

# DEFENDER TIMES

*ALL THE NEWS THAT'S FIT TO PRINT...AND THEN SOME*



*Death row exoneree and justice activist Anthony Graves joins the PDO this month. Read more in the Chief's Message.*

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## **CHIEF'S MESSAGE: TAKE CARE OF EACH OTHER**

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**BY: ALEX BUNIN, CHIEF**

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I shared the recording of County Judge Lina Hidalgo's talk to us with a friend outside the office. The friend commented that it was relaxing to hear Judge Hidalgo speak. There is something calming about listening to someone who is both caring and interested. Deeds are even more important than words, and her leadership in establishing a policy that will provide up to 12 weeks of paid leave to county employees who are new parents is illustrative of that care and interest.

Seeing those qualities in a county leader should make everyone appreciate how important it is to care about each other in our office. The larger we get and the more distanced we are, it becomes more laborious to express care and interest among the entire office. Try to reach out and make contact with co-workers. Sometimes, we get caught up in what we are doing and overemphasize the importance of our own work in relation to others. Everyone in the office is important and contributes in different ways.

Our growth and distance makes it even more difficult to make decisions without rippling impacts, sometimes negative ones. Work locations and salaries are all interconnected, which makes it hard to change any one without affecting many others. Sometimes, the choices feel personal when they are not. Someone asked me about a decision that was made and whether they had been singled out for discipline. I have been managing offices long enough that I was not surprised. It is a challenge to reassure everyone they are appreciated. Since resources are limited it may seem like they are being withheld when they are merely being apportioned. Do not assume a decision was made at your expense. If you do feel that way, please come visit and talk about it.

You regularly see emails naming our new employees. I wanted to mention one in particular who is a big deal. In December, Anthony Graves will join the PDO. I cannot do justice to Anthony's story here. The title of his book "Infinite Hope: How Wrongful Conviction, Solitary Confinement, and 12 Years on Death Row Failed to Kill My Soul," sums it up nicely. There is also a documentary and a Texas Monthly article. He is a great public speaker and a wonderful person. He will help the office in many ways – mentor, consultant, community liaison. Welcome him. ■



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## **TE'IVA BELL MOVES ON**

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### **P.Q. DREADFUL, STAFF WRITER**

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PDO Senior Litigator Te'iva Bell is jubilant. She has just won election to the 339<sup>th</sup> Judicial District Court after a long, stressful campaign that she waged in addition to her regular docket of felony cases and her obligations as a mom and trial division team leader.

Te'iva will fill the position previously held by Maria T. Jackson, who abandoned the bench when she decided to try to pursue a longshot run at Commissioner Rodney Ellis' seat last year. Jackson was known for her frequent unexplained absences from court, her adversity to trials and substantive hearings, and her pleasant demeanor. Jackson's bench has been held lately by Jesse McClure, who has showed up to work and given defendants a fair shake by most accounts, but lacks the same concrete state criminal court experience Te'iva has.

Te'iva will leave at the end of the year to take her bench, and her absence will be difficult for the office, especially the Trial Division. In addition to her exceptional mentorship and leadership skills, besieged trial lawyers are already feeling the strain of heavier dockets, and recent hiring rounds that included a lot of young attorneys may serve the office well in the future, but could leave the more experienced lawyers scrambling to cover Te'iva's caseload of serious felonies.

But the office's loss of a gifted attorney is tempered by how much the community stands to gain from her bench: true commitment to justice reform, an independent and compassionate arbiter, and a real understanding of the issues we face as defense attorneys and our clients face as defendants.

Te'iva's going way celebration will be December 18, 2020 at 1:30 pm via Zoom. ■

NEW IN THIS ISSUE:

**Chris Self on Juvenile Lifers!**  
p. 7

**Tres Leches Egnog!!!**  
p. 6

**Jane Says!**  
p. 5



## JURY CHARGE TIP OF THE MONTH

CHERI DUNCAN, ASSISTANT PUBLIC DEFENDER, APPELLATE DIVISION

### Why You Should Care About the Jury Charge

Two main reasons to care about the jury charge, aside from the basic constitutional reasons – due process, right to trial by jury, etc. First: Preserving error. Jury charge error is one of the few issues that can be raised successfully on appeal even if it is not preserved by objection at trial. This doesn't mean, though, that trial counsel can ignore problems with the charge. If the error is not preserved, then a conviction will not be reversed unless the problem with the charge was "egregiously harmful" to the defendant. (Hint: almost nothing is egregiously harmful). Preserved charge error is subject to ordinary "harmless error" review. See *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985). See, also, Tex. Code Crim. Proc. sect. 36.19.

