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Criminal Justice Section

The State Bar of Texas

October 18, 2016

A MESSAGE FROM YOUR CHAIR

Dear Section Members:

It is my honor to have been named the 2016-2017 chair of the Criminal Justice Section of the State Bar of Texas. It's hard to believe that in a few short weeks I will celebrate 25 years of practicing criminal law in Fort Worth, affectionately known as "Cowtown." I began my career under the legendary District Attorney, Tim Curry. During my tenure with the Tarrant County District Attorney's Office, I earned my stripes as an active member and teacher in the trial division. After more than two decades, I left public service to go in to private practice as a criminal defense attorney and joined [Varghese Summersett PLLC](#).



I am incredibly grateful for the training and mentorship I received over the years from many of the preeminent leaders in the Criminal Justice Section. Serving in this capacity is a meaningful way to give back and contribute to the future of our profession. Whether you are a prosecutor, law professor, defense attorney, or judge, it's imperative to remain abreast of the latest case law, legislative trends, and professional training. It's also critical for all criminal law practitioners to adhere to the highest tenets of professionalism and integrity.

Our mission is to keep our 3,100-plus members on top of their game by providing the highest level of training, education, and camaraderie. In addition to providing informative newsletters with recent case decisions, we will notify you of upcoming CLE courses, meetings, seminars, and networking opportunities.

Collaboration and communication are keys to the success of any section. We are in the process of developing initiatives to improve our website by providing more online content that will benefit your practice. We welcome feedback and suggestions from our members. After all, membership has its privileges.

Let me close by saying that I am excited to be the Section Chair and will strive to earn your vote of confidence and be responsive to all members of the section.

Christy Jack, Chair
[Criminal Justice Section](#)
State Bar of Texas

SAVE THE DATE: UPCOMING TEXAS CLE

October 2016

Technology for Litigators (live)

Houston – October 25, 2016

MCLE Credit: 6.75 hours (includes 2.25 hours of ethics)

MCLE No: 701348157

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November 2016

Firearms Law: What Every Texas Attorney Needs to Know 2016 (video)

Dallas – November 3-4, 2016

MCLE Credit: 13.25 hrs (includes 2 hours of ethics)

MCLE No: 901347750

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eDiscovery in Your Case (live)

Austin – November 4, 2016
MCLE Credit: 6.5 hours (includes 1.75 hours of ethics)
MCLE No: 901348156
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December 2016***Free!* Criminal Writs (live)**

Austin – December 1-2, 2016
MCLE Credit: 12.25 hours (includes 2.50 hours of ethics)
MCLE No: 901360164
[Register](#) for Free Class

February 2017**Advanced Immigration Law 2017 (live)**

Houston — February 9-10, 2017
MCLE Credit: 12 hours (includes 3 hours of ethics)
MCLE No: 901361000
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Advanced Trial Strategies 2017 (live)

New Orleans — February 9-10, 2017
MCLE Credit: 13 hours (includes 3.25 hours of ethics)
MCLE No: 901360671
[Register](#) for Course

March 2017**Advanced Immigration Law 2017 (video)**

Dallas — March 23-24, 2017
MCLE Credit: 12 hours (includes 3 hour ethics)
MCLE No: 901361000
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Council Members - Terms Expire July 2019[Kenda Culpepper](#)[Katheryn Haywood](#)[Hon. Lisa Michalk](#)[Hon. Diane Navarrete](#)**RECENT DECISIONS: WHAT YOU NEED TO KNOW****SUPREME COURT**[Luis v. United States](#), 136 S. Ct. 1083 (2016).

A court order under 18 USC § 1345 permitting the government to freeze appellant's untainted assets violated her right to counsel under the Sixth Amendment by infringing upon her ability to hire the attorney of her choosing. While the Government is permitted to freeze tainted assets before trial, here the Government attempted to freeze funds unconnected to the crime without a showing of proper governmental interest in the property.

"The Government cannot, and does not, deny [appellant's] right to be represented by a qualified attorney whom she chooses and can afford. But the Government would undermine the value of that right by taking from [appellant] the ability to use the funds she needs to pay for her chosen attorney."

[Mathis v. United States](#), 136 S. Ct. 2243 (2016).

In *Mathis*, the Supreme Court addressed the applicability of the modified categorical approach as it relates to the manner and means used to commit an offense. The Armed Career Criminal Act imposes an enhanced mandatory 15-year minimum sentence for defendants convicted of a crime involving a firearm with three prior federal or state "violent felony" convictions, including burglary, extortion, or arson. Defendant was convicted under an Iowa burglary statute, which forbids unlawful entry into "any building, structure, or land, water, or air vehicle." The Iowa statute's inclusion of "land, air, or water vehicle" renders it broader than the generic version of burglary, which only requires unlawful entry into a "building or other structure." The Supreme Court concluded the modified categorical approach could only be applied to determine "which elements played a part in the defendant's conviction." The broader Iowa burglary statute could not support a sentence enhancement under the Armed Career Criminal Act.

[Voisine v. United States](#), No. 14-10154, 2016 U.S. LEXIS 4061 (June 27, 2016).

