SAN ANTONIO
DEFENDER
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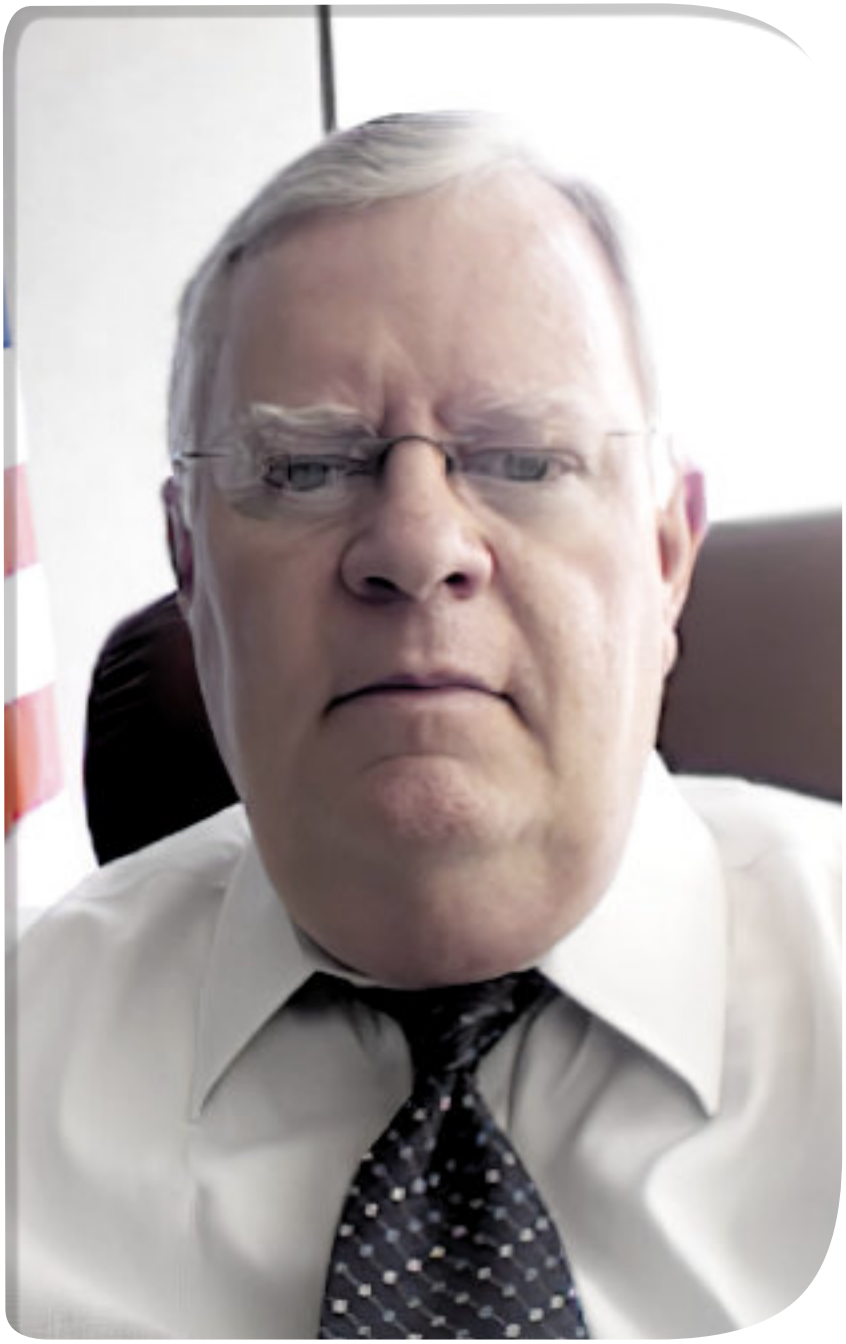
IN MEMORIAM:



LUCIEN B. CAMPBELL

AN
ANDERS BRIEF -
IN VERSE

ISSUES
CONCERNING
APPEALS
FOLLOWING
REVOCATIONS
FROM DEFERRED
ADJUDICATION

POST-
CONVICTION
TESTING OF
BIOLOGICAL
EVIDENCE

SACDLA

If you would like to submit an article to be considered for publication in *The Defender*, or see about how you can help or become involved with and contribute as an Associate Editor, please email mtallenlaw@gmail.com.

SAN ANTONIO

DEFENDER

EDITOR-IN-CHIEF, DEFENDER

Matthew T. Allen

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Letter From the President

Joseph A. Esparza

"All the secrets to life can be found in the Texas Rules of Appellate Procedure." I saw this response as part of a post on Facebook once by an older lawyer helping out a younger lawyer. The older lawyer answered the younger lawyer's question and offered some advice. I no longer recall his answer, but his opening line stuck with me because it made me laugh. Every once in a while, it pops up in my head and I smile. Here, I think, is someone who may have found the secret to life, at least his anyway. I'm still looking.

As I write this message, I am doing my best to confine myself to home as our country goes through a pandemic. House arrest, but with the freedom to leave it when I choose to for essentials. A lot of people are in the same position and they complain about it, which surprises me. They complain about the loss of freedom or staying home with all their belongings and family, some make the prospect sound draconian. It's confinement-lite, not the real thing. I don't want to imagine the real thing.

I can't imagine what it feels like to be sentenced to time in either a jail or a prison and have it be a COVID rich environment as well. Yet, as criminal defense attorneys we have clients in this very predicament. For many of these clients, a direct appeal may prove to be their only way out of a terrible situation. For criminal defense attorneys who focus on trial work, we now enter a world far removed from that in which we normally practice, where the emphasis turns to legal research and writing, to parsing case opinions looking for support for one's arguments and points of error.

As appellate practitioners, we now focus on the record of trial, scanning the past for help in the future. There's a reason the acronym for the Texas Appellate rules is "TRAP." Was error properly preserved? Was there a ruling on the objection? Did the Judge refuse to rule? Can we save this potential point of error if there wasn't? Was the objection one that might provide relief? Was this structural error or is some other standard applied to the error being appealed? As the Appellant, can I fit my brief into the 15,000 word limit? Once the Appellee's Brief is received, should I file a Reply brief? Should I request oral argument?

Appellate work can make you a better lawyer because it forces you to learn the law. That rule that everyone follows but no one really knows why? Appellate lawyers know. It's a specific code, rule, or statute. Have you ever watched a trial and witnessed the lawyer make the same objection again and again, even when the jury was annoyed or the Judge angry? That lawyer was preserving error and playing the long game. It's something I did myself once in a murder trial, going back and forth with a Judge over a constitutional objection to the point where the Judge was definitely annoyed with me. For multiple pages of a transcript, I objected and argued and after the trial was done, my client was convicted. But on appeal, I got the conviction reversed. I didn't do it alone, I had more experienced counsel to bounce ideas off of and mentor me through the process. Oral argument before a panel of justices in that case made me a better lawyer.

Appeals aside, this issue is also a tribute to a local legal giant, Lucien Campbell. The founder of the Federal Public Defender's Office for the Western District here in San Antonio back in 1975, he was a local powerhouse of a lawyer, well versed in the law and in the courtroom. Under his management, that office grew from a handful of lawyers into a large organization that continues to capably represent indigent criminal clients throughout the Western District. I only met Mr. Campbell a few times, but I was always impressed by his breadth of knowledge and his friendliness. He was a UT Law graduate and a former Judge Advocate General, before working as a prosecutor and, finally, defense counsel. Many experienced criminal attorneys and Judges here in town knew him and all respected him. He passed away on June 30, 2020. If anyone deserves a tribute issue, it is Mr. Lucien Campbell. May he rest in peace. His work is done.

CALL FOR SUBMISSIONS

The San Antonio Defender is always looking for content that serves to inspire, educate and excite our membership. If you would like to contribute, please contact a member of the *Defender* staff.

Letter From the Editor

Matthew Allen

CALLING FOR ARTICLE SUBMISSIONS

Do you have too much free time in-between zoom hearings?

Are you a judge that is tired of attorneys doing something or filing something wrong in your court?

Are you a prosecutor that somehow got a hold of this magazine (or somehow saw something on our listserve that you're not supposed to see) and are so secure in your job that you're willing to write an article to help defense attorneys?

Are you on the SACDLA Board and haven't written your article required to serve on the board?

Are you an up-and-coming defense attorney that wants others to know how smart you are even if you don't have as much gray hair?

Are you a non-attorney that actually knows more about the law than a licensed attorney?

Are you still reading this? If so, I would encourage everyone to submit an article for publication consideration in the *Defender* magazine. There are so many issues surrounding our profession right now and it only benefits our members if we get different perspectives and insights on new and old issues. There is no right or wrong length for an article and (almost) no wrong topic.

I sincerely appreciate those who have submitted articles that are published and those that are awaiting publication. If you ever have questions or want to submit an article, please email me at mtallenlaw@gmail.com.

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In Memoriam:

Lucien B. Campbell

Mark Stevens

Lucien Campbell died on June 30, 2020. He was 77 years old. Lucien was appointed the first Public Defender for the Western District of Texas in 1975, and he spent the next 32 years molding that office into what is now widely and properly regarded as one of the finest group of Defenders in the country. To his colleagues, Lucien was "Jefe," a title plainly bestowed to show both respect and affection.