Second: Avoiding an IAC claim. The Court of Criminal Appeals takes jury charge error so seriously that it has granted habeas relief for defendants who claim ineffective assistance of counsel due to a trial lawyer's failure to raise an objection a jury charge error. See, e.g., *Ex parte Simpler*, No. AP-76,087, 2009 WL 256526 (Tex. Crim. App. 2009), not designated for publication). *Caveat lector*, my friends.

Tip: To preserve any error in the charge:

1. Object to each part of the jury charge that is incorrect, and specifically tell the court why it is incorrect.
2. Object if the trial court leaves out anything you want in the charge (a definition, an affirmative defense, a lesser included offense, etc.).
3. Make your objections on the record, whether written or oral. Lots of judges like to have an informal charge conference to discuss objections to their first draft of the charge. That's fine, but once the final draft is presented, make sure to re-urge on the record any objections you raised during the informal conference that weren't included in the final draft. Otherwise, they are considered waived.
4. Get your objections on the record before the charge is read to the jury. For a helpful summary of the law and procedures for preparing the charge, see Tex. Code Crim. Proc. sect. 36.14. It is helpful, but not necessary, to submit a written version of any language you would like the court to include.

### Winter Clothing Drive is In Full Swing!



**Tanesha Arline and Alex Compean are collecting gently used winter clothing and blankets to donate to Star of Hope over the Holiday Season.**

Collection boxes can be found in the bail hearing office at 1301 Franklin, on the 13<sup>th</sup> floor by Alex Compean's desk, and on the 12<sup>th</sup> floor by the kitchen area.

If you don't come to the office anymore or don't have clothing to contribute, you can send \$\$\$ to the very thrifty Allison Mathis, and she will use it to purchase clothing for the drive.

Thanks so much to everyone who's already stepped up to make this a great success. If you haven't participated yet, there's still time!

**Deadline to contribute cash or clothing is Friday December 11, 2020.**

### TRIAL TIPS: WALK THE WALK



#### DAMON PARRISH, II FELONY TRIAL TEAM LEAD

One of the biggest things we bring into court with us is our ego. It can be a difficult thing to deal with, and a hard thing to part with. I know that my ego still gets in my way.

But I also know that letting my ego get the best of me is not in the best interest of my clients. Example: I know that I am not the strongest legal writer in our office. I do it when I need to do it, I will always try to get better at it, but I don't really enjoy it and I have come to terms with the fact that it's ok to ask for help from other attorneys who are more confident at legal writing. In return, I try to be available to help other attorneys work through things I think I am good at- spoken arguments, case theories, and trial strategies, for example.

Knowing your strengths and weaknesses and knowing when you should ask for help is not the sign of a weak lawyer- it is the sign of a strong lawyer. Being able to acknowledge that you haven't seen and done it all is a trait I admire a lot, and see more in older lawyers than younger lawyers. When you're new to being an attorney, you think you know everything. When you've been an attorney a little longer, you realize just how much you don't know, you realize it's ok you don't know it, and you realize that it's ok to ask for help. Those realizations are key to being the most effective advocate you can be.

## SAIF'S AMAZING CASE LAW UPDATE!

SAIF KAZIM

APD, FELONY TRIAL DIVISION

*Ex Parte Diaz*, No. 10-20-00244-CR (Tex. App. - Waco, Nov. 18, 2020) (not designated for publication)

The Tenth Court of Appeals reversed a trial court's denial of habeas relief because the State did not establish that it was ready for trial within 90 days of the accused's arrest. Although the case was indicted within 90 days, the State conceded in response to a speedy trial motion that it required further preparation to be ready for trial.

*Martell v. State*, No. 08-18-00180-CR (Tex. App. - El Paso, Nov. 20, 2020)

The Eighth Court of Appeals reversed an adjudication of guilt where the accused failed to report to probation because the evidence established that the accused was entitled to a due diligence defense. The probation department failed to attempt to execute a *capias* at the accused's last known address in Mexico, and thus the due diligence defense codified in 42A.109 applied.