Federal law prohibits possession of a firearm by an individual convicted of a "misdemeanor crime of domestic violence." The Supreme Court held that a reckless domestic violence assault qualifies as a "misdemeanor crime of domestic violence. Under 18 USC 921(a)(330)(A) a misdemeanor crime of violence involves the "use...of physical force." On a textual level, the Supreme Court observed that a person who recklessly assaults another uses force to the same degree as someone who acts knowingly or intentionally because the act must still be volitional. Furthermore, the relevant history indicates that legislatures in the majority of states have extended laws prohibiting firearm possession to those convicted of reckless assaults. The Court concluded that a holding excluding reckless assaults would undermine state laws and the federal provision.

[Utah v. Strieff](#), 136 S. Ct. 2056 (2016).

After leaving a suspected drug house, defendant was stopped by police and questioned about his activity. A check revealed defendant had an outstanding warrant for his arrest and methamphetamine was later found on defendant's person. The Supreme Court held the exclusionary rule did not apply in the absence of flagrant police misconduct because the existence of a valid, pre-existing warrant overcomes the need to suppress illegally obtained evidence even if the initial stop was unconstitutional.

FIFTH CIRCUIT[United States v. Hinkle](#), No. 15-10067, 2016 U.S. App. LEXIS 14810 (5th Cir. August 11, 2016).

Appellant pled guilty to possession with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) with the Career Offender enhancement for previous felony convictions involving violence or a controlled

substance. At the district court level appellant argued that his prior convictions for burglary and delivery of a controlled substance should not count as predicate offenses for the purposes of Career Offender Status. The Texas definition of "delivery," which includes "offers to sell," is broader than the Career Offender definition of a "controlled substance offense." In its review, the Fifth Circuit held Texas' Delivery of a Controlled Substance statute does not qualify as a controlled substance offense within the Career Offender Guideline provision. Applying the Mathis approach of using the modified categorical approach to identify the elements of a prior offense, the Fifth Circuit held the prior conviction could not serve as a predicate offense because the delivery element of appellant's past charge criminalized a "greater swath of conduct than the elements of the relevant [Guidelines] offense."

[United States v. Willis](#), No. 15-60105, 2016 U.S. App. LEXIS 10289 (5th Cir. June 7, 2016).

As part of probationer's supervised release conditions for abusive sexual contact of a minor, he was required to submit to a polygraph examination. Appellant argued this condition violated his Fifth Amendment right against self-incrimination. The Fifth Circuit held "that requiring probationers to undergo polygraph examinations as a condition of their supervised release does not violate the Fifth Amendment." The Court differentiated between questions posing "a realistic threat of self-incrimination" and those that pertained to violations of the terms of appellant's probation. The polygraph examination condition by itself did not prevent appellant from asserting his Fifth Amendment right should he need to assert it and the condition was proper.

TEXAS COURT OF CRIMINAL APPEALS

[Cameron v. State](#), 482 S.W.3d 576 (Tex. Crim. App. 2016).

In appellant's murder-for-hire trial, appellant's family was excluded from the courtroom during *voir dire* due to the size of the jury panel. On initial appeal to the Court of Criminal Appeals in 2014, the Court found the trial was improperly closed. The Court urged that a crowded courtroom did not, by itself, provide enough justification to warrant closing the courtroom. The most recent appeal, however, did not address why the trial judge closed the courtroom but focused instead on the defense's burden to prove the courtroom was improperly closed. The trial court record indicated appellant's family was escorted out of the courtroom during *voir dire* but did not state if they were allowed back to the courtroom after the panel was chosen. Appellant's failure to prove that her trial was closed to the public ended the analysis and the Court did not consider whether the closure was justified.

[Henley v. State](#), No. PD-0257-15, 2016 Tex. Crim. App. LEXIS 110 (Tex. Crim. App. June 29, 2016).

Appellant was found guilty of misdemeanor assault causing bodily injury to family member and appealed the trial court's decision to exclude evidence on his claim of defense of a third person. Appellant pulled his ex-wife out of her car by her hair and punched her, but claimed his actions were justified because she was an unfit parent. Additionally, appellant reasoned he wanted to protect his children from the possibility of future harm from his ex-wife's boyfriend and stepson. The Court of Criminal Appeals overruled the Second Court of Appeals' decision to permit the justification defense because the threat of harm to appellant's children was neither immediate nor certain to occur in the immediate future. Appellant's children were not expected to come into contact with the boyfriend or stepson and appellant's ex-wife posed no threat to the children. The defense of a third person justification was not relevant and therefore inadmissible where the threat was not imminent.

[Vasquez v. State](#), 483 S.W.3d 550 (Tex. Crim. App. 2016).

Defendant filed two motions to suppress all oral statements made while in custody prior to his capital murder trial. The motions to suppress were denied and defendant was convicted. In his appeal, defendant argued that admission of his recorded interview was in error because it was obtained after unrecorded pre-*Miranda* interrogations. The Court of Criminal Appeals found defendant failed to preserve his objection to the two-step nature of his custodial interrogation (question first, give *Miranda* warnings later) because defendant did not timely object. Although defendant objected to the two-step interrogation in his closing argument, his written motions to suppress failed to challenge the two-step interrogation. Defendant's failure to notify the State or trial court to his objection did not properly preserve the issue for appeal.

Case summaries prepared by [Varghese Summersett PLLC](#).

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