Lucien's reputation as a lawyer was enviable. Most lawyers, even those who specialize in appeals, are never privileged to argue in the highly selective United States Supreme Court. But Lucien did, and so did lawyers in five other cases originating from the Federal Public Defender's office of the Western District of Texas. I knew of Lucien long before 2002, but that year I had the opportunity to work closely with him (and Alfredo Villarreal and Phil Lynch), on a lengthy, difficult case. I learned then first-hand about Lucien's mastery of the rules of evidence and procedure, his work ethic, his thorough preparation, his consummate professionalism, and, above all, his capacity to lead. Leading an office of talented, diverse, and outspoken defense lawyers for three decades years is no small accomplishment.

I never knew Lucien outside the office though, and it was only later, and in large part through reading the tributes published here, that I learned about his non-lawyer persona. He loved languages; in addition to English, he was fluent in Spanish and French. He read extensively and loved travel. He appreciated good food, fine wine, cold beer, art, and music, especially jazz, opera, and classical. After retiring he learned to play the piano and the guitar. He never forgot his friends, and was always willing to answer frequent questions from the many lawyers he had mentored during his career. And to the end, he loved a good card game, which, almost invariably, he won.

When The Defender learned that Lucien had died, we reached out to a select group of some the best lawyers around and asked them to share their memories. Since all our contributors are lawyers, it is not surprising that they speak of his accomplishments in the courtroom. That is good because the readers of this publication are also all criminal defense lawyers, and can all learn from and be inspired by Lucien Campbell, the lawyer.

It comes as no surprise to me, though, that all of our lawyer-contributors also spoke about Lucien Campbell, the man. Lucien proved by the full life he lived—in and out of the courtroom—that we lawyers can excel at our work, but can also have the energy—and make the time—to become kind, smart, interesting, well-balanced people who have a rewarding and meaningful existence away from the office. To me, that is the most important lesson we should try to learn from the life of this fine man.

Nancy Barohn

I worked for Lucien for only a year and a half in the 1980's. We liked each other. We were friends until the day he died. But it didn't start out that way.

I met Lucien in 1984. I had recently come to Texas from the Midwest, from a state public defender's office where the practice was very rough, and the defense bar very aggressive. Lawyers from my office in Kansas City had

been known to give the finger to the jury in closing argument–without sanction. It would not have been out of the ordinary for a lawyer to break the glass out of an office window. The philosophy there was to try everything no matter how horrible the case, and many of these cases were truly horrible. My job description there was "to make the horrible less horrible," and to go down fighting.

Against this background, I applied for an open position at Lucien's office twice. I got an interview the second time I applied, only because I typed my application, and Lucien valued presentation. It did not begin fortuitously.

On my walk back to his office, I noticed a photograph, prominently displayed, of a group of people standing in front of a courthouse with the inscription, "To Lucien, a great prosecutor"–signed by Ted Butler. I was trying to process this unhappy information as I walked into the office and met Lucien. He was very imposing physically and very serious. He did not smile, and had what I perceived at that time to be a very thick Texas accent, which can be somewhat off-putting to the Midwesterner. To put it mildly, we were unimpressed with each other. Only because I was his only candidate, and only because the position had been open for so long, did he agree to let me work for him on a trial basis. On my first day, he put a large expandable folder on my desk and told me to prepare a Rule 35 motion. He did not speak to me for the rest of the week.

At that time, the office was very small. There were only three lawyers–Lucien, Joe Brake, and me–two secretaries, Lydia and Imelda, and our investigator, Albert. I had plenty of "alone" time that first week, so I poked through the desk where I discovered notes and letters left behind by the previous occupant, Ed Prado–then awaiting confirmation to the district bench. These were really funny, but no clues were left on where to begin. On Friday, I put my work product on Lucien's desk, then went home and cried, vowing not to return. But I did. And Lucien decided to keep me despite my "givens."

I had a great time. Lucien really never told me how to do anything–he just told me to go do it. I got to try a lot of cases, including theft of 35 cents from the cash register at Kelly Air Force Base, "willful injury to a tree" in a federal park (against Judge Mathy and the Jahns), and a variety of drug and felony cases. It was a simpler time, before the Federal Sentencing Guidelines, and nothing really terrible happened. Clients routinely got probation. The very worst sentence a client of mine ever received was 18 years for manufacturing methamphetamine–eligible for parole in six years.

Lucien would read and edit my briefs to make sure I didn't stray too far out of bounds–though we sometimes differed on where the lines were. If I pissed someone off, or got into a dustup, Lucien would get on the phone and get it sorted. If I became overly-enthusiastic, he would cool my jets. Once, I had a Dyer Act case and ran into Lucien's office with much enthusiasm to tell him that I had a great defense as to why my client stole a car from a remote campsite somewhere out West before his arrest in San Antonio. Lucien looked up from his desk and mildly said, "Nancy, you are in Texas. In Texas, there are many reasons to kill a man, but there is never a reason to steal a car." And, he didn't get mad at me–even when I spilled a cup of coffee on a Fifth Circuit record, though I know he really wanted to.

As a lawyer, Lucien was a force who was always there to talk to. Most important, he didn't lie, he didn't cheat, he didn't try to take advantage of anyone, he was always prepared, he always behaved in a professional manner, and he always did his job without fanfare, and without seeking praise, even though he was always the smartest guy in the room. And he made it look effortless.

Beyond all this, Lucien was my friend and bridge opponent for 25 years after I left his office. We had lots of fun. Despite our initial dim appraisals of each other, it turned out that we had many interests in common, including such obscure interests as ham radio. And he was hilariously funny.

In December of last year, I was unable to attend our monthly bridge session so I emailed Lucien with stray thoughts:

> I always loved the voice-overs on the Masters–not to mention the Pro Bowlers Tour (which is another whole story). I thought it would be great to have a life where you could do your job in hushed silence, followed by a round of applause. Guess I should have bowled.

In true form, Lucien followed with an after-action report:

> **Bridge Results.** In a shocking upset, the pickup pair of Lucien–Pete surprised Clark–David in knuckle-biting straight sets, three chukkars of 5, 2 and 10, for a total of 17 for the low-production afternoon. No one expected this, considering Lucien, unlike Pete, brought no master points to the table.
>
> **Best Wine Poured.** In another upset, Clark's Adelaida 2013 edged out Lucien's Faust 2013 for best of show. Playing out before us, another chapter in the rise of upstart Paso Robles AVA, measured against the legendary Napa Valley.
>
> **Weakest Play for Sympathy.** Pete's comparison of his off-duty diversions to Wallace's, as if daily shoveling out the wife's quarterhorse manure was somehow less glamorous than gamebird shooting on the lease.
>
> **Best Story Told.** No award. With the absence of two particular starters, Nancy and Wallace, stories had a poor day.

And that's a wrap. If I have overlooked any salient categories, comments will remain open for 48 hours.

PS: And Nancy, if you had bowled, a lot more people would needlessly have been locked in jail for a lot longer.

Words are not enough to express how much I will miss this good man.

SAN ANTONIO EXPRESS—Monday July 26 1976

Public defender playing big role

By BILL MINTZ

Although just six months old, the San Antonio public defender office is playing a big role in the criminal federal criminal justice system.

The office was created to represent defendants in federal criminal cases who cannot afford an attorney.

Office was created to represent defendants who cannot afford an attorney for criminal cases

throughout the nation.

The five federal district judges in the Western District decided to create the

judges, the lawyers wanted to avoid possible intimidation of the lawyers by the judges, he said.

"But the public defender cannot be fired except by the Judicial Council of the fifth circuit," he said.

"And Lucien Campbell is not going to be intimidated."

Cooperating

The third rule proposed

The Hon. Henry J. Bemporad

United States Magistrate Judge
Western District of Texas

It is hard to overstate the impact that Lucien had on my career, my development as a lawyer, and my life.

Lucien had a deeply positive influence on my legal career. It is from him that I learned the most important lessons a criminal defense lawyer can learn: that there is no substitute for hard work and preparation; that cases are won and lost in the details; and that an advocate's greatest asset, in or out of the courtroom, is integrity. Lucien showed me what it meant to put service to the client first—he helped me to understand that the only way a criminal defense lawyer can truly gain the respect of the prosecutor and the Court, and the admiration of the community, is to represent the defendant zealously and fairly.

Lucien also taught me a lot about leadership. When managing an office as large and diverse as the Federal Public Defender for the Western District of Texas, one has to face innumerable obstacles and challenges—there is always a fire to put out, always a crisis at hand. Lucien taught me to face such challenges head on, speaking truth to power and treating colleagues and support staff fairly and forthrightly even when (indeed, especially when) they made mistakes. And although he was a very demanding boss, Lucien never held anyone to a standard nearly as high as the one he applied to himself.

But Lucien's most profound influence was on my personal life. He was a man with a dizzyingly vast array of interests and talents, and of intense curiosity—right until the end of his life, he was always studying, learning, and expanding his knowledge. He taught me so much about so many things that I will always carry with me: a love of jazz, of fine wine (and single-malt scotch), and of great books, great food, and travel. Most importantly of all, Lucien taught me about friendship. He was a great friend during the 17 years we worked together, and even a better friend for the 13 years afterwards. I cherished every chance I had to spend time with him.

My father Rabbi Jack Bemporad was also one of Lucien's dear friends, and he perhaps put it best: "Lucien represented the best not just in the legal profession, but embodied also the best of America. Apart from being a model as to what a lawyer should be, he was a true friend."