*Kerr v. State*, No. 07-19-00338-CR (Tex. App. - Amarillo, Nov. 9, 2020) (not designated for publication)

The Seventh Court of Appeals reversed two consecutive seventy-five year sentences following an adjudication of guilt where the same trial court had previously imposed a more lenient sentence before the case came back after a reversal on appeal. The appellate court held that there is a presumption of judicial vindictiveness under the Due Process clause where a successful appellant is given a harsher sentence after an appeal without affirmative reasons on the record justifying the increased severity.

*Leanox v. State*, No. 06-19-00164-CR (Tex. App. - Texarkana, Nov. 23, 2020)

The Sixth Court of Appeals reversed a conviction for state jail forgery where the jury charge only listed the elements of a Class B misdemeanor forgery. The court held that in order to prove state jail felony forgery of a check under Penal Code 32.21(d), the evidence must show that the accused had a specific purpose other than to "obtain or attempt to obtain a property of service." Otherwise, the value-based categorization of subsection (e-1) controls. Although this element is not explicit in the statute, it is implied by its structure.

*Fuller v. State*, No. 06-19-00247-CR (Tex. App. - Texarkana, Nov. 4, 2020) (not designated for publication)

The Sixth Court of Appeals reversed sentences for sexual assault with a child that were stacked with a sentence of continuous trafficking of persons because the offenses arose out of the same criminal episode, and they were committed before Section 3.03 of the Penal Code was amended to make continuous trafficking an exception to the general rule that sentences for offenses from the same criminal episode prosecuted in one action should run concurrently.

*Neal v. State*, No. 06-20-00045-CR (Tex. App. - Texarkana, Nov. 5, 2020) (not designated for publication)

The Sixth Court of Appeals reversed a conviction for possession of a prohibited short barrel firearm due to insufficient evidence, where the State failed to establish an element of the offense, namely that the item was not registered in the National Firearms Registration and Transfer Record.

*State v. Soto*, No. 04-19-00427-CR (Tex. App. - San Antonio, Oct. 28, 2020) (not designated for publication)

The Fourth Court of Appeals affirmed an order granting suppression of the accused's statements, where he asked law enforcement, "Can I have a lawyer?" after he was in custody but before he was Mirandized. The court held that the tone and demeanor of the question rendered it an unequivocal and unambiguous invocation of his right to counsel.

*Denny v. State*, No. 11-18-00270-CR (Tex. App. - Eastland, Oct. 30, 2020).

The Eleventh Court of Appeals reversed a conviction for tampering with physical evidence, holding that the evidence was insufficient where a CPS investigator directed her subordinate to delete a photograph related to a CPS investigation. The court concluded that an element of the offense is that the evidence was actually concealed. Because law enforcement already had a copy of the photo, the evidence was insufficient. ■



### POETRY CORNER

*Poetry makes the hard parts of life easier to bear, and makes the joyful parts more beautiful. Each month, Appellate Division Chief Jani Maselli Wood will share a poem that is meaningful to her in some way. If you would like to submit a poem for consideration, please email Jani.*

*This month's poem was written by PDO Investigator Nikia Redmond. Nikia writes, "I am not much of a poet; however, it was something I wrote in honor of my mom upon her passing. Beneath the colorful words carry great meaning; it all comes out of my life story. My mom adopted me as a baby and made me her own. I became her everything and then my children as well." Nikia- I disagree that you are "not much of a poet." Your homage to your mom is beautiful and moving. Please write more!*

### **The Portrait Nikia Redmond**

Maxine had a gift; the kind only God could give. Being an artist and art teacher, she knew she was using her gift well. But she wanted to create the kind of artwork that would take a lifetime to complete and would stand for generations to come. And so she began.

The perfect canvas arrived; it was naturally soft, beautiful and blemish-free. Over the first few years, she bathed the surface in pale pinks breathing of love with yellows of happiness to compliment. Then the deep blue of faith, the true blue of confidence, and the royal blue of intelligence were carefully layered on year after year. Finally, she speckled the canvas with enthusiastic oranges; then splatters of the most passionate reds. In this piece, she was very pleased.

