

SAN ANTONIO

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DEFENDER



**NINE THINGS
YOU CAN DO
DURING THE
PANDEMIC TO
HELP YOUR LAW
PRACTICE**

**COMPASSIONATE
RELEASE FOR
FEDERAL CLIENTS**

SPEEDY TRIAL

**A PLEA &
SENTENCING
WITHOUT
A CLIENT**



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Letter From the President

Joseph A. Esparza



"I don't think it'll be hard to stay six feet away from my family during this time. I'm sick of them already."

One can go online and find a lot of people trying to find anything light about this pandemic and numerous efforts to try to lift spirits during this difficult period. They mean well, but it isn't easy. This novel pandemic will forever be known as the COVID-19 year: 2020. It began overseas and quickly worked its way around the world, infecting and hurting populace after populace, grinding normal life to a halt, forcing many countries to implement plans that feel like government is hitting "Control - Alt - Delete." We are being rebooted and have to adapt to a changing, hopefully temporary landscape during this time. It feels like forever, but it's only been a few months. America has been fighting to flatten the curve and many people are being asked to stay home and stay safe as businesses suffer and pocketbooks take a hit. While many heroic efforts have been made by medical professionals

and others working tirelessly around the clock, the number of affected and the dead can be staggering. Already as of April 30, 2020, the United States has surpassed 62,000+ deaths in just under two months. That is more American deaths by COVID-19 than occurred in every war America has ever been involved in except for WWII and the Civil War. Covid-19 deaths beat out WWI, Vietnam, Korea, Afghanistan, Iraq, etc. It beats out any number of deaths from terrorist attacks we have ever suffered as a nation. The pandemic we face is no joke and the danger is very real.

When I became President of SACDLA this spring, it felt for a moment like I'd been given the keys to a new, great house. That happened to be on fire. The occupants of the house were reacting in different ways to the fire too. Some were helpful, some nervous, some angry, and most were stressed, having to cope with an almost daily changing home and work life. And now

stewardship of this great house is mine. I think of the virus and how it is affecting us all, and I think of all the good SACDLA has done over the years, all the training, all the parties, the fellowship, and I know this crisis is something we can help each other through. I am not alone with this stewardship. SACDLA has a strong executive board and a robust and active board membership. I think of the easy camaraderie we enjoy and all the relationships over the years between our members. I think of the friendships and know we will survive this and we will do it together. I hope all our members remain safe and that none of us or our loved ones come down with this horrible virus, but that is beyond my control. Things are scary right now and may be for a while longer, but with grit and a will to adapt, we will survive this reboot. We will get back on track.

I have been working with TCDLA on Covid-19 issues and have made available to our members all the acquired tools to assist us as defense counsel, efforts from attorneys all over Texas. We are now working to have ZOOM hearings/meetings in Bexar County and have a temporary slowdown on jury trials to help flatten the curve and ensure a healthy San Antonio. We have remote visitation from our laptops with our jailed clients. These new systems are not perfect, but good people are working on them. We are also working to help members who feel overwhelmed deal with these new changes by offering an ear or shoulder through our

SACDLA Wellness Committee, whose contact information will be republished on the listserv very soon. TCDLA also has a “Mindful Monday” webinar for interested attorneys to cover wellness issues. We are adapting as lawyers and helping one another and if we give it a chance, we can collectively do some real good even in spite of the virus.

During this time of struggle, remember that you are not alone. We are all a Facetime or a phone call away. If you feel you need to talk to someone, reach out and start that conversation. I believe that is what makes SACDLA strong, our willingness to be there for one another. We have an excellent reputation amongst other lawyer groups in Texas and I intend to keep it that way. But it is not something I can do alone. So let us make a promise to each other in 2020. Let us see how well our group of intelligent, passionate, and tenacious members can practice law in a changing landscape, without casting blame or aspersions on people or institutions who are working hard and living under the same changing landscape we are. Let us be there for each other, constructively. I hope you agree that now is not the time to fan flames, but rather to put them out. We have done so for our clients in times past, we can and should do so for them and ourselves now. I believe we are up to this challenge. I look forward to a challenging year with you.

Letter From the Editor

Matthew T. Allen



I was content working endless hours each week to defend our clients and to uphold the Constitution. Looking at my calendar and seeing a different trial case every few days was the new normal. Running around the courthouse in the mornings, sometimes looking like I had no head, was my exercise routine. I heard about Covid-19 but wasn't too concerned for my health or my business. Then things got a little worse and I became obsessed with reading about Covid-19. I became part of the hysteria wondering how the 18 rolls of toilet paper was going to last us. How much toilet paper do we use? Why is everyone buying it? Do I need to buy more? I was still going into work and then my son's daycare shut down. Suddenly I was "working" from home with a 3-year-old coworker. I missed work and started worrying about where money would come from. My wife became the new breadwinner which she was quick to point out (jokingly and lovingly). I became worried about money, the health and

well-being of our son (is watching Frozen six times a day bad for kids?), and we had recently found out that my wife was pregnant! My sleepless nights worrying about cases turned into sleepless nights for other reasons.

But then I thought back to those crazy days of working all day and how I wished I had more time to do other things. I had to take advantage of this free-time that I may never get again: we started exercising as a family and found out my son is more in shape than me; we started cooking dinner together again; and we were spending more quality time together as a family. We were playing hot wheels together and Zingo (like Bingo but with objects). My Dad would come over a few times a week to play catch in the backyard. My wife, my Dad, and I had time to teach Max how to play baseball and run the bases. I was getting to do all those things that were being neglected the past few months or even years.

As things start to get back to normal and these stressors turn back into our old stressors, I hope that we remember some of these new routines and incorporate them in our daily lives. I know that these times were trying for many people, financially and emotionally, and I do not mean to say that I hope things stay the same. Many people have lost their lives and there is no greater tragedy. I only have my experience to speak from and I know others have different thoughts. I know our clients, especially those incarcerated, have struggled and continue to struggle. I am saddened yet inspired by the constant things I see

from defense attorneys about how a certain situation is difficult but they have continued to fight for their client and what is right. My dream is not for Covid-19 to continue to threaten lives and livelihoods or to stay at home for the rest of my life. My dream is that we find a vaccine for Covid-19, the murder hornets go away, and everyone gets back to doing what they love to do. I know this dream probably isn't a reality but I'm a criminal defense attorney; we dream big and do everything we can to make it a reality. I hope all of you, your families, your friends, and your clients are safe during this trying time.

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Nine Things You Can Do During the Pandemic to Help Your Law Practice

Andrew Froelich

1. Visit EVERY SINGLE ONE OF YOUR CLIENTS.

a. At the time of writing, ICSOLUTIONS has made available remote visitation. It's never been easier to let your clients know what the latest is. Even a five-minute visit to let your client know that you're still waiting on the video from the prosecutor may save you a grievance on the back end.

b. Speaking of your clients in jail, check with Michael Young EVERY WEEK to see if one of

your old clients has been arrested and is just sitting, waiting on you to come rescue them.