We were blessed to have Lucien in our lives, and I will always be grateful to him.

John A. Convery

Lucien B. Campbell laid the cornerstone for indigent criminal defense in the federal courts of the Western District of Texas, then devoted decades of his career to the project as architect, builder and leader of the Office of Federal Public Defender.

He was a lawyer's lawyer—extremely knowledgeable, skilled in legal research, writing, case organization and courtroom delivery. He practiced case preparation in every case with diligence and determination. He was a shining example of the professional ethical lawyer. Just contemplate the diplomatic and organizational skills required to navigate the terrain of fairly independent individual federal judges in diverse Divisions from El Paso, Midland/Pecos, Waco, Austin, and San Antonio to Del Rio; then add oversight, supervision and periodic reappointment by the Fifth Circuit and Administrative Office for U.S. Courts, as well as day-to-day personal supervision of the ma-

jor law firm that is the offices of the Federal Public Defender for the Western District of Texas. Epic!

At Lucien Campbell's request and with his recommendation to the Chief Judge I "volunteered" in 1998ish to serve as Criminal Justice Act (CJA) Panel Representative for the Western District, to lead and mentor the panel of federal court appointed lawyers, liaison with the Federal Public Defender and CJA program officials in Washington, and serve as ombudsman for the panel lawyers with the federal judges. I served for 20 years. Working on CJA projects and problems with Lucien during that time, and later with outstanding Federal Public Defenders hired and trained by Lucien (Henry Bemporad, Maureen Franco), was a very rewarding personal and career experience for me. Mentor and friend to many, many lawyers, teacher and leader in continuing legal education for judges and lawyers—Lucien was all this and much more. Lucien was an interesting, well read, well traveled family man who appreciated good food, great wine and the company of good friends.

Carolyn Fuentes

I first began working for Lucien Campbell in 1985, after nearly a decade of practicing law. I quickly decided that he was the hardest-working and smartest boss I had ever had. I think everyone who worked for Lucien felt the same way. Maybe that is why we naturally and proudly referred to him as "Jefe." Lucien's skill, dedication, and just plain old heart inspired those of us who worked with him to give our all to defend our clients. Perhaps Lucien's greatest skill was leading by example. I will never forget seeing him interact with a client in the early days. The accused, a poor, illiterate, undocumented immigrant sat on one side of the screen that divided lawyer from client at the federal courthouse holding cell. Lucien—an imposing figure—deep-voiced, educated, and in a position of power, sat on the other. The sincere respect with which Lucien treated our client, his patient explanation of the law, in perfect Spanish, and his calm efforts to seek out facts to help in the client's defense, all showed the client that Lucien worked for him. Lucien gave pride and hope to our clients, and backed it up with meticulous preparation and the best representation that any criminal accused could receive. As I watched Lucien though the years, with clients and in the courtroom, I resolved to try to be like him—to respect our clients, to be a strong advocate for the defense, and always to work my hardest on our clients' behalf. Lucien was the best jefe I ever had, the best lawyer I ever met, and a fabulous friend.

Maureen Franco

It is very difficult to write anything that would adequately convey what Lucien Campbell meant to me professionally and personally and what he meant to the federal defender system. As I wrote to our office in announcing his death, he was a giant.

I learned how to be a lawyer from Lucien. I learned how to be a leader from him. Lucien was a man of few words but spoke them eloquently and thoughtfully. He had high standards for the people who worked for him but rightly so. Those were the very standards to which he held himself. Lucien taught all of us that our word was our bond. He taught us that our individual and collective integrity was our greatest asset to our clients and to the federal criminal justice system. Lucien demonstrated to us that hard work and preparation will always pay off in the end. Even if we don't win the case, our client will see that we did everything within our power to give him or her a voice. Everyone, and I mean everyone, held Lucien in high regard. He could be "scary" which was the word ascribed to him by many of us long time federal defender employees. Scary not because he wasn't a benevolent leader but because we all sought to make ourselves worthy of the chance he took by hiring us. Scary because he was so smart. Scary because deep down we all knew we could never measure up to Lucien and the standards he had set for himself and all of us.

Personally, he meant the world to me. Lucien was my mentor and a second father. Just like my father, he had a unique knack of reaching out to me when I needed support and encouragement. Several times, since I became the Federal Defender in 2013, Lucien reached out to remind me to have courage. Reminding me that what we do is important. Reminding me that being a Federal Public Defender was a calling that few are lucky to have the opportunity to answer. I created an annual award named in Lucien's honor (which I am certain he hated), and my awarding it to an employee is the highest compliment I can give.

I mourn that there is a generation of lawyers in our office who never got the chance to work for and learn from Lucien Campbell. I will miss him immensely. I have saved all of our messages and will reread them when I feel myself not quite living up to the standard he set for me as the Defender. I hope I will hear his voice as I read his words of encouragement to be courageous. I will be forever grateful to him.

Gerry Goldstein

I first met Lucien in 1973. My partner Van Hilley and I had been appointed by Judge Peppy Dial to represent Fred T. Durrough, charged with capital murder in the Olmos Park home invasion-murder of Colonel Henry Tyler. Lucien sat quietly as second chair to Charlie Conway, who at the time tried almost all the Bexar County capital cases for then DA Ted Butler. Durrough was convicted after a three-week trial during which Lucien played only a supporting role. Although his death sentence was later reversed on change of venue grounds, Lucien Campbell's five-minute closing was probably the most compelling and effective I've witnessed in over 51 years of practice. Durrough had two prior murder convictions and yet another for armed robbery. When it came to Lucien's turn, he rose slowly from the prosecutors' table with my client's three pen packets in his hands. There was a small walkway behind the jury box and Lucien walked purposefully behind the jurors. As the jurors craned their necks to observe, Lucien methodically thumb-tacked each of the judgements to the wall behind them, telling the jurors in Brother Campbell's unique slow and precise style: "These last three juries spared Fred Durrough's life so he could return to your community to kill again. Do you want to be the fourth? That's up to you." He then sat down, his eyes piercing into each juror's with his lips pursed in that inimitable Lucien Campbell style. Everyone in the courtroom knew at that moment the case was over and Fred Durrough's fate had been chiseled in stone!

Two years later Lucien was selected by the Fifth Circuit to lead the first Federal Public Defender Office in the Western District of Texas. At the time, our local Bar was vocally expressing concerns that such a publicly supported defender service posed a threat to the private bar (the perceived scourge of socializing the practice of law). Lucien on the other hand was outspoken in his concern that by placing the financial fortune of the defense function under the umbrella and control of the federal judiciary Congress had created a conflict not shared by federal prosecutors, who were independently financed through Congress. Lucien's strong and principled voice came as a breath of fresh air amid the austere atmosphere that prevailed in then-Chief Judge Adrian Spear's federal courthouse.

During the succeeding three decades at the helm of that office, Lucien became a trailblazing voice for the defense of the defenseless, rising above the petty politics and competing policies that plague our justice system. In the process he amassed an incredibly talented staff of well-trained, stand-up advocates, many of whom have gone on to become prominent defense lawyers and judges in our community and beyond. One, Ed Prado, even went on to serve a distinguished career as a judge on the Fifth Circuit Court of Appeals and now as the U.S. Ambassador to Argentina. There is no better example of Lucien's professional mentorship than Magistrate Judge Henry Bemporad, who succeeded Lucien in 2007, and continued that passion for providing skilled and talented representation to those most in need until he became a federal Magistrate Judge in 2012. We even stole one of the defenders Lucien hired and trained, able lawyer Kurt May. I could go on to single out so many of the remarkable and talented lawyers Lucien groomed into some of our District's most forceful and respected advocates. However, suffice it to say that his office successfully argued three precedent-setting cases before the United States Supreme Court, a feat few law offices, civil or criminal, could match.

Lucien Campbell represented the best and the brightest of our profession. Over the years I had the pleasure of sharing courtrooms, a few dining rooms, and far too many bar rooms with Lucien, enjoying a little fruit of the vine and lamenting the latest incursion into the rights of the accused. I even had the honor of summarizing his career at a retirement ceremony for Lucien in 2012. But what will always remain foremost in my memory was Lucien's signature calm and collected demeanor. Whether discussing the appropriate wine for an evening meal in erudite enological prose, critiquing your most recent appellate argument, or the latest precedent from the Supremes, Lucien's slow-talking, concise, and pithy wisdom, always delivered with a twinkle in his eyes and that characteristic shit-eatin' grin, will forever and indelibly be etched in my mind. God speed, my Brother.

Ronald Perry Guyer

In 1974 I was working at Nicholas and Barrera. Mr. Nicholas invited me to go with him to the Court house to meet with an assistant district attorney. The goal was to keep a pool room heroin dealer out of prison. I was introduced to Lucien Campbell. Mr. Nicholas, the consummate schmoozer, negotiator and dealmaker, ran into the brick wall in the form of Lucien Campbell. I do not remember the fate of our client but I do remember that Lucien was unmoved by Mr. Nicholas's charms.

In the spring of 1975 Lucien was appointed the first Federal Public Defender for the Western District of Texas. His first two assistants were Joe Brake and Ed Prado. A small office for a sprawling district but there were only 26 Assistant U.S. Attorneys, both civil and criminal, in the Western District of Texas. I was number 26. The gravity of assignments sent me to cover the Midland-Odessa and Pecos divisions. Weed smuggling from the Big Bend was 90% of the docket, and the Pecos Division cases were prosecuted in Midland.