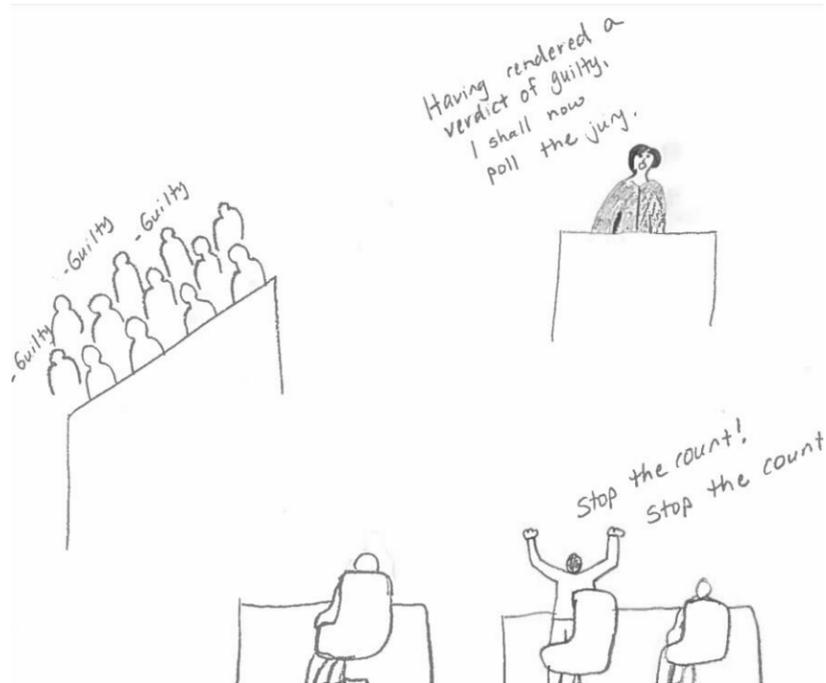
The frame arrived; made of wood from the heavens. She caressed into the grains of the frame oils of fortitude and astuteness. She wrapped the frame around the canvas and whispered, "You are forever a part of my portrait. Remain wrapped around her; comfort her always; together you will share in all she encounters in this world."

The easel arrived; made of mesmerizing gold from the heavens. She polished the gold with balms of strength and wisdom. Upon the golden easel, she placed the portrait and the frame. To the easel she whispered, "You are forever a part of my portrait. Undergird her and the frame; for you are the vigor they will stand upon always."

This was my mom's life's work; the most extensive use of her gift. If you are wondering if you've ever seen it, I promise you have; and even heard her call each piece by name. Nikia Marie...the portrait; Taylor Vaughn...the frame; Dias Raphiel II...the easel. Aaaaahhhh...now you KNOW you have seen my mom's greatest work.



### Quod Stultus Viverra Cartoons Fresh From the Gallows



*Editor's note: the political opinions expressed in Quod Stultus Viverra are not officially adopted by the HCPDO itself. It's just a political cartoon. A good one.*

### PDO PET OF THE MONTH

## Santa Paws

NICHOLAS SMITH, APD MMH

Many people know the stories of Santa Claus, an older man that rides around his sleigh on December 24th delivering toys to the good children of the world, while leaving behind coal for the naughty ones. You leave out milk and cookies, and some carrots for the reindeer. However, do you ever wonder, who takes care of our pets' Christmas wishes? Look no further! Santa has his own little helper, Santa Paws! Each year, a special, loving pet is selected to be Santa's Sled Ambassador for all the animal companions around the world. Since no pet is on the naughty list, they all deserve a treat and a WOOF of well wishes for the new year. This year's Santa Paws is none other than Odin, the adorable rescue dog of Brandy Gum, from the fabulous organization Canine Angels, here in Houston. 13/10 would hope he doesn't get motion sickness.



## LEGISLATIVE UPDATE

**TED WOOD**  
APD, APPELLATE DIVISION

**NEW SESSION IS ON ITS WAY!**

Another Texas legislative session is just around the corner. The next session of the Texas Legislature will begin in January. This will be the 87th Legislative Session.

The first day bills could be filed for the upcoming session was November 9th. Over 600 bills have already been filed in the House as of November 24th. And there have been nearly 200 bills filed in the Senate as of the same date.

Given the social distancing we are doing these days, there may be some different procedures in this legislative session in regard to hearings. The exact procedures remain to be seen. But I expect there to be hearings on many of the bills that are filed, either in person or remote.

In case you did not know, I am tasked with keeping up with legislation for the Public Defender's Office. If you have questions about anything concerning legislation, please feel free to contact me. Your questions might concern bills that are being considered this session. Or maybe you have questions about bills from past sessions. Perhaps you have questions about a statute's legislative history and you are not exactly sure how to begin your research. Also, maybe you just have some questions about how to find information on the Legislature's website ([www.capitol.state.tx.us](http://www.capitol.state.tx.us)). These are the kinds of things I am happy to talk about with you. I am working a lot from home lately. But please feel free to contact me at [ted.wood@pdo.hctx.net](mailto:ted.wood@pdo.hctx.net). Also, you can call me at 713-274-6705.

