker, the police chose to ignore that and pursue a case against Mr. Nicholson. The prosecutors also ignored the fact that their own files included the identity of the true perpetrator and instead kept their focus where the police had directed it: on Mallory Nicholson.
4. Mr. Nicholson was tried before an all-white jury (which was standard practice in Dallas County

in 1982). The jury rejected the testimony from his five alibi witnesses, all of whom were black. Studies have shown that all-white juries convict black defendants at higher rates than white defendants and have been shown to disregard the testimony of truthful black defense witnesses. Moreover, an inordinately high percentage of wrongful convictions and ultimate exonerations are of black men. In fact, seven of the last nine exonerations in Texas are of wrongfully convicted black men.

As found by the District Attorney and the court, Mallory Nicholson was an innocent man who spent over 20 years in prison, and another 20 years on parole and registered as a sex offender. Although justice for Mallory Nicholson was slow and late, nevertheless, it finally was achieved.



This story of Mallory Nicholson’s exoneration is the first of what will be a recurring feature in the Voice. Mike Ware, Executive Director of the Innocence Project of Texas, Allison Clayton, IPTX Deputy Executive Director, and Gary Udashen, IPTX board member and former board president,

will write periodic articles concerning particularly noteworthy exonerations from around the State of Texas. For purposes of these stories, the term “actual innocence” will follow the use of that term in the Texas statute providing compensation for the wrongfully imprisoned. (§103.001, Civil Practice & Remedies Code). Under that statute, wrongfully imprisoned persons are entitled to receive state compensation if they have received a pardon based on innocence, they have been granted writ relief by the Court of Criminal Appeals based on actual innocence, or they have been granted writ relief by the Court of Criminal Appeals on some other basis and the State’s Attorney dismisses the charge on the basis that no credible evidence exists that inculpates the defendant and that the State’s Attorney believes the defendant to be actually innocent.



Gary Udashen is a senior attorney with Udashen/Anton in Dallas. He is board certified in criminal law and criminal appellate law. Udashen is also a board member of the Innocence Project of Texas and served for nine years as board president.



TCDLA STAFF SPOTLIGHT
Rick Wardroup
 Curriculum Director / Staff Attorney
Celebrating 12 Years with TCDLA!

Native State: Colorado **Zodiac Sign:** Aquarius **Favorite Color:** Blue
Pets: 1 Dog, Lola | 1 Cat, Jack
Hobbies: Cycling & Reading
Fun Fact: He once intended to be a doctor and has a degree in chemistry.

Rick Wardroup was born in Denver, Colorado in the dark ages. He attended undergraduate and law school at Texas Tech University and never moved away from Lubbock. He became involved in capital litigation in 1983 and has worked on cases at the trial level, on direct appeal, state habeas and federal habeas. Rick’s jobs at TCDLA allow him to organize trainings and teach in several areas which are close to his heart, capital litigation, forensics, development of Public Defenders and lawyer wellness. He is involved in the recovery community in Lubbock and with the Texas Lawyers Assistance Program. He has been happily married to his third-and-final-wife, Karla for over 23 years. He is a proud father of two daughters and a son.



The Dos and Don'ts of DWI Deferred

DOUGLAS HUFF AND SORSHA HUFF

Deferred on DWI's isn't brand new anymore, but the nondisclosure statute has only gotten more confusing. This article takes a look at what it takes to get DWI deferred, and whether the effort is worth it after all.

THE STATUTE: Art. 42A.102 ELIGIBILITY FOR DEFERRED ADJUDICATION COMMUNITY SUPERVISION.

- b. In all other cases, the judge may grant deferred adjudication community supervision unless:
 1. the defendant is charged with an offense:
 - A. under Section 20A.02 [Trafficking of Persons], 20A.03 [Continuous Trafficking of Persons], 49.045 [Driving While Intoxicated with Child Passenger], 49.05 [Flying While Intoxicated], 49.065 [Assembling or Operating an Amusement Park Ride While Intoxicated], 49.07 [Intoxication Assault], or 49.08 [Intoxication Manslaughter], Penal Code;
 - B. under Section 49.04 [Driving While Intoxicated] or 49.06 [Boating While Intoxicated], Penal Code, and, at the time of the offense:
 - i. the defendant held a commercial driver's license or a commercial learner's permit; or
 - ii. the defendant's alcohol concentration, as defined by Section 49.01, Penal Code, was 0.15 or more; [or]
 - C. for which punishment may be increased under Section 49.09 [Enhanced Offenses and Penalties], Penal Code;

DISCUSSION

This statute essentially answers the question, "Is my client's DWI eligible for deferred?" by defining which DWI's are *not* eligible for deferred. Flipped from the negative to the positive, it might be clearer to summarize the statute this way:

The judge may grant deferred adjudication community supervision to defendants charged with DWI (or BWI) who: (1) did not have a CDL or commercial learner's permit at the time of the offense; (2) did not have a BAC of 0.15 or more at the time of the offense; and (3) cannot be subject to the increased punishment outlined in Texas Penal Code § 49.09.

Of course, there are exceptions to this rule. First, we already know it is possible to do deferred on a DWI that started with a 0.15 allegation because many of us have negotiated for this outcome. Typically, this path requires either a motion to strike the 0.15 language, or a dismissal and re-filing, which judges bless all the time. (This result makes sense in the context of nondisclosures as well: typically, the State will not oppose a qualifying nondisclosure if the 0.15 finding is stricken.)

THE STATUTE: NONDISCLOSURE

Why all the fuss? Most clients certainly like the idea of their case not ending in a final conviction upon completion. This alone is often a large reason why a client might prefer deferred adjudication. But the main reason a client would appreciate that result is out of concern for their record.

HB3582 provides a whole new type of nondisclosure, found in Texas Government Code § 411.0726. In addition to the baseline requirements for any nondisclosure (i.e., client cannot have been placed on

deferred for or convicted of anything above a fine-only traffic offense during the period of probation plus any applicable waiting period, and client cannot have been placed on deferred for or convicted of any prohibited offense), here are the basic qualifications for a DWI deferred-nondisclosure:

1. Client must have been placed on deferred for DWI or BWI (other than a DWI 0.15);
2. Judge cannot have made an affirmative finding that nondisclosure would not be in the best interest of justice, and there must be a determination that nondisclosure is in the best interest of justice;
3. Client must have received a discharge and dismissal;
4. Client must never have been previously convicted of or placed on deferred for anything other than a fine-only traffic offense; and
5. State must not successfully raise an affirmative defense (to the granting of the nondisclosure) that client was involved in an accident involving another person.

The primary benefit of DWI deferred is that the client must wait only two years from the end of their probation to apply for nondisclosure, even if they never got an ignition interlock device (by a favorable substance abuse evaluation and the judge's agreement under article 42A.408(e-1) and (e-2), for example).