U.S. District Judge Dorwin Suttle was of the opinion that the indigent defendants of M-O and Pecos Divisions should have the talents of the Federal Public Defender's Office. We would fly to Midland and hold Court and the next day drive to Pecos together to handle the majority of the cases. The 100 mile trip allowed us to resolve the majority of cases, Judge Suttle had reopened the Pecos Division. I became very well acquainted with Lucien, who was forced to transform his talents to defending weed smugglers.

On a trip to Midland we were stranded due to some airline problem. Lucien, a stout individual, was dieting with some regimen which required a liquid which he did not have in Midland. When Lucien diverted from his diet he did it the way he handled his cases. We feasted in style. I was able to view the more human side of Lucien when we shared stories and talked of more than the law or the facts of stopping truck loads of contraband. He was always prepared and always knew the law that applied to his cases. We became friends, which enriched my life.

Phil Lynch

Nice anaphora, how about some asyndeton.

Right there, that was Lucien Campbell. He knew the names of things I didn't know were things. He knew rules other people didn't know existed, even though they thought they knew the rules fairly well. And it was all matter of fact. Of course you would need to know this, how could you be what you should be if you did not. But also there was joy in getting it right and doing so elegantly.

I still, in my fourth decade out of law school, don't know that I should've been a lawyer, but I know that anything good about what passes for my lawyering owes a big debt to Lucien. Lucien wasn't simply the most intellectual and prepared of lawyers, he was also near indefatigable, which made him the perfect boss to get out of me anything that might be there. Lucien never had a lot of rules. He rarely said you will do it this way (apart from attending CLE sessions that the office paid for). What he said was do your best. Well, there went the next 30 years.

Like many who do this work I have authority issues. Lucien never bossed simply because he had authority. He encouraged or urged courses of action because he knew his stuff and he knew there was much work that needed doing. He was a boss who made copies and post office runs as willingly and as precisely (yes, there was a better practice for getting your mailings date-stamped) as he edited briefs or tailored defenses. When the boss does everything the right way, he leaves you no other option than to be like him. To do less, to pretend that you as an attorney were too important to do a task, or that as an attorney your ideas were too fine to reexamine, was to signal that you wouldn't do your best, that you declined to do your job fully.

Lucien wanted from us the rigor and focus that he brought to us and our clients. Strategies for winning, not grand causes or callings. It wasn't how right you felt about yourself doing the job. It was how right you did the job. It wasn't that he denied the possibility of moral victories; it was that he didn't let you settle for them. He taught that it wasn't a moral victory if you just walked out and said you were right, had been all along, and would

feel that way even if you lost in court. Just as he earned his authority anew each day, rather than asserted it by virtue of his office or reputation, he expected you to earn each day your sense of doing a righteous job. You had to have done enough to deserve to have won. If you did that and you didn't win, that was okay, but you didn't get righteousness points for showing up and declaring you were the good guy, the warrior, the sensitive soul alert to injustice, overcaution, and overzealousness wherever it was found.

Now all that said think about sharing an office with Lucien eight hours a day for two months. Henry Bemporad and I did that in late 1991. The FPD office was being renovated and we were to move into Lucien's office. Our desks were set against the wall in Lucien's office, Henry's on the right hand and mine on the left (and you know which one of us is a judge now). We would sit at our desks, looking at the wall. Lucien would sit at his desk several feet behind us, and see everything. I was more than a bit nervous going into this situation. Wouldn't it become obvious to Lucien that this young guy lacked his focus, his concentration, his talent? Wasn't there some sort of metaphor in this?

It turned out there was. Lucien Campbell had your back. I had worried: I'll be out in front of him, he'll see me fall. Instead, when I fell, he picked me up, dusted me off, set me back on path with an instruction or two, and the occasional deserved and focused reproach. Never only blame, and never left alone. That loyalty to his people was the quality I came to respect most about Lucien, more than the brilliance, more than the preparedness, more than the willingness to work long hours on cases. In the office Lucien created, loyalty and responsibility ran down as well as up. Lucien didn't let you down. We stood together with and for each other and our clients.

But I don't want to heroize or set Lucien apart. He made mistakes as well as copies, just fewer of the former. He read, listened, and traveled widely and well, but that didn't keep him from joining the young'uns for canned Buds at the Acapulco drive-in back when that was a place describable only as decrepit and long before it had a brief moment of hipness.

When he left the FPD, he served at the ready and gave counsel when asked. He may not have ranged as physically far in retirement as he might have anticipated he would, but his mind explored deeply and shared generously through visits and emails. He kept his family utmost, and his dear friends close. With them, he poured libations, matched wits, told stories, and played many hands. See it wasn't only your job that you do and do well, it was your life. That, great as anaphora and asyndeton were, was his best lesson.

Liz Rogers

Last fall, I was on a river trip down Mariscal Canyon, in the Big Bend, and I got my compatriots to share a campfire exercise I learned from a friend: I asked each person to share a story about the person (not a parent) who is still alive, that had the most influence on their life. Everyone told their story, and I then asked: Have you told that person what they have meant to you?

Lucien was that person to me. In spite of his formality (I'm sure he was always fearful that I would give him a big hug), I hope he knew how I adored him. I have never deleted an email he wrote, because no one wrote more cleverly. I cherished my short visits with him and Cynthia in their beautiful San Antonio home after his retirement.

Lucien Campbell hired me in 1984 as an Assistant Federal Public Defender in his El Paso office. I can't believe I got by the Spanish interrogation, but I guess he knew I was trying. In less than three years, I became his First Assistant. His standards were so high, his integrity so firm, his legal skills so sharp ... and I'm not even touching on his literary expertise, his encyclopedic knowledge of wine and art and opera and classical music and jazz. I will never forget bragging to him about enjoying my first real wine experience in San Francisco when I told him how much I loved merlot. He dryly responded: "You know that's a blend and not a grape." Of course, I did not know that, but now I do.

So many of us from the western side of his huge district are forever grateful for the chance to work for him and the organization he built to national stature. He groomed his successors, Henry Bemporad and Maureen Franco, to lead us with even bigger caseloads and more lawyers in more offices in the very large Western District of Texas. He was the mero, mero.

We will miss him for a long time to come.

Molly Roth

A master wordsmith, Lucien led without words. His presence in the courthouse and office exemplified criminal defense, devoid of pretense or pomp. Lucien exhorted us to better practice law by daily showing us his best practices. Lucien brought out our best by expecting our best, and he accepted nothing less from himself.

Lucien kept his door open. After contentious court hearings, my first stop was his office, not mine. He debriefed me thoughtfully and taught me without fail. Once, after hearing the final stages of my client's jury trial, Lucien asked me whether the district judge had granted my request for an unanimity instruction. I excused myself, ran (literally) to the courthouse, and made the request. I was happy to report to Lucien (about 20 minutes later) that yes, the court granted my request. He neither chided me for failing to do this earlier, nor congratulated me for speedily making it right. He simply guided me, and expected my best. His measured method seared lessons into my brain. He believed in me, in us, in honest advocacy for our clients.

A consummate connoisseur, Lucien also shared his knowledge of delights beyond the law. Among those delights was wine. He helped me find a perfect 40-year-old bottle for my parents' 40th wedding anniversary. Very early one morning, he called me from Paris with the bottle in hand and told me he and Cynthia would be returning with it. That was Lucien: he was an all-in actor, fully present, instructive, inspiring, and compelling. Gratitude grows where words fail.

Thank you, Lucien.

Lucien, Cynthia, and son Evan at the Supreme Court

Alfredo Villarreal

In 21 years of having the thrilling experience of practicing law alongside Lucien Campbell there were innumerable moments when I walked into his office because I was faced with a daunting issue in one of my cases. The most prominent image I have of Lucien's caliber was of him spinning in his splendid vintage high-back leather cathedral of an armchair. With his mighty right hand he would, from his credenza, effortlessly cradle the hefty Federal Code which, perpetually, he kept within grasp.

Without fail, to my inquiries, his initial volley unceasingly was, "Well, let's see what the rules say". He was one of the greatest legal minds to have ever practiced law in San Antonio and his analysis of a legal point always began with the "black-letter" law.

Lucien's intense fidelity to and passion for the law will continue to be for all defense counsel a heartening force in an era of increasingly hostile courtrooms. His vision of our mission as criminal defense lawyers is both an expression and a wise admonition that ours is "the highest calling."

AN ANDERS BRIEF IN VERSE

Randy Schaffer

For those who don't do much appellate work or are unfamiliar with an *Anders* brief, if the appellate attorney finds that there are no grounds for appeal they must still file a brief. That brief, which is more exhaustive and time-consuming than it sounds, must outline why there are no legitimate grounds and has to meticulously explain why each issue, frivolous or not, has no merit. Randy Schaffer once added a little creativity to an *Anders* brief:

Though this appeal is short on merit,
With 20 years to grin and bear it,
What appellant needs it seems to me,
Is a court not of law but equity.

For Clarence Rivers was clearly a jerk,
Making trouble, eschewing work,
He grew to manhood and gave up toys,
But kept on playing with little boys.

His life it seemed was in a rut,
His hands upon a young boy's butt,
The price he paid to be so lewd,
Was to agitate a fearsome dude.

Clarence's hands on Junior's buns,
Sent appellant and Wilma to their guns,
The errors of his loathsome ways,
Were lost in the stupor of an alcohol haze.

