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RE-ENVISIONING CRIMINAL PROSECUTIONS FOR CHILD LABOR
VIOLATIONS PURSUANT TO THE FLSA

Brian L. Owsley*

In Upton Sinclair's 1906 novel, *The Jungle*, the author depicted the horrific working conditions in the meat packing industry at that time.¹ As a result of the uproar over these conditions, Congress enacted the Federal Meat Inspection Act of 1906,² which sought to create a regulatory enforcement scheme for minimum standards within the meat packing industry.³

Today, Americans may expect that children in some countries engage in child labor, but that the problems depicted in *The Jungle* are no longer an issue in the United States. Such expectations are incorrect. Sadly, the violation of child labor laws is on the rise in the United States with violations increasing by thirty-seven percent between 2021 and 2022.⁴ The United States Department of Labor, which investigates violations of child labor laws, reported that over 3,800 children were working for companies in violation of federal labor law in 2022 by over 830 different firms.⁵

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¹ See generally UPTON SINCLAIR, *THE JUNGLE* (1906).

² Pub. L. 59-382, 34 Stat. 669 (1906); *Thornton v. Tyson Foods, Inc.*, 28 F.4th 1016, 1030 (10th Cir. 2022) (Lucero, J., dissenting).

³ 21 U.S.C. § 602; see also *United States v. Stanko*, 491 F.3d 408, 416-17 (8th Cir. 2007) (collecting cases); *United States v. Mullens*, 583 F.2d 134, 139-40 (5th Cir. 1978); *Mario's Butcher Shop and Food Center, Inc. v. Armour and Co.*, 574 F. Supp. 653, 654-55 (N.D. Ill. 1983) (quoting *Pacific Trading Co. v. Wilson & Co.*, 547 F.2d 367, 370 (7th Cir. 1976)).

⁴ Lauren Kaori Gurley, *U.S. fines firm \$1.5 million for hiring kids to clean meatpacking plants*, WASH. POST (Feb. 17, 2023, 6:47 PM EST), <https://www.washingtonpost.com/business/2023/02/17/child-labor-meatpacking-department-of-labor/>; Hannah Dreier, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, N.Y. TIMES (Feb. 25, 2023), <https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html>; see also *Selling kids: Labor trafficking*, ALA. PUBLIC RADIO (Sept. 2019, 8:00 AM CDT), <https://www.apr.org/news/2019-09-26/selling-kids-labor-trafficking>.

⁵ Laura Strickler, *Biden administration to crack down on child labor*, NBC NEWS (Feb. 27, 2023, 3:00 PM CST), <https://www.nbcnews.com/politics/biden-administration-crack-child-labor-rcna72512>; Nandita Bose & Mica Rosenberg, *U.S. to crack down on*

In this essay, Section I addresses some current examples of the use of child labor in the United States that violates federal law. In Section II, the essay describes the Fair Labor Standards Act as it relates to child labor law as well as relevant regulations. Finally, in Section III, the essay proposes various solutions to improve the statutory regime and enhance protection of children.

I. AMERICAN COMPANIES ILLEGALLY USE CHILD LABOR

Minors may work legally in some circumstances. However, there are limits to the number of hours as well as the type of work children may do, especially based on age. Historically, children worked in agricultural fields, and while that still occurs, in recent years, children have worked illegally in factories and plants that produce goods.⁶

A. Packers Sanitation Services, Inc.

In August 2022, federal investigators opened an investigation after receiving credible evidence that a number of children, some as young as thirteen, were cleaning slaughterhouses in Grand Island, Nebraska.⁷ The Department of Labor conducted interviews with children whose native language was Spanish and many of them were also attending school.⁸ The employer, Packers Sanitation Services,

child labor amid massive uptick, REUTERS (Feb. 27, 2023, 4:49 PM CST), <https://www.reuters.com/business/us-crack-down-child-labor-amid-massive-uptick-2023-02-27/>.

⁶ Abby Poirier, *Local lawyer, staffing agency respond to child labor allegations*, GRAND RAPIDS BUS. JOURNAL (Mar. 2, 2023), <https://grbj.com/news/law/local-lawyer-staffing-agency-respond-to-child-labor-allegations/> (Migrant Legal Aid Executive Director Teresa Hendricks explained that, “child labor has shifted from the fields to packing plants and industrial food production. Once children are out of the fields and not as easy to spot, their exploitation is forgotten.”).

⁷ Laura Strickler & Julia Ainsley, *The federal government is investigating the possible human trafficking of children who cleaned slaughterhouses*, NBC NEWS (Jan. 19, 2023, 5:30 AM CST), <https://www.nbcnews.com/news/us-news/feds-dhs-investigating-human-trafficking-children-slaughterhouses-rcna66081>; Press Release, Court Enters Permanent Injunction Against Food Sanitation Contractor To End Oppressive Child Labor Practices: Requires Hiring Outside Compliance Specialist, U.S. Dept. of Labor, Wage and Hour Div. (Dec. 6, 2022) (available at <https://www.dol.gov/newsroom/releases/whd/whd20221206-3>).

⁸ Remy Tumin, *Labor Department finds 31 children cleaning meatpacking plants*, SEATTLE TIMES (Nov. 11, 2022, 4:42 PM), <https://www.seattletimes.com/business/labor-department-finds-31-children-cleaning-meatpacking-plants/>; Julianne McShane, *Food sanitation company accused of employing at least 31 children on graveyard shifts in slaughterhouses*, NBC NEWS

Inc., provides food safety sanitation services to about seven hundred food processing plants across the country.⁹ The investigation expanded to other facilities that contracted Packers Sanitation Services. These children did the work, which the Department of Labor categorized as hazardous, during the overnight shift.¹⁰

The investigation revealed systemic violations at thirteen different meat packing plants across eight states.¹¹ At least three children suffered injuries such as chemical burns on their skin from exposure to stringent chemicals used to clean the floors of the meat packing plants where the animals were slaughtered.¹² Moreover, they cleaned various saws and other equipment used for processing the meat.¹³

The Department of Labor fined Packers Sanitation Services over \$1.5 million for child labor violations based on at least 102 different children.¹⁴ The company paid a fine of \$15,138 per child who was illegally working in various factories across eight different states.¹⁵ Some companies ended their contract with the cleaning service based on these revelations.¹⁶

(Nov. 11, 2022, 4:48 PM CST), <https://www.nbcnews.com/news/us-news/food-sanitation-company-accused-employing-least-31-children-graveyard-rcna56758>.

⁹ Kate Gibson, *Children illegally hired for graveyard shifts cleaning JBS meat plants, fed says*, CBS NEWS (Nov. 11, 2022, 11:56 AM), <https://www.cbsnews.com/news/children-illegally-hired-meat-plants-packers-sanitation-services-psi-jbs-feds-say/>.

¹⁰ Steve Vockrodt, *Company that put children to work in meatpacking plants in Kansas and Nebraska pays maximum fine*, KCUR (Feb. 17, 2023, 10:30 AM CST), <https://www.kcur.org/news/2023-02-17/child-labor-packers-sanitation-services-meatpacking-plants-in-kansas-and-nebraska-pays-maximum-fine>; Michael Levenson, *Food Safety Company Employed More Than 100 Children, Labor Officials Say*, N.Y. TIMES (Feb. 17, 2023), <https://www.nytimes.com/2023/02/17/business/child-labor-packers-sanitation.html>.

¹¹ Gurley, *supra* note 4; Maya Yang, *Over 100 children illegally employed by US Slaughterhouse cleaning firm*, THE GUARDIAN (Feb. 17, 2023, 15:08 EST), <https://www.theguardian.com/law/2023/feb/17/underage-child-labor-working-slaughterhouse-investigation>.

¹² Strickler & Ainsley, *supra* note 7; Gurley, *supra* note 4; Yang, *supra* note 11.

¹³ Yang, *supra* note 11.

¹⁴ Press Release, *More Than 100 Children Illegally Employed In Hazardous Jobs, Federal Investigation Finds; Food Sanitation Contractor Pays \$1.5M in Penalties*, U.S. Dept. of Labor, Wage and Hour Div. (Feb. 17, 2023) (available at <https://www.dol.gov/newsroom/releases/whd/whd20230217-1>).

¹⁵ *Id.*

¹⁶ Christopher Vondracek, *PSSI, a meatpacking cleaning firm to lay off Worthington employees after JBS ends its contract*, STAR TRIBUNE (Dec. 13, 2022, 2:56 PM), <https://www.startribune.com/psi-meatpacking-cleaning-to-lay-off-worthington-employees-after-jbs-ends-its-contract-child-labor/600235505/>.

B. Hyundai

Automobile parts companies that supply both Hyundai and Kia employed children as young as twelve years old in their factories.¹⁷ Hyundai has a majority ownership stake in SMART Alabama LLC, which produced parts for Hyundai's Elantra, Santa Fe, and Sonata models in its Luverne, Alabama plant.¹⁸ At least ten parts suppliers for both Hyundai and Kia used child labor to manufacture in their Alabama facilities.¹⁹ As one former Department of Labor administrator explained, "The ages involved, the danger of what they are being employed to do, it's a clear violation."²⁰ These subsidiaries often blamed the hiring on staffing agencies that they utilized.²¹

The Department of Labor filed a civil action against SL Alabama LLC, one of these parts suppliers, alleging that it employed seven minors between the ages of thirteen and sixteen.²² Based on these allegations, the federal labor department fined SL Alabama \$30,000 for employing children in oppressive labor.²³ Additionally, the

¹⁷ Joshua Schneyer, Mica Rosenberg & Kristina Cooke, *Hyundai subsidiary has used child labor at Alabama factory*, REUTERS (July 22, 2022, 5:48 PM CST), <https://www.reuters.com/world/us/exclusive-hyundai-subsi-dary-has-used-child-labor-alabama-factory-2022-07-22/>; Mica Rosenberg, Kristina Cooke & Joshua Schneyer, *Child workers found throughout Hyundai-Kia supply chain in Alabama*, REUTERS (Dec. 16, 2022, 1:00 PM GST), <https://www.reuters.com/investigates/special-report/usa-immigration-hyundai/>.

¹⁸ Schneyer et al., *supra* note 17.

¹⁹ Rosenberg et al., *supra* note 17; Josh Moon, *As child labor scandal grows, Hyundai provides details of a crackdown on suppliers*, ALA. POLITICAL REPORTER (Feb. 14, 2023, 8:04 AM CST), <https://www.alreporter.com/2023/02/14/as-child-labor-scandal-grows-hyundai-provides-details-of-a-crackdown-on-suppliers/>.

²⁰ Rosenberg et al., *supra* note 17 (quoting David Weil, a former administrator in the Department of Labor's Wage and Hour Division).

²¹ Poirier, *supra* note 6; Julie Dunmire, *Grand Rapids business accused of violating child labor laws*, FOX 17 (Feb. 28, 2023, 6:32 PM), <https://www.fox17online.com/news/local-news/grand-rapids/grand-rapids-business-accused-of-violating-child-labor-laws>.

²² Press Release, Federal Court Orders Hyundai, Kia Auto Parts Manufacturer To Stop Employing Minors Illegally, End 'Oppressive' Child Labor Law Violations, U.S. Dept. of Labor, Wage and Hour Div. (Oct. 11, 2022) (available at <https://www.dol.gov/newsroom/releases/WHD/WHD20221011>); Rosenberg et al., *supra* note 17.

²³ Rosenberg et al., *supra* note 17; Evan Mealins, *Hyundai to drop two Alabama suppliers facing child labor violations 'as soon as possible'*, MONTGOMERY ADVERTISER (Oct. 23, 2022, 9:06 PM CT), <https://www.montgomeryadvertiser.com/story/news/2022/10/24/hyundai-cut-ties-alabama-suppliers-accused-of-child-labor/69580199007/>.

Alabama Department of Labor separately fined the company and a staffing agency \$36,000 for state child labor violations.²⁴

C. *Hearthside Food Solutions*

Many children work in the food industries. *Hearthside Food Solutions*, located in Grand Rapids, Michigan, supplies popular food snacks and breakfast cereals.²⁵ Children, mostly recent migrants from Central America, work in several *Hearthside* plants, producing *Cheerios* and *Lucky Charms* along with *Nature Valley* and *Chewy* granola bars.²⁶ Some of these children dealt with respiratory issues from the spicy dust used in making *Flamin' Hot Cheetos*.²⁷

These children would attend high school during the day and work for *Hearthside* during the overnight shift.²⁸ Of course, this rigorous schedule led to some students terminating their studies so that they could work.²⁹

Hearthside blamed the illegal hiring of children on *Forge Industrial Staffing*.³⁰ However, some former employees of *Forge Industrial Staffing* reported that *Hearthside* supervisors were advised that they were getting young-looking employees whose documentation to work was potentially false.³¹ Moreover, *Hearthside* used this staffing agency, but did not require it to verify potential employees' ages via federal databases.³² The Department of Labor continues to investigate these allegations. Moreover, the Michigan

²⁴ Rosenberg et al., *supra* note 17.

²⁵ Dreier, *supra* note 4; Poirier, *supra* note 6.

²⁶ Dreier, *supra* note 4; Riley Beggin & Jordyn Grzelewski, *States, feds investigate reports of child labor in west Michigan*, DETROIT NEWS (Feb. 27, 2023, 6:24 PM ET), <https://www.detroitnews.com/story/business/2023/02/27/state-feds-investigate-reports-of-child-labor-in-west-michigan/69950452007/>.

²⁷ Dreier, *supra* note 4; Danielle Salisbury, *Food processor exposed for illegally employing minors in Grand Rapids, says its [sic] reviewing practices*, MLIVE (Feb. 27, 2023, 12:54 PM), <https://www.mlive.com/news/grand-rapids/2023/02/food-processor-exposed-for-illegally-employing-minors-in-grand-rapids-says-its-reviewing-practices.html>.

²⁸ Dreier, *supra* note 4; Nate Belt, *Union High School principal reacts to one of his students being featured in New York Times migrant child labor investigation*, WZZM (Feb. 28, 2023, 6:49 PM EST), <https://www.wzzm13.com/article/news/local/union-high-school-principal-reacts-to-student-being-featured-in-child-labor-investigation/69-2f6469f6-583b-4bc6-b42e-7f78d9769842>.

²⁹ Dreier, *supra* note 4.

³⁰ See Poirier, *supra* note 6.

³¹ Dreier, *supra* note 4.

³² Salisbury, *supra* note 27.

Department of Labor and Economic Opportunity opened an investigation into these allegations.³³

II. THE FAIR LABOR STANDARDS ACT ADDRESSES CHILD LABOR, INCLUDING OPPRESSIVE LABOR

After years of agitation by people moved by *The Jungle* and other examples of abuses of child labor, Congress enacted the Fair Labor Standards Act of 1938 (FLSA) to address workplace conditions, including in the meat packing industry.³⁴ In enacting this statute, Congress created criminal penalties for specific violations:

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.³⁵

However, these penalties are only a petit offense with a maximum of up to six months and only a \$10,000 fine.³⁶ Moreover, Congress mandated that a judge may sentence an individual to any incarceration only if the conviction is a second offense.

In the FLSA, Congress explicitly barred child labor and criminalized such labor.³⁷ The statute authorized the Secretary of Labor to conduct investigations regarding the use of child labor.³⁸ In enacting the child labor provisions, Congress sought to “protect children against harmful labor”³⁹ by setting “a national policy and a national standard of child labor.”⁴⁰ Regarding oppressive child labor,

³³ Dunmire, *supra* note 21.

³⁴ See 29 U.S.C. § 201, *et seq.*; see also Seymour Moskowitz, *Save The Children: The Legal Abandonment of American Youth in the Workplace*, 43 AKRON L. REV. 107, 109 (2010).

³⁵ 29 U.S.C. § 216(a); see also 29 U.S.C. § 215(a)(4) (“After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person . . . to violate any of the provisions of section 212 of this title . . .”).

³⁶ See generally Brian L. Owsley, *Issues Concerning Charges for Driving While Intoxicated in Texas Federal Courts*, 42 ST. MARY’S L.J. 411, 430-36 (2011) (discussing petit offenses).

³⁷ See generally 29 U.S.C. § 212.

³⁸ *Id.* § 212(b).

³⁹ *Lenroot v. Interstate Bakeries Corp.*, 55 F. Supp. 234, 236 (W.D. Mo. 1944), *aff’d in part, rev’d in part* 146 F.2d 325 (8th Cir. 1945).

⁴⁰ *Lenroot v. Western Union Telegraph Co.*, 52 F. Supp. 142, 147 (S.D.N.Y. 1943), *aff’d* 141 F.2d 400 (2d Cir. 1944), *rev’d* *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490 (1945).