Compare this list of requirements to the nondisclosure statute for DWI's resulting in straight probation, Tex. Gov't Code § 411.0731:

1. Client must have been placed on straight probation (including a term of confinement as a condition of probation) for DWI, other than a DWI 0.15.
2. There must be a determination that nondisclosure is in the best interest of justice.
3. Client must have completed probation.
4. Client must never have been previously convicted of or placed on deferred for anything other than a fine-only traffic offense.
5. State must not successfully raise an affirmative defense that client was involved in an accident involving another person.
6. Client must wait two years from the end of probation to apply if they maintained an ignition interlock device as a condition of probation for at least six months; five years if not.

Note that these requirements are essentially the same for a DWI resulting in a final conviction without straight probation (including situations wherein the

straight probation was revoked, per Tex. Gov't Code § 411.0736), though the waiting period changes to three years if an interlock was a condition of the sentence. And interestingly, there is no requirement that the judge *not* make an affirmative finding that a nondisclosure would not be in the interest of justice, as with a DWI deferred nondisclosure.

So, what does a DWI deferred nondisclosure get you, besides not-a-final-conviction? Well, the same thing that a DWI straight probation (final conviction) nondisclosure does: an order of nondisclosure. However, there might be an opportunity here. Remember that the DWI deferred nondisclosure statute does not have the same variable waiting periods that the final conviction statutes do. All otherwise-eligible clients who complete deferred can apply for nondisclosure after two years from the end of their probation, *regardless of whether they had a monitoring device at all*. So for clients pleading to deferred, get substance abuse evaluations done early, then bring them to the plea (provided they say good things!) with a printed-out copy of the exception statute, found here:

Art. 42A.408. USE OF IGNITION INTERLOCK DEVICE.

(e-1) Except as provided by Subsection (e-2), a judge granting deferred adjudication community supervision to a defendant for an offense under Section 49.04 or 49.06, Penal Code, shall require that the defendant as a condition of community supervision have an ignition interlock device installed on the motor vehicle owned by the defendant or on the vehicle most regularly driven by the defendant and that the defendant not operate any motor vehicle that is not equipped with that device.

....

(e-2) A judge may waive the ignition interlock requirement under Subsection (e-1) for a defendant if, based on a controlled substance and alcohol evaluation of the defendant, the judge determines and enters in the record that restricting the defendant to the use of an ignition interlock is not necessary for the safety of the community.

Alternatively, suppose a prosecutor has offered deferred, but your client blanches at the thought of having any kind of monitoring device for any period of time, and you know your judge will require an interlock despite the above exception. If your client is willing and understands the difference, counter-offering your client's willingness to do straight probation on a class

B with no device can be an effective tool in certain situations. After all, a nondisclosure is a nondisclosure, whether it follows a final conviction or not.

This is not a critique on DWI deferred. There are certainly arguments for why it provides stronger protection against the ever-absurd “superfines.” However, from a record standpoint, we may be prizing this result more than it deserves. Perhaps instead, we point out to prosecutors that DWI deferred isn’t all it’s cracked up to be. If you’re looking at an offer of 12 months of probation with interlock versus 18 months deferred, there is no practical difference for someone’s record eligibility, all other things held equal. So why not make your client’s life easier and opt for the shorter straight probation? Deferred may better serve us as a red flag than a real favor.



Douglas Huff is the Senior Trial Attorney in North Texas for Hamilton Grant Attorneys at Law based in Dallas, Texas. He currently represents individuals charged with various misdemeanors and felonies ranging from DWI, theft, assault, sexual assault, murder, and others. He can be reached at Doug@HGTexas.com or 972-943-8500.



Sorsha Huff is an associate attorney at Deandra Grant Law. She defends all kinds of criminal cases, from investigation through trial. She is the lead attorney for expunctions and nondisclosures, and recently helped establish the immigration department where she writes advisories and provides additional services for non-citizens. She can be reached at sorsha@defenseisready.com or 972-943-8500.

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In Memoriam Jeff Blackburn

1957 - 2023

Remembering Jeff Blackburn - by Robb Fickman

In the Summer of 1980, I was 23 years old and volunteering at the ACLU when I met Jeff Blackburn. Jeff and I immediately hit it off. We were both from West Texas and we were both progressives. That was the beginning of a friendship that would last 43 years. Jeff was my oldest and closest friend.

Jeff and I were roommates in law school at UH. We had a lot of fun. Jeff and I were both young idealists. We wanted to change the world. Most of our classmates seemed more interested in money. Jeff and I talked endlessly about abusive police and the racist criminal justice system. It only recently dawned on me that we never talked about money. We both wanted to be criminal defense lawyers. That is all we wanted to be.

At UH, Jeff and I volunteered to serve as Student Defenders. Our "job" was to defend college students accused of violations of the academic code. In our first and last hearing, Jeff asked the honor court, which was right out of "Animal House", if he could ask them a few questions. Jeff then proceeded to cross examine each member of the honor court to show that they had not been formed according to UH rules. They got mad and declared, "We are not here to be cross-examined by you." Jeff responded, "You are a Nullity". I muttered obscenities before they threw us out. We referred the students to a civil rights lawyer who threatened UH with a federal lawsuit and the students were saved.

I believe it was the Southern Poverty Law Center that came to UH looking for law students who would serve federal subpoenas on violent Klan members. Jeff and I quickly volunteered. We served the Klan members. We tricked them by folding up the subpoena and hiding it behind the check. We would knock on the door and hold up the check. We would say "Are you Joe Johnson? I have a check for you." When they reached out for the check, we would put the check and the subpoena in their hand. Jeff and I would then run to the car shouting, "You have been served!!" Somehow we did not get beat up or shot.

After we were licensed, Jeff returned to his home in Amarillo. Over the next four decades we stayed in good touch. We were both activists in our own communities. It was never a competition. We always encouraged each other. Jeff's accomplishments in the Tulia case, the Cole case and with the Innocence Project were extraordinary. As Jeff was my friend, I was always proud, and never surprised by what he managed to do. Jeff was driven by an unyielding passion for justice. He would not stop until he achieved his goal. Jeff obtained pardons and exonerations for many people and he changed the law to help make our system more just.



One Last Call - by Nicole DeBorde Hochglaube

Two weeks ago Thursday, I had been given the gift of one last phone call with my friend, friend to us all at TCDLA really, Jeff Blackburn. For as long as I can remember, Jeff has answered Strike Force calls no matter where he was or what he was doing. He was willing to drop what he was doing to help a fellow criminal defense lawyer in need even if that meant driving for hours to be where he needed to be to help. He was always willing to brainstorm over the latest conundrum to help our brothers and sisters battling it out for their clients do their best even when confronted with threats against their own freedoms. Jeff was truly a lawyer's lawyer. When I heard the news that Jeff was sick, I was saddened at the prospect of losing a friend, colleague and mentor. Jeff, however, seemed more at peace each of the last few times I spoke with him. Jeff told he only had weeks left but took the time to ease the burden of the loss he knew his friends would feel by sharing his peace. As the weeks went by after hearing the news from Jeff, I continued to think about Jeff's constant support of us all and the peace he seemed to have found despite his prognosis. It was with this in mind that I thought I would check in with him to see if he was up to sharing some of his wisdom and advice about arriving at this peace with us. Jani Maselli Wood had invited me to speak at a seminar about why we do what we do, and I thought my friend Jeff just might have the answer. He did.