So angered were appellant and his wife,
That on deaf ears fell the pleas for life,
Despoiling Junior was such a disgrace,
That appellant decreed, "Off with your face."

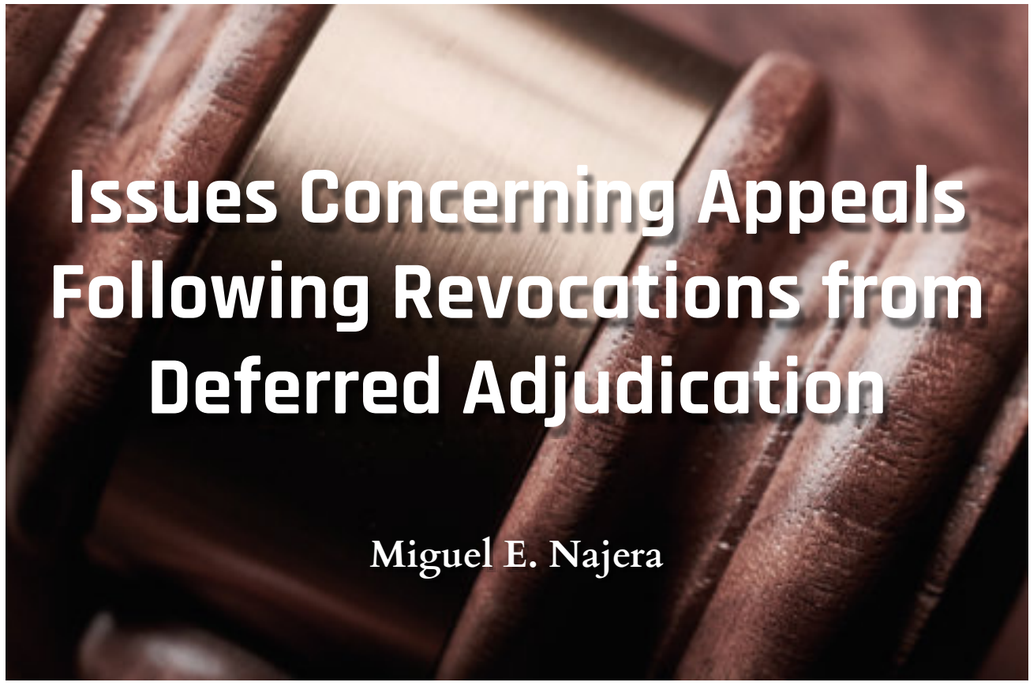
And so it was, a shotgun blast,
Clarence's problems were now in the past,
No more weed and no more wine,
No more face and not much of a spine.

And then without any reason or rhyme,
The trial court frowned on this minimal crime,
20 to do in the crossbar hotel,
And up that point we thought all was well.

So the record was read and I studied the law,
But the trial was held without a flaw,
And though I persisted with the greatest of zeal,
I reluctantly deem this a frivolous appeal.

No doubt appellant will be unnerved,
Cause Clarence done got what he deserved,
And though this court will deny relief,
The passing of Clarence shouldn't bring much grief.

As for appellant it seems a shame,
To lose his freedom and tarnish his name,
But unquestionably it can be said,
'Tis better to be Ned than dead.



Issues Concerning Appeals Following Revocations from Deferred Adjudication

Miguel E. Najera

While practicing in both County and District Criminal Courts, attorneys will become familiar with the "Certification of Appeal" document that is required as part of any plea agreement. Typically, it is a relatively simple concept that does not require an in-depth explanation to their clients. In the average plea-bargain case, most clients will be waiving their right of appeal. The exceptions are pre-trial motions, such as motions to suppress, that have been ruled upon by the trial judge; those can be appealed to the appellate court regardless of the plea. However, those circumstances are rare, and most attorneys will inform their clients that if the judge follows the plea-bargain agreement, they will need the judge's permission to appeal—permission that is as elusive as a cool summer evening in South Texas. However, things get a little more complicated when it comes to Motions to Adjudicate Guilt.

The Process

If your client received deferred adjudication from the court, but then subsequently violates the conditions of probation, the supervising probation officer will file a violation report that will eventually lead to a Motion to Adjudicate Guilt being filed by the State. *See Tex. Code Crim. Proc. Ann. art. 42A.108*. If the State's attorney and judge decide to sign off on the motion, a warrant will be generated, and the probationer will be arrested. *See id. art. 42A.751*. In most instances, your client will be arrested without the magistrate setting a bond. This is likely due to the language in article 42A.751(c), which provides in part that "only the judge who ordered the arrest for the alleged violation may authorize the defendant's release on bail." *See id*. Your client will then be detained until you approach the judge and request a bond. Fortunately, because there has been no final conviction, judges recognize in these situations the need to set a bond on motions to adjudicate guilt.

As the original attorney handling the plea should have warned his or her client, if the judge finds the underlying alleged violations to be true, the probationer is now facing the full range of punishment. Some courts allow for negotiation with prosecutors and will honor agreements made between the parties; others do not. However, there are some courts that will or will not honor agreements depending on the specific circumstances—such as when it is the first motion to adjudicate guilt. Therefore, it is of the utmost importance to familiarize oneself with each particular judge's routine. This will allow you to better represent your client's interests and to know the potential for an agreement or for the necessity of a revocation hearing. Additionally, when dealing with Motions to Adjudicate Guilt, be mindful of the affirmative defense laid out in article 42A.109, which concerns failures to report and the due diligence requirement of the State. *See Tex. Code Crim. Proc. Ann. art. 42A.109*.

Overview of Appellate Rights After Revocation

As with a plea, trial courts will require you and your client to sign a certification of appeal concerning the revocation—which begs the question: What are your client's rights concerning an appeal from an adjudication of guilt following a revocation hearing? This question is separate from appeals of orders deferring adjudication, which is another Pandora's box of case law to be examined at another time.

Originally, a defendant had no right to appeal from the trial court proceeding on the original charge after having been found to have violated a condition of his or her deferred adjudication community supervision. *See Wier v. State, 919 S.W.2d 469, 470 (Tex. App.—Amarillo 1996, no pet.)*. However, in 2007, the legislature amended article 42.12§5(b), and in 2017, the legislature repealed article 42.12 and replaced it with article 42A.108, the statute that now controls adjudication hearings. Under current law, the courts of appeal do not have jurisdiction to hear appeals from modifications of the terms of probation or terms of deferred adjudication. *See Basaldua v. State, 558 S.W.2d 2, 5 (Tex. Crim. App. 1977); Quaglia v. State, 906 S.W.2d 112, 113 (Tex. App.—San Antonio 1995, no pet.)*. Nor can a defendant, after revocation, appeal any issues relating to the voluntariness of his original plea placing him on deferred adjudication. *See Manuel v. State, 994 S.W.2d 658, 662 (Tex. Crim. App.1999)*. That is, issues relating to the origi-

nal proceedings, meaning when the defendant was originally placed on deferred adjudication, cannot be subsequently raised in a separate appeal upon revocation. *See id*. This includes not only voluntariness but also sufficiency of the evidence. *See id. at 661-62*. Sadly, this also extends to the sufficiency of the evidence as to the violations of the conditions of deferred supervision. Appellate courts have consistently held that the trial court's decision to proceed with an adjudication of guilt is one of absolute discretion and is not reviewable on appeal. *See Williams v. State, 592 S.W.2d 931, 932-33 (Tex. Crim. App. 1979)*.

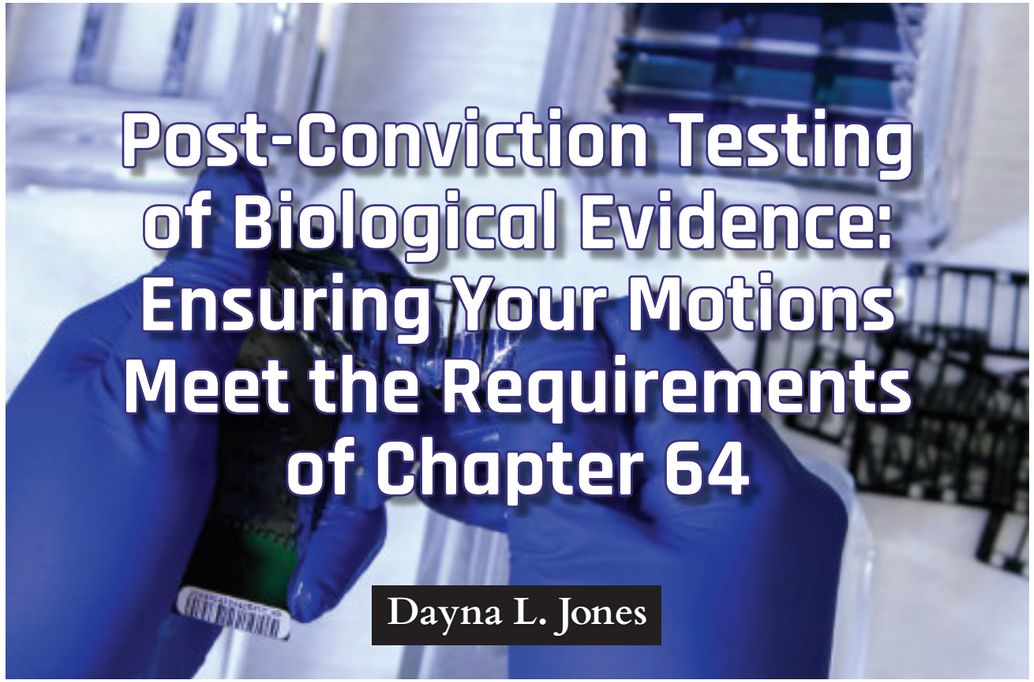
So, What Can Be Appealed?