2. Clean your office.

a. We all have places we store things for a "just in case." Whether it's that one case that says that thing we always forget, or the coupon for free installation of Intoxalock that expired two years ago. If not now, when?

b. Can you throw out that 1999 Code of Criminal Procedure? Probably.

3. Go through your open files.

a. What are you waiting on? A better offer? Have you followed up with that expert? Have you filed a discovery motion? Does this need a speedy trial? Is it an FTA from four years ago? Have they hired a new attorney? Or been re-arrested?

b. I made a point to go through every single one of my “open” files and guess what I found? A LOT.

i. I never heard back about PTD on that client, I’d better e-mail the prosecutor.

ii. I literally pled that case a year ago.

iii. That idiot FTA’d ... and now he’s in jail and no one told me.

iv. The prosecutor dismissed that case six months ago!

1. BOOM - Voucher.

v. Two clients had hired someone else!

1. BOOM - Voucher.

4. Speaking of finding money...

a. If you aren’t keeping a copy of every single one of your vouchers and making sure you’re getting paid, you’re working pro bono on some cases; I guarantee it.

b. Every six months, I hire someone (pay my daughter) to go through my vouchers to make sure I get paid. If the voucher doesn’t match what Paymode-X says, or if it’s short, I contact the auditor’s office to know why. Sometimes the auditor says that the voucher has never been received by their office. Sometimes it isn’t in the system at all, in which case I can go back and re-submit the voucher.

c. EVERY SINGLE TIME I GO THROUGH VOUCHERS, I FIND AT LEAST \$250 THAT I’M OWED.

5. Update your contract.

a. A few months ago, an experienced attorney gave a CLE about ethics but ended up talking about how he structures his contracts. 25% up front (to file a letter of rep), the next 50% to review discovery, and ALWAYS KEEP THE LAST 25% IN YOUR IOLTA, just to refund “no questions asked” and write the check from your IOLTA. And if you plea/dismiss/try, only then is that last 25% earned. I stole this contract and haven’t regretted it since.

6. Organize your old files.

a. How long are we legally required to keep our old files? Five years? Until the appeal has exhausted? When else are you going to throw away that misdemeanor file from 2009?

7. Backup Storage on the “cloud.”

a. I got Carbonite a few months ago to back up all my Word documents, etc. If my laptop blows up, I might have a copy of those motions I can download to my new laptop and be back in business in a day.

b. Speaking of backup, Trey Porter has been trying to talk me into going paperless for a couple years now. Ask him, it’s a huge money saver.

8. Update your Case Management and Billing?

a. Have you tried case management software? How much are you paying for that?

b. How much are you paying for Square? .25%

i. Can you do auto withdraw? On a schedule?

c. Have you considered Lawpay? Is it more than what you’re paying now?

9. Re-negotiate your Lexis/Westlaw subscription.

a. Can you save money during the short term?

b. Is there a free option from the State bar that works for you? 



Andrew Froelich

CALL FOR SUBMISSIONS

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Speedy Trial

Jennifer Ann Zarka

The state has the burden of bringing a case to trial—not the accused. The defendant has no burden in his/her prosecution. So, how long must a defendant wait?

Unfortunately, the answer is not clear cut.

The Right

The Sixth Amendment of the U.S. Constitution guarantees the right to a speedy and public trial in all criminal prosecutions. The Fourteenth Amendment of the U.S. Constitution and the “Due Process Clause” makes the fundamental right to a speedy trial applicable to the States. Article I, Section 10 of the Texas Constitution

also guarantees those accused in all criminal prosecutions the right to a speedy and public trial. But neither source, nor Texas law, defines “speedy.” That means once a person is accused either by being arrested or charged, he or she could wait months or even years before being brought to trial. During this waiting period, evidence may get lost and witnesses may disappear, resulting in a weakened defense for the defendant.

While the accused is waiting for his/her case to be disposed of, he/she must assert the right to have a trial. This can be done by filing a motion requesting a speedy trial. It may be accomplished by setting the matter on a trial docket. It likely

cannot be achieved by waiting on a pretrial docket and simply showing up at court for each setting. A defense attorney must be vigilant in asserting the speedy trial right and probably should file a motion with the request to properly preserve the assertion.

The Remedy: Dismissal

The good news is that the defendant's charges may be fully dismissed if the court finds the accused was deprived of his or her right to a speedy trial. However, since the sole remedy for violation of the right to a speedy trial is a dismissal, courts are hesitant in finding a deprivation of the right. This means defendants may bear a heavy burden after all when making the claim they have been denied their constitutional right to a speedy trial in Texas.

Many judges will attempt to avoid the ultimate remedy by simply bringing in a jury for a trial on the day the dismissal is considered. However, it is important to urge and re-urge the right to a dismissal if the judge finds that the speedy trial right was violated. If the violation has occurred, a trial simply won't cure the infraction.

When has the right to a speedy trial been violated?

A defendant's right to a speedy trial is violated when there has been an unjustified delay between the accusation and trial which results in prejudice to the accused.

First, there must exist a delay that is "presumptively prejudicial." Then, the court will assess whether there has been a deprivation of the speedy trial right. To do so, Texas courts have embraced the analysis established by the United States Supreme Court in its decision in *Barker v. Wingo* when addressing claims of a denial of the right to a speedy trial. *Harris v. State*, 827 S.W.2d 949, 956 (Tex. Crim. App. 1992). That analysis is conducted on an *ad hoc* basis by weighing and then balancing four factors. *State v. Munoz*, 991 S.W.2d 818, 821 (Tex. Crim. App. 1999). Those factors are: 1) length of delay, 2) reason for delay, 3) assertions of the right, and 4) prejudice to the accused. *Barker*, 407 U.S. at 530.

Length of delay

Barker mandates the length of delay must have a reasonable relation to the type of crime. Consider a case that is a misdemeanor and the delay is interminable. Such a nebulous, and possibly perpetual, period of delay is presumptively prejudicial for any crime. We cannot accept a lifelong sentence for a minimal crime.

While a longer delay may be tolerated for a more serious crime, the State has the burden of justifying the length of the delay. The longer the length of the delay that can be attributed to the bad faith or negligence of the State, the less a defendant must show actual prejudice or prove diligence in asserting his right to a speedy trial. *Cantu v. State*, 253 S.W.3d 273, 280-81 (Tex. Crim. App. 2008).

Reason for delay

Another *Barker* factor to be taken into consideration is the reason for the delay. In Texas, the State has the burden of justifying the length of delay once a *prima facie* showing of prejudice has been made. *Courtney v. State*, 472 S.W.2d 151, 154 (Tex. Crim. App. 1971). In *Courtney*, the court stated that when analyzing the delay, there must first be a *prima facie* showing of prejudice to the accused though the accused need not necessarily show actual prejudice. Once a presumption or *prima facie* case of prejudice has been shown, then the burden falls on the State to prove that the accused has suffered no serious prejudice beyond that which results from ordinary and inevitable delay. *Id.* at 154.