I reached out to him by text and asked if he would be up to or even interested up for a visit by phone to share any thoughts about why we do what we do, so that I could share those thoughts with you. No surprise, Jeff texted back and asked if I was free in an hour. I made sure I was. I had the privilege of spending over an hour talking with Jeff and listening to the wisdom that maybe cannot be tapped until a person is confronted with the realities of running out of time. Jeff would pass away only days after our phone call. I cannot do justice to what he shared, but I promised

In Memoriam Jeff Blackburn

(continued)



him I would pass along what I could. The day after we talked, I had the honor of sharing his thoughts on life, our practices and why we choose this path with the people at the seminar pictured here with this article. I was able to share this picture with Jeff before he died and, as always, he responded with grace and gratitude and wishes for us all to continue the fight for what is right.

So, why do we do what we do? It turns out that Jeff had done quite a bit of thinking on this topic. It is also no real revelation that we are all actually running out of time, we just are not confronted with this in the clear terms Jeff was, but Jeff thought it was worth repeating. And, true to character, even sent a paper he said could be shared with TCDLA. Can you imagine? Sharing a paper in the last days, knowing full well how limited time truly was, is exactly the way Jeff lived. Helping other lawyers sort through the issues not only presented by our cases but of life, stress, value and purpose right to the end. The paper has been passed on for TCDLA to include in resources for us all. There is so much more to say than can be written here in time for this note to reach the Voice by publication deadlines, but the answer is this: We do this because we were made this way. Jeff studied the ways of the Samurai and warrior culture for years and employed many of the strategies of those teachings in not only his practice but his life. He felt that some people are meant to serve as warriors. There are warriors among us who join the military and give their lives

in that way for the same principles. Criminal defense lawyers are the same in the way they see the world and the problems to be solved. These are the people who step in front of the bullies on the playground as children to stop the bully from tormenting someone she does not even know. These are the people who sign up to fight battles we are told in advance we cannot or should not win. I asked him why it made sense, then, to go to law school, pay all that money to get a degree to live a life involving near impossible and often stressful battles for often little monetary reward? Again, he explained, because we can either do what we were meant to do because of who we are, or we and deny it and face the consequences.

As Jeff ran out of time, he met other people who were either in hospice or who had family members in hospice. There he encountered dying men who took the path of denying what they were intended to do in the name of what is often attractive – plenty of money to tally a goal or to live life in the gaps between earning that money and trying to do something meaningful with the remaining time in between. One man he met embodied the problem. This man had scored his victories in his law practice finding a technical problem with a contract to save his employer of the moment millions, and now he was out of time. The time when he would spend that money doing things he cared about would never come. He was full of anger and out of options. Jeff, on the other hand, was at peace, full of gratitude for the friends he made along the way, his family and the work he had done for what he cared about. He was grateful for you, his fellow travelers on this path. He wanted to be clear it is not the money that is the problem. It is the turning away from what you were meant to do thinking you might earn more that way that is the problem. Making money doing something you love is truly enriching, making the same money or even substantially more doing something that means nothing to who you are is debilitating and destructive. We do not do what we do for the adoration of others either. Jeff knew, at the surface, what we do appears to go against the grain of what society often views as popular or even dignified. He also knew that at its core, what we do as criminal defense lawyers – standing up for the accused and justice and trying to make this system generally better – is the purest and most noble of choices. It may be painful and stressful and sometimes the futility can make it feel like a confounding choice. But at the end, Jeff was able to look back down the path he had traveled to give us, his fellow journeymen a scouting of what lies ahead. I so appreciated the time he took to share with us what our collective friendship in this group of kindred spirits meant to him, and to call out to all of us where the pitfalls and danger zones lie in our path ahead as he neared his view from the top. Thank you, Jeff, for taking one last Strike Force call to help this friend and to help us all. We love and miss you and are filled with gratitude for all that you have shared with us all these years.



Casting a wide net: Immigration's Definition of a "Conviction"

BRIAN EHRENBERG

Countless times I have heard judges say accepting and successfully completing deferred adjudication will not result in a conviction. However, when your client is not a US citizen, that is simply not true. That is why it is our duty as criminal defense attorneys to make sure our clients fully understand the consequences they face before they sign any paperwork.

The Immigration and Nationality Act defines a conviction as "a formal judgement of guilt...entered by a court" or "if adjudication of guilt has been withheld, where ... a judge or jury has found the alien guilty, or the alien has entered a plea of guilty or nolo contendere, or has admitted sufficient facts to warrant a finding of guilt, and ... the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." See INA § 101(a)(48)(A), 8 USC § 1101(a)(48)(A). The Board of Immigration Appeals has used this definition to make a quick and easy test to see if the noncitizen has a criminal conviction, which is:

(a finding or plea of guilt) + (any imposition of probation, fine, or jail) = conviction.

See *Matter of Cabrera*, 24 I&N Dec. 459, 460–62 (BIA 2008), *Matter of Mohamed*, 27 I&N Dec. 92 (BIA 2017).

Thus, even if a charge is dismissed after successful

completion of deferred adjudication, immigration courts can still find that your client was convicted of the charged offense. *Id.*

This can have significant consequences for your client depending on their particular circumstances and the charge itself. For example, if you have a client that is a Deferred Action for Childhood Arrivals (DACA) recipient and they have successfully completed deferred adjudication for a DWI charge, your client will still have a DWI conviction for immigration purposes and could be barred from renewing DACA. See *Understanding the Criminal Bars to the Deferred Action Policy for Childhood Arrivals*, Immigrant Legal Resource Center, (Oct. 2012), available at: https://www.ilrc.org/sites/default/files/documents/ilrc-understanding_criminal_bars_to_deferred_action.pdf.

So, what are some options you can pursue if you have a noncitizen client that does not want to risk jail time and the ICE detainer that comes along with it? One option is to fight for a conditional dismissal. You can argue that it is the same concept as deferred adjudication in the sense that both end in a dismissal after the defendant completes some type of rehabilitative actions. While a conditional dismissal could fulfill the imposition of punishment portion of the BIA equation, your client would not be pleading guilty/no contest,

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nor admitting the alleged conduct, and there would not be a finding of guilt with a conditional dismissal. See *Matter of Mohamed*, 27 I&N Dec. 92 (BIA 2017). Thus, there would be no conviction for both state and immigration purposes. But, be warned: Immigration courts can still deem a dismissed offense a conviction if the court record contains admission or stipulation to facts or evidence sufficient to warrant a finding of guilt. See *id.* So, be sure to double check what is written in the dismissal orders and diversion contracts themselves where applicable.