Thank you!

## JANE SAYS

*Editor's note: if there is one person in the Felony Trial Division that is universally adored, it is Team Lead Jane Vara. Jane is experienced, thorough, and encyclopedic in her knowledge. She is a superlative lawyer and mentor, and I think every time I've talked to her I've come away with something I didn't know (and usually a fistful of chocolate from her desk). Humble, kind, and extremely respected by both the prosecution and defense bar, Jane speaks softly and carries a big ass stick. I am thrilled that she is writing for our newsletter now, and hope you really enjoy her first column. -AJM.*

### ON PASSION AND CALLING

*Jane Vara, Felony Trial Team Lead*



I think the word passion is over-used. Passion is a “strong and barely controllable emotion”. People are passionate about cupcakes, music, sports, and other people. When I hear someone described as being passionate about their work, I always wonder. The problem is that passion subsides. It fades. It rises and falls like any other emotion. Passion does not sustain us during the difficult times that we face in our work. Passion may storm in with a burst of energy and quickly fade out. It may make a grand entrance and quickly leave. Passion wants to solve things in the moment and loses interest when the moment passes.

I like to think of people being called to their work. A calling is a “strong urge toward a particular way of life or career; a vocation”. A calling is something that comes from deep inside. A calling keeps you going. A calling is something that you can't ignore, even when you wish you could. A calling enters a room with the intention to stay. It will hammer away at a problem long after everyone else has lost interest. A calling does not allow for short cuts. It is there for the long haul.

I wish for you a calling. I hope that even on the worst day, you keep going. I hope that through the tears this work sometimes bring, you see clearly how you help others. I hope you know you are not alone. I hope you feel appreciated. I hope you are here for the long haul.

## KNIT CLUBBIN'

### HIGH HOLIDAYS



The PDO's daring, darling Knit Club continues to meet each Tuesday at 12:30 via Zoom, and everyone is welcome!

You don't have to be a knitter to join Knit Club, but please know that the first rule of Knit Club is that we talk about Knit Club. A lot. Jani commissioned local artist Quinn Hochglaupe to design Knit Club's new official logo, pictured above. Now don't you want to be a member of the ONLY club in the PDO to have an official logo?

Knit Club's holiday party will be via Zoom on Tuesday, December 15<sup>th</sup> at 12:30. You don't have to go but I'm just saying, you might want to keep an eye on us.



REDACTED FOR ONLINE VERSION

## Chapter and Verse

### ALLISON MATHIS, APD POST-CONVICTIONS

Dear and Beloved Colleagues,

I hesitate to tell you this. I don't want you to know what I've been doing these past several months because I don't want you to hate me. Well, maybe I'm ok with some of you hating me. But I know that the world of post-conviction stuff is shrouded in a cloud of mystery to some extent, and what exactly it is that I do...well...I've heard the whispering. I know you wonder.

One of the things I do as a post-conviction lawyer is evaluate the performance of other lawyers for ineffectiveness and then raise it in a writ. That's right. That's the rub right there. Start calling around and asking for attorneys' recollections of what they did and why and all of a sudden, no matter how nice you try to be, you're reviled. But guys, that's the whole reason I'm writing to you today, because I don't want you to be the subject of some writ lawyer's dreaded call (it wouldn't be me, our office generally does not writ cases our trial division handled).

What we need to talk about today is sensitive. We're at that point in the code, analogous to the Old Testament book of Numbers where there's a lot of begat-ing and boring stuff. But hidden in the boring stuff are things we should be aware of.

Today, let's look at Art. 2.08(a), DISQUALIFIED. Here's what it says, "District and County attorneys shall not be of counsel adversely to the State in any case, in any court, nor shall they, after they cease to be such officers, be of counsel adversely to the State in any case in which they have been counsel for the State." That said, the conflict only applies to an active case, not to cases that are being used as enhancements- so if the ADA was just involved in a prior conviction being used for an enhancement, they can technically still sit as defense counsel on the new case. *See: Holland v. State*, 729 S.W. 2d 366, 368 (Tex. App.—Beaumont 1987, no pet.)

Ok, you're asking, what does this have to do with us, we're not counsel for the State. Yes, beloved, *but some of you used to be*. And the conflict that runs with an attorney runs to their entire office, including public defenders' offices (*See: Texas Rules of Disciplinary Conduct*, 1.6(f)).