There are a few, limited exceptions—such as, the ability to raise matters that render the original judgment void. In one case, a defendant was permitted to challenge on appeal the jurisdiction of the trial court, arguing that the original charging instrument containing misdemeanors failed to invest the district court with jurisdiction over the case. *See Puente v. State, 71 S.W.3d 340, 344-45 (Tex. Crim. App. 2002)* (addressing appellate argument regarding whether the conviction was "void"). Typically, a defendant may appeal, after revocation, issues relating to legal developments that occurred after the entry of the order for deferred adjudication—the reasoning being such issues could not have been raised earlier. Thus, any issues that could have been raised at the time the defendant was placed on deferred adjudication will be subsequently barred from being revisited after revocation. *See Manuel, 994 S.W.2d at 661-62;Pena v. State, 551 S.W.3d 367, 369 (Tex.App.—Amarillo 2018, no pet.)*.

Another case allowing for an appeal is *Durgan v. State, 240 S.W.3d 875, 877-78 (Tex. Crim. App. 2007)*, where a defendant was permitted to appeal matters not challenging the trial court's decision to adjudicate. Specifically, the defendant in that case challenged whether the trial court had erred in proceeding to a revocation hearing while the defendant was incompetent to proceed. *Id*.

A final tactic for defense attorneys focuses on sentencing. Because a trial court's decision to revoke deferred adjudication seems, in and of itself, a decision outside the purview of the appellate courts, a defense attorney can, instead, focus on the punishment hearing. Procedurally, the punishment hearing is a separate matter, which is held after a court has decided to revoke a defendant's deferred adjudication. As such, issues relating to the punishment hearing can be brought on appeal after revocation. *See Issa v. State, 826 S.W2d 159, 161 (Tex. Crim. App. 1992)*. Such issues include deadly-weapon findings, *Tellez v. State, 170 S.W.3d 158, 161, 163-64 (Tex. App.—San Antonio 2005, no pet.)*; the trial judge predetermining punishment before hearing evidence at the punishment phase, *Washington v. State, 71 S.W.3d 498, 499(Tex. App.—Tyler 2002, no pet.)*; and issues of ineffective assistance of counsel, *Kirtley v. State, 56 S.W.3d 48, 52 (Tex. Crim. App. 2001)*.

In conclusion, a defense attorney should note that appeals following revocations are very limited and relief is rarely granted. Thus, when confronted with a motion to adjudicate guilt, a defense attorney should take his or her clients' limited appellate rights into consideration and advise them accordingly. It is a prime example of the carrot and stick idiom. It is tasty in its ability to keep one from serving a sentence, avoiding a conviction, and in some cases in its ability to be sealed. However, the stick is a formidable one, with the weight of a full range of punishment and little recourse when it begins to swing at your rear.



Post-Conviction Testing of Biological Evidence: Ensuring Your Motions Meet the Requirements of Chapter 64

Dayna L. Jones

Chapter 64 of the Texas Code of Criminal Procedure provides for post-conviction testing of certain biological evidence if the convicted individual meets the Code's requirements. Post-conviction DNA testing is just one tool that defense attorneys can use to assist in correcting a wrongful conviction. This article is intended to serve as a basic guide on filing and litigating Chapter 64 motions in the convicting court.

The purpose of Chapter 64 is to provide a mechanism for a defendant to establish his innocence by excluding himself as the perpetrator of a crime. *Peyravi v. State, 440 S.W.3d 248, 249 (Tex. App.—Houston [14th Dist.] 2013, no pet.]*. As such, a person who received deferred adjudication is not convicted and cannot request testing under this chapter. *State v. Young, 242 S.W.3d 926, 929 (Tex. App.—Dallas 2008, no pet.)*.

Furthermore, a convicted individual may not rely on Chapter 64 if the items he wants tested could have been tested at the trial level."The convicted person must show that (a) DNA testing was not available; (b) DNA testing was available but not technologically capable of providing probative results; or (c) no DNA testing occurred through no fault of the convicted person, for reasons that are of such a nature that the interests of justice require DNA testing." *Ex parte Gutierrez, 337 S.W.3d 883, 895 (Tex. Crim. App. 2011)(internal citations omitted)*.

The items sought to be tested must relate to evidence "that was secured in relation to the offense that is the basis of the challenged conviction". *Tex. Code Crim. Pro. Ann. Art.64.01(b); In re Morton, 326 S.W.3d 634, 646–47 (Tex. App.—Austin 2010, no pet.)*. This means a convicted person may not rely on Chapter 64 as a means to have items tested that were not collected at the trial level for the offense he was ultimately convicted of committing. In *Morton*, Michael Morton sought DNA testing of items collected in a different murder to be tested as well as the bandana that was collected in the murder of his wife. "Evidence collected in connection with the investigation of the McKinney murder was not—and has not been—secured in relation to Christine Morton's murder. Therefore, we affirm the district court's denial of appellant's motion to have DNA testing performed on biological evidence collected from the scene of the McKinney murder." *Id*. As we all know, the bandana that was collected in his wife's murder was ordered to be tested and that led to Mr. Morton establishing his innocence. *Id*.

There is no free-standing right to DNA testing in Texas, thus Chapter 64 only requires a judge to order testing when all of the required elements are satisfied. This places the burden to establish eligibility for testing on the convicted person. The convicted person must submit the motion for DNA testing to the convicting court to test "evidence that has a reasonable likelihood of containing biological material." *Tex. Code Crim. Pro. Ann. art.64.01(a-1)*. The convicted person must provide an affidavit containing statements of fact in support of the motion.

The judge must find that the evidence still exists and is in a condition that makes DNA testing possible and has been subjected to a proper chain of custody. *Tex. Code Crim. Pro. Ann. art.64.03(a)(1)(A)*. The court must also find there is a reasonable likelihood that the item contains biological material suitable for DNA testing. *Tex. Code Crim. Pro. Ann. art.64.03(a)(1)(B)*. "Biological material" is defined as items in the possession of the state that contains: "blood, semen, hair, saliva, skin tissue or cells, fingernail scrapings, bone, bodily fluids, or other identifiable biological evidence that may be suitable for DNA testing; and includes the contents of a sexual assault evidence collection kit." *Tex. Code Crim. Pro. Ann. art.64.01(a)*. Identity must have also been an issue in the case. *Tex. Code Crim. Pro. Ann. art.03(a)(1)(C)*. But, a convicted person's guilty or *no lo contendere* plea will not prohibit him from filing a motion under this chapter. "[T]he convicting court is prohibited from finding that identity was not an issue in the case solely on the basis of the plea, confession, or admission." *Tex. Code Crim. Pro. Ann. art.64.03(b)*.

The convicted person must also establish by a preponderance of the evidence he or she would not have been convicted if exculpatory results had been obtained through DNA testing and the request for DNA testing is not

made to unreasonably delay the sentence or administration of justice. *Ex parte Gutierrez, 337 S.W.3d 883, 889 (Tex. Crim. App. 2011)*.

The items sought to be tested must have been in possession of the state during the trial but was either not previously tested or if it was previously tested, new testing techniques provide a reasonable likelihood of more accurate and probative results. A previously tested item could also be retested if it was tested at a laboratory that ceased DNA testing after an audit by the Texas Forensic Science Commission revealed faulty testing practices and the item in question was tested during the time period revealed in the audit. *Tex. Code Crim. Pro. Ann. art.64.01(b)(2)(B)*.

There is no longer an absolute right to counsel under this chapter. The right to counsel has been limited and requires the trial judge to find "that reasonable grounds exist for the filing of a motion." *Ex parte Gutierrez, 337 S.W.3d at 889*.

If the convicting court finds that the request for testing has satisfied all necessary requirements, the court shall order the testing. *Tex. Code Crim. Pro. Ann. art.64.03*. The convicting court may order testing be done at the Department of Public Safety (DPS) lab, a lab contracted by DPS, or another lab accredited under article 38.01 of the Texas Code of Criminal Procedure. *Id*.

It is important to note that during the 84th Texas Legislative session, article 38.01 of the Texas Code of Criminal Procedure was amended and the new requirements took effect January 1, 2019. These new requirements establish that every forensic analyst must be licensed and meet the requirements of the Texas Forensic Commission. If you handle cases involving any forensic testing, it is imperative that you familiarize yourself with these new requirements.

CALL FOR SUBMISSIONS

The San Antonio Defender is always looking for content that serves to inspire, educate and excite our membership. If you would like to contribute, please contact a member of the *Defender* staff.