Another option may be to plea to an immigration neutral offense. This option obviously would still result in a conviction, but the offense will not be one that will result in the revocation of their status. There are so many counties in Texas and most have their own way of dealing with pre-trial diversion and community supervision, which is outside the scope of this article. However, you can use what you know now in regards to immigration's definition of a "conviction" and what you know about your own county to help negotiate a plea that will not add a bar to your noncitizen client's removal relief. For example, while obstruction of a

highway and a DWI first are both Class B Misdemeanors and can carry the same punishment or probation conditions, obstruction of a highway is not listed as a "significant misdemeanor" and will not automatically be considered a "criminal bar" for purposes of DACA. See *Understanding the Criminal Bars to the Deferred Action Policy for Childhood Arrivals*, Immigrant Legal Resource Center, (Oct. 2012), available at: https://www.ilrc.org/sites/default/files/documents/ilrc-understanding_criminal_bars_to_deferred_action.pdf. Always remember, removal from the United States is a collateral consequence like no other. It is equivalent to banishment and may be a more important penalty than jail time to a noncitizen client. See *Padilla v. Kentucky*, 559 U.S. 356,368 (2010). Thus, it is important to make sure we as criminal defense attorneys are fighting for immigration neutral consequences for our noncitizen clients and fully understanding the potential immigration consequences to their criminal cases.



Brian Ehrenberg is the Associate Director of the Center for Criminal Justice at the Earl Carl Institute. He and his wife, Mariana Ehrenberg, also manage Valdes Ehrenberg, Pllc, an immigration law firm with offices in Dallas, Kerrville, and Houston. He is member of the Crimmigration Committee for the Texas Criminal Defense Lawyers Association. Most importantly he is the father of two amazing boys. He can be reached at behrenberg@veattorneys.com and 214-915-8835.



Texas Criminal Defense Lawyers Association

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The committee is designed to focus on specific related issues that MACs face. Public Defenders may join the committee as some items overlap. MAC committee members can be chiefs, attorneys employed by MAC or those who are contract lawyers for the MAC.

Email mschank@tcdla.com if you'd like to join!



Texas Sex Offender - Travel Within the U.S. * Headed to Las Vegas

"TIM" A MEMBER OF TEXAS VOICES

INTRODUCTION BY BILL HABERN

The article below is a reminder about the advice we give whenever a client of ours is required to register as a sex offender and how that requirement affects their lives even after our representation comes to a close. I believe that each of us should always advise our clients that as a registered sex offender there are limitations imposed on you traveling or visiting other states in the U.S. or foreign countries. As to foreign countries, there are those that will not allow you to enter at all. Be sure and check before you plan a trip to any foreign country. As for travel to other American states, be sure that you know what the period of time you are allowed for registration as a visitor in that state. Also, be aware of additional imitations that state imposes on visiting registered sex offenders.

Bill Habern

Every state has **different** laws about how long a person who is required to register can VISIT before they will be required to register in that state. In Texas, a registered person can visit for up to 7 days without having to register. That is not the case in many other states. In fact, Florida (whose registration requirements for "visitors" are somewhat ambiguous in the statutes) requires, according to the [FDLE website](#), (#7) registration for

registered people, be they registered as offenders or as predators, within 48 hours of entering the state. The most important thing to consider when visiting Florida is that once you have completed your registration requirement, your information will remain on the Florida public registry for life, even if you were only visiting for a few days.

It is a shame that registered people (and their families), and especially those who have completed their sentences, must navigate through a complicated and stressful process to take a vacation, a business trip, or simply visit with out-of-state relatives. But for now, please do your research before travelling.

Planning a trip to Nevada? Below is an account from our member Tim regarding his recent trip to Las Vegas.

Nevada has a requirement that those on the registry, within 48 hours of entering Nevada, register with the local law enforcement. Since my conference was going to be 4 days in Las Vegas, I researched information on how and where to do this, including these links:

<https://www.nvp.uscourts.gov/supervision/general/>

[registration-requirements/sex-offender-registration-requirements/https://www.lvmpd.com/en-us/RecordsFingerprintBureau/Pages/ConvictedPersonsRegistration.aspx](https://www.lvmpd.com/en-us/RecordsFingerprintBureau/Pages/ConvictedPersonsRegistration.aspx)

I decided to go as early as possible on a Tuesday which I am certainly glad I did. You enter the building and go straight to a receptionist behind a desk, you explain why you are there, are assigned a number and then head to a waiting room. Once your number is called, you go to a clerk who asks you questions about your stay, such as where you are staying, when you entered Nevada, when you are leaving, did you drive, if so, vehicle, etc. You also answer questions about your offense and they mention that if you change hotels or where you stay while visiting you are required to return to the registration office and let them know.

After that, if it's your first time registering in Nevada, they take DNA samples and fingerprints, so you again go wait for another clerk who will eventually call your number and he'll begin his process. The DNA submission included swabbing both sides of the mouth. Once you finish there you are done so, about 2 hours of my time spent 'complying' with this law.

I would highly advise going early in the morning or right before they close as several of the workers there mentioned they get busy doing background checks for people wanting to work in casinos. I easily could have spent over half a day there if I did not go as early as I did (their website states they open at 8 am but there were a dozen people already in the building with numbers before 8 am).

For more info about state-to-state laws, visit the [NARSOL WIKI page](#).



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Texas Voices for Reason and Justice (TVR, INC) is a statewide, no non-sense, research-based or-profit, volunteer organization devoted to promoting a more balanced, effective, and rational criminal justice system. TVRJ advocates for common sense, research-based laws and policies through education, legislation, litigation, and support for sex related offenders as well as for member of their families.

Texas Voices may be reached at PO Box 23539 San Antonio, Texas 78223. The toll-free phone is (877) 215-6688. The e-mail address is Texasvoices.org.

TCDLA thanks Texas Voices and it is Executive Director, Mary Sue Molnar, for granting permission to reprint the above copyrighted comments.

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Significant Decisions Report

KYLE THERRIAN

There's an SNL skit done in the theme of a TV court show. It takes place in Bangor, Maine, but all the participants are Cajun except the defendant - he ain't from around there [wherever there is]. The judge has a thick Louisiana accent, the plaintiff is dressed like a southern belle (with white knit gloves and an ornate hand fan), her witness is eight-term Congressman Fenton Worthington Carrey (a "New England treasure" wearing an LSU hat and drinking a jar of moonshine). Ultimately the judge sentences the defendant to serve a period of confinement in a lighthouse "crawlin' with gators!" and to eat the "spiciest bowl of jambalaya you'd ever likely to encounter!" The defendant implores the court to explain what the heck is going on.