“[n]o employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce.”⁴¹ Finally, employers can be required to obtain proof of employees’ ages so as to avoid hiring children.⁴²

The Department of Labor promulgated various regulations concerning the employment of minors.⁴³ Specifically, there were regulations that barred children ages fourteen or fifteen years from working certain jobs.⁴⁴ Since the enactment of the Fair Labor Standards Act in 1938, children under the age of thirteen are generally restricted in obtaining employment.⁴⁵ No one under the age of sixteen is permitted to work in manufacturing jobs.⁴⁶

Moreover, those regulations control the specific hours such children may legally work.⁴⁷ For example, they cannot work more than three hours on a school day and no more than eight hours on non-school days.⁴⁸ Moreover, they cannot work overnight at all.⁴⁹ These regulations put employers on notice that there are significant restrictions for employing children between the ages of fourteen and fifteen and that they must ensure that any employment adheres to the regulations.⁵⁰

For all minors, the Department of Labor limits work in slaughterhouses and meat packing plants.⁵¹ Similarly, they cannot work in jobs that involving the operation of machines that form,

⁴¹ 29 U.S.C. § 212(c); accord *Halsey v. Administrator*, Wage and Hour Div., U.S. Dep’t of Labor, No. 3:06-cv-00205, 2007 WL 4106268, at *3 (D. Alaska Nov. 16, 2007) (unpublished); see also 29 U.S.C. § 203(l) (defining oppressive child labor).

⁴² 29 U.S.C. § 212(d).

⁴³ See Moskowitz, *supra* note 34.

⁴⁴ 29 C.F.R. § 570.33; see also *Chao v. Vidtape, Inc.*, 196 F. Supp.2d 281, 295 (E.D.N.Y. 2002) (regulations bar minors from working in jobs involving manufacturing of goods).

⁴⁵ 29 C.F.R. § 570.119; see also *McLaughlin v. McGee Bros. Co.*, 681 F. Supp. 1117, 1135 (W.D.N.C. 1988).

⁴⁶ 29 C.F.R. § 570.118.

⁴⁷ 29 C.F.R. § 570.35; see also *Chao*, 196 F. Supp.2d at 295; *Dole v. Fountain*, No. S89-0825, 1990 WL 351811, at *5 (S.D. Miss. Feb. 12, 1990) (unpublished).

⁴⁸ 29 C.F.R. § 570.35(a)(4); 29 C.F.R. § 570.35(a)(5); see also *Chao*, 196 F. Supp.2d at 295.

⁴⁹ 29 C.F.R. § 570.35(a)(6).

⁵⁰ U.S. Dep’t of Labor v. Mr. Cao’s LLC, No. 22-1165, 2022 WL 16948601, at *5 (D. Kan. Nov. 15, 2022) (unpublished).

⁵¹ 29 C.F.R. § 570.61; see also 29 C.F.R. § 570.120; *Donovan v. ECLA of N.H., Inc.*, 615 F. Supp. 106, 107 (D.N.H. 1984).

punch, or shear metal.⁵² Finally, these minors are prevented from working in jobs that involve operating bakery machines, which includes cleaning such machines.⁵³

III. CONCLUSION

The approach to addressing this problem is grounded in holding corporations accountable for their hiring decisions, including hiring through staffing agencies.⁵⁴ With growing reporting and revelations of child labor violations, the Biden administration announced that it would take action to combat the problem.⁵⁵ This announcement came after Packers Sanitation Services agreed to pay a \$1.5 million fine and the Department of Labor opened an investigation into Hearthside Food Solutions.⁵⁶ Both state and federal agencies must be more diligent in investigating and punishing actors for such violations.

There was some initial concern that the children employed in these hazardous positions were being trafficked. Some of the children may have emigrated recently to the United States and have no legal status that authorizes them to work in the country. As one child labor inspector noted “many undocumented children are forced into jobs upon arriving in the U.S.”⁵⁷ Immigration reform is necessary to protect minors from employers willing to hire them by providing better, legal alternatives.

The intersection of undocumented individuals working in the United States with child victims of labor violations poses an interesting situation. Indeed, it provides another example where the government is lax in prosecuting employers when they violate pertinent federal criminal statutes. Despite an overwhelming number of prosecutions of individuals who illegally enter⁵⁸ or illegally reenter⁵⁹ the United States, the federal government almost never prosecutes

⁵² 29 C.F.R. § 570.59; *see also* 29 C.F.R. § 570.120.

⁵³ 29 C.F.R. § 570.62(a); *see also* *Winchell's Donut House, Div. of Denny's, Inc. v. U.S. Dep't of Labor*, 526 F. Supp. 608, 609 (D.D.C. 1980).

⁵⁴ *Dunmire*, *supra* note 21.

⁵⁵ *Strickler*, *supra* note 5; *Bose & Rosenberg*, *supra* note 5.

⁵⁶ *Strickler*, *supra* note 5; *Bose & Rosenberg*, *supra* note 5.

⁵⁷ *Selling kids: Labor trafficking*, *supra* note 5; *see also* Joshua Schneyer, Mica Rosenberg & Kristina Cooke, *Teen risked all to flee Guatemala. Her payoff: grueling job in U.S. chicken plant*, REUTERS (Feb. 7, 2022, 1:00 PM GMT), <https://www.reuters.com/investigates/special-report/usa-immigration-alabama/>.

⁵⁸ 8 U.S.C. § 1325(a).

⁵⁹ *Id.* § 1326(a).

employers or their employees when they hire undocumented individuals.⁶⁰ Similarly, there are few prosecutions of companies for violating child labor laws.

The existing child labor laws are straight-forward and both companies and staffing agencies must apply basic hiring regulations. As one attorney noted, “If the staffing agencies that are providing workers and the companies hiring workers do what they’re supposed to do, that will go a long way in curbing this. There are very specific requirements if you’re going to hire someone.”⁶¹

With a petit offense as the potential criminal charge and only after a previous offense of child labor, the FLSA does not send a message that the federal government cares much about children being employed to do oppressive labor. First, the criminal penalties should be a felony with a maximum penalty for a simple violation of the child labor laws of five years. Additionally, there should be criminal penalties for corporate entities as well as individuals with significant monetary sanctions to provide a deterrent. Moreover, the requirement that there be a previous offense should be removed. Regardless, Packers Sanitation Services or Hearthside Food Solutions with multiple violations at different locations should be covered by existing statutory language.

As one scholar notes, the FLSA has essentially remained unchanged since its enactment.⁶² Congress should amend the FLSA to criminalize the hiring of children in the first instance. Moreover, that offense should be more serious than the petit offense that it currently is by making it a felony. This criminalization should extend to individuals involved in managing the corporations as well as hiring minors and can be based on principles of vicarious liability.⁶³

⁶⁰ See Brian L. Owsley, *Supply and Demand in the Illegal Employment of Undocumented Workers*, 71 CATH. L. REV. 227 (2022) (discussing how prosecutors generally fail to prosecute criminal violations by employers who hired undocumented workers).

⁶¹ Dunmire, *supra* note 21.

⁶² Moskowitz, *supra* note 34, at 109 (“The FLSA has not been significantly amended since its adoption in 1938. Many youth workers are not covered; penalties for violation of the act are extraordinarily lax.”).

⁶³ See *United States v. Park*, 421 U.S. 658 (1975) (holding a CEO criminally liable for wrongdoing by the corporation based on vicarious liability); see also *United States v. DeCoster*, 828 F.3d 626, 632 (8th Cir. 2016) (affirming three-month sentence for corporate officers who introduced eggs with salmonella into interstate commerce); *United States v. Gel Spice Co.*, 773 F.2d 427, 432, 435 (2d Cir. 1985) (affirming conviction of corporation and company president for rodent infestation of food product).

Moreover, Congress should greatly increase the maximum civil penalty for each violation from the current amount of \$15,138.⁶⁴ This violation amount increased from \$14,050 on January 13, 2023.⁶⁵ This increase is inadequate to provide a significant financial consequence to using illegal child labor. Thus, the civil penalties should be raised significantly.

Manufacturers and other labor-intensive companies should not be allowed to outsource hiring to third party staffing agencies. This approach excuses such companies from the responsibility of ensuring that their employees can legally work for them. At a minimum, companies should be required to conduct their own independent verification of each employee's legal work status from workers provided by staffing agencies. Finally, such liability should be based on strict liability for employers when they employ children in violations of the FLSA.⁶⁶

Finally, consumers need to demand better from companies and their suppliers. For example, companies that use suppliers like Packers Sanitation Services and Hearthside Food Solutions should suffer financially. Consumers should protest these companies and boycott products made with illegal child labor.

Implementing these changes will go towards alleviating the child labor problems that the United States currently faces, and thus prevent a return to the world of Upton Sinclair's *The Jungle*.

⁶⁴ 29 C.F.R. § 570.140(b)(1).

⁶⁵ Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2023, 88 F.R. 2210, 2217 (Jan. 13, 2023).

⁶⁶ Strict liability is a criminal offense that does not require the defendant to have any intention to engage in criminal conduct but can still be adjudged as guilty. See *Rehaif v. United States*, 139 S. Ct. 2191, 2212 (2019); *Morrisette v. United States*, 342 U.S. 246, 254 n.13 (1952).

The following is a supplementary infographic for *Re-envisioning Criminal Prosecutions for Child Labor Violations Pursuant to the FLSA* created to promote legal comprehension.

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Re-envisioning Criminal Prosecutions for Child Labor Violations Pursuant to the Fair Labor Standards Act



I. American Companies Illegally Use Child Labor



Minors may work legally in some circumstances. However, there are limits to the number of hours as well as the type of work children may do, especially based on age. Historically, children worked in agricultural fields, and while that still occurs, children have worked illegally in factories and plants that produce goods.¹

A. Packers Sanitation Services, Inc.

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As one former Department of Labor administrator explained, "The ages involved, the danger of what they are being employed to do, it's a clear violation."¹⁰ These subsidiaries often blamed the hiring on staffing agencies that they utilized.¹¹

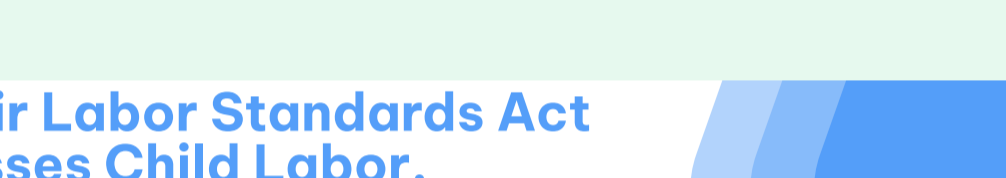


The Department of Labor filed a civil action against SL Alabama LLC, one of these parts suppliers, alleging that it employed seven minors between the ages of thirteen and sixteen.¹² Based on these allegations, the federal labor department fined SL Alabama \$30,000 for employing children in oppressive labor.¹³ Additionally, the Alabama Department of Labor separately fined the company and a staffing agency \$36,000 for state child labor violations.¹⁴

C. Heartside Food Solutions

Many children work in the food industries. Heartside Food Solutions, located in Grand Rapids, Michigan, supplies popular food snacks and breakfast cereals.¹⁵ Children, mostly recent migrants from Central America, work in several Heartside plants, producing Cheerios and Lucky Charms along with Nature Valley and Chewy granola bars.¹⁶

These children would attend high school during the day and work for Heartside during the overnight shift.¹⁷ Of course, this rigorous schedule led to some students terminating their studies so that they could work.¹⁸



Heartside blamed the illegal hires of children on Forge Industrial Staffing.¹⁹ However, some former employees of Forge Industrial Staffing reported that Heartside supervisors were advised that they were getting young-looking employees whose documentation to work was potentially false.²⁰ Moreover, Heartside used this staffing agency, but did not require it to verify potential employees' ages via federal databases.²¹

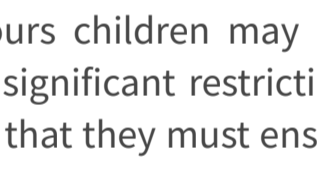
The Department of Labor continues to investigate these allegations. Moreover, the Michigan Department of Labor and Economic Opportunity opened an investigation into these allegations.²²

II. The Fair Labor Standards Act Addresses Child Labor, Including Oppressive Labor

Congress enacted the Fair Labor Standards Act of 1938 (FLSA) to address workplace conditions, including in the meat packing industry.²³ In enacting this statute, Congress created criminal penalties for specific violations:²⁴

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

However, these penalties are only a petit offense with a maximum of up to six months and only a \$10,000 fine.²⁵ Moreover, Congress mandated that a judge may sentence an individual to any incarceration only if the conviction is a second offense.



In the FLSA, Congress explicitly barred child labor and criminalized such labor.²⁶ In enacting the child labor provisions, Congress sought to "protect children against harmful labor" by setting "a national policy and a national standard of child labor."²⁷

"[N]o employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce."²⁸

Employers can be required to obtain proof of employees' ages so as to avoid hiring children.²⁹

Since the enactment of the Fair Labor Standards Act in 1938, children under the age of thirteen are generally restricted in obtaining employment.³⁰ No one under the age of sixteen is permitted to work in manufacturing jobs.³¹

Regulations control the specific hours children may legally work.³² These regulations put employers on notice that there are significant restrictions for employing children between the ages of fourteen and fifteen and that they must ensure that any employment adheres to the regulations.³³

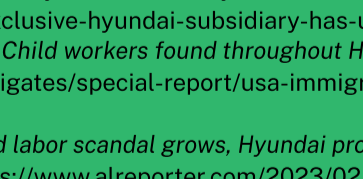
III. Conclusion

The approach to addressing this problem is grounded in holding corporations accountable for their hiring decisions, including hiring through staffing agencies.³⁴ Both state and federal agencies must be more diligent in investigating and punishing actors for such violations.

Immigration reform is necessary to protect minors from employers willing to hire them by providing better, legal alternatives.

The existing child labor laws are straight-forward and both companies and staffing agencies must apply basic hiring regulations.

With a petit offense as the potential criminal charge and only after a previous offense of child labor, the FLSA does not send a message that the federal government cares much about children being employed to do oppressive labor. The criminal penalties should be a felony with a maximum penalty for a simple violation of the child labor laws of five years. Additionally, there should be significant penalties for corporate entities as well as individuals with significant monetary sanctions to provide a deterrent. Moreover, the requirement that there be a previous offense should be removed.



Congress should amend the FLSA to criminalize the hiring of children in the first instance. Moreover, that offense should be more serious than the petit offense that it currently is by making it a felony.

Manufacturers and other labor-intensive companies should not be allowed to outsource hiring to third party staffing agencies. At a minimum, companies should be required to conduct their own independent verification of each employee's legal work status from workers provided by staffing agencies.

Finally, consumers need to demand better from companies and their suppliers. For example, companies that use suppliers like Packers Sanitation Services and Heartside Food Solutions should suffer financially. Consumers should protest these companies and boycott products made with illegal child labor.

Source - *Re-envision Criminal Prosecutions for Child Labor Violations Pursuant to the FLSA* by Brian Owsley. Infographic created by Annaliza Rodriguez, Staff Reporter (2022-2023)

1. Abby Poirier, *Local lawyer, staffing agency respond to child labor allegations*, GRAND RAPIDS BUS. JOURNAL (Mar. 2, 2023), <https://grbj.com/news/local-lawyer-staffing-agency-respond-to-child-labor-allegations/> (Migrant Legal Aid Executive Director Teresa Hendricks explained that, "child labor has shifted from the fields to packing plants and industrial food production. Once children are out of the fields and not as easy to spot, their exploitation is forgotten.");

DOMESTIC VIOLENCE AND FIREARMS: PROTECTING VICTIMS OF DV

Angela Downes*

According to the Gun Violence Archives, 12,941 Americans have died in gun-related incidents this year.¹ There have been 169 mass shootings this year alone.² The issue of gun violence compounds with each passing day and permeates every aspect of life: from the recent Bruen case (where the Supreme Court found that gun owners have a constitutional right to carry guns in all places outside of their homes and that laws that restricted concealed carry licensing laws violated the Second Amendment);³ to the recent 5th Circuit ruling in the Rahimi case, which allows people with domestic violence protective orders against them to possess firearms;⁴ to the constant school shootings and the continued police brutality. Despite robust legislative action with respect to regulation of the purchase, possession, and transportation of firearms, and proposals to substantially curtail ownership of firearms, there is no definitive singular way to address increasing gun violence. While gun violence continues to increase, finding solutions from the fallout are slow to emerge.

I. UNITED STATES V. RAHIMI

During the winter of 2020, Zackey Rahimi was involved in five shootings around Arlington, Texas.⁵ In one incident, he shot at someone's house after selling them prescription drugs. After getting into a car accident, he shot at a car, left the scene and returned to the accident scene in another vehicle and shot at the car again.⁶ Three days before Christmas he shot at a constable's car.⁷ After New Year's, he fired shots into the air outside of a Whataburger after his friend's

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¹ *Gun Violence Archive 2023*, GUN VIOLENCE ARCHIVE, <https://www.gunviolencearchive.org/> (Apr. 22, 2023).

² *Id.*

³ *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2120–2121 (2022).

⁴ *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023).

⁵ *Id.* at 448.