In any case, an interminable delay, that is of no fault of the accused, is sufficient to establish a *prima facie* case of prejudice.

Defense attorneys should be diligent in demanding a trial and keeping track of every delay. Show the court the delays come from lack of due diligence from the prosecutors (no investigation, no witnesses contacted, etc). Prove there was a court reset (not a defense not ready). Do whatever it takes to show the defense is NOT responsible for any delay in the case.

Assertion of the right

The defendant has the burden of proving the assertion of the right to a speedy trial. *Barker* at 531. Courts have noted that an accused who

waits too long to assert his right to a speedy trial will have his silence weighed against him. According to the United States Supreme Court, the defendant's assertion of his speedy trial right is entitled to strong evidentiary weight in determining whether he is being deprived of that right. *Id.* at 532.

The defense should assert the right to speedy trial at each and every court setting. Assert it again when the Motion to Dismiss for Lack of Speedy trial is filed. Set the case for jury trial at the very first appearance in court. At the first trial setting announce ready. Ask the Court to make a notation on the Court's docket sheet at each setting that the defendant is ready and not causing delay. Never ask for a reset that is attributed to the defense.

Prejudice

The fourth factor to be taken into account when determining whether a right to a speedy trial has been denied is prejudice to the accused. Prejudice should be assessed in light of the defendant's interests which the speedy trial right was designed to protect. *Barker* at 532.

The three interests that the speedy trial was designed to protect are: 1) freedom from oppressive pretrial incarceration, 2) mitigation of the anxiety and concern accompanying public accusation, 3) avoidance of impairment to the accused's defense. *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

The most important of these interests is protection against the impairment of the accused's defense because the inability of a defendant to adequately prepare their case skews the fairness of the entire system. *Id.* at 532. The prejudice is obvious if witnesses die or disappear during a delay. *Id.* at 532. The longer the delay, the greater chance that other witnesses will also become unavailable. Be prepared to offer testimony to establish what a witness would have said at the trial.

The pretrial oppression and anxiety is evident in in nearly every case. A defendant is caught in a circuitous wheel, whereby, although presumed innocent and entitled to a trial, unable to control the timeline for bringing the case to a trial date. Many defendants are locked up and already deprived of freedom and the ability to adequately prepare his/her defense.

The prejudice should be personal to each defendant. Show the court how the delay has changed the life of the accused. Bring as many injuries as possible to the court's attention. Show examples like a chef who is unable to taste the food he prepares with alcohol for a year because he is awaiting trial on a DWI charge. Show that a witness who was in the car with a defendant during the traffic stop and arrest has since died. Show that a truck driver who lives in another state has traveled to Texas 15 times to appear for trial and spent thousands of dollars while awaiting trial on a drug charge.

Make it personal and make it obvious that the appropriate and only Constitutionally tenable

remedy for the deprivation of the accused right to speedy trial is dismissal.

SPEEDY TRIAL CASES

1. *Barker v. Wingo*, 407 U.S. 514 (1972). The mother of all ST cases. The four factor balancing test.
2. *United States v. Marion*, 404 U.S. 307 (1971). ST time starts running with arrest or when charging instrument filed, whichever is first.

Also, pre-indictment delay doesn't count, absent a Due Process violation.

3. *Doggett v. United States*, 505 U.S. 647 (1992). Most delays of eight months or longer are presumptively unreasonable.

Also, as delay approaches one year, it is usually considered "presumptively prejudicial."

Also, delay in arresting D. counts.

Also, can't penalize D. for not asserting right when he didn't know he'd been charged.

4. *State v. Owens*, 778 S.W.2d 135 (Tex. App.—Houston [1st Dist] 1989). Length of delay tolerated varies with the complexity of the case. In this burglary case, seven months was too long.
5. *Pierce v. State*, 921 S.W.2d 291 (Tex. App.—Corpus Christi 1996). Excellent

incorporation of *Doggett* and other USSC cases, in reversing on ST grounds.

6. *Phipps v. State*, 630 S.W.2d 942 (Tex. Crim. App. 1982) (Panel Op.). Proving prejudice due to absent witness(es).
7. *Zamorano v. State*, 84 S.W.3d 643 (Tex. Crim. App. 2002). Different ways a D. can be “prejudiced” by the delay.
8. *United States v. MacDonald*, 456 U.S. 1 (1982). Pre-indictment delay doesn’t count, absent a Due Process violation.
9. *Ex parte Carrio*, 992 S.W.2d 486 (Tex. Crim. App. 1999). “Laches” invoked in a criminal case.



Jennifer Ann Zarka

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CAUSE NO. XXXX

STATE OF TEXAS § IN THE COUNTY COURT
v. § AT LAW NO. XX
INNOCENT ACCUSED § BEXAR COUNTY, TEXAS

MOTION TO DISMISS FOR LACK OF SPEEDY TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes INNOCENT ACCUSED, by and through his attorney of record, and moves the Court to dismiss his case for lack of speedy trial, and for good cause shows the following:

I. Right to a Speedy Trial

An accused is guaranteed the right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution, Article I, § 10 of the Texas Constitution, and article 1.05 of the Texas Code of Criminal Procedure. This right attaches once a person is arrested or charged. *Barker v. Wingo*, 407 U.S. 514, 532 (1972). It is the duty of the State to bring the defendant to trial and to ensure that the trial is consistent with due process. *Id.* at 531. If the Court determines that the defendant has been deprived of his right to a speedy trial, the charge against him must be dismissed. *Id.* at 522; *See also Strunk v. United States*, 412 U.S. 434, 440 (1973).

II. Background

Mr. INNOCENT ACCUSED entered the United States in January, 2011 on an H-2B visa that expired on November 30, 2011. See Exhibit 1. At the time of his arrest, Mr. INNOCENT ACCUSED was in San Antonio under the employment of Milberger’s Landscaping and Nursery, a local company that sponsored him on his H-2B visa.

On October 9, 2011, Mr. INNOCENT ACCUSED was arrested and charged in the instant case with possession of marijuana in an amount less than two ounces. Mr. INNOCENT ACCUSED appeared before this Honorable Court on November 15, 2011 and promptly requested a trial by jury pursuant to

Mr. INNOCENT ACCUSED's desire to challenge the allegations against him. This Honorable Court set Mr. INNOCENT ACCUSED's case for trial on May 29, 2012. In compliance with the mandate of his H-2B visa that required departure on or before December 10, 2011, Mr. INNOCENT ACCUSED returned to Mexico. Mr. INNOCENT ACCUSED intended to return to the United States again in early 2012 on a subsequent H-2B visa. However, § 212 (a)(2)(A)(i) [8 U.S.C. 1182] of the INA precludes reentry to the United States because the pending charge against him involves an allegation of drugs. Although presumed innocent, Mr. INNOCENT ACCUSED is unable to reenter the United States to challenge the charges against him and stand trial on November 13, 2012. Thus, Mr. INNOCENT ACCUSED is precluded from redress and the courts are not open to him in violation of the Texas "Open Courts" provision. *See* Tex. Const., Art.I, § 13.