This scene plays out in my head nearly every time a trial court revokes a person's bond. Here's the scenario in far too many places: a pretrial officer sends evidence of a potential bond violation to the court, the court prints off the evidence and calls a hearing *sua sponte*, the defendant must answer the trial court's allegations of a bond violation with minimal notice, the State is not present and the defendant's party opponent is the judge, there are no witnesses to cross-examine and no way to test the validity of evidence (the interlock device, the drug test, the GPS monitor, etc.). You might be able to grovel your way out of it, but you are definitely not going to refute the judicial accusation. If the judge does not bestow upon you their benevolence, you get your bond revoked, get ordered to do something you don't want to do, or you get sanctioned (punished) somehow.

Frankly, the sanction might as well be a lighthouse "crawlin' with gators" because it makes as much sense. What courts are doing amounts to converting our adversarial system of justice into an inquisitorial one. It is wrong, illegal, and the subject of my favorite significant decision this month.

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 significant or published opinions since the last Significant Decisions Report.

Fifth Circuit

In re Palacios, 58 F.4th 189 (5th Cir. 2023)

Attorneys. Isaias L. Palacios (pro se)

Issue & Answer. Ralph Petty worked as Midland County's chief appellate prosecutor at the same time he worked as the judge's briefing clerk in the defendant's case. If the defendant can show this is a constitutional violation, must he also show harm before he is permitted to file a second subsequent writ of habeas corpus? Yes.

Facts. Remember Ralph Petty, the Chief Appellate prosecutor in Midland County? If not here is a summary of his debacle from the October 2020 SDR:

Ralph Petty, the chief appellate and writ counsel for the Midland County District Attorney's Office moonlighted as a clerk and legal advisor to the district judges in cases where his office represented the State of Texas. His employment with the district judges was described as follows: "When a habeas application was filed, the judge of the convicting court assigned the writ to Petty. He then reviewed the file, performed any necessary research, and submitted a recommendation and a proposed order with findings of facts and conclusions of law to the assigning judge." This went on for fifteen years. . . . [] Petty resigned from the State Bar of Texas in lieu of disciplinary action and the Supreme Court found the facts established violations of Texas Disciplinary Rules of Professional Conduct, Rule 1.06(b)(2)(conflict of interest by virtue of other employment or personal interests).

In the instant case, the defendant is requesting Fifth Circuit permission to file a second or successive writ of habeas corpus because he is one of many Texas prisoners whose case Petty worked on as both a prosecutor and an employee of the judge presiding over his case. He asserts newly discovered evidence, namely "collusion of Petty and the judge"—which deprived him of a fair trial.

Analysis. Assuming the defendant satisfies all other burdens (showing of constitutional violation, satisfaction of the newly discovered evidence standard) he cannot show that he suffered harm.

He suggests that but for the collusion between the trial court and the prosecutor, he would have had available to him various affirmative defenses. However, those affirmative defenses were not available to him in the law. This is true regardless of prosecutor-judge collusion.

Comment. I think this is structural error. No doubt, a showing of harm is important to the court's institutional integrity, but the flip side of that coin is the importance that the institution of criminal justice, as a whole, has integrity. Justice is not simply in the outcome, but also in the appearance of justice. There is no appearance of justice in the cases touched by Ralph Petty.

Texas Court of Criminal Appeals

Lira v. State, No. PD-0212-21 (Tex. Crim. App. Jan. 11, 2023)

Attorneys. Michael Mark (trial), John Moncure (appellate).

Issue & Answer. "Does the Texas Supreme Court's [COVID-19 Emergency Order] authorize a trial court to conduct a plea proceeding via videoconference despite the lack of a defendant's written consent?" No.

Facts. The State charged the defendant with assault on a public servant. The defendant and the State reached a plea agreement and the trial court

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set the defendant for a plea via the court's "Zoom/video-conference plea docket." Counsel filed a motion objecting to the trial court conducting the plea hearing via Zoom. Specifically, counsel raised the constitutional right to counsel, right to a public trial, and statutory rights under Article 27 of the Code of Criminal Procedure.

Analysis. The Supreme Court (SCOTX) cannot issue emergency orders suspending a party's substantive rights or which affect a trial court's authority.

Trial courts have no authority to preside over an unconsented-to videoconference plea. This issue is similar to the one raised by the State's refusal to give its consent to proceed to a trial before the court (bench trial); the trial court has no authority to proceed without the State's consent. *In re State ex. Rel. Ogg*, 618 S.W.3d 361 (Tex. Crim. App. 2021). The SCOTX emergency orders authorizing trial courts to modify or suspend procedures "is not a magic wand that allows a judge to preside over a proceeding over which he is otherwise barred from presiding."

A defendant has a substantive right to be present in-person for his plea hearing. This right is likely protected by the Sixth Amendment and certainly protected by various provisions of the Code of Criminal Procedure, including Article 27.13 ("A plea of guilty or a plea of nolo contendere in a felony case must be made in open court by the defendant in person . . ."), Article 1.15 ("No person can be convicted of a felony . . . unless the defendant, upon entering his plea, has in open court in person waived his right of trial by jury . . ."), Article 1.15 (waiver of jury trial must be "in open court in person.") These rights are waivable (under Articles 27.19 and 27.18), but the defendant expressly refused to make such a waiver.

Dissenting (Keller, J.). The constitutional right to in-person proceedings is rooted in the Sixth Amendment right to confrontation which is not absolute. The in-person requirements of the Code of Criminal Procedure are procedural requirements which may be modified by courts according to the statutes authorizing the underlying SCOTX orders.

Comment. Solution: the State can make its plea recommendation contingent on waiving the right to an in-person plea hearing. I'm not sure I would have wasted the energy writing a 43-page opinion to solve problems of the State's own making.

Garcia v. State, No. PD-0679-21 (Tex. Crim. App. Jan. 11, 2023)

Attorneys. Ricardo Gonzalez (trial), Sharon Slopis (appellate).

Issue & Answer. The defendant shot the victim through the breast and the thigh. The bullets did not strike any vital organs, the victim got herself to the hospital, the wounds were stapled shut, and the victim walked away. Under these facts was evidence sufficient to establish serious bodily injury? Yes.

Facts. The defendant shot his girlfriend twice because she was smoking weed in the living room with another guy. The bullets went through her thigh and through her chest without striking any organs. She walked away from the scene and walked into the hospital where she received treatment, and her wounds were closed with staples. At trial, she testified that she thought she would die. The ER doctor also testified that gunshots can be fatal and he considered the wounds to constitute serious bodily injury. The doctor did not tie this opinion to the statutory elements of serious bodily injury nor did he testify what would have happened if the wounds were untreated.