⁶ *Id.*

⁷ *Id.* at 448–49.

credit card was declined.⁸ During all these incidents, Rahimi was not legally permitted to have guns because of a restriction from a February 2020 protective order, issued after he allegedly assaulted his girlfriend.⁹ After the shootings, police executed a search warrant of his home and found a handgun and rifle, of which possession violated both state and federal law.¹⁰ Rahimi was indicted by a federal grand jury for possession of a firearm while under a domestic violence protective order.¹¹ He subsequently argued that that the charge violated his constitutional rights and the courts initially disagreed.¹² The case was then reheard by the Fifth Circuit.

The Fifth Circuit struck down the federal law prohibiting the possession of firearms by people subject to domestic violence protection orders.¹³ The ruling signaled that the rule prohibiting abusers from possessing firearms is unconstitutional under the Second Amendment.¹⁴ In 2022, in *New York State and Rifle & Pistol Association v. Bruen*, the U.S. Supreme Court established a new standard that modern gun control laws must be “consistent with the Second Amendment’s text and historical understanding,”¹⁵ and the Fifth Circuit applied this new standard in *Rahimi*. Writing for the court, Justice Cory T. Wilson opined, “Rahimi, while hardly a model citizen, is nonetheless among ‘the people’ entitled to the Second Amendment’s guarantees, all other things equal.”¹⁶

The court’s decision in *Rahimi* applies in Texas, Mississippi, and Louisiana. This case will likely make its way to the U.S. Supreme Court through the appellate process.

A. *What does Rahimi mean for domestic violence victims?*

The impact of the case is potentially catastrophic for domestic violence victims. Practitioners and advocates agree that disarming abusive and dangerous domestic violence behavior is the first step to avoiding future violence. The Court focuses *not* on the safety of domestic violence victims and public health of the larger community, but on ensuring that perpetrators have uninterrupted access to

⁸ *Id.* at 449.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 448–50.

¹² *Id.* at 448.

¹³ *Id.*

¹⁴ *Id.* at 460–61.

¹⁵ *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022).

¹⁶ *United States v. Rahimi*, 61 F.4th 443, 453 (5th Cir. 2023).

firearms. The statistics are clear: the likelihood for lethality increases when there is access to guns. Under this ruling, known abusers will be allowed to keep their guns, and perhaps get more, without consideration that the weapons might be used to coerce, injure, or kill victims.

II. PROTECTIVE ORDERS

A protective order is an order issued by a court that tells a perpetrator that they must stay away from a victim. Protective orders are one of the only tools available to victims to stop the abuse. If a perpetrator violates an order, a victim can call the police and the perpetrator will be arrested. The orders remain in effect even if the victim moves to another state.¹⁷ The orders are more effective when it is clear when the perpetrator knows what is allowed and what is not. Generally, protective orders contain language that states that perpetrators must stay away from victims; may not communicate, harass or stalk the victim or the victim's family; the perpetrator may be ordered to attend specialized counseling; and the protective order will most likely be in effect for at least two years.¹⁸ Most importantly, protective orders are most effective when firearm possession is prohibited.¹⁹ They are still the most effective tool that victims have against domestic violence harassment, stalking, and violence.

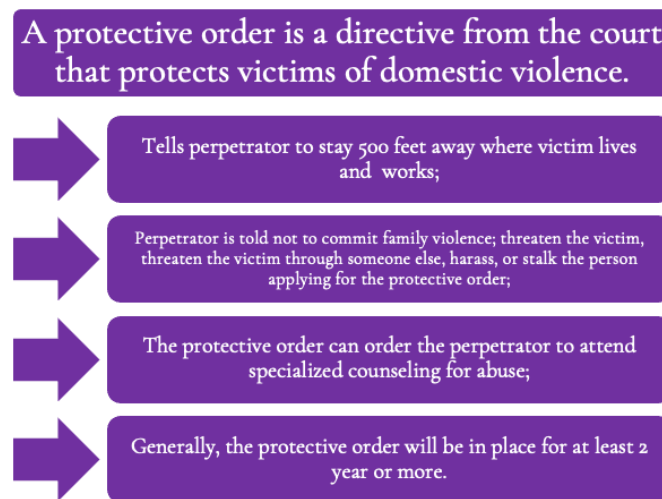


Figure 1: Protective Orders

¹⁷ The Violence Against Women Act (VAWA) requires jurisdictions honor and enforce protection orders issued in other states. See 18 U.S.C. § 226(a).

¹⁸ Tex. Fam. Code Ann. § 85.022(a)(1)(b).

¹⁹ GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, *Domestic Violence & Firearms in Texas*, <https://giffords.org/lawcenter/state-laws/domestic-violence-and-firearms-in-texas/> (last updated Jan. 5, 2023).

A. *Emergency Protective Orders*

Emergency Protective Orders are available if the perpetrator is in jail.²⁰ It becomes police-enforceable immediately after the magistrate judge signs the order and gives the perpetrator a copy. The victim, police officer, magistrate or the District Attorney's Office can request an Emergency Protective Order.²¹ These orders generally contain the same provisions as the standard two-year Protective Order but operates to protect domestic violence victims while a case against the perpetrator is pending and before a Final Protective Order is issued.²²

B. *Who can apply for a protective order?*

Any adult who lives in a household experiencing domestic violence or family violence may apply for a protective order for themselves or for their children.²³ For a protective order for domestic violence, the applicant (or the children the application is filed for), must have been the victim of physical abuse OR the threat of imminent danger within the last 90 days AND one of the following relationships or circumstances applies to the victim and the abuser:

1. Spouse or former spouse
2. Relative related by blood
3. In-law related by marriage
4. Biological parents of the same child
5. Live-in boyfriend or live-in girlfriend
6. Former live-in boyfriend or former live-in girlfriend
7. Members of the same household
8. Dating relationship
9. Third-Party Dating/Marriage
10. Victim of stalking
11. Victim of sexual assault ²⁴

The protective order may be filed in the county where you live or where the incident occurred.²⁵

²⁰ Tex. Fam. Code Ann. § 83.001.

²¹ *Id.* § 82.002(a)–(e).

²² *Id.* § 83.002.

²³ *Id.* § 82.002(a).

²⁴ *Id.* §§ 83.001, 71.0021 (defining “dating violence”), 71.004 (defining “family violence”).

²⁵ *Id.* § 82.003.

The World Health Organization and the U.N. called domestic violence a “shadow pandemic.”²⁶ During the COVID-19 pandemic, incidents of domestic violence increased because victims were locked down with abusers, and many shelters struggled to safely provide services. Domestic violence incidents rose in the United States by about 8.1% after the imposition of pandemic-related lockdowns, according to an analysis by the National Commission on Covid-19 and Criminal Justice.²⁷ At the same time, gun purchase rates steadily increased.²⁸

Domestic violence and gun violence are closely intertwined. Firearms contribute significantly to domestic violence as they are used by perpetrators to threaten, coerce, control, and kill victims. Around 4.5 million women in the United States have been threatened with a gun and nearly 1 million women have been shot or threatened by an intimate partner.²⁹ These threats often escalate to murder. Alarming, According to the Educational Fund to Stop Gun Violence, a woman is five times more likely to be murdered when her abuser has access to a gun.³⁰ Like many other forms of gun violence, the deadly intersection of guns and domestic violence has a disproportionate impact on communities of color, particularly for Black, Native American/Alaska Native, and Latinx women. The violence can also affect those close to the situation. 59.1% of mass shootings are domestic violence related.³¹

²⁶ *The Shadow Pandemic: Violence against women during COVID-19*, UN WOMEN, <https://www.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response/violence-against-women-during-covid-19#campaign> (last visited Apr. 23, 2023).

²⁷ ALEX R. PIQUERO ET AL., NAT. COMM. ON COVID-19 AND CRIM. JUSTICE, DOMESTIC VIOLENCE DURING COVID-19: EVIDENCE FROM A SYSTEMATIC REVIEW AND META-ANALYSIS 3 (Feb. 2021), <https://build.neoninspire.com/counciloncj/wp-content/uploads/sites/96/2021/07/Domestic-Violence-During-COVID-19-February-2021.pdf>.

²⁸ Press Release, NORC, One in Five American Households Purchased a Gun During the Pandemic (Mar. 24, 2022) (available at <https://www.norc.org/NewsEventsPublications/PressReleases/Pages/one-in-five-american-households-purchased-a-gun-during-the-pandemic.aspx>).

²⁹ Susan B. Sorenson & Rebecca A. Schut, *Nonfatal Gun Use in Intimate Partner Violence: A Systematic Review of the Literature*, 19 TRAUMA VIOLENCE ABUSE 431, 431, <https://pubmed.ncbi.nlm.nih.gov/27630138/>.

³⁰ *Firearm Homicide*, THE EDUC. FUND TO STOP GUN VIOLENCE (last updated Feb. 2021), <https://efsgv.org/learn/type-of-gun-violence/firearm-homicide/>.

³¹ Lisa B. Geller, Marisa Booty & Cassandra K. Crifasi, *The role of domestic violence in fatal mass shootings in the United States, 2014–2019*, INJURY EPIDEMIOLOGY, May 31, 2021, at 4, <https://injejournal.biomedcentral.com/articles/10.1186/s40621-021-00330-0>.

The long-term impact of *Rahimi* is still unknown, but it is likely there will be an increase in domestic violence murders. Research is clear that if guns are present in domestic violence circumstances, the likelihood of death increases. We must continue to ensure that perpetrators of domestic violence do not have access to guns.

III. CREATING A SAFER ENVIRONMENT FOR DOMESTIC VIOLENCE VICTIMS THROUGH LEGISLATION

There are several bills in the current Texas legislature focused on domestic violence issues. Here are some notable bills that, if they become law, will positively increase safety and care for victims:

- H.B. 79 is related to employment leave for victims of domestic violence, sexual assault, and stalking.³²
- H.B. 482 would prohibit those convicted of certain family violence cases from owning firearms.³³
- H.B. 1796 would require family violence centers to clearly provide services that are effective for victims, such as 24-hour shelters and crisis hotlines, and demonstrate “culturally relevant” and “trauma-informed” advocacy efforts.³⁴
- H.B. 2229, the “Natalia Cox Act,” would require police officers and medical professionals to provide a written list of resources and legal options available to those experiencing domestic or dating violence.³⁵

Guns and domestic violence are a deadly combination. The outcomes are clear: if perpetrators have access to guns, the likelihood that victims will be hurt or killed increases. Victims deserve to have all of the protections available to ensure their safety. Not only do we need effective laws on the books but also, we must ensure that all provisions are available and upheld. Without this standard, perpetrators will not fully be held accountable, and more victims will be hurt and killed. This accountability is not possible if perpetrators are allowed to possess firearms.

³² H.B. 79, 88th Leg., Reg. Sess. (Tex. 2023), <https://legiscan.com/TX/bill/HB79/2023>.

³³ H.B. 482, 88th Leg., Reg. Sess. (Tex. 2023), <https://legiscan.com/TX/bill/HB2229/2023>.

³⁴ H.B. 1796, 88th Leg., Reg. Sess. (Tex. 2023), <https://legiscan.com/TX/bill/HB1796/2023>.

³⁵ H.B. 2229, 88th Leg., Reg. Sess. (Tex. 2023), <https://legiscan.com/TX/bill/HB2229/2023>.

If you or someone you know is experiencing domestic violence, please see the local and national resources and contact information below:

NATIONAL RESOURCES

Futures Without Violence: The National Health Resource Center on Domestic Violence
1-888-792-2873
www.futureswithoutviolence.org

Safe Horizon
https://www.safehorizon.org/get-help/domestic-violence/

The National Domestic Violence Hotline
1-800-799-7233 (SAFE)
www.ndvh.org

National Sexual Assault Hotline
1-800-656-4673 (HOPE)
www.rainn.org

National Resource Center on Domestic Violence
1-800-537-2238
www.nrcdv.org
www.vawnet.org

National Domestic Violence Hotline Local Resources Search
https://www.thehotline.org/get-help/domestic-violence-local-resources/

National Dating Abuse Helpline
1-866-331-9474
www.loveisrespect.org

National Suicide Prevention Lifeline
1-800-273-8255 (TALK)
www.suicidepreventionlifeline.org

National Coalition Against Domestic Violence
https://ncadv.org/

National Center on Domestic Violence, Trauma & Mental Health
1-312-726-7020 ext. 2011
www.nationalcenterdvtraumamh.org

DALLAS-FORT WORTH METROPLEX RESOURCES

The Family Place
Offers animal-friendly shelters
https://familyplace.org/

The Potter's House Dallas
https://www.thepottershous.org/safe/

Safe Haven
Offers shelters and resources in Tarrant County
https://www.safehaventc.org/

Texas Muslim Women's Foundation
https://tmwf.org/domestic-family-violence/

Dallas County District Attorney's Office (Protective Orders) Family Violence Division
214-653-3528
https://www.dallascounty.org/government/district-attorney/divisions/family-violence.php

Viola's House
Services and housing for teenage mothers aged 12-21
https://violashouse.org

Genesis Women's Shelter and Support
https://www.genesisshelter.org/

**SUPERVISED CHILD
VISITATION**

Faith and Liberty's Place
8915 Harry Hines Blvd.
Dallas, TX 75235
(214) 956-0100
<https://familyplace.org/services/our-services>

WOMEN OF COLOR

INCITE! Women of Color
Against Violence
incite.natl@gmail.com
www.incite-national.org

AFRICAN AMERICAN

The Black Church and Domestic
Violence Institute
1-770-909-0715
www.bcdvi.org

LATINA/LATINO

Casa de Esperanza
Linea de crisis 24-horas/24-hour
crisis line
1-651-772-1611
www.casadeesperanza.org

INDIGENOUS WOMEN

National Indigenous Women's
Resource Center
855-649-7299
www.niwrc.org

ASIAN/PACIFIC ISLANDER

Asian and Pacific Islander
Institute on Domestic Violence
1-415-954-9988
www.apiidv.org

DIFFERENTLY ABLED

Domestic Violence Initiative
(303) 839-5510
(877) 839-5510
www.dviforwomen.org

National Clearinghouse for the
Defense of Battered Women
1-800-903-0111 ext. 3
www.ncdbw.org

Deaf Abused Women's Network
(DAWN)
Hotline@deafdawn.org
202-559-5366
www.deafdawn.org

The following is a supplementary infographic for *Domestic Violence and Firearms: Protecting Victims of DV* created to promote legal comprehension.

Suggested citation:

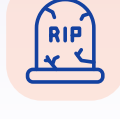
Angela Downes, *Domestic Violence and Firearms: Protecting Victims of DV*, ACCESSIBLE LAW, Summer 2023, at 22 app. illus.

Domestic Violence & Firearms

The Impact of *Rahimi* on Protective Orders

INSIGHTS

on firearms and domestic violence



12,945

people in the U.S. have died from gun-related instances in 2023.¹



169

mass shootings have occurred in the U.S. in 2023 alone.²



8.1%

increase in domestic violence occurrences during the COVID-19 pandemic.³



1 million

women have been threatened with a firearm or shot by an intimate partner.⁴



59%

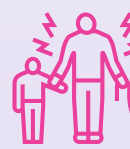
of mass shootings are linked to domestic violence.⁵

How do Protective Orders help victims?

A protective order is a directive from a court that protects domestic violence victims that can include the following:⁶



Abusers must stay 500 feet away from the victim's home and place of employment.



Abusers are forbidden from committing family violence.



Abusers may not talk to, harass, or stalk victims.



A court can order the abuser attend specialized counseling for the abusive behavior.



Abusers cannot talk to or harass a victim through someone else.



Protective Orders are in place for 2 years, but may be longer.

United States v. Rahimi

- In 2023, the 5th Circuit Court of Appeals struck down a federal law that prohibited domestic violence abusers from owning a firearm.⁷
- Because the **Second Amendment of the U.S. Constitution protects the right to bear arms, the Court said the federal law was unconstitutional.**⁸
- This case applies to **Texas, Louisiana, and Alabama.**



Thus, under *Rahimi*, protective orders may not as effectively help victims because there is limited prohibition on an abuser's access to guns.

The case increases risk of injury to or death of domestic violence victims, because of the link between domestic violence and firearms.

Texas Legislative Bills

If the following bills become law, they would positively help to protect domestic violence victims:

- H.B. 79** is related to employment leave for victims of domestic violence, sexual assault, and stalking.⁹
- H.B. 482** would prohibit those convicted of certain family violence cases from owning firearms.¹⁰
- H.B. 1796** would require family violence centers to clearly provide services that are effective for victims, such as 24-hour shelters and crisis hotlines, and demonstrate “culturally relevant” and “trauma-informed” advocacy efforts.¹¹
- H.B. 2229**, the “Natalia Cox Act,” would require police officers and medical professionals to provide a written list of resources and legal options available to those experiencing domestic or dating violence.¹²

Resources for Domestic Violence Victims in Dallas-Fort Worth

Genesis Women's Shelter & Support
www.genesisshelter.org

The Family Place
www.familyplace.org

Safe Haven
www.safehaventc.org

Viola's House
www.violashouse.org

Texas Muslim Women's Foundation
www.tmwf.org

Dallas County District Attorney's Office
www.dallascounty.org/government/district-attorney/divisions/family-violence.php

Tarrant County District Attorney's Office
www.protectiveorder.tarrantcounty.com

Source - DV and Firearms: Protecting Victims of Domestic Violence by Professor Angela Downes. Infographic created by Kirsten Clark, Director of Acquisitions & Staff Reporter (2022-2023).