III. Barker Analysis

The Sixth Amendment of the U.S. Constitution guarantees the right to a speedy and public trial in all criminal prosecutions. The Fourteenth Amendment of the U.S. Constitution and the "Due Process Clause" makes the fundamental right to a speedy trial applicable to the States. Article I, Section 10 of the Texas Constitution also guarantees those accused in all criminal prosecutions the right to a speedy and public trial. Texas courts have embraced the analysis established by the United States Supreme Court in its decision in *Barker v. Wingo* when addressing claims of a denial of the right to a speedy trial. *Harris v. State*, 827 S.W.2d 949, 956 (Tex. Crim. App. 1992). That analysis is conducted on an *ad hoc* basis by weighing and then balancing four factors. *State v. Munoz*, 991 S.W.2d 818, 821 (Tex. Crim. App. 1999). Those factors are: 1) length of delay, 2) reason for delay, 3) assertions of the right, and 4) prejudice to the accused. *Barker*, 407 U.S. at 530.

The *Barker* test is triggered by a delay that is unreasonable enough to be presumptively prejudicial. *Doggett v. United States*, 505 U.S. 647, 652 (1992). Once triggered, the courts must analyze the speedy trial claim by first weighing the strength of each *Barker* factor and then balancing their relative weights in light of the conduct of both the State and the accused. *Zamarano v. State*, 84 S.W.3d 643, 648 (Tex. Crim. App. 2002). In the present case, Mr. INNOCENT ACCUSED argues that an indefinite delay is unreasonable and his right to stand trial has been impeded because he cannot gain entry into the United States. Thus the delay creates unfair prejudice against Mr. INNOCENT ACCUSED.

A. Length of Delay

Barker mandates the length of delay must have a reasonable relation to the type of crime. In the present case, Mr. INNOCENT ACCUSED is charged with a Class B misdemeanor and the delay is interminable. Such a nebulous, and possibly perpetual, period of delay is presumptively prejudicial for

any crime. Mr. INNOCENT ACCUSED is powerless on his own to re-enter the United States to defend himself against the State's allegations. While a longer delay may be tolerated for a more serious crime, the State has the burden of justifying the length of the delay. The longer the length of the delay that can be attributed to the bad faith or negligence of the State, the less a defendant must show actual prejudice or prove diligence in asserting his right to a speedy trial. *Cantu v. State*, 253 S.W.3d 273, 280-81 (Tex. Crim. App. 2008). In the instant case, the delay is attributed exclusively to government policy.

Although Mr. INNOCENT ACCUSED is presumed innocent, he is unable to seek remedy in a Texas Court for the charges against him. The Texas "Open Courts" provision of the Texas Constitution which states, "All courts shall be open, and every person for any injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law," prohibits unreasonable restrictions on the right to seek redress in the Texas courts. Tex.Const., Art. I § 13. See e.g., *Saks v. Votteler*, 648 S.W.2d 661 (Tex.1983) (invalidating a medical malpractice law restricting children's suits because the law unreasonably denied their common law right to recover damages from a negligent doctor); *LeCroy v. Hanlon*, 713 S.W.2d 335 (Tex.1986) (invalidating a tax that the legislature had imposed on court filing fees and affirming the right to redress as a substantial right which cannot be arbitrarily or unreasonably interfered with by the legislature); *Lucas v. United States*, 757 S.W.2d 687. (Tex.1988) (invalidating a law limiting the amount of damages in medical malpractice cases because the statute limited common law relief in an arbitrary fashion when balanced against the purpose of the law).

Mr. INNOCENT ACCUSED's inability to reenter the United States to challenge his charge by jury trial is at tension with the Texas "Open Courts" provision. Mr. INNOCENT ACCUSED's departure from the United States was required by the terms of his government-issued H-2B visa. Constructively, the charges although merely pending, serve to close access to this Honorable Court. Mr. INNOCENT ACCUSED is presently entitled to the presumption of innocence on his pending charge in this Court. Mr. INNOCENT ACCUSED, a presumptively innocent man is without a remedy for redress. If the State government cannot bring Mr. INNOCENT ACCUSED to court, the only just, and Constitutionally tenable remedy is to dismiss the charge.

B. Reason for Delay

Another *Barker* factor to be taken into consideration is the reason for the delay. In Texas, the State has the burden of justifying the length of delay once a *prima facie* showing of prejudice has been made. *Courtney v. State*, 472 S.W.2d 151, 154 (Tex. Crim. App. 1971). In *Courtney*, the court stated that when analyzing the delay, there must first be a *prima facie* showing of prejudice to the accused though the accused need not necessarily show actual prejudice. Once a presumption or *prima facie* case of prejudice

has been shown, then the burden falls on the State to prove that the accused has suffered no serious prejudice beyond that which results from ordinary and inevitable delay. *Id.* at 154.

In the present case, an interminable delay, that is of no fault of the accused, is sufficient to establish a *prima facie* case of prejudice; Indeed, Mr. INNOCENT ACCUSED is unable to be present to stand trial and therefore cannot defend himself. Mr. INNOCENT ACCUSED is not responsible for the delay. He is unable to present himself because of immigration regulations against which he is powerless. Mr. INNOCENT ACCUSED left the United States per the requirements of his H-2B work visa. Although presumed innocent and entitled to a trial, Mr. INNOCENT ACCUSED is unable to reenter the United States because of the pending charges. Of all the parties involved, Mr. INNOCENT ACCUSED is the least able to affect whatever actions may be necessary to ensure his presence in court. This Honorable Court and the State of Texas have remedies available through dismissal of the charges.

C. Assertion of the Right

The defendant has the burden of proving the assertion of the right to a speedy trial. *Barker* at 531. Courts have noted that an accused who waits too long to assert his right to a speedy trial will have his silence weighed against him. According to the United States Supreme Court, the defendant's assertion of his speedy trial right is entitled to strong evidentiary weight in determining whether he is being deprived of that right. *Id.* at 532.

In the present case, Mr. INNOCENT ACCUSED has been asserting his right to speedy trial at each court setting, and through the filing of the present motion. Mr. INNOCENT ACCUSED set his case for jury trial at his first appearance in this Court. At his first trial setting on May 29, 2012, counsel for Mr. INNOCENT ACCUSED alerted the Court and prosecution of the problem that Mr. INNOCENT ACCUSED was being deprived of the opportunity to appear in court for trial. The Court made a notation regarding this problem on the Court's docket sheet. *See* Exhibit 2, attached. Mr. INNOCENT ACCUSED has never asked for a reset.