As our office has expanded, we have begun bringing in more and more lawyers who worked at the HCDAO, some immediately prior to their start date with our office. This column does not take a stance on whether or not that is a good idea, but I do want to encourage you all to be **extremely cognizant** of the fact that a person who is a recent ADA coming into our office walks in with a quiet caseload of *per-se* conflicts for the recent hire **and for you**. Defender Data does not contain a list of all the cases ADA's were on when they left the office and moved to our office. Relying on a cursory Defender Data conflict check does not protect you from IAC. I would also suggest to you that if an active ADA moves over to our office, you need to check and see if they were in any way involved with prosecuting any of your current cases, because I would suggest that that has now created a conflict that did not exist when you conflict-checked the case at the beginning.

Ethical rules were created by people who have thought about them much more than any of us have. It can be really difficult not to substitute our own judgment for theirs, and to think that our specific case is different because X,Y, or Z and the client needs a good lawyer and you are one. But I beg you not to do that, to understand that there are great lawyers out there in the private bar, and that conflict is not something we want to develop a reputation for fostering, individually or office-wide.

Love Always,

Allison



PDO Investigator Cynthia Patterson submitted this amazing eggnog recipe her family enjoys throughout the holidays. Cheers!

#### Tres Leches Eggnog

##### INGREDIENTS

2 (13.5oz.) Cans Coconut Milk  
 1 (12 oz.) Can Evaporated Milk  
 1 (14 oz.) Condensed Milk  
 8 egg yolks  
 2/3 cup dark rum  
 1/3 cup brandy  
 1 tsp. vanilla  
 1 (8.75 oz) Cream of Coconut, chilled in fridge overnight  
 1 cup heavy cream  
 ¼ cup powdered sugar  
 ¼ vanilla extract  
 Ground nutmeg or cinnamon for garnishing  
 For rimming glass (optional)  
 1 tbsp. Blue Agave  
 ½ cup finely crushed Goya Maria cookies (about 8 cookies) You can substitute cinnamon graham crackers)

##### DIRECTIONS

1. Combine coconut milk, evaporated milk and condensed milk in large saucepan over medium heat, bring to a simmer
2. Beat egg yolks until thick. Gradually whisk in half of the hot milk mixture into egg yolk mixture. Pour into saucepan. Reduce heat to medium low. Cook, stirring constantly, using wooden spoon, for 5 to 8 minutes or until mixture thickens and coats back of spoon.
3. Remove from heat. Strain through fine-meshed sieve and cool completely. Stir in rum, brandy and vanilla. Cover and chill in refrigerator for at least 6 to 8 hours. It is good in the refrigerator for 3 to 5 days.
4. Whipped coconut cream: beat hardened cream of coconut, heavy cream, powdered sugar and vanilla in chilled mixing bowl with electric mixer on high speed for 2 to 3 minutes or until creamy, light and fluffy. Chill until ready to use.
5. Fold whipped coconut cream into eggnog and divide into 6 glasses. Garnish each with a pinch of nutmeg or cinnamon



Misdemeanor Mental Health Attorneys Nick Smith, Helen Simotas, and Derick Smith are once again going to be on the airwaves! Tune in to hear a rebroadcast of their previous conversation about Mental Health Justice on FM 90.1 KPFT (or stream from KPFT.org) on December 18, 2020 at 6:00 pm.

The show can also be found in KPFT.org archives under the "Her Sex, Her Health" episodes for November 20, 2020.

This is a big deal! Let's support our friends and colleagues who are getting out there in the community and talking about what we do and how to make it better.



## Chris Self: The Second Look Bill

*Felony Trial APD Chris Self has always been honest about the mistakes he made in his youth, and as a result of that, he has spent much of his career fighting to help people who were sentenced excessively as children.*

*The following piece is an excerpt from A Word to My Younger Self, a book compiling letters of reflection from “Second Lookers,” young men and women who received extreme prison sentences as children. The book is published by Epicenter Initiative ([secondlooktexas.org](http://secondlooktexas.org)) and available for purchase on Amazon) and on Epicenter’s website ([secondlooktexas.org/shop](http://secondlooktexas.org/shop)).*

*The Second Look Bill is aimed at fulfilling the promise of the Supreme Court’s holding in Graham v. Florida that people incarcerated as children should be afforded a meaningful opportunity for release based on demonstrated maturity and rehabilitation. Please contact your Texas State Senator or Representative and voice your support for juvenile parole reform.*