- References**
- Gun Violence Archive 2023, GUN VIOLENCE ARCHIVE (April 22, 2023), available at <https://www.gunviolencearchive.org/>.
 - Id.
 - ALEX R. PIQUERO ET AL., NAT. COMM. ON COVID-19 AND CRIM. JUSTICE, DOMESTIC VIOLENCE DURING COVID-19: EVIDENCE FROM A SYSTEMIC REVIEW AND META-ANALYSIS (Feb. 2021), <https://build.neoninspire.com/counciloncj/wp-content/uploads/sites/96/2021/07/Domestic-Violence-During-COVID-19-February-2021.pdf>.
 - Susan B. Sorenson, Rebecca A. Schut, *Nonfatal Gun Use in Intimate Partner Violence: A Systematic Review of the Literature*, 19 TRAUMA VIOLENCE ABUSE 431, 431, <https://pubmed.ncbi.nlm.nih.gov/27630138/>.
 - Lisa B. Geller, Marisa Booty, Cassandra K. Crifasi, *The role of domestic violence in fatal mass shootings in the United States, 2014-2019*, INJURY EPIDEMIOLOGY, May 31, 2021, at 4, <https://injejournal.biomedcentral.com/articles/10.1186/s40621-021-00330-0>.
 - Tex. Fam. Code Ann. § 85.022(a)(1)(b).
 - United States v. Rahimi, 61 F.4th 443, 448 (5th Cir. 2023).
 - See New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2120-2121 (2022).
 - H.B. 79, 88th Leg., Reg. Sess. (Tex. 2023), <https://legiscan.com/TX/bill/HB79/2023>.
 - H.B. 482, 88th Leg., Reg. Sess. (Tex. 2023), <https://legiscan.com/TX/bill/HB482/2023>.
 - H.B. 1796, 88th Leg., Reg. Sess. (Tex. 2023), <https://legiscan.com/TX/bill/HB1796/2023>.
 - H.B. 2229, 88th Leg., Reg. Sess. (Tex. 2023), <https://legiscan.com/TX/bill/HB2229/2023>.



CRIMMIGRATION: THE CONSEQUENCES OF CRIMINAL CONDUCT ON
NON-CITIZENS

Adriana Fierro Rascon*

Immigration law is complex and constantly changing. If you are a non-citizen facing criminal charges, please consult with an experienced immigration attorney specializing in removal defense BEFORE accepting a plea because what may seem like an appealing plea could result in severe immigration consequences. It's also important to note that criminal conduct can still trigger immigration consequences even if it ultimately results in no criminal conviction.

I. INTRODUCTION

Criminal charges can often result in serious, and perhaps unintended, consequences for those living in the United States without lawful status or as lawful permanent residents (green card holders). Unfortunately, most non-citizens with criminal convictions fail to understand the true consequences of their conviction until it affects them later in life. For this reason, both attorneys and non-citizen defendants must be conscious of the long-lasting immigration consequences of a criminal plea and conviction.

In the groundbreaking 2010 decision of *Padilla v. Kentucky*, the Supreme Court recognized that changes in immigration law “have dramatically raised the stakes” for non-citizens facing criminal charges, and for that reason, “accurate legal advice has never been more important.”¹ In that case, Mr. Padilla, a non-citizen, pled guilty to a drug offense on the advice of counsel who told him “not to worry about deportation because he had lived in the country for so long.”² Mr. Padilla was subsequently placed in removal proceedings and argued Sixth Amendment violations stating that but for the ill advice of his attorney, he would have taken his case to trial.³ After *Padilla*, attorneys must inform non-citizen clients of the immigration consequences involved with criminal pleas.⁴

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¹ *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010).

² *Id.* at 359.

³ *Id.*

⁴ *Id.* at 374.

II. WHAT KIND OF IMMIGRATION CONSEQUENCES ARISE FROM CRIMINAL CHARGES AND CONVICTIONS?

Criminal charges and convictions can have severe consequences for non-citizens. It is no secret that our criminal justice system is often used as a way to remove non-citizens from the United States, as our government has long been aware of the immigration consequences of criminal convictions. In *Bridges v. Wixon*, the Supreme Court acknowledged that the consequences of removal on a non-citizen are likely more severe than the imposition of the criminal sentence itself because once removed, they are likely to face “poverty, persecution, and even death.”⁵

Depending on the nature and severity of the crime, a criminal record can lead to a denial of entry, removal, inadmissibility, or the inability to become a U.S. citizen in the future. These consequences are explained in detail below.

A. Denial of Entry

“Denial of entry” is a legal term used in immigration law that is used when a person is not allowed entry at a border crossing.⁶ Under immigration law, a non-citizen arriving at a port of entry is subject to inspection by immigration officials who will determine whether they meet the legal requirements for entry into the country.⁷ One of those requirements includes an assessment of a person’s criminal record.⁸

A non-citizen with a criminal conviction may be denied entry into the United States even if they have been allowed to enter on previous occasions. Ultimately, immigration officials will review their criminal history to assess whether they are “admissible” (defined below) and whether the severity of their crime(s) would pose a threat to public safety. It is important to note that immigration officials can exercise discretion when making these determinations.⁹

Example: Ronald is in the United States on an F-1 student visa. He is convicted of aggravated assault and serves a one-year jail sentence. After being released, Ronald returns to Egypt, his birth country,

⁵ *Bridges v. Wixon*, 326 U.S. 135, 164 (1945) (Murphy, J., concurring).

⁶ INA § 101(a)(13)(a) (2018).

⁷ *Applying for Admission into United States*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/travel/international-visitors/applying-admission-united-states> (last modified May 27, 2022).

⁸ 8 U.S.C. § 1182(a)(2) (2018).

⁹ *Id.*

during winter break from school. Upon returning to the United States, an immigration official reviews his criminal conviction and denies entry on the grounds that he poses a threat to public safety.¹⁰

B. *Inadmissibility*

An “inadmissible non-citizen” refers to a non-citizen who has not been inspected and admitted to the United States and is subject to grounds of removal specified in section 212 of the Immigration Nationality Act (INA).¹¹ In other words, an inadmissible non-citizen is generally not eligible to enter, remain, or adjust their immigration status in the United States.

The consequences of inadmissibility will depend on whether you are inside or outside the United States. It is possible to be living in the United States and be inadmissible. An inadmissible non-citizen living in the United States may be subject to removal and/or ineligible to adjust their immigration status despite having a qualifying familial relationship. An inadmissible non-citizen living outside the United States will likely be denied entry.

Inadmissibility can be triggered in various ways, one of them being through criminal convictions. Certain criminal offenses, such as crimes involving moral turpitude (CIMTs), drug offenses, or certain violent crimes, will give rise to inadmissibility issues.¹²

Example: Regina is a non-citizen who entered the United States five years ago on a visitor visa that has since expired. Regina has two child abuse convictions from two years ago. Regina recently married a United States citizen and planned to file for adjustment of her immigration status. Despite Regina’s ability to comply with most of the requirements, her past convictions will likely make her inadmissible and thus ineligible to adjust her immigration status.

¹⁰ *Id.* § 1227(a)(2).

¹¹ *Reporting Terminology and Definitions*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/immigration-statistics/reporting-terminology-definitions> (last updated Aug. 12, 2022) (“inadmissible noncitizen”).

¹² 8 U.S.C. § 1182(a)(2) (2018).

C. Removal

“Removal” is a legal process in immigration law that involves the forced removal of a non-citizen from the United States.¹³ Certain crimes, such as aggravated felonies or drug offenses, are considered “removable offenses.”¹⁴ A non-citizen convicted of a removable offense will likely be placed in removal proceedings and ordered removed from the United States. Removal proceedings are handled in federal immigration court, where a federal immigration judge will make a final ruling.¹⁵

During these proceedings, the non-citizen can present their case on why they should be allowed to remain in the country based on any avenues of relief¹⁶ they may qualify for. However, if the immigration judge determines that the non-citizen is ineligible for relief, the judge will issue an order of removal. Once a non-citizen is ordered removed, they will be detained by immigration authorities and placed in a detention facility until they can be removed. In some cases, the non-citizen may be allowed to depart the country voluntarily within a specific time frame.¹⁷ However, failure to do so may result in forced removal by immigration officials.

Example: Robert is a non-citizen who entered the United States without inspection two years ago. All of Robert’s family members reside in his home country. Robert is arrested and convicted for a fraud-related criminal offense. At the conclusion of his criminal case, Robert is placed in removal proceedings where he makes his case against removal in front of an immigration judge. The immigration judge finds that Robert lacks any plausible avenues of relief and orders his removal.

¹³ *Reporting Terminology and Definitions*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/immigration-statistics/reporting-terminology-definitions> (last updated Aug. 12, 2022) (“removal (noncitizen removed)”).

¹⁴ 8 U.S.C. § 1227(a)(2) (2018).

¹⁵ *About the Office*, THE U.S. DEP’T OF JUSTICE, <https://www.justice.gov/eoir/about-office> (last updated Apr. 25, 2023).

¹⁶ Some avenues of relief of removal include cancellation of removal, asylum, withholding of removal, convention against torture protection, and adjustment of status. To read more about these avenues of relief see American Immigration Council, *The Removal System of the United States: An Overview*, RESEARCH (Aug. 2022), https://www.americanimmigrationcouncil.org/sites/default/files/research/removal_system_of_the_united_states_an_overview.pdf.

¹⁷ 8 U.S.C. § 1229c(a)(1) (2018).

III. WHAT CRIMES MAKE A NON-CITIZEN INADMISSIBLE AND REMOVABLE?

When analyzing the immigration consequences of a criminal offense (*i.e.*, inadmissibility or removability), you must first determine whether the criminal conduct constitutes a ground for inadmissibility or removability. This categorization is important because a crime that makes a non-citizen inadmissible may not necessarily make them removable, and vice versa. It is also important to note that eligibility for certain forms of immigration relief may depend on the type of criminal conduct. Below are the criminal grounds of inadmissibility and removability under the INA and federal law.

Criminal Grounds of Inadmissibility ¹⁸	Criminal Grounds of Removability ¹⁹
<ul style="list-style-type: none"> ▪ Admission or conviction of a crime involving moral turpitude (with some exceptions) ▪ Admission or conviction of a drug offense ▪ An immigration official knows or has reason to believe that the person has participated in drug trafficking or has benefitted from an inadmissible relative's drug trafficking within the last five years ▪ An immigration official knows or has reason to believe that the person has participated in human trafficking or has benefitted from an inadmissible relative's human trafficking within the last five years ▪ Engaging or seeking to engage in prostitution or commercialized vice ▪ Two or more criminal convictions where the total combined sentence is at least five years ▪ Engaging in serious criminal activity where prosecutorial immunity has been asserted ▪ Foreign government officials who have committed severe violations of religious freedom ▪ An immigration official knows or has reason to believe that the person has participated in or seeks to participate in money laundering 	<ul style="list-style-type: none"> ▪ A conviction for a crime involving moral turpitude that was committed within five years after the date of admission <i>and</i> carries a potential sentence of a year or more ▪ A conviction of two or more crimes involving moral turpitude arising out of different incidents of criminal misconduct ▪ An aggravated felony conviction any time after admission ▪ A conviction for fleeing from an immigration checkpoint ▪ A conviction of a controlled substance violation any time after admission (with the exception of a single incident of possession of marijuana of 30g or less for personal use) ▪ A person who, at any time after admission, has been a drug abuser or addict ▪ A conviction of certain firearms offenses ▪ A conviction for miscellaneous crimes relating to espionage, treason, and sedition ▪ A conviction for a crime of domestic violence, stalking, child abuse, child neglect, or child abandonment ▪ A judicial finding of violating certain provisions of domestic violence protection orders in civil or criminal court

¹⁸ INA § 212(a)(2) (2018).

¹⁹ 8 U.S.C. § 237(a)(2) (2018).

A. *False Claim of United States Citizenship*

Lying about being a United States citizen may raise grounds for inadmissibility and removability under section 212 of the INA.²⁰ Moreover, lying about United States citizenship is a federal criminal offense punishable by a fine and up to three years in prison.²¹ A false claim can occur by voting in a United States election, using a fake birth certificate, or simply checking the wrong box on Form I-9. A false claim to citizenship is a serious matter as it will result in a permanent inability to obtain lawful or citizen status in the future and may trigger removal proceedings.²²

B. *What is a Crime Involving Moral Turpitude?*

Crimes involving moral turpitude (CIMT) can render a non-citizen both inadmissible and removable. There is no official legal definition as to what constitutes a CIMT, however, the Board of Immigration Appeals (BIA) defines them as “a class of offenses involving ‘reprehensible conduct’ committed with some form of . . . culpable mental state Conduct is ‘reprehensible’ if it is ‘inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.’”²³ In other words, CIMTs are morally unacceptable acts involving dishonesty, fraud, or otherwise immoral behavior.

C. *What is an aggravated felony?*

Under immigration law, an aggravated felony includes murder, rape, sexual abuse of a minor, drug or firearm trafficking, money laundering, certain firearm offenses, child pornography, theft, violent crimes, prostitution, or an attempt to commit these crimes.²⁴ This list is non-exhaustive, and the complete version may be found under section 101(a)(43) of the INA. It is important to note that, for immigration purposes, misdemeanors and non-aggravated offenses can also qualify as aggravated felonies.

²⁰ INA § 212(a)(6)(C)(ii) (2018).

²¹ 18 U.S.C. § 911 (2018).

²² INA § 237(a)(3)(D) (2018).

²³ *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 849 (BIA 2016) (internal citations omitted).

²⁴ *Reporting Terminology and Definitions*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/immigration-statistics/reporting-terminology-definitions> (last updated Aug. 12, 2022) (“Aggravated Felony”).

D. *What is a criminal sentence for immigration purposes?*

Immigration law defines a criminal sentence as “the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”²⁵ In simple terms, a criminal sentence for immigration purposes occurs when the judge orders an individual’s incarceration, even if that incarceration is ultimately suspended.

A suspended sentence occurs when a judge imposes jail time but then delays imposing the sentence, allowing the defendant to serve some form of community supervision.²⁶ It is important to understand the effects of a suspended sentence. For example, a suspended *imposition* of incarceration without jail time is NOT a sentence for immigration purposes.²⁷ However, a suspended *execution* of incarceration IS a sentence for immigration purposes because the sentence was still imposed regardless of whether it was executed.²⁸

E. *What constitutes a criminal conviction for immigration purposes?*

Under immigration laws, the term “conviction” with respect to a non-citizen refers to:

A formal judgment of guilt of the [non-citizen] entered by a court, or if adjudication of guilt has been withheld, where[] . . . a judge or jury has found the [non-citizen] guilty or the [non-citizen] has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and . . . the judge has ordered some form of punishment, penalty, or restraint on the [non-citizen’s] liberty to be imposed.²⁹

So, what does this wordy definition really mean? For immigration purposes, a conviction can arise when there is a punishment, penalty, or restraint on a non-citizen’s liberty *and*:

²⁵ 8 U.S.C. § 1101(a)(48)(B) (2018).

²⁶ Suspended Sentence, BLACK’S LAW DICTIONARY (6th pocket ed. 2021).

²⁷ Immigrant Legal Resource Center, § *N.4 Sentence*, IMMIGRANT LEGAL RES. CTR., July 2013, at 97, 97 https://www.ilrc.org/sites/default/files/resources/n.4-sentence_solutions.pdf.

²⁸ *Id.*

²⁹ 8 U.S.C. § 1101(a)(48)(A) (2018).

1. A formal judgment from the court finding the non-citizen guilty; *OR*
2. A finding of guilt by the jury after a trial; *OR*
3. A non-citizen enters a plea of guilty or no-contest; *OR*
4. A non-citizen admits sufficient facts to warrant a guilty finding.

F. *What is NOT a conviction for immigration purposes?*

When defending criminal charges, there are creative ways to resolve a case so that it fails to meet the “conviction” definition under immigration law. Below are some examples of situations where the threshold for an immigration conviction is not met:

- Juvenile matters: Generally, criminal cases handled in juvenile court do not constitute a conviction for immigration purposes. However, it is important to note that, in some states, this protection may not apply in cases where a child turns 18 while the case is pending, and the case is transferred to an adult court.³⁰
- Acquittals: An acquittal occurs when a person accused of committing a crime is found not guilty by a judge or jury. A case that results in an acquittal does not constitute a conviction for immigration purposes.³¹
- Pardons: A pardon is an act by the president (federal offenses) or the governor (state offenses) that nullifies a crime's punishment and legal consequences.³² A pardon relieves a non-citizen of the immigration consequences of their criminal conviction.
- Pre-trial Diversion/Deferred Prosecution (specific qualifications required): These are different types of plea agreements that may not constitute a conviction so long as there was (1) no guilty plea, (2) no plea of no contest, or (3) no judicial finding of guilt. To comply with these strict requirements, there must be absolutely *no admission* or *finding* that the non-citizen committed the offense.³³
- Vacated conviction for legal error or pending criminal appeal: If a non-citizen's criminal conviction is vacated due to legal error, it is not a conviction for immigration purposes. Some

³⁰ ILRC STAFF ATTORNEYS, A GUIDE FOR IMMIGRATION ADVOCATES 189 (23rd ed. 2022).