D. Prejudice to the Accused

The fourth factor to be taken into account when determining whether a right to a speedy trial has been denied is prejudice to the accused. Prejudice should be assessed in light of the defendant's interests which the speedy trial right was designed to protect. *Barker* at 532.

The three interests that the speedy trial was designed to protect are: 1) freedom from oppressive pretrial incarceration, 2) mitigation of the anxiety and concern accompanying public accusation, 3) avoidance

of impairment to the accused's defense. *Barker v. Wingo*, 407 U.S. 514, 532 (1972). The most important of these interests is protection against the impairment of the accused's defense because the inability of a defendant to adequately prepare their case skews the fairness of the entire system. *Id.* at 532. The prejudice is obvious if witnesses die or disappear during a delay. *Id.* at 532. In the present case, a key witness, WITNESS, who was at residence with Mr. INNOCENT ACCUSED at the time of his arrest has moved from his last known address. Defense counsel has been unable to locate Mr. WITNESS since his relocation. The longer the delay, the greater chance that other witnesses will also become unavailable.

The pretrial oppression and anxiety is evident in the instant case: Mr. INNOCENT ACCUSED is caught in a circuitous wheel, whereby, although presumed innocent and entitled to a trial, the very charges against him serve to preclude his ability to challenge the charges or exonerate himself. Having left the United States in accordance with the provisions of his H-2B visa and not being able to reenter merely by virtue of the pending charges, Mr. INNOCENT ACCUSED is unable to be present in court through no fault of his own. Furthermore, defense counsel lacks the authority by which to secure Mr. INNOCENT ACCUSED's presence here in the United States.

The appropriate and only Constitutionally tenable remedy for the deprivation of Mr. INNOCENT ACCUSED's right to speedy trial is dismissal.

WHEREFORE, PREMISES CONSIDERED, Mr. INNOCENT ACCUSED asserts he has been deprived of his right to a speedy trial and moves the charge against him be dismissed.

Respectfully submitted,

Zarka Law Firm
620 N Flores Street
San Antonio, TX 78205

Jennifer Ann Zarka
Attorney for Innocent Accused
SBN: 24073769
Phone: (210) 468-0400
Fax: (210) 855-5630
Email: jenny@zarkalawfirm.com





Compassionate Release for Federal Clients

Guillermo Lara

Below is a four-step process for filing and exhausting all remedies for Compassionate Release for clients in Federal Custody (in this case out of risk of infection with COVID-19). I have also attached a letter that has been successful in the past.

1. Request Compassionate Release from BOP

The sources of authority that courts have recently invoked to release from custody prisoners with heightened health risks from COVID-19 who have not yet been sentenced are not available to those who have already been sentenced. Federal Rule of Criminal Procedure 35, which

permits modification of a prison sentence under specified circumstances will not always apply either. 18 U.S.C 3622(A), allows BOP, and not the Court, to grant temporary release in defined circumstances. Relevant is 18 U.S.C 3582(c), because the statute permits a court to reduce a prisoner's sentence only after he or she has exhausted his or her remedies through BOP. Courts look at it as a change of circumstances with COVID-19. Bottom line, you would have to exhaust administrative remedies through BOP First.

2. Appeal denial on form (BP-9) within 20 days.

3. After administrative remedies are exhausted, then motion the Court.

4. If all of that fails, know you did everything you could have done. 🌀

April 22, 2020

**Warden of FCI Fairton
Federal Bureau of Prisons 655 Fairton-Millville Road Fairton, NJ 08320**

**Re: Inmate _____
United States Marshall No. : _____**

Dear Warden:

Please be advised that I represent the above-referenced inmate, _____, as his attorney. On behalf of _____, I submit the following as a request for compassionate release, pursuant to 18 U.S.C § 3582 (c) and 28 C.F.R. §571.61. There are now extraordinary and compelling circumstances, unforeseen at the time of _____ sentence, which necessitate his immediate release from prison.

As you are almost certainly aware, the current outbreak of the novel coronavirus, COVID-19, is absolutely devastating the New Jersey region, it is highly contagious, and this virus can be deadly for individuals with pre-existing conditions and/or compromised immune systems. As of April 22, 2020, 92,387 cases of COVID-19 with over 4,753 deaths have been reported in New Jersey. Moreover, the vast majority of the deaths in New Jersey caused by COVID-19 were to individuals with pre-existing conditions.

One such pre-existing condition is asthma. As verified in paragraph _____ pre-sentence report, he suffers from asthma and has been using his inhaler since his incarceration for this offense in Karnes, Texas. His medical records from Karnes will corroborate this. Additionally, _____ suffers from anxiety. In addition, Mr. _____ requested his inhaler on three occasions from this facility and has been complaining of shortness of breath. He has not been provided an inhaler. Mr. _____ has advised me that resources are limited and extra services have been restricted.

The threat of COVID-19 is real, even within the sheltered environment of jails. The significant risk to high-risk individuals and the alarming contagious nature of this virus has caused New Jersey and New Jersey State Courts to release hundreds of inmates who are either at high risk from COVID-19, serving short prison sentences, or close to their projected release

dates. The virus has not only struck New Jersey jails; federal facility FCI Fairton has also had a positive test for COVID-19. (See: <https://www.bop.gov/coronavirus/>)

Accordingly, given that _____ is at very high risk of death or serious complications if he contracts COVID-19, extraordinary and compelling circumstances exist, unforeseen at the time of _____ sentence, which mandate his immediate release pursuant to 18 U.S.C § 3582 (c) and 28 C.F.R. §571.61. _____ was sentenced on February 24, 2020, at a time when no one in the United States had discussed the severity of coronavirus and before Attorney General William Barr's Memorandum for Director of Bureau of Prisons.

Furthermore, in accordance with the mandates of 18 U.S.C § 3582 (c) and 28 C.F.R. §571.61, which endorse compassionate release of inmates facing extraordinary and compelling circumstances (unforeseen at the time of Mr. _____'s sentence), please issue an order immediately releasing Mr. _____ from prison.

Please expedite this request given the serious nature of threat that Mr. _____ faces if exposed to COVID-19.

If released, Mr. _____ will be residing with his mother and other family members at the home located at _____. His mother's name is _____. The following other members will also be residing at the location: _____. If released, Mr. _____ will remain home in order to self-quarantine and best protect himself from exposure to COVID-19. Mr. _____ has health insurance through his fiancé and will be treated by the University Health System if needed.

Accordingly, please grant Mr. _____ request for compassionate release pursuant to 18 U.S.C § 3582 (c) and 28 C.F.R. §571.61, based upon the extraordinary and compelling circumstances discussed above, which were unforeseen by the judge at the time of sentence. Thank you for your consideration, and please contact me if you have any questions or need any additional information.