CAUSE NO. XXXX-CR-XXXX

STATE OF TEXAS	§	**IN THE XXX JUDICIAL**
V.	§	**DISTRICT COURT**
JOHN SMITH	§	**BEXAR COUNTY, TEXAS**

MOTION FOR THE COURT TO ORDER DNA TESTING

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW JOHN SMITH, who by and through undersigned counsel and pursuant to Article 64.01 of the Texas Code of Criminal Procedure moves this Honorable Court to order the DNA testing of evidence collected by law enforcement and the Bexar County Crime Lab, which is now in the possession of the Bexar County District Clerk's Office and would show the following:

FACTUAL AND PROCEDURAL BACKGROUND

Mr. Smith was convicted of Murder and sentenced to 60 years in the Texas Department of Criminal Justice—Institutional Division. At trial, it was alleged that Mr. Smith entered the complainant's home. Evidence collected at the scene included a hat that was purportedly left behind by the perpetrator. This hat was admitted and relied on by the state at trial as State's Exhibit 5. The hat was previously checked for DNA evidence, however, in 2004 the Bexar

County Crime Lab could not find any DNA evidence at all on the inside of the hat.

This hat was identified at trial as being left by the perpetrator, thus if DNA evidence is obtained from the hat and the evidence does not belong to Mr. Smith, then he would be excluded as the perpetrator of this crime. Mr. Smith has provided an affidavit that forensic testing on the hat would exclude him as the perpetrator of the offense. *Affidavit attached as Exhibit ___.*

DNA collection and testing has significantly changed since the time of trial. Mr. Smith asserts that new DNA testing could find DNA and that this DNA would not link him to this offense.

EVIDENCE IN POSSESSION OF THE STATE

The hat in question was admitted at the trial as State's Exhibit 5 and it is currently in the possession of the Bexar County District Clerk's Office.

Court's Authority to Order DNA Testing

Article 64.01 of the Code of Criminal Procedure provides that the convicting court may order forensic DNA testing of evidence that has a reasonable likelihood of containing biological material secured in relation to the offense and was in the possession of the state during the trial of the offense, but was not previously subjected to DNA testing or "although previously subjected to DNA testing, can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the

previous test." Tex. Code Crim. Proc. art. 64.01(a-1) and (b).

This Court may order that DNA testing be conducted by: "(1) the Department of Public Safety; (2) a laboratory operating under a contract with the department; or (3) on the request of the convicted person, another laboratory if that laboratory is accredited under section 411.0205, Government Code." Tex. Code Crim. Pro Art. 64.03(c).

Request for Findings

Applicant requests that the Court make the following findings:

(1) the evidence still exists and is in a condition making DNA testing possible;

(2) the evidence has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;

(3) that identity was or is an issue in the case;

(4) a reasonable probability exists that the person would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing; and

(5) Applicant's request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice.

REQUEST FOR TESTING

Mr. Smith requests that this court order the Bexar County District Clerk's Office to send the hat listed as Exhibit 5 to the Bexar County Crime Lab for testing. Mr. Smith further requests that DNA be collected from the inside and outside of the hat. Specifically, Mr. Smith requests that all sides of the outside of the hat be tested for the presence of skin tissue or cells that may be

suitable for forensic DNA testing.If such biological evidence is located on the hat that this DNA evidence be tested against a known sample taken from the Petitioner, Mr. Smith.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, John Smith respectfully prays for this Honorable Court to 1) Order that any and all evidence pertaining to this Motion that is in the Custody of the State of Texas and any of its agents, including law enforcement, be preserved and not destroyed; 2) that any destruction or tampering with any evidence after the date of this Motion would be deemed in bad faith by the State; 3) pursuant to Chapter 64.02 of the Code of Criminal Procedure require the state to either deliver the evidence to court, along with a description of the evidence or explain in writing why the state cannot deliver the evidence; 4) order the Bexar County District Clerk's Office send the hat from State's Exhibit 5 to the Bexar County Crime Lab to conduct DNA testing; and 5) order the DNA testing of the item listed *infra* and any further relief he may be entitled at law.

Respectfully submitted:

/s/Dayna Jones
DAYNA L. JONES
Bar No. 24049450
LAW OFFICE OF DAYNA L. JONES
Address, Contact Information
Attorney for Defendant,
John Smith

The San Antonio Criminal Defense Lawyers Association

P.O. Box 831206
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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)**

Suffer the Little Children?[1]

Why is Texas Ignoring Miller v. Alabama and the Treatment of Juveniles as Adults?

Angela Moore

Currently Petition No. 20-0277 to the Texas Supreme Court is pending regarding the treatment of juveniles as adults in Texas. All criminal practitioners are familiar with the line of cases since *Roper v. Simmons*,[2] where the United States Supreme Court stated clearly that Juveniles were different from adults and should therefore be treated differently.

This case concerns an issue of first impression for our juvenile client, and a thorough, meaningful, and detailed review of this case is of the utmost importance to R.I.C. and all juvenile offenders in Texas. These issues include the Constitutionality of §54.02(f), of the TEXAS FAMILY CODE, and the application of the seminal cases concerning treating Juvenile offenders as adult offenders and sentencing them as such. Specifically, *Miller v. Alabama*, 567 U.S. 460, 477 (2012) which states, "To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional." *Miller*, at 477.

The U.S. Supreme Court clearly explained, "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime." *Roper v. Simmons*, 543 U.S. 551, 578, (2005). *Montgomery v. Louisiana*, 577 U.S.–––– (2016), held that *Miller*, "announced a substantive rule of constitutional law." 577 U.S., at –––– (slip op., at 20). That rule draws "a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption" and allows for the possibility "that life without parole could be a proportionate sentence [only] for the latter kind of juvenile offender." *Id*., at–––– (slip op., at 18) citing *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

When the Juvenile Court improperly finds against the great weight and preponderance of the evidence that a juvenile should be transferred, the adult court does not obtain jurisdiction over the juvenile and all Orders resulting from the purported transfer are void and without any effect.

Here, in *RIC*, the trial court specifically refers to a number of events in the record to support the findings, but many of those incidents are inconsistent, indeed some contrary, with the rulings of the juvenile court appealed herein, that R.I.C. is sophisticated and mature, unamenable to treatment, and the available facilities will not adequately protect the public. To pass United States Constitutional muster, the findings of fact supporting the 54.02(f) factors must be discerned, weighed, and viewed through the reasoning of *Roper*,[4] *Graham*,[5] and *Miller*.[6] The appellate courts routinely support finding the trial court could support its findings and transfer by a preponderance of the evidence. No matter what evidence is presented or not presented, the boxes are checked and the child is shuffled to adult court, sometimes without defense counsel fighting this certification and transfer aggressively and armed with the facts and the law.

The Kent Cornerstone

The Supreme Court's 1966 decision in *Kent v. United States*, 383 U.S. 541, 546 (1966) provided for fundamental fairness in a juvenile waiver hearing. *Kent* is also the basis for a con-

1 "But Jesus said, Suffer little children, and forbid them not, to come unto me: for of such is the kingdom of heaven." (KJV). A more modern translation of this verse reads: "But Jesus said, 'Let the little children come to me. Don't stop them, because the kingdom of heaven belongs to people who are like these children.' (Matthew 14:19) (international Children's bible).

2 *Roper v. Simmons*, 543 U.S. 551, 578, (2005).

3 *Roper v. Simmons*, 543 U.S. 551(2005).

4 *Graham v. Florida,* 560 U.S. 48(2010).

5 *Miller v. Alabama*, 567 U.S. 460(2012).

stitutional transfer hearing. Robert O. Dawson, DELINQUENT CHILDREN AND CHILDREN IN NEED OF SUPERVISION: DRAFTMAN'S COMMENTS TO TITLE 3 OF THE TEXAS FAMILY CODE, 5 Tex. Tech L. Rev. 510, 562 (1974). The Supreme Court's decision in *Kent* is premised on a Due Process violation resulting from the manner in which a juvenile was certified and prosecuted as an adult.

The Court stated that "[t]he child is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment. The Court concluded that petitioner—then a boy of 16—was by statute entitled to certain procedures and benefits as a consequence of his statutory right to the 'exclusive' jurisdiction of the Juvenile Court." *Id*. The *Kent* Court further explained that a decision as to waiver of jurisdiction and transfer to the District Court was potentially as important to petitioner "as the difference between five years confinement and a death sentence, we conclude that, as a condition to a valid waiver Order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision." *Kent* at 557. Due Process requires the lower court to consider all of the facts presented in totality, as does the statute, §54.02 TEX. FAM. CODE. The appellate review of the court's findings by the COA cannot rationally be based solely on the evidence of one unqualified witness to the exclusion of evidence which is more substantial by well credentialed witnesses.

Is the appellate standard for review as set out in *Moon v. State* limited to only review the sole evidence relied upon by the trial court to the exclusion of other evidence presented, and if so, does this standard violate *Kent v. U.S*., and the Fifth and Fourteenth Amendments to the United States Constitution notions of Due Process and a meaningful appellate review, since the COA held that if the trial court "shows its work" it will "rarely be reversed?"

In *Ex parte Navarro*, 538 SW.3d 608 (Tex. Crim. App. 2018), the Texas Court of Criminal Appeals highlighted the importance of *Kent* by stating, "... Due Process requires juvenile courts to include within their juvenile-transfer Orders a 'statement of the reasons or considerations for waiving exclusive jurisdiction.'" *Navarro* at 613 (citing *Kent*, 383 U.S. at 561). Importantly, *Moon v. State* recognized that after the *Kent* decision, "… the law in Texas was changed so that, before a juvenile court could waive its exclusive jurisdiction, it must 'state specifically in the Order its reasons for waiver and certify its action, including the written Order and findings of the court.' *Moon*, 451 S.W. 3d 28, 37 (Tex. Crim. App. 2014) (explaining that the change in Texas law was meant to codify *Kent*).