Analysis. Serious bodily injury looks to the injury caused by the defendant and does not require consideration of any medical treatment that may have lessened the injury. Here the court of appeals erroneously found evidence insufficient by focusing on the shortcomings of the State's evidence and not what it proved using a light-most-favorable-to-verdict consideration. A layperson's belief about the seriousness of an injury can support a finding of serious bodily injury as can a jury's common sense. The evidence shows the gunshot wounds were serious enough to impair the victim's ability to drive herself to the hospital and to lose memories of the event (suggesting shock or blackout). She thought she would die. A doctor said her injuries were serious. This evidence combined was enough.

Comment. The opinion out of the Fourteenth Court of Appeals used to be my favorite case on "Kyle Therrian's Interactive Case Law Quiz CLE (And Drinking Game)." It really separated the true SDR Sig Heads from the casuals. Now it's just another case.

Hatter v. State, No. PD-0823-21 (Tex. Crim. App. Jan. 11, 2023)

Attorneys. Natalie Schulz (trial), Tonya Rolland (appellate).



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Issue & Answer. Are agreements to dismiss a case conceptually the same as an immunity agreement such that the agreement can be enforced by a trial court through an order of dismissal when the State fails to uphold its end of the bargain? No.

Facts. The State charged the defendant with (1) Assault on a Peace Officer, (2) DWI, and (3) another DWI. The felony prosecutor and felony defense counsel agreed that the defendant would plead guilty to the DWI charges and the State would dismiss the Assault on a Peace Officer charge. The misdemeanor defense counsel did not like this and worked to thwart the felony dismissal. Felony defense counsel explained this predicament to the felony prosecutor. The felony prosecutor assured felony defense counsel that “no matter what happened to the DWI cases, he would dismiss the assault case and not re-file it.” Shortly after the felony prosecutor dismissed the defendant’s felony case, the misdemeanor prosecutor dismissed the defendant’s two DWI charges (based on faulty blood vials). The arresting officer learned that all of the defendant’s charges were dismissed and complained to the felony prosecutor’s superiors. The felony prosecutor was compelled by his office to re-file the felony assault charge and the instant litigation ensued. The Defendant filed and the trial court granted a motion for specific performance resulting in the trial court dismissing the re-filed assault case. The court of appeals affirmed the order of dismissal finding that “the State and Appellee had entered into an enforceable immunity agreement.”

Analysis. Immunity is a tool for the government to use when it wishes to compel testimony over a witness’s invocation of his or her Fifth Amendment privilege against giving incriminating testimony. Immunity requires trial court approval. Because the courts have interpreted a grant of immunity as a prosecutorial promise to dismiss a case, the parties treat the promise to dismiss the instant case as an immunity agreement. The parties, in turn, argue about whether the trial court may retroactively sanction an immunity agreement (dismissal) the trial court was unaware of at the time it ordered the dismissal. However, the facts of this case do not present the existence of an immunity agreement. “While grants of immunity from prosecution are conceptually w to dismiss a case, that does not necessarily mean that all promises to dismiss a case are grants of immunity from prosecution.” Moreover, the concept of an immunity agreement is “indelibly intertwined with the Fifth Amendment

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- Watch the documentary "Defending Gideon: A Documentary," available on YouTube
- Watch "Gideon's Army," available on Amazon Prime
- Watch "Strong Island," available on Netflix
- Watch an episode or two of "Time: The Kalief Browder Story," available on Netflix
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right against self-incrimination and the Sixth Amendment rights to confront one's accusers and to compulsory process." The facts underlying the instant agreement have no bearing on these rights—the agreement was simply one made in the course of determining the best disposition of the defendants cases—"the beginning of a plea bargain agreement."

"We remand this matter to the court of appeals for that court to determine whether the trial court's decision granting Appellee's motion for specific performance is correct under any other theory of law applicable to the case, [including the enforcement of a plea bargain]."

Comment. There's a side to this story we haven't heard: misdemeanor defense counsel's. It had better be a good one to be this much of a stick in the mud.

Dunham v. State, No. PD-0831-18 (Tex. Crim. App. Jan. 11, 2023)

Attorneys. L. Jeth Jones, II (trial), Josh Schaffer (appellate).

Issue & Answer 1. When a defendant sells goods or services through fraudulent representations and those representations are ultimately corrected before the transaction is completed, is the evidence sufficient to convict the defendant of making a

false representation under the Deceptive Business Practices statute? Yes.

Issue & Answer 2. A person commits the offense of Deceptive Business Practices when he intentionally, knowingly, or recklessly, in the course of business, "commits one or more of [12 different statutorily described] deceptive business practices." To convict, must a jury be unanimous on which of the deceptive business practices the defendant engaged in? No.

Facts. The defendant was a door-to-door home security salesman for Capital Connect. The instant case involves his sale of a security system to an 81-year-old woman. He sold the complainant a CapitalConnectsystem under the guise of upgrading her current system she held with a competitor company, Central Security Group. He created a false impression that the upgraded services were free or would not increase her monthly costs. He coached the complainant through a cancellation of services with Central Security Group and then put the complainant in touch with a Capital Connect representative. The Capital Connect representative ultimately explained to the complainant that accepting services would require her to change companies. By the time the complainant executed the new agreement, she realized the defendant did not work for Central, but she signed anyway.

The complainant also signed an acknowledgment that Capital Connect is an independent entity. Notwithstanding what was clear to the complainant at the moment of execution, she indicated that she would not have allowed the defendant to walk her to the point of executing a new agreement had she not been tricked into believing he worked for her current home security company. The State charged the defendant with the Class A misdemeanor offense of Deceptive Business Practices under Penal Code § 32.42(b). They charged the offense three different ways, alleging that he:

Intentionally, knowingly, and recklessly [in the course of business]:

1. represented that a commodity or service was of a particular style, grade, or model when it was another [tricking the complainant into thinking he was selling her an upgrade offered by her current company]
2. represented the price of the service falsely . . .
3. made a materially false or misleading statement . . .

The jury convicted the defendant and the trial court sentenced him to one-year of confinement.

Analysis 1. The defendant contends that the court of appeals erroneously narrowed the scope of conduct when evaluating whether the State sufficiently proved his act of [fraudulent] representation to the complainant. He argues that, because the complainant ultimately received accurate information before executing an

agreement, the transaction taken as a whole was not a fraudulent representation. But cannons of statutory interpretation do not support his argument. Representations can occur before a completed transaction and the legislature intended to punish not only those who successfully make fraudulent representations, but those who fail, too. Here, the defendant’s words and conduct were sufficient for the jury to find that he falsely “represented” information to the complainant. He made statements that included: “I’m here to *update* your security.” He pointed to the Central Security Group sign in the front yard. He told the complainant “I’ll put a light *on it* to make it visible from the street” in order to “*update*” the neighborhood. He began switching out equipment before the execution of the agreement. He did not wear his company’s uniform.

Analysis 2. “Jury unanimity is not required for the specific manners and means for this offense. The basis of our finding is found in the phrase ‘one or more of the following.’” The statute explicitly focuses on whether a person committed ‘one or more of the following deceptive business practices.’ The statute cares not which act the defendant committed (or how many).