Regards,



Guillermo Lara Jr.
Attorney at Law
Texas BAR ID 24071138
310 S. St. Mary's St., Suite 965
San Antonio, Texas 78205
Phone: 210-209-8143

Cc.: AUSA _____

Via email: _____@usdoj.gov



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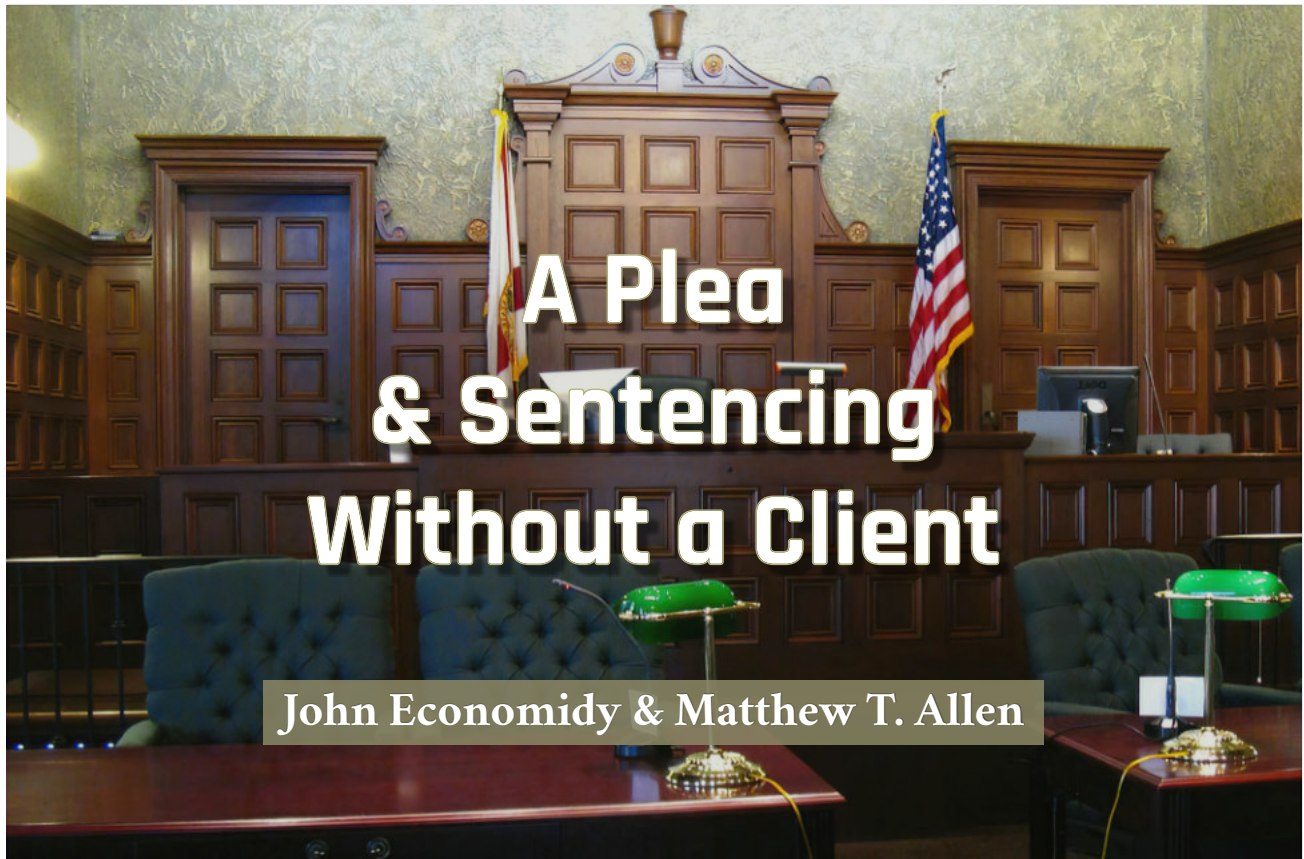
Dayna Jones - Mandamus and Appeal

Dayna Jones is in private practice at the Law Office of Dayna Jones. In addition to handling numerous trials, Dayna Jones is a post-conviction guru who dedicates a large portion of her practice to appeals and writs of habeas corpus. Dayna has argued appeals in front of the Fourth Court of Appeals in San Antonio and the Fifth Circuit, among others.

Jenny Zarka - Speedy Trial Right

Jenny Zarka runs the Zarka Law Firm, which handles criminal defense, juvenile law, and family law. Jenny authored an article on the Speedy Trial Right in this edition of the *Defender* magazine and will be addressing how to assert that right and the arguments relating to COVID-19 in this CLE.





John Economidy recently sent out a response and emailed me privately about a topic that attorneys may not know, but might save them and their client a lot of time and heartache: Sentencing in Absentia. A Sentencing in Absentia is basically a plea and sentence without your client being in court. A typical defense attorney reaction would be outrage that your client is not present but take a situation such as John's situation and it makes a lot of sense. Your client is picked up in another county and stuck there. They have a case in Bexar County and you're trying to work out a deal. Maybe it would take care of the case altogether and they could be released quicker than waiting for a transfer. It sounds like a lot of work but you will be saving yourself and your client time if it works for your client and you do it right.

Here are a few easy steps:

1. Make sure your client qualifies under Texas Code of Criminal Procedure 42.14 (no 3g offenses);
2. Make a request with the Judge and, as a courtesy, the district attorney, to conduct the plea in absentia (42.14(e)) deals with fingerprinting if the district attorney requests it;
3. Get your paperwork from the District Attorney as you would any other plea;
4. Create your own document making sure to track the language in the statute and negate the exceptions in the statute and create a signature line for you and your client;

5. Send the paperwork to your client along with a pre-addressed and stamped envelope for them to mail the papers back (mail a second copy for them to keep);

6. Once you receive the papers back, go to the Court and get the signature of the Judge and then make sure it is properly filed with the Court.

Attached is the letter that John Economidy uses.

CASE NUMBER

STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
V.	§	____TH JUDICIAL DISTRICT
	§	
DEFENDANT'S NAME	§	BEXAR COUNTY, TEXAS

DEFENDANT'S REQUEST TO BE SENTENCED IN ABSENTIA

I, XXX, hereby request that I be sentenced in absentia in the above cause consistent with my prior guilty plea and my plea bargain agreement.

I was previously incarcerated in pretrial confinement in the Bexar County Adult Detention Center, 200 N. Comal Street, San Antonio, Texas. I entered my plea on the above styled and numbered cause on (date) for the offense of _____. Sentencing was set for (date). I authorize the court to set a sentencing date of its choice without notifying me of that date as long as my counsel is notified.

Justification. After I entered my plea, the COVID-19 crisis hit. So that pretrial defendants in the Bexar County Adult Detention Center would not be infected with the rampant virus, nonviolent offenders like me were granted a personal recognizance bond. However, I had a detainer on me from _____ County, Texas, and I was picked up on that detainer and am currently in pretrial detention pending trial in _____ County. However, because of the COVID-19 pandemic, the court system in _____ County has been closed unit (date), as apparently has the court system in Bexar County, Texas.