³¹ *Id.*

³² *Pardon*, BLACK'S LAW DICTIONARY (6th pocket ed. 2021).

³³ ILRC STAFF ATTORNEYS, *supra* note 30.

examples of when a legal error can arise when the appellate court finds evidence of jury misconduct, ineffective assistance of counsel, or constitutional violations during the non-citizen's court proceedings.³⁴

Example: In the case *Matter of J.M. Acosta*, the BIA ruled that a criminal conviction on direct appeal is not a conviction for immigration purposes because the conviction is not deemed final.³⁵ However, it is important to note that not all circuit courts agree with this BIA holding and may not follow it.

IV. CONCLUSION

Be informed and protect your rights. A non-citizen facing criminal charges must work with an experienced immigration attorney to fully understand the immigration consequences of a conviction. An immigration attorney can also assist in formulating a creative plea deal to help a non-citizen remain in the United States, such as proposing a plea for a different offense or providing language that fails to meet immigration conviction requirements. Every situation is unique, so while accepting a plea may be one person's way of avoiding removal, for another, it could mean their ticket back home. With immigration consequences being just as severe—if not more severe—than criminal consequences, non-citizens must work with an attorney that will protect their rights and guide them through the complex world of *crimmigration*.

³⁴ ILRC Staff Attorneys, *supra* note 30.

³⁵ *Matter of J.M. Acosta*, 27 I&N Dec. 420, 428 (BIA 2018).

ACTUAL INNOCENCE & CONVICTION INTEGRITY UNITS

Cynthia R. Garza*

The concept of a Conviction Integrity Unit (CIU), sometimes referred to as a Conviction Review Unit (CRU), gained popularity not only in Texas, but around the nation after the creation of the Dallas County CIU in 2007.¹ At that time no one knew exactly what a CIU was, what function it should have, or why any District or State Attorney (the State) would want to create one in the first place. As systematic reform began to challenge our traditional ideals of justice, there grew not only a desire but also a *need* to ensure ethical, fair, and just prosecution. In turn, 96 CIUs have been created in the United States as of March 2023,² slightly double the number of units that existed five years ago.³

First Things First: What is a CIU?

Let's begin with the basics: a CIU is a dedicated unit within a prosecutor's office that, at its most basic model, reviews convictions involving claims of actual innocence using an established process.⁴ District and State Attorney's Offices staff CIUs differently throughout the country, primarily due to various factors affecting individual jurisdictions, such as budget, caseload, and office size. Regardless of staffing, one thing is certain: a well-run CIU seeks to ensure an independent, comprehensive review and investigation of convictions in which it is suspected that there was a miscarriage of justice. Depending on the jurisdiction, CIUs have the additional responsibility to litigate cases, including leading the intricate process of overturning a conviction; a process necessary in the face of actual

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¹ Barry Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705, 705 (2017).

² *Conviction Integrity Units*, THE NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx> (last visited Apr. 20, 2023).

³ See NATIONAL REGISTRY OF EXONERATIONS, EXONERATIONS IN 2018, at 2 (Apr. 9, 2019), <https://www.law.umich.edu/special/exoneration/Documents/Exonerations%20in%202018.pdf>.

⁴ JOHN HOLLWAY, QUATTRONE CTR. FOR THE FAIR ADMIN. OF JUSTICE UNIV. OF PA. L. SCHOOL, CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE 2 (Apr. 2016), <https://www.law.upenn.edu/live/files/5522-cru-final>.

innocence or wrongful conviction evidence that questions the validity of the conviction, itself.

The Dallas County District Attorney's Office was initially met with skepticism and criticism from both outside the office and within the Office's ranks. In fact, many people questioned why the CIU was part of the District Attorney's Office *at all*: "Isn't that the job of an innocence project or the defense bar?" they would ask. Such questions are to be expected when the traditional role of a prosecutor is seemingly challenged, but the answers to these types of questions are multifaceted. The State is the party that not only has access to the most information, tools, and resources, but it is also the party who pursued charges against the convicted individual, in the first place. Additionally, unlike other types of attorneys, prosecutors are bound by particular laws and ethical rules to ensure the integrity of the criminal justice process. Amongst those duties is the duty "not to convict, but to see that justice is done."⁵

When the State undertakes a case, it is important to consider the prosecutor's duty of justice to several affected parties. First, prosecutors owe a duty of justice to victims of crime. For many prosecutors, this duty requires acts of advocacy and empowerment. Prosecutor offices regularly guide victims through a complex and sometimes tedious criminal justice system, all while striving to hold those who harmed the victim accountable and to uphold the State's duty to ensure that victims are afforded the rights granted to them under the law.⁶ Prosecutors also have a duty to seek justice for the community as a whole—that is, to ensure that schools, businesses, and neighborhoods remain safe and confident in the criminal justice system.⁷ Next, the State owes a duty of justice to the criminal justice system itself because prosecutors take an oath to follow the law and to ensure that convictions are obtained with full integrity and

⁵ Tex. Code Crim. Proc. art. 2.01; *see also* Tex. Disciplinary Rules Prof'l Conduct R. 3.09, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9).

⁶ *See* Tex. Code Crim. Proc. art. 56A.051; *see also* Tex. Const. art. I, § 30.

⁷ Kristine Hamann & Laura Greenberg-Chao, *The Prosecutor's Evolving Role: Seeking Justice Through Community Partnerships and Innovation*, PROSECUTOR'S CTR. FOR EXCELLENCE (May 2016), <https://pccinc.org/wp-content/uploads/2019/11/20160606-The-Prosecutors-Evolving-Role-Seeking-Justice-Through-Community-Partnerships-and-Innovation-PCE-Hamann-Greenberg-Chao.pdf>; *see also* Mission Statement, DALLAS CTY., <https://www.dallascounty.org/government/district-attorney/mission.php> (last visited Apr. 20, 2023).

fairness.⁸ Finally, prosecutors have a duty to ensure justice for the defendant. You see, the duty to follow the law requires that prosecutors observe and respect the rights of the defendants, while exercising appropriate and measured prosecutorial discretion guided by the evidence and the highest ethical principles.⁹ When an innocent person is imprisoned, we have not fulfilled our duty of justice to any of the above-mentioned parties.

What Does “Actual Innocence” Mean?

“Actual innocence” is a legal term to describe when a person is factually innocent. In other words, the person did not commit the crime for which they were convicted.¹⁰ In Texas, actual innocence cases can be presented to the court in the following two ways:

1. The stand-alone claim of actual innocence based solely on newly discovered evidence, also known as a *Herrera*-type claim of actual innocence;¹¹ and
2. The *Schlup*-type claim, which is a procedural claim in which the claim of innocence does not itself provide a basis for relief, rather is tied to a constitutional error.¹²

The *Herrera* claim requires applicants to meet a clear and convincing burden of proof which has repeatedly been described by the Texas Court of Criminal Appeals as a “*herculean* task,”¹³ whereas the *Schlup* claim requires applicants to meet the lower “by preponderance of the evidence” burden of proof.¹⁴

Wrongful Convictions

Additionally, over the years, several causes of wrongful convictions have been identified, including faulty eyewitness identification, false or misleading scientific evidence, prosecutorial or

⁸ Tex. Gov’t Code Ann §§ 42.002(a), 42.003; see State of Texas, Office of the Secretary of State, *Oath of Office*, <https://www.sos.state.tx.us/statdoc/forms/2204.pdf>; see also Tex. Disciplinary Rules Prof’l Conduct R. 3.09; Tex. Code Crim. Proc. art. 2.01.

⁹ Tex. Disciplinary Rules Prof’l Conduct R. 3.09.

¹⁰ VALENA BEETY, KAREN NEWIRTH & KAREN THOMPSON, *MISCARRIAGES OF JUSTICE: LITIGATING BEYOND FACTUAL INNOCENCE 10* (2023), <https://academyforjustice.asu.edu/wp-content/uploads/2023/01/20230123-A4J-MoJ-Report-digital.pdf>.

¹¹ See *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996).

¹² See *Schlup v. Delo*, 513 U.S. 298 (1995).

¹³ *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006).

¹⁴ *Schlup*, 513 U.S. at 327.

official misconduct, perjury, false accusations, and false confessions.¹⁵ Usually, wrongful convictions involve more than one cause.

A study examining the first 325 of the Innocence Project's DNA exonerations revealed that faulty eyewitness identification was the leading cause of those wrongful convictions, followed by misapplication of forensic scientific evidence.¹⁶ While most of Dallas County's exonerations have followed similar trends, the Dallas County CIU has experienced exonerations involving all of the contributing causes of wrongful convictions tracked by the National Registry of Exonerations.

How Does a CIU Function?

In Texas, post-conviction habeas legal proceedings challenging a conviction must be filed by either the convicted person through their attorney or pro se (i.e., on their own behalf without the legal representation of an attorney).¹⁷ The prosecutor cannot file claims on behalf of the convicted person because they represent the State—even in cases where the prosecutor agrees that someone is actually innocent. Therefore, since CIUs are part of the district or state's attorney's office, a CIU cannot initiate legal proceedings on behalf of a convicted person, nor can they represent the convicted person in court. CIUs can however, initiate a post-conviction review and investigation of the convicted person's case under the appropriate circumstances. Specifically, Texas prosecutors are also able to petition the court to appoint an attorney for an unrepresented, indigent defendant in limited circumstances.¹⁸

As of March 2023, there are a total of six CIUs in Texas; they are located in Dallas, Harris, Tarrant, Bexar, Travis, and Collin counties.¹⁹

¹⁵ *Percentage of Exonerations By Contributing Factor* tbl., NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx> (last updated May 15, 2023).

¹⁶ Emily West & Vanessa Meterko, *Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 Years*, 79 ALB. L. REV. 717, 735 (2016).

¹⁷ Tex. Code Crim. Proc. arts 11.07, 11.072, and 11.073. This document is not intended to address post-conviction matters in capital murder cases where the death penalty was imposed.

¹⁸ *Id.* art. 11.074.

¹⁹ *Conviction Integrity Units*, *supra* note 2.

The table below gives a very brief introduction to each of the units:

County	Est.	Staffing	Types of Claims Accepted for Review	Who Can Submit a Request for Review	How To Submit a Claim	Contact Info
Dallas County ²⁰	2007	<ul style="list-style-type: none"> • 4 full-time attorneys²¹ • 2 full-time investigators • 2 full-time legal assistants 	<ul style="list-style-type: none"> • Actual innocence • Wrongful conviction (constitutional claims tied to actual innocence) • New scientific evidence • Systematic errors 	<ul style="list-style-type: none"> • Inmates • Defense Bar • Innocence projects and clinics • Prosecutors • Law enforcement • Judges • Members of the scientific community²² 	In writing (no formal application)	Dallas County District Attorney's Office, Conviction Integrity Unit 133 N. Riverfront Blvd., LB 19 Dallas, TX 75207 214-653-3600
Harris County ²³	2009	<ul style="list-style-type: none"> • 1 full-time attorney • 1 full-time investigator • 1 full-time paralegal 	<ul style="list-style-type: none"> • Actual innocence • Wrongful conviction • New scientific evidence 	<ul style="list-style-type: none"> • Inmates • Defense Bar • Innocence projects and clinics • Prosecutors • Members of the scientific community²⁴ 	In writing using case review form (found here)	Harris County District Attorney's Office, Conviction Integrity Division 1201 Franklin St., 6 th Floor Houston, TX 77002 713-274-6040
Bexar County ²⁵	2015	<ul style="list-style-type: none"> • 3 full-time attorneys • 1 investigator (on an as-needed basis and shared with another division) • 1 intern 	<ul style="list-style-type: none"> • Actual innocence • Systematic errors (including ineffective assistance of counsel, time credit claims, claims related to courtroom error) • New scientific evidence • Wrongful convictions (constitutional claims tied to actual innocence) • Immigration and other equitable relief matters 	<ul style="list-style-type: none"> • Inmates • Family members of inmates • Defense Bar • Innocence projects and clinics • Prosecutors • Interest groups and media 	In writing using case review intake form (found here or via email request)	Bexar County Criminal District Attorney's Office, Conviction Integrity Unit 101 W. Nueva St., 4 th Floor San Antonio, TX 78205 ciu@bexar.org

²⁰ Visit <https://www.dallascounty.org/government/district-attorney/divisions/conviction-integrity.php> for more information.

²¹ One attorney, one investigator, and one legal assistant are grant-funded through December 2025.

²² For example, Texas Forensic Science Commission or local labs, etc.

²³ Visit https://www.harriscountytexas.com/post_conviction_bureau for more information.

²⁴ For example, Texas Forensic Science Commission or local labs, etc.

²⁵ Visit <https://www.bexar.org/3324/Conviction-Integrity-Unit> for more information.

Tarrant County ²⁶	2015	<ul style="list-style-type: none"> • 3 full-time attorneys²⁷ • 1 full-time investigator • 1 part-time investigator • 1 full-time support staff 	<ul style="list-style-type: none"> • Actual innocence • Systemic errors (including constitutional claims impacting actual innocence or wrongful conviction) • New scientific evidence supporting actual innocence • Claims should be predicated on factual matters 	<ul style="list-style-type: none"> • Inmates (for his/her own case) • Family members of inmates • Defense attorneys • Innocence advocacy groups (projects and clinics) • Internal referrals from prosecutors • Courts • Law enforcement 	Complete a CIU Review Request (available here or by request)	Tarrant County Criminal District Attorney's Office, Tim Curry Criminal Justice Center 401 W. Belknap Fort Worth, TX 76196 Attention: Conviction Integrity Unit
Travis County ²⁸	2017	<ul style="list-style-type: none"> • 4 full-time attorneys²⁹ • 1 full-time investigator • 1 full-time support staff 	<ul style="list-style-type: none"> • Actual innocence • Wrongful convictions (constitutional claims tied to actual innocence) • New scientific evidence that supports actual innocence 	<ul style="list-style-type: none"> • Inmates • Defense Bar • Innocence projects and clinics • Prosecutors 	Online (application found here)	TCDA.CIU@traviscountytx.gov Phone: 512-854-9400
Collin County	2018	<ul style="list-style-type: none"> • 1 full-time attorney 	<ul style="list-style-type: none"> • Actual innocence • Wrongful convictions (constitutional claims tied to actual innocence) • New scientific evidence that supports actual innocence 	<ul style="list-style-type: none"> • Inmate • Defense bar • Innocence projects and clinics • Prosecutors 	Complete a CIU Review Request (form available upon request)	Collin County Criminal District Attorney, Conviction Integrity Unit 2100 Bloomdale Rd., Ste. 100 McKinney, TX 75093 972-548-4323

Although all units are staffed and structured differently, they share an understanding of the way actual innocence cases should be reviewed. CIUs recognize their responsibility to train attorneys, law enforcement, and other criminal justice stakeholders in an effort to protect against wrongful convictions in the future. Some CIUs have also been involved in helping to construct and support legislative changes both in Texas and around the nation for criminal justice reform in the area of wrongful convictions.

²⁶ Visit <https://www.tarrantcountytx.gov/en/criminal-district-attorney/criminal-division/ConvictionIntegrity.html> for more information.

²⁷ One attorney is dedicated to handling disclosures and discovery issues.

²⁸ Visit <https://www.traviscountytx.gov/district-attorney/ciu> for more information.

²⁹ One attorney is grant-funded through 2024.

CIU Best Practices

There is no magic formula for what makes a CIU successful. The truth is there is not one single identifiable quality to ensure success because it is only when you combine several qualities that a truly successful CIU is formed. Defining “success” across the board in this context, however, can be difficult. It is important to consider various factors that can affect the optics of success, which among other things, can vary based upon applicable laws to each jurisdiction. For example, laws allowing one district attorney’s office to take certain action as it relates to innocence cases may be vastly different from the laws affecting the neighboring state’s district attorney, which may constrain that office’s discretion.

As a general matter, however, the following guidelines collected from a variety of sources are suggested best practices and may help guide the creation and evaluation of a CIU:

1. Structure & Independence
The CIU should be an independent unit within the district attorney’s office, separate and apart from the appellate and/or post-conviction section of the office. The head of the Unit should report directly to the elected district attorney.
2. Staffing
The head of the CIU should have a strong defense or innocence background. Although that is the suggestion, it is also recognized that well-respected, experienced prosecutors who are able to approach case reviews with a truly open and unbiased mind are also a viable option.
3. Case Referrals
Case referrals should be from individuals claiming innocence, innocence organizations, defense attorneys, internal audits, prosecutors, and forensic science providers. If your office does not have a designated CIU, you should have a designated staff member who can document the intake of these referrals and is responsible for review of the claims.
4. Case Selection Criteria
The CIU should develop criteria for cases that the unit will accept for review. The idea is that the CIU, should look past traditional procedural bars and use broad criteria that uses the interest of justice as the guiding principle. For example, a defendant’s guilty plea should not be the reason their case is rejected for review of wrongful conviction claims.