Dissenting (Yeary, J.). The concept of “style, grade, or model” is not broad enough to encapsulate a misimpression about the identity of the company selling the product. The Court does not engage in the well-established analytical framework for determining whether jury unanimity is required.



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Instead, the court focuses on one clause of the statute which suggests that the twelve different types of infractions are manners and means of committing the same offense. The great weight of tools for interpreting the legislature's intent indicates that each subsection constitutes a separate offense. If it were otherwise, the State could simply charge the defendant by scattershot, allege very different types of conduct, and obtain a conviction from jurors whom each believe the defendant did very different things punishable in different ways.

Comment. I was 100% with Judge Richardson, his analysis was quite logical. But, after reading both opinions, I think Judge Yeary is correct. The Court should be consistent in the incredibly complex way of analyzing jury unanimity: (1) first determine the offense type (nature of conduct, result of conduct, circumstances surrounding conduct), (2) then do the eighth-grade grammar test (don't ask . . . it has something to do with where the ands and ors are located), (3) then consider the culpable mental state, (4) then consider double jeopardy implications, (5) then look at the grades of the offense.

Cook v. State, No. PD-0850-21 (Tex. Crim. App. Jan. 11, 2023)

Attorneys. Clint Allen (trial), Gena Bunn (appellate).

Issue & Answer. The trial court erroneously allowed a police officer to give a direct opinion on a child witness's credibility. When a child advocate, a therapist, and several lay witnesses also gave opinions on the same witness's credibility without objection, is the trial court's error relating to the police officer harmless? Yes.

Facts. A jury found the defendant guilty of sexually assaulting the complainant, a seven-year-old. The story began with the complainant's mother catching the complainant performing oral sex on his brother. This is when he made an outcry accusing the defendant of sexual assault (basically he learned it from the defendant). The defendant was friends with the complainant's grandmother. Complainant's mother brought the complainant to speak with his grandmother about the accusation and then the complainant recanted. The grandmother video-recorded this recantation. The video culminated in the complainant accusing his stepfather of "messing" with him. "The State's case, and Appellant's opposing arguments centered on whether C.S. was telling the truth to his mother

and the police, or to his grandmother Gladys on the recording." The issue of credibility was a theme by both parties throughout trial. The State sponsored a police officer who told the jury the complainant was telling the truth. The State sponsored a child advocate who told the jury that he was not doing things that indicate untruthfulness. The State also sponsored a therapist who testified that the complainant was incapable of lying about such a thing. The defendant presented evidence of his good reputation and of the dishonest reputation of the complainant's mother.

Analysis. The trial court erred in allowing the police officer to give a direct opinion on the complainant's credibility. However, the officer's opinion had "slight—if any—influence on the jury's verdict." The question and answer were fleeting in comparison to the trial as a whole: "Did you think the child is lying?" "No." Jurors should assume the police officer believes the victim, anyway. The judge instructed the jury to determine credibility.

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The State did not mention or emphasize the officer's opinion. Other witnesses vouched for the credibility of the complainant. The complainant gave a lot of details about the abuse. There were circumstances that made the accusation plausible.

Comment. I'm not sure why there was not an objection to the parade of witnesses who vouched for the credibility of the complainant. It might be that this is the State's blueprint for CAC cases and courts find any way they can to let them get away with it. If trial counsel thought this was permissible, I would not blame him. The courts always find a way around it. And if we are going to allow it to happen despite it being wrong, it kind of is permissible, isn't it?

1st District Houston

Yepez v. State, No. 01-22-00049-CR (Tex. App.—Houston [1st Dist.] Jan. 10, 2023)

Attorneys. Eddie Cortes (trial), Allen Isbell (appellate).

Issue & Answer. May a trial court include a Rule 404(b) limiting instruction pertaining to the State's use of extraneous offenses when defense counsel objects and requests the jury charge contain no such language? Yes.

Facts. The State charged the defendant with indecency with a child. A jury convicted. The defendant lived in the same home as the complainant. The complainant testified that every other night the defendant would molest her. The complainant testified about a separate period of molestation occurring several years prior in a different home. According to the complainant, the defendant's conduct was similar during both periods of molestation. The defendant's attorney did not object to the admission of extraneous offense evidence, nor did he request a contemporaneous limiting instruction. However, the State proposed that the jury receive a limiting instruction in the jury charge. The defendant's position was that such an instruction would confuse the issues and he contended that both periods of molestation were truly an ongoing series of molestations. According to the defendant, the instruction created the implication that there was some other offense the jury had not heard about. The state's position was that the omission of such an instruction would result in reversible error. The trial court included the limiting instruction in the jury charge.

Analysis. A defendant must object to the

admission of evidence and contemporaneously request a limiting instruction if he wishes the trial court to later provide the jury with a charge setting forth the law explaining to the jury the appropriate use of extraneous offense. The trial court has no obligation to include a limiting instruction in the jury charge when the defendant does not follow this procedure. But the fact that a trial court includes an instruction without an obligation (without a duty) does not necessarily mean that the trial court is without authority. "Appellant has not directed us to, nor have we found, any cases holding that a trial court errs by including an extraneous-offense limiting instruction in the jury charge over a defendant's objection [when the defendant did not make a contemporaneous request and resisted the instruction in the charge conference]. Even if the trial court erred here, the defendant did not sufficiently brief the issue of harm for the court to waste its time considering the issue.

Comment. The "didn't-brief-harm" section of this opinion was a gratuitous snipe at the appellant's attorney. The court's frustration with a barebones 2-total-pages of briefing may be justified. It may also be that counsel just didn't want to write an *Anders* brief. Either way, the desire to take a dig at an attorney doesn't justify being plainly wrong about the law. This is what the CCA says about the burden allocation to brief harm:

"To dispel any lack of clarity in our cases, we affirm that burdens of proof or persuasion have no place in harm analysis conducted under *Almanza*. Because the Court of Appeals placed a burden of proof on the appellant, we shall remand the case to the Court of Appeals for a review of the record, giving consideration to the fact that neither party has a burden to show harm." *Warner v. State*, 245 S.W.3d 458 (Tex. Crim. App. 2008).

Heck, even the First Court recognizes this as the standard (or it has in the past). See *Farrar v. State*, No. 01-18-01043-CR (Tex. App.—Houston [1st Dist.] Apr. 30, 2020)(not designated for publication). I'm afraid the court, for not a good reason, is giving the State yet another thing they can cite (albeit erroneously) to persuade the court that it must let an injustice stand for the sake of un-dotted i's and un-crossed t's.

11th District Eastland

Loza v. State, No. 11-21-00034-CR (Tex. App.—Eastland, Jan. 12, 2023)

Attorneys. Samuel Darnell (trial), Matt Zimmerman (appellate).