The Texas Board of Pardons and Paroles has a short list of codified reasons that they use to explain the reason for denying a person release on parole. Many of the people reading this book who entered prison as children—as well as their loved ones and advocates—will recognize “2D” as the Board’s shorthand way of saying that a person simply has not done enough time by the Board’s measure.<sup>1</sup>

As I write this, countless men and women are working diligently inside of prison walls, educating themselves in preparation for re-entry to the workforce; devoting themselves to spiritual practices; and engaging in probing rehabilitative counseling programs in order to prepare for successful re-entry. Without a change in our system, thousands of them will also come to know the hopeless feeling that many already know when they see the “2D” year after year, in spite of their efforts.

At the point of the “2D” vote, the purpose of incarceration is no longer rehabilitation, but oppression. Continue to live in sweltering Texas heat unmitigated by air conditioning.<sup>2</sup> Continue to work for free to produce the necessary items that your family will have to pay a premium to buy you.<sup>3</sup> Continue to live in an environment where you are at risk of being murdered by the public servants employed to ensure safety in the facility.<sup>4</sup> Have your life expectancy shortened by two years for each year that you remain incarcerated.<sup>5</sup>

Do these things, the government is saying, not because of your present conduct, but because of a decision you made as a child.

Indeed, youth at the time of the allegation is considered an aggravating factor in the Parole Guidelines scoring system, the rubric used by Parole Board Members and Commissioners to assess the risk associated with granting release.<sup>6</sup> Likewise, conditions inherent in children, such as lack of employment history prior to arrest and association with negative peer groups, are deemed to be indicative of higher risk.<sup>7</sup>

The Parole Guidelines Risk Assessment—a simple, one-page worksheet—was made in response to a legislative mandate to remedy decades of clandestine policy changes made to justify arbitrary decisions relating to release<sup>8</sup> amid an era of rampant civil rights violations that caused Texas’s prison system to be placed into federal receivership.<sup>9</sup> Decades after the advent of the Parole Guidelines Score system, the Board is “not fully and consistently using the parole guidelines as intended,” leading to inconsistent approval rates across parole panels reviewing individuals with comparable scores.<sup>10</sup>

Advances in how we understand human development reveal the obsolescence of the Parole Guidelines Score rubric. Modern psychology tells us that youth at the time of the allegation allows for greater capacity for rehabilitation.<sup>11</sup> Modern neuroscience tells us that the decisions that land a child in adult prison are a temporary condition of youth, resulting from a structurally immature brain that will ultimately grow to function in a way that is more rational and mature.<sup>12</sup>

In response to this understanding, the United States Supreme Court famously acknowledged the difference between children and adults, and that punishments which might pass constitutional muster for adults are cruel and unusual as applied to children.<sup>13</sup>

The language in these Supreme Court opinions continues to be aspirational from the vantage point of a practitioner, incarcerated person, or incarcerated person’s loved one in Texas. To date, Texas’s policy response has been to delegate to the Board of Pardons and Paroles the decision as to whether a child dies in prison. The flaw in that design is that the Texas parole review, as a system, fails to consider the mitigating qualities of youth. Candidates for parole who are paying for childhood mistakes are dependent upon the discretion of parole voters who choose to depart from their prescribed rubric.

<sup>1</sup> Parole / Mandatory Supervision Information: Approval/Denial Reasons, TEXAS BD. OF PARDONS & PAROLES, [https://www.tdcj.texas.gov/bpp/what\\_is\\_parole/reasons.htm](https://www.tdcj.texas.gov/bpp/what_is_parole/reasons.htm) (last accessed Feb. 14, 2020).

<sup>2</sup> Jolie McCollough, *A judge told Texas to put some inmates in air conditioning. Lawyers say prison officials are violating that order*, TEXAS TRIBUNE, Sept. 5, 2019, <https://www.texastribune.org/2019/09/05/texas-prison-air-conditioning-heat-contempt-motion/> (last accessed Feb. 14, 2020).

<sup>3</sup> Vicky Camarillo, *The Penal System Today is Slavery: Lawmakers Finally Start to Talk About Unpaid Labor in Texas Prisons*, TEXAS OBSERVER, May 10, 2019, <https://www.texasobserver.org/penal-system-slavery-unpaid-labor-texas/> (last accessed Feb. 14, 2020).