5. Collaborative Approach

When reviewing wrongful conviction claims, both parties should largely abandon the traditional adversarial spirit that is commonplace in the justice system. In fact, a hallmark attribute of a well-run CIU is its collaborative approach to cases. Prosecutors and defense attorneys working CIU cases share non-privileged information—often after a confidentiality agreement is signed—in order to ensure that the investigation moves forward with all parties having access to the same information. That means, for example, that forensic testing is conducted pursuant to a joint agreement, witness interviews may be coordinated and jointly conducted, the State openly shares its files, and the defendant may also be interviewed by the CIU. This collaboration works well because the primary goal of all involved is to seek the truth.

6. Transparency

Create, maintain, and provide a public reporting of case reviews (e.g., statistics) as a way to maintain public confidence in the CIU and District Attorney's Office as a whole, but also as a way to manage quality assurance.

General Practical Guidance

When a person believes they may have an “actual innocence” case, it is generally best to first have the claim(s) evaluated by an innocence organization and/or a qualified defense attorney. If, after evaluating the case, a CIU review is recommended or the claimant is pro se and would like to have a CIU review the case, the CIU in the jurisdiction where the conviction originated should be contacted in order to initiate the request. If the jurisdiction where the case originated does not have a CIU, an inquiry to the district attorney's office could be made to determine whether anyone in the State's office is specifically designated to review actual innocence matters.

Regardless of which route is taken, all criminal practitioners handling cases in Texas involving actual innocence claims may find it helpful to familiarize themselves with the following innocence cases:

- *Ex parte Miles*, 359 S.W.3d 647 (Tex. Crim. App. 2012).
- *Ex parte Mayhugh*, 512 S.W.3d 285 (Tex. Crim. App. 2016).
- *Ex parte Chaney*, 563 S.W.3d 239 (Tex. Crim. App. 2018).

Each one of these cases published by the Texas Court of Criminal Appeals has an excellent discussion on actual innocence, and several

other constitutional claims that are sometimes found when investigating innocence cases.

Finally, criminal practitioners handling actual innocence cases should review the Texas Code of Criminal Procedure, especially the statutes involving post-conviction writ of habeas corpus: articles 11.07, 11.072 (probation writs), and 11.073 (new scientific evidence); as well as the Texas Rules of Appellate Procedure, paying close attention to those rules applying to writs of habeas corpus. In addition, it is important to become familiar with the specific form on which the writ of habeas corpus application must be submitted; the form can be found on the Texas Court of Criminal Appeals' website.³⁰

In Closing...

There is no greater tragedy in the criminal justice system than the conviction of an innocent person. Today, Texas prosecutors are trained to follow newer laws that have been established as a direct result of wrongful convictions, like the Michael Morton Act, which requires prosecutors to “produce and permit the inspection . . . by or on behalf of the defendant” of any material evidence.³¹ Prosecutors are trying their best to comply with the law, just as the defense bar is also trying their best to diligently represent their clients in the age of digital media evidence overload. The State Bar of Texas is looking closely at ethical complaints against all attorneys and, in the more recent years, has publicly condemned the actions of some prosecutors.³² Criminal justice reform efforts should be pursued around the country in order to establish procedures to avoid the same pitfalls that befell criminal justice stakeholders in the past. As society

³⁰ Find the form here: <https://www.txcourts.gov/cca/practice-before-the-court/forms/>.

³¹ Tex. Code Crim. Proc. art. 39.14(a).

³² See, e.g., Charles J. Sebesta, Jr. v. Comm'n for Lawyer Discipline, No. 56406 (Texas Bd. Disp. App. Feb 8, 2016) (affirming disbarment); Schulz v. Comm'n for Lawyer Discipline, 2015 WL 9855916 (Texas Bd. Disp. App. Dec. 17, 2015) (fully probated suspension); Order of the Supreme Court of Texas, Misc. Docket No. 13-9155, Nov. 19, 2013 (accepting resignation of State Bar of Texas law license of Ken Anderson in lieu of discipline); see also Alexa Ura, *Anderson to Serve 9 Days in Jail, Give Up Law License as Part of Deal*, THE TEX. TRIBUNE, Nov. 8, 2013, <https://www.texastribune.org/2013/11/08/ken-anderson-serve-jail-time-give-law-license/>; Order of the Supreme Court of Texas, Misc. Docket No. 21-9040, April 13, 2021 (accepting resignation of State Bar of Texas law license of Richard E. Jackson in lieu of discipline); Marie Fazio, *Ex-Prosecutor Who Withheld Evidence in Murder Case Gives Up Law License*, N.Y. TIMES, May 18, 2021, <https://www.nytimes.com/2021/05/18/us/rick-jackson-disbarred-texas.html>.

evolves, we must continue to promote and ensure the improvement and fairness of its criminal justice system, and all affected by it.

Helpful References

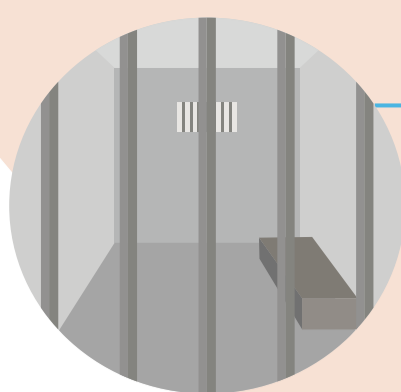
- *The Healing Justice Project* – a national nonprofit organization serving individuals who have been impacted by crime and exonerations; providing post-trial support and recovery to crime victims and survivors, exonerees, and their families. Information on resources to assist survivors, crime victims, exonerees, and practitioners can be found at <https://healingjusticeproject.org/>.
- *The National Registry of Exonerations* – a Project of the Newkirk Center for Science & Society at University of California Irvine, the University of Michigan Law School, and Michigan State University College of Law. The Registry provides detailed information about every known exoneration in the United States since 1989. Information about causes of wrongful convictions and resources for practitioners can be found at <http://www.law.umich.edu/special/exoneration/Pages/about.aspx>.
- *The Innocence Project* – founded in 1992 by Peter Neufeld and Barry Scheck at Cardozo School of Law, the *Innocence Project* exonerates the wrongly convicted through DNA testing and reforms the criminal justice system to prevent future injustice. Information about causes of wrongful convictions and resources for practitioners can be found at <https://www.innocenceproject.org/>.
- *Innocence Project of Texas* – provides free investigative and legal services to indigent prisoners serving time for crimes they did not commit. Information about exonerations in Texas and reform initiatives can be found at <https://innocencetexas.org/>.
- *The Innocence Network* – an affiliation of organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted, working to redress the causes of wrongful convictions, and supporting the exonerated after they are freed. Visit <https://innocencenetwork.org/> for more information.

The following is a supplementary infographic for *Actual Innocence & Conviction Integrity Units* created to promote legal comprehension.

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ACCESSIBLE LAW, Summer 2023, at 43 app. illus.

Actual Innocence & Conviction Integrity Units



What are Conviction Integrity Units (CIUs)?



A CIU is a dedicated unit within a prosecutor's office that reviews convictions involving claims of actual innocence according to an established process.¹ A CIU seeks to ensure an independent, comprehensive review and investigation of convictions where it is suspected that there was a miscarriage of justice.



Actual innocence is a legal term to describe when a person did not commit the crime for which they were convicted.² In Texas, actual innocence is established in two ways:

- a stand alone claim based on newly discovered evidence (*Herrera*-type claim)³ and
- a procedural claim tied to a constitutional violation. (*Schlup*-type claim).⁴



Several causes of wrongful convictions have been identified, including:

- faulty eye witness identification;
- false or misleading scientific evidence;
- prosecutorial or official misconduct;
- perjury;
- false accusations; and/or
- false confessions.⁵

How does a CIU function?

In Texas, a legal proceeding challenging a conviction must be filed by either:



- the convicted person through their attorney

or



- pro se (the convicted person on their own behalf without an attorney).⁶

CIUs can initiate a review and investigation of the convicted person's case.



- In Texas, prosecutors are also able to petition the court to appoint an attorney for an unrepresented, indigent defendant in some circumstances.⁷

CIUs in Texas

There are 96 CIUs in the United States⁸ and 6 in Texas.⁹

County	Types of Claims Accepted	Who Can Submit a Request for Review	How To Submit a Claim	Contact Info.
Dallas County ¹⁰ Est. 2007	<ul style="list-style-type: none"> • Actual innocence • Wrongful convictions (constitutional claims tied to actual innocence) <ul style="list-style-type: none"> • New scientific evidence • Systematic errors 	<ul style="list-style-type: none"> • Inmates • Defense Bar • Innocence projects and clinics • Prosecutors • Law enforcement • Judges • Members of the scientific community¹¹ 	In writing (no formal application)	Dallas County District Attorney's Office Conviction Integrity Unit 133 N. Riverfront Blvd., LB 19 Dallas, Texas 75207 214-653-3600
Harris County ¹² Est. 2009	<ul style="list-style-type: none"> • Actual innocence • Wrongful convictions • New scientific evidence 	<ul style="list-style-type: none"> • Inmates • Defense Bar • Innocence projects and clinics • Prosecutors • Members of the scientific community¹³ 	In writing using case review form (found here)	Harris County District Attorney's Office Conviction Integrity Division 1201 Franklin St., Floor 6 Houston, Texas 77002 713-274-6040
Bexar County ¹⁴ Est. 2015	<ul style="list-style-type: none"> • Actual innocence • Systemic errors (including ineffective assistance of counsel, time credit claims, claims related to courtroom error) <ul style="list-style-type: none"> • New scientific evidence • Wrongful convictions • Immigration and other equitable relief matters 	<ul style="list-style-type: none"> • Inmates • Family members of inmates • Defense Bar • Innocence projects and clinics • Prosecutors • Interest groups and media 	In writing using case review intake form (found here or provided via email request to ciu@bexar.org)	Bexar County Criminal District Attorney's Office Conviction Integrity Unit 101 W. Nueva St., 4th Floor San Antonio, Texas 78205 ciu@bexar.org
Tarrant County ¹⁵ Est. 2015	<ul style="list-style-type: none"> • Actual innocence • Systemic errors • New scientific evidence supporting actual innocence • Claims should be predicated on factual matters 	<ul style="list-style-type: none"> • Inmates • Family members of inmates • Defense attorneys • Innocence advocacy groups (projects and clinics) • Internal referrals from prosecutors • Courts • Law enforcement 	Complete a CIU Review Request (available here or by request)	Tarrant County Criminal District Attorney's Office Tim Curry Criminal Justice Center 401 W. Belknap Fort Worth, Texas 76196 Attention: Conviction Integrity Unit
Travis County ¹⁶ Est. 2017	<ul style="list-style-type: none"> • Actual innocence • Wrongful convictions • New scientific evidence that supports actual innocence 	<ul style="list-style-type: none"> • Inmates • Defense bar • Innocence projects and clinics • Prosecutors 	Online (application found here)	TCDA.CIU@traviscountytx.gov Phone: 512-854-9400
Collin County Est. 2018	<ul style="list-style-type: none"> • Actual innocence • Wrongful convictions • New scientific evidence that supports actual innocence 	<ul style="list-style-type: none"> • Inmates • Defense bar • Innocence projects and clinics • Prosecutors 	Complete a CIU Review Request (form available upon request)	Collin County Criminal District Attorney Conviction Integrity Unit 2100 Bloomdale Rd., Ste. 100 McKinney, TX 75093 972-548-4323

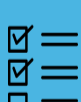
CIUs Best Practices

All units are staffed and structured differently. They share a unique understanding and a common perspective in the way actual innocence cases should be reviewed.

There is no magic formula for what makes a CIU successful but there are various factors to consider to help guide the creation and evaluation of a CIU.



An independent unit led by a head attorney who should report directly to the elected district attorney.



Develop a criteria for cases the unit will accept for review based on the interest of justice.



Staffing with Strong Defense or Innocence Background



Collaborative approach between prosecutors and defense attorneys.



Case referrals from individuals claiming innocence, organizations, defense attorneys, internal audits, prosecutors, and forensic science providers.



Transparency and public reporting of case reviews as a way to maintain public confidence and manage quality assurance.

Source • *Actual Innocence & Conviction Integrity Units* by Cynthia R. Garza, Chief, Special Fields Bureau; Chief, Dallas County District Attorney's Office. Graphic created by Astrid Fuentes, Staff Editor (2022-2023).

- References**
1. Barry Scheek, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705, 705 (2017).
 2. VALENA BEETY, KAREN NEWIRTH & KAREN THOMPSON, MISCARRIAGES OF JUSTICE: LITIGATING BEYOND FACTUAL INNOCENCE 10 (2023), <https://academyforjustice.asu.edu/wp-content/uploads/2023/01/20230123-A4J-MoJ-Report-digital.pdf>.
 3. See *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996).
 4. See *Schlup v. Delo*, 513 U.S. 298 (1995).
 5. *See Schlup v. Delo*, 513 U.S. 298 (1995).
 6. Tex. Code Crim. Proc. arts 11.07, 11.072, and 11.073. This document is not intended to address post-conviction matters in capital murder cases where the death penalty was imposed.
 7. *Id.* art. 11.074.
 8. *Conviction Integrity Units*, THE NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx> (last visited Apr. 20, 2023).
 9. *Conviction Integrity Units*, *supra* note 8.
 10. Visit <https://www.dallascounty.org/government/district-attorney/divisions/conviction-integrity.php> for more information.
 11. For example, Texas Forensic Science Commission or local labs, etc.
 12. Visit https://www.harriscountyda.com/post_conviction_bureau for more information.
 13. For example, Texas Forensic Science Commission or local labs, etc.
 14. Visit <https://www.bexar.org/3324/Conviction-Integrity-Unit> for more information.
 15. Visit <https://www.tarrantcountytx.gov/en/criminal-district-attorney/conviction-integrity.html> for more information.
 16. Visit <https://www.traviscountytx.gov/district-attorney/ciu> for more information.



OOH, THAT SMELL, CAN'T YOU SMELL THAT SMELL? THE SMELL OF MARIJUANA AND THE FOURTH AMENDMENT OF THE CONSTITUTION

Jon L. McCurley

*The story of marijuana in the United States is complex, full of political maneuvering and conflicting viewpoints. In the 1930s, the Marihuana Tax Act was struck down in *Leary v. United States*; the law was unconstitutional because it violated Leary's Fifth Amendment rights.¹ The Court's decision effectively nullified the Marihuana Tax Act.²*

The country was deeply divided in the 1970s during the Nixon administration, with high tensions between the government and various groups such as blacks and anti-war leftists, commonly known as “hippies.” Despite the inability to make it illegal to be Black or against the war, Nixon found a way to crack down on his perceived enemies by making marijuana illegal.³ Congress subsequently passed the Controlled Substances Act in 1970 to address drug possession and trafficking.⁴ This decision went against the recommendations of several commissions, including the Le Dain Commission,⁵ the British Wootton Report,⁶ and the US Shaffer Report.⁷

The plant *Cannabis Sativa L*, or “marihuana,”⁸ is politicized, criminalized, and stigmatized, which can have far-reaching implications. The Controlled Substances Act classified *Cannabis* as a Schedule I drug, which are determined to have a high potential for

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¹ *Leary v. United States*, 395 U.S. 6, 52 (1969).

² *Id.*

³ Tom LoBianco, *Report: Aide Says Nixon's War on Drugs Targeted Blacks, hippies*, CNN.COM (March 24, 2016) <https://www.cnn.com/2016/03/23/politics/john-ehrllichman-richard-nixon-drug-war-blacks-hippie/index.htm>.

⁴ *Overview of Controlled Substances and Precursor Chemicals: Controlled Substances Act of 1970*, FACTSHEETS FOR USC ENVIRONMENTAL HEALTH & SAFETY, <https://ehs.usc.edu/research/cspc/chemicals> (last visited March 18, 2023).

⁵ See JOHN S. BENNET, LE DAIN COMMISSION OF INQUIRY INTO THE NON-MEDICAL USE OF DRUGS TABLES FOURTH AND FINAL REPORT, CAN MED ASSOC J. (Jan. 5, 1974).

⁶ See BRITISH ADVISORY COMMITTEE ON DRUG DEPENDENCE, CANNABIS: REPORT BY THE ADVISORY COMMITTEE ON DRUG DEPENDENCE (1968).

⁷ See GABRIEL G NAHAS & ALBERT GREENWOOD, THE FIRST REPORT OF THE NATIONAL COMMISSION ON MARIHUANA (1972): SIGNAL OF MISUNDERSTANDING OR EXERCISE IN AMBIGUITY (Jan. 1974).