In contrast to this COA opinion, the Supreme Court specifically emphasized that the juvenile transfer Order must delineate the basis of the full investigation conducted by the court and recitation on a case-specific evidentiary basis for the transfer of jurisdiction. The Court explained that meaningful review "requires the [appellate] court to review the reasons and findings supporting transfer. *Id*. at 546-47. The reviewing court must have before it a statement of the reasons motivating the waiver, including a statement of the relevant facts applied to the law to determine whether the conclusions are justified. The reviewing [appellate] court may not "assume" that there are adequate reasons, nor may it merely assume that "full investigation" has been made. See *Id*."

Accordingly, the Court held that it was incumbent upon the juvenile court to accompany its waiver Order with a statement of the reasons or considerations.

Here, the COA did not provide meaningful appellate review, nor Due Process, in determining that this finding of transfer by the trial court was basically unreviewable and did not require a comparison and weighing of the contrary evidence presented. As such the Order of transfer must be reversed.

Petitioner asserts that a proper determination and fulfillment of §54.02 begins with the court's consideration of the 54.02(f) factors. Waiver of a juvenile's status and transfer to adult criminal court is not merely routine procedure. A proper weighing of the facts and evidence must be presented to the COA. See *Ex parte Navarro*, 538 SW. 3d at 613 ("The legal basis for Navarro's claim—whether the juvenile-transfer Order in his case was insufficient—was recognized in 1966 by the United States Supreme Court."). The COA fails to recognize and apply the precedent of the U.S. Supreme Court, that is, to provide the opportunity for meaningful appellate review, which was a Due Process violation and fundamentally unfair. More importantly, *Kent*, as other opinions by the Texas Court of Criminal Appeals, recognizes that a waiver and transfer hearing is a critical stage for juveniles. *Lanes v. State*, 767 S.W. 2d 789 (Tex. Crim. App. 1989); *Hidalgo v. State*, 983 S.W. 2d 746 (Tex. Crim. App. 1999).

The Texas juvenile system is rehabilitative in nature and seeks to carry out its legislative intent by protecting the legal rights of the child while simultaneously replacing the stigma of criminality through the rehabilitative treatment of the juvenile. Paragraph (3) clearly states that the removal of this stigma through treatment is "consistent with the protection of the public interest." Petitioner argues that by fulfilling Paragraph (3), the juvenile system is implementing the mandates of Paragraph (1) and "protecting the welfare of the community." TEX. FAM. CODE § 51.01(2). Again, Petitioner turns to *R.E.M.* for illumination of this tension.

We find nothing in the statute which suggests that a child may be deprived of the benefits of our juvenile court system merely because the crime with which he is charged is a 'serious'

crime. Implicit in this conclusion is a rejection of the underlying philosophy of the juvenile court system, since it is based on the assumption that children who commit 'serious' crimes cannot be successfully rehabilitated. Only by indulging in this presumption can it be concluded that 'the welfare of the community requires criminal' prosecution of any child who commits a serious crime.

If, despite the gravity of the charged offense, the child can be successfully rehabilitated by resort to the facilities available to juvenile court, it is clear that such rehabilitation will promote the 'welfare of the community' at least as effectively as criminal prosecution with no prospects of rehabilitation, while, at the same time, it accords to the child the beneficial results which our Legislature has concluded can be achieved by protecting youthful offenders from stigma and demoralization effects of criminal prosecution. *R.E.M.* at 847.

The "protection of the public" and "likelihood of rehabilitation" of 54.02(f)(4) should be construed in harmony, not as terms in tension, otherwise the legislative intent of the Juvenile Justice Code and the unique history of juvenile courts tend to subvert their very purpose. The benefit of this factor should go to the juvenile, who have been found to be worthy of rehabilitation for over 120 years. It should also be found in favor of the juvenile because the juvenile system created high security facilities offering comprehensive and individualized treatment to meet the needs of each juvenile "to give him the care that should be provided by parents[.]" TEX. FAM. CODE § 51.01(4).

How can a juvenile be rehabilitated if juvenile facilities cannot meet his needs? Petitioner argues that this is the fault of society or the legislature or both, not the fault of the juvenile. *Lanes* at 797–99. The reasoning could only follow that it is simpler and less complicated to house children in adult prison rather than provide them with the facilities and programming they need to be rehabilitated. Counsel is troubled as to why there aren't the services necessary to meet the needs of at-risk and severely troubled youth in detention, where the State requires them to remain awaiting adjudication.

Here, in *RIC*, the Petitioner argues that there is a flaw in either the interpretation of 54.02(f)(1) or its practical application. 54.02(f)(1) requires the State to prove there is probable cause for the alleged offense. Furthermore, the State is allowed the privilege of proceeding on hearsay testimony, which Petitioner resolutely objected. Texas Jurisprudence suggests the State may satisfy 54.02(f)(1) by merely articulating the facts which support a probable cause determination. We argue that 54.02(f)(1) does not conform to the preponderance of the evidentiary standard, but a lower evidentiary standard of probable cause. As such, 54.02(f)(1) fails to satisfy the legislative intent that these factors would submit to a finding of a preponderance of the evidence.

As the anomaly stands as applied by the lower courts, then if the State proves the probable cause of the information through hearsay, then the preponderance of the evidence standard is satisfied. However, this finding sidesteps the preponderance of the evidence standard required by §54.02, unless juveniles are to concede in every instance that articulable facts that a juvenile committed an offense fulfill a factor leading toward the waiver of their protected status. Such an implication is counterintuitive to the reasoning behind *Roper* and its progeny, and the legislative intent of the Texas Family Code.

The State of Texas mangles the law to refute the law of *Miller*.

Thus, Appellant no longer faced the death penalty because she was I.D. The Texas capital sentencing scheme provides in pertinent part: "In the proceeding, evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty." TEX. CRIM. PROC. CODE ANN. §37.071. However, no such proceeding is provided for when the defendant is categorically destined to receive the punishment of life without parole. Appellant has no recourse to show the jury she is not irreconcilably incorrigible. See *Miller v. Alabama*.

However, it is also important to note that for such a serious offense with such a serious sentence as life without parole, such a sentence for an I.D. person, much like a juvenile, is a death sentence. Since "death is different," then life without parole must be different too. In effect, *Miller* is clear that it is the failure of a sentencing court to consider the hallmark features of youth prior to sentencing that offends the Constitution. *Miller* does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered. It is clear that intellectually disabled persons cannot be executed. It is also clear that juvenile offenders cannot be executed due to their youth. It is also now clear that juveniles cannot be subjected to a mandatory life sentence in the capital sentencing scheme, but must receive a meaningful sentencing.[6] However, a vacuum exists in Texas jurisprudence: how can an adult, with a child's mental aptitude, receive a meaningful sentencing hearing?

It is Appellant's position that such an affirmative duty exists for all offenders facing life without parole, but in particular Appellant's situation, where she is a child mentally, and there is no vehicle available to inform the jury of her mitigating evidence. Thus, again, it is not enough for the resentencing court to allow for mitigating evidence of the minor's childhood, mental state, mental deficiencies,

6. The issue of reformation of mandatory life without parole sentences for juveniles being reformed to life with the opportunity of parole is still a subject of vast litigation.

peer pressure, and other circumstances of the crime. The court must also consider that evidence before imposing the resentence. See *Tatum v. Arizona*, 137 S.Ct. 11 (2016), J. Sotomayor concurring, (writing that based upon the records before the Court, none of the sentencing judges had addressed the question that *Miller* and *Montgomery* required a sentencer to ask: "whether the petitioner was among the very rarest of juvenile offenders, those whose crimes reflect their permanent incorrigibility"). Appellant should have that same right, to present evidence that she is not a disposable person, and did not possess permanent incorrigibility.

The Texas Court of Criminal Appeals held that a defendant's "lack of normal impulse control is simply not a circumstance recognized by the Legislature to diminish the criminal responsibility of an accused or reduce his crime to a lesser included offense." *Wagner v. State*, 687 S.W. 2d 303, 312 (Tex. Crim. App. 1984) (op. on reh'g). It is clear that there is no "diminished capacity" defense to defeat the element of mens rea during the guilt-innocence phase of trial. *Id*.; *Jackson v. State*, 115 S.W.3d 326, 330 (Tex. App. -Dallas 2003), aff'd, 160 S.W.3d 568 (Tex. Crim. App. 2005); *Thomas v. State*, 886 S.W. 2d 388, 391 (Tex. App. - Houston [1st Dist.] 1994, pet. ref'd); *De La Garza v. State*, 650 S.W. 2d 870, 876 (Tex. App. -San Antonio 1983, pet. ref'd).

Appellant is prevented from introducing any evidence of I.D. as diminished capacity during guilt innocence, or as mitigating circumstances as to her appropriate punishment, since the default strict liability punishment is life without parole. As discussed above, since death as a sentence is not available for Appellant, she has no vehicle to rightfully inform the jury of the plethora of factors surrounding her I.D. which directly affect her ability to form the intent to commit capital murder and to understand those consequences. The evidence would also certainly bear strongly upon Appellant's suitability for a lesser sentence. As a result, Appellant has been denied due process at her trial to determine her guilt or innocence, and also to have an individualized sentencing, which would include significant evidence of her mental deficits and stunted emotional growth and empathy.

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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 / Announcements
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	Online Set-up Instructions
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9:30am	Voir Dire in a Sexual Assault Case — Sarah Roland
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