I have not committed any offense listed in Texas Code of Criminal Procedure 42A.054(a). The offense for which I pleaded guilty did not involve use or exhibition of a deadly weapon. Bexar County, Texas has proper jurisdiction over my case in the above styled and numbered cause.

I hereby waive the right to be present at the rendering of the judgment and sentence in cause number _____. I understand that my court-appointed attorney, (name, SBT #, address) will be present with the sentencing judge at the time of my sentencing.

Other than to state that I will faithfully abide by the terms and conditions of my probation, I do not have anything to say as to why the sentence should not be pronounced, and there is nothing to prevent sentencing under "Article 42.07, Texas Code of Criminal Procedure. I do not have a pardon from the Governor of Texas. I am competent to stand trial.

I request that this honorable court sentence me in accordance with the plea bargain agreement entered into with me, my defense attorney (NAME), and the attorney representing the State, (name). The plea bargain is filed with the clerk's record. The plea bargain called for (terms of plea bargain), which was **to be probated for (#) years** and a \$ ____ fine. **The sentence was to run concurrent with any sentence that I might receive from courts in _____ County. Based on information and belief, I believe that the _____ County charge is number _____ in the ___ Judicial District Court.** Further, the State was to dismiss (identify dismissed felonies and misdemeanors).

My recollection is that court bailiffs recorded my fingerprints on court documents at the time I entered my guilty plea.

I, (Name), have a SID number in Bexar County of _____. I am being presently incarcerated in the County Jail, (address). My identification number in _____ County is _____. I hereby declare under penalty of perjury that the request to be sentenced in absentia is true and correct.

Executed on this (date), under Texas Civil Practices and Remedies Code chapter 132.

NAME OF DEFENDANT





The San Antonio Criminal Defense Lawyers Association

P.O. Box 831206
San Antonio, Texas 78283-1206
Telephone: (210) 501-2916
Facsimile: (210) 885-7714

MEMBERSHIP APPLICATION

*NAME: Mr. Mrs. Dr. Professor Other

First Name

Last Name

MI

MAILING ADDRESS: _____

Street Address/Suite Nbr./PO Box

City

State

ZIP

County

TELEPHONE: _____ FAX: _____

*EMAIL ADDRESS: _____

*TEXAS BAR CARD NO.: _____ DATE OF BIRTH: _____

Certified Criminal Law Specialist? YES NO

Member of TCDLA? YES NO NACDL? YES NO

Do you want a Membership Certificate? YES NO

CATEGORY OF MEMBERSHIP:

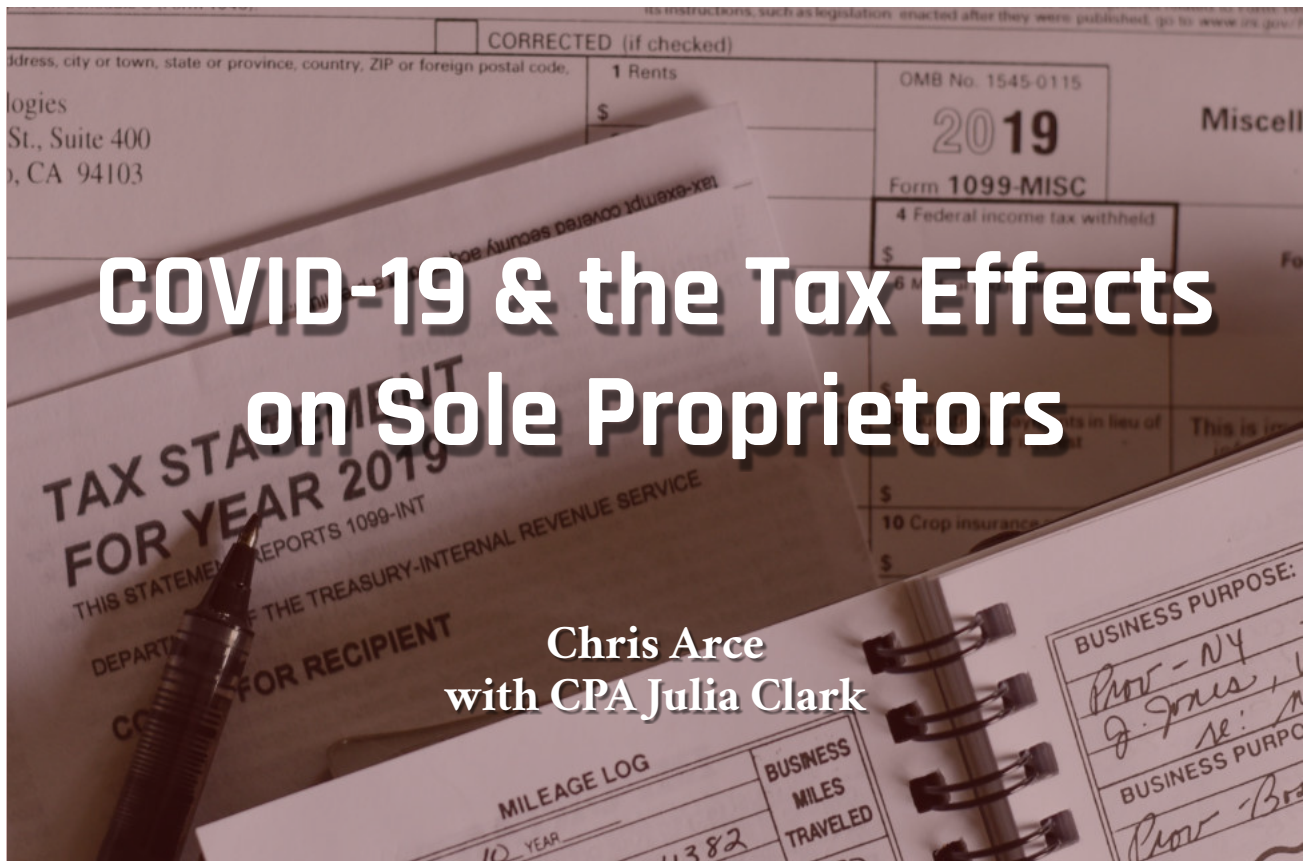
- Contributing (\$150 per year) St. Mary's Law Student / First Year Lawyer (\$30)
 Regular (\$75 per year) St. Mary's Crim. Law Assn. (\$0, Volunteer 5 hours)

(Attorneys:) I am a member in good standing of the State Bar of Texas. I am actively engaged in the defense of criminal cases in the State, County or Municipal Courts in Bexar County or the surrounding contiguous Counties, or in the Federal Courts of the Western District of Texas. I do not hold a full time or elected Judicial or Prosecutorial Position.