⁸ The Marihuana Tax Act of 1937 used an alternate spelling of marijuana; therefore, although “marijuana” is preferred, this article will use “marihuana” spelling when consistent the wording of statutes.

abuse and no accepted medical use, prohibiting its use for any purpose.⁹ The potent smell of marijuana makes it (and anyone near the plant) an easy target for government surveillance, continuing to circumvent constitutional protections such as the Fourth Amendment.

I. H.B. 1325

In simple terms, the Constitution, through the Fourth Amendment, protects people from unreasonable searches and seizures by the government.¹⁰ The Fourth Amendment, however, is not a guarantee against all searches and seizures, but only those deemed unreasonable under the law.¹¹ This protection is critical, as the smell of marijuana is used as the basis for police searches.¹² Before the passage of Texas House Bill 1325 (H.B. 1325), courts held that the smell of marijuana was sufficient to constitute probable cause to search a person or vehicle.¹³ Since the passage of H.B. 1325, this is not always the case.

In June 2019, H.B. 1325 was signed into law by Governor Abbott. As a result, sections 481.002(5) and 481.002(26) of the Health and Safety Code, were amended as follows:

(5) “Controlled substance” means a substance, including a drug, an adulterant, and a dilutant, listed in Schedules I through V or Penalty Group 1, 1-A, 2, 2-A, 3, or 4. The term includes the aggregate weight of any mixture, solution, or other substance containing a controlled substance. The term does not include

⁹ *Overview of Controlled Substances and Precursor Chemicals*, *supra* note 4.

¹⁰ U.S. CONST. amend. IV, § 3.

¹¹ *Id.*

¹² See, e.g., *Isam v. State*, 582 S.W.2d 441, 444 (Tex. Crim. App. 1979) (holding that the odor of marijuana provides sufficient probable cause to justify search of automobile); *Moulden v. State*, 576 S.W.2d 817, 819–20 (Tex. Crim. App. 1978) (holding that the odor of burnt marihuana in automobile constitutes sufficient probable cause to search overnight bag on floorboard in front of defendant who was a passenger in the vehicle); *Ross v. State*, 486 S.W.2d 327, 328 (Tex. Crim. App. 1972) (holding that the odor of marihuana on defendant’s person creates sufficient probable cause to search defendant’s pockets) *overruled on other grounds by* *Walters v. State*, 359 S.W.3d 212 (Tex. Crim. App. 2011); *Hernandez v. State*, 867 S.W.2d 900, 907 (Tex. App.—Texarkana 1993, no pet.) (concluding that odor of marijuana provided sufficient probable cause to search truck); *Jordan v. State*, 394 S.W.3d 58, 64–65 (Tex. App.—Houston [1st Dist.] 2012, pet. ref’d) (citations omitted) (holding that a strong odor of marijuana emanating from a car establishes probable cause to search the car and its occupants).

¹³ See *id.*

hemp, as defined by Section 121.001, Agriculture Code, or the tetrahydrocannabinol in hemp.

(26) “Marihuana” means the plant *Cannabis sativa* L., whether growing or not, the seeds of that plant, and every compound, manufacture, salt, derivative, mixture, or preparation of that plant or its seeds. The term does not include:

....

(F) hemp, as that term is defined by Section 121.001, Agriculture Code.¹⁴

Section 121.001, of the Agriculture Code defines “hemp” as “the plant *Cannabis sativa* L. and any part of that plant, including the seeds of the plant and all derivates, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with delta-9 tetrahydrocannabinol (THC) concentration of not more than 0.3 percent on a dry weight basis.”

H.B. 1325 legalized industrial hemp production. Hemp, a chemotype of the species *Cannabis sativa* L., as defined by H.B. 1325, can now be legally grown and sold by licensed parties.¹⁵ H.B. 1325 specifically excludes industrial hemp from the definition of marijuana, which remains a controlled substance.¹⁶ Hemp, as defined in H.B. 1325, is not a controlled substance and may be lawfully possessed by any state citizen.¹⁷

Before H.B. 1325, marijuana’s distinct and readily recognizable odor often lead law enforcement to believe that a criminal act was occurring.¹⁸ However, after H.B. 1325 simply detecting the odor of marijuana may not be enough to justify a search or seizure under the Fourth Amendment because in order to search or get a warrant, law enforcement officials must have probable cause that a *crime* has been committed or is about to be committed.¹⁹ “We’re trained to recognize marijuana. Coming from someone who’s been around hemp as well,

¹⁴ Tex. Health & Safety Code Ann. § 481.002(5)(26).

¹⁵ H.B. 1325, 86th Leg., Reg. Sess. (Tex. 2019).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See *Osborn v. State*, 92 S.W.3d 531, 537 (Tex. Crim. App. 2002) (“While smelling the odor of marihuana smoke may not be an event normally encountered in daily life, it requires limited, if any, expertise to identify.”).

¹⁹ U.S. CONST. amend. IV, § 3.

they are very similar. They look the same; they smell the same,” said Officer Jeffrey Pearce with the College Station Police Department.²⁰

In a memorandum dated July 10, 2019, Randall Prince of the Texas Department of Public Safety raised concerns about law enforcement and marijuana.²¹ He correctly stated that “marihuana” was not decriminalized.²² According to Deputy Director Prince, DPS crime labs could not measure the THC concentration level in marijuana or hemp.²³ He did, however, say that H.B. 1325 would not restrict officers from enforcing marijuana laws, but did elaborate that “regulatory hemp program[s]” were not established in H.B. 1325.²⁴ Although the DPS says that the *decriminalization*²⁵ of hemp would not negate probable cause for marijuana-related offenses, they did say that the legal and regulatory structure for hemp was still in flux.²⁶ The State also provided some guidance on the legality of hemp.²⁷

The Legislature has recently excluded “hemp” as defined by Section 121.001 of the Agriculture Code from the definition of marihuana.²⁸ Because of the similarities in the definitions of marihuana and hemp, the continued viability of the holding that officers and lay witnesses may identify marijuana through their senses alone may be in question.²⁹

II. THE SMELL OF MARIJUANA IS STILL A BASIS FOR SEARCHES, BUT THE COURTS ARE PUSHING BACK.

Two Pennsylvania courts have made rulings related to the smell of marijuana and whether it establishes probable cause for a

²⁰ Kathleen Witte, *Texas A&M-developed device helps weed out hemp from marijuana*, KBTX (Jan. 21, 2020, 5:39 PM CST), <https://www.kbtx.com/content/news/Texas-AM-developed-device-could-detect-THC-in-the-field-567177391.html>.

²¹ Memorandum from Randell Prince, Deputy Director to All Commissioned Personnel (June 10, 2019) (on file with the Department of Public Safety Interoffice).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ It should be noted that H.B. 1325 *legalized* hemp, it did not decriminalize it.

²⁶ *Id.*

²⁷ *Id.* (“HB 1325 does create some criminal offenses related to hemp. The most likely violation encountered by officers is the improper transportation of hemp plant materials. Under section 122.356 of the Agriculture Code, a person is prohibited from transporting these materials, unless they are produced in compliance with an approved hemp program and the person has a shipping certificate or other documentation verifying this information.”).

²⁸ Tex. Health & Safety Code Ann. § 481.002(26)(F).

²⁹ *Gaffney v. State*, No. 06-19-00189-CR, at *6 n.4 (Tex. App. Jan. 29, 2020).

search. In *Commonwealth v. Barr*, the court held that the mere odor of marijuana emanating from a vehicle is insufficient to establish probable cause for a warrantless search.³⁰ The court emphasized that the odor of marijuana does not provide probable cause to believe that a crime has been or is being committed.³¹ The case states that “the odor of marijuana may be a factor, but not a stand-alone one, in evaluating the totality of the circumstances for purposes of determining whether police had probable cause to conduct a warrantless search.”³²

Further, in *Commonwealth v. Grooms*, the court held that the smell of marijuana alone may not establish probable cause for a search.³³ In that case, the police conducted a warrantless search of a locked, unoccupied, and legally parked vehicle.³⁴ The owner of the vehicle was charged with several possession crimes.³⁵ The Pennsylvania Superior Court vacated the defendant’s sentence holding that the trial court erred in applying a per se rule for establishing probable cause.³⁶

Overall, the Pennsylvania Supreme Court, like other courts, has ruled that the odor of marijuana, in combination with other factors, provides enough evidence to justify a search.³⁷ Yet, other courts have ruled that the odor of marijuana alone does not provide enough evidence to support a search and that other factors, such as the location of the odor, the behavior of the individuals involved, and the quantity of the substance, must be considered.³⁸

In the landmark case of *Terry v. Ohio*, the U.S. Supreme Court ruled that law enforcement officials may briefly detain a person if they have a reasonable suspicion that the person is involved in criminal activity.³⁹ In *Illinois v. Caballes*, the U.S. Supreme Court ruled that using a drug-sniffing dog during a routine traffic stop does not violate the Fourth Amendment if the stop is not prolonged.⁴⁰ These court decisions have been used to justify searches based on the odor of marijuana in many cases.

³⁰ *Commonwealth v. Barr*, 266 A.3d 25, 41 (Pa. 2021).

³¹ *Id.*

³² *Id.* at 41.

³³ *Commonwealth v. Grooms*, 247 A.3d 31, 41, 2021 PA Super 23.

³⁴ *Id.* at 33–35.

³⁵ *Id.* at 33.

³⁶ *Id.* at 41.

³⁷ *See, e.g., Commonwealth v. Barr*, 266 A.3d 25, 41 (Pa. 2021).

³⁸ *See Grooms*, 247 A.3d at 41.

³⁹ *Terry v. Ohio*, 392 U.S. 1, 20–22 (1968).

⁴⁰ *Illinois v. Caballes*, 543 U.S. 405, 408 (2005).

III. HEMP AND REASONABLE SUSPICION

Is the smell of hemp even combined with red eyes and slow speech grounds for reasonable suspicion? “Hemp and cannabis look, feel, and smell the same,” according to Florida Assistant State Attorney Andy Kantor.⁴¹ Both hemp and marijuana are the plant species *Cannabis sativa* L.⁴² Both include the chemical THC (delta-9 tetrahydrocannabinol, a psychoactive compound in marijuana) and terpenes (the chemicals that give Cannabis its smell).⁴³ Around 150 terpenes have been identified in the Cannabis plant.⁴⁴ The difference between hemp, which can be legally possessed and purchased, and marijuana, which remains a controlled substance under Texas law, is the amount of THC that each contains.⁴⁵ The Texas Department of Agriculture inspects hemp to ensure the THC is less than 0.3% of the sample’s dry weight.⁴⁶

So, what of the smell? A compound smells if it is sufficiently volatile. Cannabis (hemp and marijuana) contains monoterpenes, sesquiterpenes, and diterpenes.⁴⁷ These smells reach receptors in the nose. A molecule induces a specific sense of smell provided that its shape matches a complementary cavity of the receptor, much like when two keys can fit the same lock.⁴⁸ So, all cannabis has the same smell from the presence of terpenes.⁴⁹

Differentiating between hemp and marijuana is increasingly more difficult for law enforcement. The only way to determine if

⁴¹ Andrew Pantazi, *State’s New Hemp Law Complicates Pot Cases*, JACKSONVILLE.COM (Aug. 7, 2019), <https://www.jacksonville.com/story/news/crime/2019/08/07/florida-legalized-hemp-now-prosecutors-are-dropping-marijuana-charges-and-retiring-dogs/4514065007/>.

⁴² *Cannabis*, LEAFLY, <https://www.leafly.com/learn/cannabis-glossary/cannabis> (last visited June 12, 2023).

⁴³ Sarana Rose Sommano, et al., *The Cannabis Terpenes*, 24 MOLECULES (SPECIAL ISSUE) 1 (2020).

⁴⁴ Judith K. Bloom & Jörg Bohlmann, *Terpenes in Cannabis sativa - From plant genome to humans*, 284 PLANT SCI. 67, 67 (2019).

⁴⁵ Trey Malone, *CBD, marijuana and hemp: What is the difference among these cannabis products, and which are legal?*, MSUTODAY (Apr. 6, 2021), <https://msutoday.msu.edu/news/2021/cbd-marijuana-and-hemp>.

⁴⁶ *Agriculture and Consumer Protection Division*, TEX. DEP’T OF AGRIC., <https://www.texasagriculture.gov/RegulatoryPrograms/HempProgram.aspx> (last visited Apr. 17, 2023); Tex. Agric. Code Ann. § 122.053.

⁴⁷ Sommano, et al., *supra* note 41.

⁴⁸ Jennifer C. Brookes, Andrew P. Horsfield & A. Marshall Stoneham, *The Swipe Card Model of Odorant Recognition*, 12 SENSORS 15709, 15709 (2012).

⁴⁹ Sommano, et al., *supra* note 41.

cannabis is hemp or marijuana is to test it and measure its THC level, and currently, there is no field test.⁵⁰

IV. HEMP AND PROBABLE CAUSE

The Fourth Amendment of the United States Constitution protects American citizens from unreasonable searches and seizures by the State.⁵¹ Fourth Amendment case law establishes that illegally obtained evidence is inadmissible even if indicative of criminal activity.⁵² Only evidence that is lawfully obtained is admissible.⁵³ H.B. 1325 legalized hemp.⁵⁴ Marijuana and hemp look and smell the same, so there is likely no way for an officer to establish probable cause to search or seize for marijuana with sight and smell alone.

In *Beck v. Ohio*, the Supreme Court held that probable cause requires “that at the moment of the arrest an officer have facts and circumstances within their knowledge and of which they had reasonably trustworthy information that are sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.”⁵⁵ Additionally, probable cause requires “more than mere suspicion” but less than evidence that would justify a conviction.⁵⁶ Concerning marijuana and hemp, the sight and smell are indistinguishable; therefore, for the purposes of the Fourth Amendment, insufficient to believe a person is committing an offense.

Legalizing industrial hemp has made a K-9 identification of a controlled substance insufficient to form the basis of probable cause for a search. “A K-9 can't decipher the difference between the scent of hemp and ordinary marijuana. They can come from the same plant. The difference is statutorily created by the legislature at 0.3%,” said Ohio State Highway Patrol Lieutenant Rob Sellers.⁵⁷

⁵⁰ Jolie McCullough, *Texas was warned its new hemp law would complicate marijuana prosecutions. Lawmakers didn't listen.*, THE TEX. TRIBUNE (July 30, 2019, 12AM CST), <https://www.texastribune.org/2019/07/30/texas-lawmakers-warned-hemp-law-marijuana/>.

⁵¹ U.S. CONST. amend. IV, § 3.

⁵² See *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁵³ *Id.*

⁵⁴ H.B. 1325, 86th Leg., Reg. Sess. (Tex. 2019).

⁵⁵ *Beck v. State of Ohio*, 379 U.S. 89 (1964).

⁵⁶ *Id.*

⁵⁷ Lacey Crisp, *Hemp or marijuana: Can police K-9's sniff out the difference?*, 10 WBNS (Aug. 22, 2019, 4:14 PM EDT), <https://www.10tv.com/article/news/crime/crime-tracker/hemp-or-marijuana-can-police-k-9s-sniff-out-difference-2019-oct/530-26f33294-8fci-4cco-8ca2-269e12b28bco>.

K-9s detect the presence of marijuana by smelling terpenes in the substance; since both hemp and marijuana contain the same terpenes, a drug detection canine unit will alert on either substance, incapable of distinguishing between the two.⁵⁸ The olfaction system controls the brain's ability to smell.⁵⁹ K-9s have a highly developed olfactory system and a larger olfactory epithelium than humans.⁶⁰

After identifying the sight or smell of *Cannabis sativa* L., an officer may attempt to verify his suspicion using a canine. In Texas, lawful products containing less than 0.3% THC can be legally possessed.⁶¹ Because the K-9 could only detect the presence of *Cannabis sativa* L. by smelling terpenes, there is no reason to suspect that a person had committed or was committing an offense. And therefore, no probable cause to justify the search.

To confirm whether a person did have marijuana, it would require an unlawful seizure. No field test can differentiate if the plant is hemp or marijuana. The Fourth Amendment protects against the seizure of property absent a warrant or probable cause.⁶² Currently, there is no field test, and the Texas DPS can test for THC, but that is not definitive in determining if a plant is hemp or marijuana. This turns into a “catch-22.” Without a way to distinguish between the different strains of *Cannabis*, there is no probable cause for the seizure. Without the seizure, there is no way to test the substance. The State cannot constitutionally seize property absent probable cause to test for its legality, as the seizure would require an arbitrary state intrusion.⁶³ Without something more than the sight or smell of cannabis, the lack of probable cause makes the seizure unconstitutional.⁶⁴ Without the seizure, there can be no proof that the substance is not legally owned industrial hemp.