<sup>4</sup> Jolie McCollough, *Three Texas inmates have died at the hands of prison officers as use of force continues to rise*, Texas Tribune, Feb. 7, 2020, <https://www.texastribune.org/2020/02/07/texas-prison-deaths-come-staffers-use-force-against-inmates-increases/> (last accessed Feb. 14, 2020).

<sup>5</sup> Evelyn Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989-2003*, *American Journal of Public Health* 103, no. 3 (March 1, 2013): pp. 523-528.

<sup>6</sup> TEXAS BD. OF PARDONS & PAROLES, *Instructions for Completing the Texas Bd. of Pardons & Paroles Risk Assessment*, p. 2 (March 1, 2016); TEXAS BD. OF PARDONS & PAROLES, *Parole Guidelines Annual Report FY 2015*, p. 3 (Apr. 2016) (citing Standard Parole Guidelines, Board Rule 145.2(b)(1)).

<sup>7</sup> *Id.*

<sup>8</sup> TEXAS SUNSET ADVISORY COMMISSION, THE BOARD OF PARDONS AND PAROLES: A STAFF REPORT TO THE SUNSET ADVISORY COMMISSION 7 (1986) available online at <https://www.sunset.texas.gov/reviews-and-reports/agencies/board-pardons-and-paroles-bpp> (last accessed Nov. 13, 2016).

<sup>9</sup> *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980).

<sup>10</sup> TEXAS SUNSET ADVISORY COMMISSION, STAFF REPORT: TEXAS DEPARTMENT OF CRIMINAL JUSTICE, BOARD OF PARDONS AND PAROLES, Correctional Managed Health Care Committee 26 (2006) available online at <https://www.sunset.texas.gov/reviews-and-reports/agencies/board-pardons-and-paroles-bpp> (last accessed Nov. 13, 2016).

<sup>11</sup> Waterman, Alan, *Identity Development from Adolescence to Adulthood*, 18 DEVELOPMENTAL PSYCHOL. 341, 355 (1982).

<sup>12</sup> Steinberg, Laurence, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 AM. PSYCHOL. 739–750 (2009).

<sup>13</sup> *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 567 U.S. 460 (2012).

In a system that views children who enter prison as inherently high risk, individual candidates pray to be seen as exceptional by a decision-making body that reviews 6,000 cases per month.<sup>14</sup> Candidates are not entitled to representation by counsel. Candidates are not entitled to a hearing.

As a practitioner who has looked into the eyes of many juvenile lifers, heard their stories, and investigated their histories for myself, I can tell you that the road to their fates are generally paved by some combination of heavy stone: pain and trauma; victimization and abuse; school and child welfare systems that failed them; and illnesses and disabilities beyond their control.

At present, there is no rubric accounting for what these men and women have been through. There is no rubric accounting for what measures these remarkable individuals are taking to overcome odds and persevere. Second Look calls for that type of comprehensive review.

The Second Look Bill<sup>15</sup> calls for the Board to consider myriad factors when reviewing candidates for parole who entered prison as children. Not only would review take into account the diminished capacity of juveniles and hallmark features of youth, but it would also take into account the candidate's own individual circumstances. Family history, prenatal history, developmental history, medical history, trauma history, and social history all become relevant factors in the parole review decision. Psychological evaluations will provide additional insight into the mental status of the individual.

Parole voters will be able to make meaningful decisions based upon the whole person, and not by obsolete and impersonal scoring instruments. Although detractors often suggest that Second Look's earlier eligibility date will release people they deem "dangerous" while they are still at risk to society, the opposite is true. Because of the more in-depth and individualized review of the candidate's history, voters will not only have a better view of the individuals who demonstrate growth and maturity, but also those who do not.

If anything, a more meaningful parole review makes society safer without erring on the side of condemning children to die in prison in the name of public safety. Especially people who are—as I write and as you read—toiling to overcome obstacles that many never survive. There are exemplars of strength and courage within those walls from which we all can learn.

"2D" cannot be the sole factor in determining whether a child dies in prison. Because "[e]ach of us is more than the worst thing we've ever done."<sup>16</sup>

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<sup>14</sup> AMERICAN CIVIL LIBERTIES UNION, *False Hope: How Parole Systems Fail Youth Serving Extreme Sentences*, 6 (2016).

<sup>15</sup> For the previously introduced version, see 2019 Texas House Bill No. 256 (NS), Texas Eighty-Sixth Legislature.

<sup>16</sup> Bryan Stevenson, *Just Mercy: A Story of Justice and Redemption*. First edition. New York: Spiegel & Grau, 2015.