*SIGNATURE: _____ DATE: _____

PLEASE MAIL APPLICATION TO: SACDLA, P.O. Box 831206, San Antonio, Texas 78283-1206

*Required Information (Bar Card No. not required for student membership application)



COVID-19 & the Tax Effects on Sole Proprietors

Chris Arce
with CPA Julia Clark

The Law Office of Chris Arce has been doing business in San Antonio, Texas for the last seven years. We are a small firm that handles Criminal Defense, Personal Injury, and Family Law. As a small firm and sole proprietorship this year has definitely been unique in more ways than one. When the first reports of COVID-19 began surfacing we did not wait long before implementing the work from home for myself, my assistant, and interns.

We all know what happened soon thereafter. Live court hearings ceased, the phones stopped ringing, and clients stopped paying their bills. It was a very crucial time for all solo firms and all businesses. As we scrambled to figure out the

Economic Injury Disaster Loan (EIDL) we also caught wind of the SBA Payment Protection Plan (PPP). We then discovered all the hoops we would have to jump through in order to receive some type of relief with the PPP. Many of us were let down by our 'Big Banks' even though we did everything correctly—we either received little or no email communication on the status of our applications until we received the disappointing "Not Approved" email, and by that time, we also received the response, "SBA's PPP was hugely popular. In fact, we have learned the SBA has approved loans that will exhaust all the funding available for the initial round." Well, that was a gut punch. As we cursed our financial institutions and swore that we would be leaving them

as soon as this was over, we caught wind of a second round of funding. Still, some received it and others (including myself) did not.

Now present day, we have seen the courts slowly opening back up with Zoom online hearings and the phones are somewhat ringing again. Some courts take a little more leg work in order to get a hearing set and other courts are moving faster than before. Regardless, we are all in this together.

So, what now? What does that mean for “Sole Props” that either only have a few employees or just do it all on their own?

I called my CPA to discuss a few things that I am sure are on every “Solo’s” mind and here are the answers.

Q: Any different tax implications for Sole Proprietors?

In the past if you had a net operating loss you could carry it back and free up some tax. In 2018, they said you cannot carry it back anymore, you could only carry it forward. The CARE ACT says you could now carry back your 2018, 2019 and 2020 losses all the way back up to five years to free up some tax. Although the normal deadline for filing a carryback claim for 2018 using Form 1045 (or 1139 for corporations) has passed, Rev-Proc. 2020-24 provides that carryback claims arising in 2018 will be considered filed timely if filed by July 27, 2020.

Q: When are my 2019 taxes due? What about Quarterly taxes?

Your 2019 taxes and Quarterly taxes both are pushed back to July 15, 2020 with no penalties or interests. This was done automatically with no need for you to have to file an extension. If you are still not ready to file on July 15, 2020 you can still file an extension which will extend it to September 15 or October 15, 2020 depending on what forms to file.

Q: I didn’t receive any relief from the SBA PPP, is it worth it to even try again?

Short answer, YES! There is still money available and it was such a good deal it definitely will not hurt to try. I recommend drafting up your 2019 1040 C form (it doesn’t have to be filed) and submitting that in with your necessary paperwork. Although it’s capped at \$100,000 you could still potentially get roughly \$16,000-\$20,000. The best part about it is that, if used “properly,” 100% of it could be totally forgiven; and if not, your outstanding balance will continue to accrue interest at 1%, for the remainder of the two-year period. Also, I would try through a small local bank rather than a big national bank as they still have funding available.

Q: I didn’t receive any relief from the SBA PPP. What else is available?

If you did not receive any funds from the SBA PPP program and you have employees, you may be eligible for a 50% refundable payroll tax credit on wages paid up to \$10,000 during the crisis. This is available to businesses whose business was disrupted due to the shutdowns and can show that they experienced a decrease in gross receipts of 50% or more when compared to the same quarter last year.

Employers may also be able to delay the employer-side of social security payroll tax payments until January 1, 2021 with 50% owed on December 31, 2021 and the other half owed on December 31, 2022.

There is also relief for mandatory distributions from retirement plans. If you are over 70 and required to take mandatory distributions, those requirements have been waived for 2020. In addition, if you are facing virus-related challenges, you may be able to take distributions from your retirement account without the 10% early distribution penalty. You can withdraw up to \$100,000 and pay the tax over a three-year period with no penalty, or you have three years to repay the funds to the account.

As I had given up completely on receiving any type of relief while drafting this article, I went ahead and set up an account with a local bank and re-applied for the SBA PPP (fingers crossed), but at last, hope is alive. Obviously, these changes can be complex. I recommend visiting with your tax advisor to make sure you are taking advantage of everything out there to help your business through these tough times. STAY SAFE! 🙏



Chris Arce



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jclark@juliaclarkcpa.com
(512) 684.8410 ext. 101*

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Advanced Criminal Defense

August 28-29, 2020

San Antonio Airport Hilton

(210) 340-6060

611 NW Loop 410

San Antonio, Texas

John Convery & Mark Stevens

Course Directors



SCHEDULE Friday August 28, 2020	
8:00 am	Registration/ Continental Breakfast
8:30 am	Goldstein on the Fourth Amendment 🌹 Gerry Goldstein
9:30 am	What the Law May Be Next Week and Next Year 🌹 Mark Stevens
10:15 am	Break
10:30 am	Technology in the Courtroom 🌹 Frank Sellars
11:15 am	Juvenile Law Update 🌹 Jill Mata
12:00 pm	Break/ Lunch Buffet Service
12:15 pm	How to Accomplish a Herculean Task 🌹 Keith Hampton
1:45 pm	Recent Decisions from the Fifth Circuit 🌹 Judy Madewell
2:30 pm	Immigration Consequences in Criminal Cases 🌹 Jordan Pollock
3:15 pm	Break
3:30 pm	Preparing for and Challenging the State's Experts 🌹 Michael Gross
4:15 pm	Recent Decisions from the Texas Court of Criminal Appeals 🌹 Judge Bert Richardson and Judge David Newell

SCHEDULE Saturday August 29, 2020	
8:15 am	Continental Breakfast
8:30 am	Ethics for the Criminal Lawyer 🌹 Judge Audrey Moorehead
9:30 am	Voir Dire in a Sexual Assault Case 🌹 Sarah Roland
10:15 am	Break
10:30 am	Voir Dire in a DWI Case 🌹 Doug Murphy
11:15 am	Voir Dire in a Family Violence Case 🌹 Katheryn Haywood

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Note: **This course is not open to prosecutors and their staff.** The practice of criminal defense is much different today than even last year. The Fiesta Advanced Criminal Defense CLE will help its attendees provide professional and ethical assistance to citizens accused of crimes. Each of the topics is designed to allow both the novice and advanced criminal defense practitioner to use the information and resources immediately in defense of clients. The experienced speakers from around Texas and specially designed curriculum promise to provide current invaluable insight and trial skills to all who attend.

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