Issue & Answer. Officers must have search warrant to enter the home of a third party to execute an arrest warrant. Does a defendant who is a guest in the home of a third party have standing to challenge his arrest after officers entered the third-party home with an arrest warrant but not a search warrant? No.

Facts. A jury convicted the defendant of possessing methamphetamine. The defendant had an outstanding felony warrant. Officers executed a knock-and-talk plan at an apartment where they knew the defendant stayed. The apartment was the home of a friend, and the defendant was a guest. When officers saw the defendant, they entered, arrested, searched incident to arrest, and discovered methamphetamine on the defendant's person.

Analysis. SCOTUS requires a search warrant before an officer can execute an arrest warrant in the home of a third party. *Steagald v. United States*, 451 U.S. 204 (1981). The CCA applied *Steagald* in *Hudson v. State*. However, the *Steagald* and *Hudson* defendants were not the subject of the arrest warrant. Unlike the defendant in the instant case, *Steagald* and *Hudson* were people whose homes were entered by police seeking to arrest a third person—their privacy rights were violated in the name of apprehending another person. The police would not need a search warrant to enter the home of a person who is the subject of an arrest warrant; so it would make little sense to grant the subject of an arrest warrant a greater right to privacy in the home of a third person.

Comment. The analysis on the necessity of a search warrant is sound, but something still seems off. Doesn't an overnight guest have all privacy rights of the owner of the home in which he stays under Fourth Amendment analysis? Isn't the exclusionary rule a mechanism to deter police misconduct?

13th District Corpus Christi/Edinburg

In re Ramos, No. 13-22-00497-CR (Tex. App.—Corpus Christi / Edinburg, Jan. 13, 2023)

Attorneys. Abner Burnett (trial) (appellate).

Issue & Answer. Can a trial court revoke bond without a hearing, notice, hearing formal evidence, and without providing the defendant an opportunity to be heard? No.

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Facts. The trial court released the defendant from custody during the pendency of his case on a \$25,000 surety bond and ordered that he not have any contact with the complaining witness. The State filed a motion alleging that the defendant threatened to kill the complaining witness and attached as an exhibit to their motion a copy of the offending text message. The motion was not verified, and the exhibit was not sponsored by a witness, authenticated, or admitted into evidence. Nonetheless, when the State urged its motion, the trial court ordered the defendant's bond revoked. The following ensued:

Defense Counsel: "hold on"

Defendant: I've done nothing wrong . . . I have evidence to prove that

Defense Counsel: Before you revoke his bond, I believe I'm allowed an opportunity to present evidence

Trial Court: *no you're not.*

Analysis. Article I, Section 11 of the Texas Constitution provides "all prisoners shall be bailable by sufficient sureties, unless for capital offense[s], when proof is evident; but this provision shall not be so construed as to prevent bail after indictment found upon the examination of the evidence, in such manner as may be prescribed by law." The Texas Constitution expressly authorizes the denial of bail when a defendant who is accused of a felony or family violence violates a condition of pretrial release related to the safety of the community. The magistrate must find the violation by a preponderance of the evidence.

When a court sets a hearing in advance of trial, Code of Criminal Procedure Article 28.01 requires the trial court to give 10 days notice of such hearing so that the parties may prepare, conduct research, and subpoena witnesses if necessary.

A trial court has the authority to revoke a bond under Article 17.09 of the Code of Criminal Procedure if the bond is "defective, excessive or insufficient in amount, or that the securities, if any, are not acceptable, or for any other good and sufficient cause." However, the trial court may not revoke bond arbitrarily.

Here the state filed a motion alleging that the defendant threatened the complaining witness. However, the trial court proceeded to consider the motion without notice or a hearing. The trial court did not allow the defendant to present evidence or to make a record. The State offered no evidence to support their allegation. The trial court failed in

its ministerial duty to follow the Code of Criminal Procedure.

Comment. I mean the phrase "hold on" is so meaningful to me. So powerful. Not only is the defendant entitled to notice and opportunity to present evidence, but the trial court must hear evidence, apply the rules of evidence (see Rule 101©(C)), and the State must satisfy its evidentiary burden before the defendant's liberty is dissolved.

14th District Houston

Hankston v. State, No. 14-13-00923-CR (Tex. App.—Houston [14th Dist.] Dec. 13, 2022)

Attorneys. Alexander Bunin (appellate), Angela Cameron (appellate), Brent Mayr (trial).

Issue & Answer. In *Carpenter v. United States* SCOTUS held that a defendant has an expectation of privacy in at least seven days of historical cell site location information (CSLI). *Carpenter* was decided during the pendency of this case. Under Fourth Amendment analysis an otherwise unlawful search can sometimes survive by showing law enforcement adhered to a statute that permitted their search at a time preceding a SCOTUS ruling later prohibiting it. Can the State save a bad CSLI search here where the defendant moved to suppress under Texas's statutory exclusionary rule (Article 38.23)? No.

Facts. A jury convicted the defendant of murder. The State used CSLI evidence to corroborate witness testimony. Law enforcement obtained the defendant's CSLI by obtaining an order pursuant to a statute now unconstitutional under SCOTUS's analysis in *Carpenter v. United States*. The defendant moved to suppress CSLI evidence pursuant to Article 38.23 and the trial court denied his motion.

Analysis. Texas courts apply both federal and state exclusionary rules. The Texas exclusionary rule, Article 38.23, does not incorporate all of the federal exclusionary rule exceptions. In particular, "good-faith reliance on a statute in conducting a warrantless search is not a recognized exception to the Texas exclusionary rule." To this end, the trial court was in error to conclude that law enforcement's improper (*Carpenter*-offending) CSLI search was saved by law enforcement's adherence to a not-yet-invalid statute. One disadvantage of Article 38.23 when compared to the Fourth Amendment is that erroneous trial court rulings face non-constitutional harm analysis on appeal. Nonetheless, the defendant satisfied this burden.

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The CSLI evidence at trial was compelling when compared to the less-than-compelling witness testimony such that the court has “grave doubt that the result of the trial was free from the substantial effect of the error.”

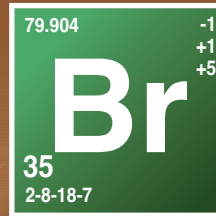
Comment. What does this mean: “the matter is so evenly balanced regarding the effect of the error that we are in virtual equipoise as to the harmlessness of the error.” Since Oliver Wendall Holmes is no longer with us, I plugged it into Chat GPT and got “the phrase means that the impact of the mistake is so equal on both sides that it’s difficult to determine whether the mistake will cause any harm or not. Essentially, it suggests that the error is so balanced that it’s difficult to determine whether it will have any significant impact.” Still confused?

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

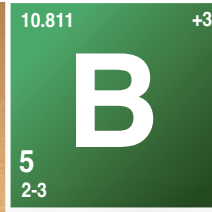
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