⁵⁸ Jeff Welty, *The Effect of Legal Hemp on Drug Dog Sniffs (Part I)*, N. C. CRIMINAL LAW: A UNC SCH. OF GOV'T BLOG (Feb. 6, 2023), <https://nccriminallaw.sog.unc.edu/the-effect-of-legal-hemp-on-drug-dog-sniffs-part-i/>.

⁵⁹ Colleen Walsh, *What the nose knows*, THE HARVARD GAZETTE (Feb. 27, 2020), <https://news.harvard.edu/gazette/story/2020/02/how-scent-emotion-and-memory-are-intertwined-and-exploited/>.

⁶⁰ Eileen K. Jenkins, Mallory T. DeChant, & Erin B. Perry, *When the Nose Doesn't Know: Canine Olfactory Function Associated With Health, Management, and Potential Links to Microbiota*, FRONTIERS IN VETERINARY SCI., Mar. 2018, at 4.

⁶¹ See H.B. 1325, 86th Leg., Reg. Sess. (Tex. 2019).

⁶² U.S. CONST. amend. IV, § 3.

⁶³ *Id.*

⁶⁴ *Id.*

The Fourth Amendment to the Constitution and comparable state constitutional provisions demand that probable cause exist for a search or seizure to be deemed lawful.⁶⁵ As there is no authentic way for the state to differentiate between legal hemp and marijuana, an officer cannot have information “sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense” based on sight or smell of the plant *Cannabis sativa L.* alone.⁶⁶ If an officer has no probable cause to search the individual’s person, vehicle, or home based solely on the smell of what is believed to be *Cannabis sativa L.*, the seizure of the substance is similarly without probable cause, as the officer had no way to determine the substance’s legality without arbitrarily seizing it on the presumption that it was a controlled substance.

The command of the State and Federal constitution requires the accused to receive a fair trial and due process of law.⁶⁷ Allowing admittance of evidence collected through a search without probable cause would unfairly prejudice a defendant because it would violate his rights under the Fourth Amendment of the United States Constitution and Chapter 14 of the Texas Code of Criminal Procedure.⁶⁸

In conclusion, the smell of marijuana has been a complex issue in Fourth Amendment law. While the odor of marijuana may provide enough evidence to justify a search in some cases, it is not enough evidence in and of itself to support a search or seizure. In addition, the legalization of marijuana in several states has raised new questions about the relationship between the odor of marijuana and the Fourth Amendment. The courts will continue to grapple with these complex legal questions in the coming years.

⁶⁵ U.S. CONST. amend. IV, § 3; Tex. Const. art 1, § 9.

⁶⁶ *Beck v. State of Ohio*, 379 U.S. 89, 92 (1964).

⁶⁷ *Id.*

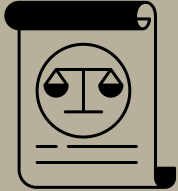
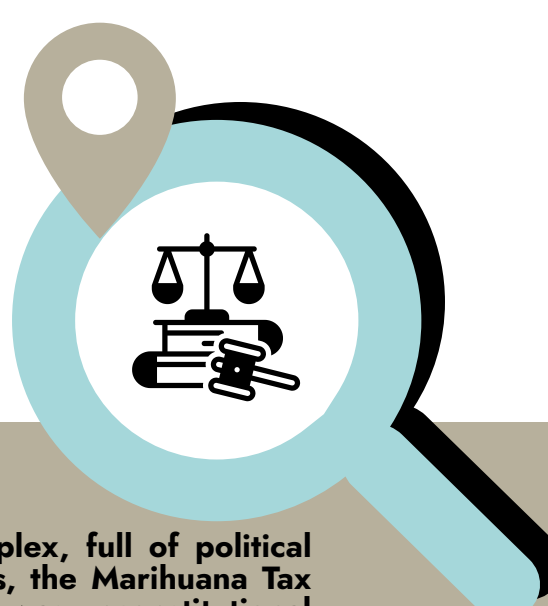
⁶⁸ U.S. CONST. amend. IV, § 3; Tex. Code Crim. Proc. § 14.03.

The following is a supplementary infographic for *Ooh, That Smell, Can't You Smell That Smell? The Smell of Marijuana and the Fourth Amendment of the Constitution* created to promote legal comprehension.

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Ooh, That Smell, Can't You Smell That Smell? The Smell of Marihuana and the Fourth Amendment of the Constitution



The Story of marihuana in the United States is complex, full of political maneuvering and conflicting viewpoints. In the 1930s, the Marihuana Tax Act was struck down in *Leary v. United States*; the law was unconstitutional because it violated Leary's Fifth Amendment right.¹ The Court's decision effectively nullified the Marihuana Tax Act.²

Controlled Substance Act of 1970

The Controlled Substance Act addressed drug possession and trafficking.³ It classified Cannabis as a Schedule I drug, which are determined to have a high potential for abuse and no accepted medical use, prohibiting its use for any purpose.⁴

Texas House Bill 1325

In June 2019, House Bill 1325 was signed into law by Governor Abbott. The Bill amended the definition of "marihuana." "Marihuana" means the Plant Cannabis sativa L., whether growing or not, the seeds of the plant, and every compound, manufacturing, salt, derivation, mixture or preparation of that plant or its seed.⁵ However, the definition excludes "hemp."⁶

Section 121.001 of the Agricultural Code

The Agricultural Code defines "Hemp" as "the plant Cannabis sativa L. and any part of that plant, including the seeds of the plant and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with delta-9 tetrahydrocannabinol (THC) concentration of not more than 0.3 percent on a dry weight basis."⁷

The Smell of Marihuana and the Fourth Amendment

The Constitution, through the Fourth Amendment, protects people from unreasonable searches and seizures by the government.⁸ To search or get a warrant, law enforcement officials must have probable cause.⁹ The Fourth Amendment, however, is not a guarantee against all searches and seizures, but only those deemed unreasonable under the law.¹⁰ This protection is critical, as the smell of marijuana is used as the basis for police searches.¹¹

Before H.B. 1325



Before H.B. 1325, marijuana's distinct and readily recognizable odor often lead law enforcement to believe that a criminal act was occurring.¹² "While smelling the odor of marijuana smoke may not be an event normally encountered in daily life, it requires limited, if any, expertise to identify."¹³



We're trained to recognize marijuana. Coming from someone who's been around hemp as well, they are very similar. They look the same; they smell the same.

– Officer Jeffrey Pearce with the College Station Police Department

After HB 1325



After H.B. 1325, simply detecting the odor of marijuana may not be enough to justify a search or seizure under the Fourth Amendment. H.B. 1325 legalized industrial hemp production, a chemotype of the species Cannabis sativa L. defined by H.B. 1325 that can now be legally grown and sold by licensed parties.¹⁴ H.B. 1325 specifically excludes industrial hemp from the definition of marihuana, which remains a controlled substance.¹⁵ Hemp, as defined in H.B. 1325, is not a controlled substance and may be lawfully possessed by any state citizen.¹⁶

Is The Smell of Hemp Even if Combined with Red Eyes and Slow Speech Reasonable Suspicion?

"Hemp and cannabis look, feel, and smell the same," according to Florida Assistant State Attorney Andy Kantor.¹⁷ The difference between hemp, which can be legally possessed and purchased, and marijuana, which remains a controlled substance under Texas law, is the amount of THC.¹⁸ The Texas Department of Agriculture inspects hemp to ensure the THC is less than 0.3% of the sample's dry weight.¹⁹ Differentiating between hemp and marijuana is increasingly more difficult for law enforcement. The only way to determine if cannabis is hemp or marijuana is to test it and measure its THC level, and currently, there is no field test.²⁰

The Fourth Amendment of the United States Constitution is to protect American citizens from unreasonable searches and seizures by the State.²¹ The Constitution establishes that illegally obtained evidence is inadmissible even if indicative of criminal activity.²² Only evidence that is lawfully obtained is admissible.²³ Marijuana and hemp look and smell the same, there is likely no way for an officer to establish probable cause to search or seize for marihuana with sight and smell alone.

Therefore, because there is no way for an officer to determine if the substance is hemp or marijuana and because the Fourth Amendment protects against arbitrary search and seizure of goods by the police, any evidence collected based on the smell of a substance that resembles marihuana lacks probable cause and is inadmissible in court.

In conclusion, the smell of marijuana has been a complex issue in Fourth Amendment law. While the odor of marijuana may provide enough evidence to justify a search in some cases, it is not always enough evidence in and of itself to support a search or seizure.

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6. *Id.*
7. Tex. Agric. Code Ann. § 121.001.
8. U.S. CONST. amend. IV, § 3.
9. *Id.*
10. *Id.*
11. *See, e.g., Isam v. State*, 582 S.W.2d 441, 444 (Tex. Crim. App. 1979) (holding that the odor of marijuana provides sufficient probable cause to justify search of automobile); *Moulden v. State*, 576 S.W.2d 817, 819–20 (Tex. Crim. App. 1978) (holding that the odor of burnt marihuana in automobile constitutes sufficient probable cause to search overnight bag on floorboard in front of defendant who was a passenger in the vehicle); *Ross v. State*, 486 S.W.2d 327, 328 (Tex. Crim. App. 1972) (holding that the odor of marihuana on defendant's person creates sufficient probable cause to search defendant's pockets) *overruled on other grounds* by *Walters v. State*, 359 S.W.3d 212 (Tex. Crim. App. 2011); *Hernandez v. State*, 867 S.W.2d 900, 907 (Tex. App.—Texarkana 1993, no pet.) (concluding that odor of marijuana provided sufficient probable cause to search truck); *Jordan v. State*, 394 S.W.3d 58, 64-65 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd) (citations omitted) (holding that a strong odor of marijuana emanating from a car establishes probable cause to search the car and its occupants).
12. *See Osbourn v. State*, 92 S.W.3d 531, 537 (Tex. Crim. App. 2002).
13. *Id.*
14. H.B. 1325, 86th Leg., Reg. Sess. (Tex. 2019).
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THE IMPORTANCE OF BELIEVING YOUR CLIENT

Sarah Carmichael

Courts today rely almost exclusively on plea bargaining to move their cases through the system. A plea bargain is offered by the prosecutor to a guilty offender, and if the defendant takes the plea, both the State and the accused can avoid trial. Many times, a plea is a way to reduce exposure to a lengthier sentence. A client should only plea if they are in fact guilty of the crime. However, a client may feel pressure to take the deal, simply because it's easier, even if they are not guilty. What is your responsibility as a lawyer? How much should you fight for your client?

I. INTRODUCTION

Several years ago, I stumbled onto a book by Michael Morton called *Getting Life*.¹ This book changed my entire perspective on the nature of convictions in this country. Michael Morton was wrongfully convicted in Williamson County, Texas, in 1986, for the murder of his wife, although it was later proven that he was innocent, and the crime was committed by another person. Thanks to DNA evidence, which was in its infancy during that time, Morton's innocence was established, and he was freed 25 years after his conviction. Morton's case was unique because it was also later proven that the prosecutor intentionally withheld exculpatory evidence that could have proven Morton's innocence at trial. District Attorney Ken Anderson was later charged and found to be in contempt of court by Texas's 9th Judicial District for his role in withholding evidence in Morton's trial. Anderson ultimately lost his law license and was sentenced to ten days in jail (of which he served five, with credit for good behavior).

Michael Morton was freed in 2011, after he was exonerated from his conviction. However, he had already served twenty-five years in prison for the crime and lost everything he had. In 2013, Texas Governor Rick Perry signed the Michael Morton Act into law, which is designed to ensure a more open discovery process, removing barriers for defense attorneys and defendants to access evidence.²

¹ MICHAEL MORTON, *GETTING LIFE: AN INNOCENT MAN'S 25-YEAR JOURNEY FROM PRISON TO PEACE* (2014).

² To read more about the Michael Morton Act see Brandi Grissom, *Perry Signs Michael Morton Act*, THE TEX. TRIBUNE (May 16, 2013, 2:00 PM CST), <https://www.texastribune.org/2013/05/16/gov-rick-perry-signs-michael-morton-act/>.

There is a weight that we as defense attorneys must carry to get it right the first time. For a defendant, the stakes are just too high to get it wrong. As the defense attorney, it is your duty to listen to your client's story, evaluate the facts, and work to get the best deal possible for your client. But what if your client pushes back and refuses to concede guilt by taking a plea? The short answer is: You need to listen to your client!

II. WHEN YOUR CLIENT SHOULD NOT TAKE THE DEAL

Too many prosecutors and jaded defense attorneys find it easy to say, "Yeah, sure you didn't do it, everyone says that!" or to discount the statement: "I didn't do what they are accusing me of!" It's all too easy to dismiss these comments as expected, coming from the accused, but it is important to recognize when a client is adamantly insisting on their innocence.

Recently, I represented a young woman accused of shoplifting. The first time I met her was in jail. She was wearing an orange jumpsuit, and she told me she had never been in trouble before. As I interviewed her to try to get the facts of the incident, she told me about the two guys and another girl she had gone to the popular large store with. The other three knew of the plan to shoplift, but she kept telling me she did not. She told me that she was at the jewelry counter, and about to pay for a \$10 bracelet when the two males made their way through the checkout without paying. As the men attempted to leave the store, they were stopped at the exit. The two men, the other woman, and my client were all taken to an office, where loss-prevention specialists called the police and had them all arrested and taken into custody.

During discovery,³ I saw videos of my client in the store's office, but there was not any kind of proof that she actually took anything or had the intent to steal. All the other videos showed the men in the video, but not my female client. The men were on video going through the motions of scanning merchandise, but they were not actually doing so. When some of the videos in the discovery packet did not play, I went to the prosecutor multiple times to inquire about the unplayable videos.

The prosecutor offered a plea for my client of forty-five days in jail, after admitting that she had not seen the videos. My client, a young mother who just wanted to get back to her small baby, was

³ The discovery period is the formal process in which both sides gather and share information about the evidence in a case.

tempted to take the deal. She was not able to post the very low bond, as she was very poor. However, she continued to insist on her innocence. I told her I had no reason to doubt what she was saying, especially since I had yet to see any evidence on video that she was part of the shoplifting scheme.

As our next court date approached, I began asking the prosecutor for dismissal. In my mind, if no one could access any video proof that my client participated in shoplifting, how could the State even allow her to be convicted? How could my client even entertain the idea of taking a plea deal? Ultimately, the prosecutor admitted that she, too, could not find any evidence on the videos, and she dismissed the case. My client was thrilled! However, she had spent more than 30 days in jail, away from her family and small baby, and there was nothing that could be done to get that time back.

At a certain point in her case, it would have been easy to convince my client to take a deal. She was desperate to get back to her baby, which is only natural. However, something about the way she talked about the case told me I should persist. Receiving that notice of dismissal and being able to tell my client her case was dismissed was one of the best feelings I've experienced so far in my practice of law.

III. "I WANT A PSYCHIATRIC EVALUATION, I WAS INSANE."

Another one of my cases involved a client who was charged with Assault to a Peace Officer, which is a second degree felony, carrying a punishment range between 2 to 20 years in prison.⁴ During an arrest for failing to identify herself to officers, she began having a panic attack and told officers that she was suicidal. While officers were arresting her, they placed her face down on a gravel driveway. She began hitting her head against the rocks, actively trying to injure herself. She told me she was trying to die right there and then. When she was placed in the patrol car, her panic worsened, and she tried to do anything possible to escape from the patrol car. In the process, she head-butted the police officer and busted his lip, resulting in the felony charge.

She told me multiple times that she did not mean to hit the officer, but in fact, she was having a psychotic episode. When the prosecutor offered a plea of 6-years deferred adjudication⁵ with

⁴ Tex. Penal Code Ann. §§ 22.01(b-2), 12.33.

⁵ Deferred adjudication is a special kind of probation which delays a conviction until the probation term is completed. A person who successfully completes this probation will not be found guilty, and therefore no conviction on their criminal record.

community service hours, my client adamantly rejected the offer, saying she wanted a psychiatric evaluation. She told me that she was “crazy” at the time and that she did not know what she was doing. She felt that having a 6-year term of probation, even if it would be deferred, was unfair, and would limit her from pursuing her goals and dreams.

The legal standard for insanity is difficult to meet. Fewer than 1% of cases use this affirmative defense in trial; it’s incredibly rare.⁶ In Texas, the test for determining insanity is whether, at the time of the conduct charged, the defendant, “as a result of a severe mental disease or defect, did not know that her conduct was wrong.”⁷

In this case, the State honored our request for the psychiatric expert to administer the mental health inquiry, and actually filed the motion themselves. The client was evaluated by a clinical forensic psychologist, whose report said she was insane at the time of the incident. The psychologist found that the client was “having a manic melt-down episode that compromised her judgment and decision-making capabilities” during the incident. After weighing all the evidence, the psychologist concluded that “[she] was not sane at the time of her alleged criminal behaviors.”

After receiving the notice that the client was insane at the time of the incident, my law partner and I asked for a dismissal. However, the State was reluctant. Ethically, we could not allow the client to accept a deferred adjudication probation offer, because, even if the finding of guilt was to be deferred, she would still be pleading guilty to an offense that she committed while legally insane. As her attorney, I could not let her do that, because a guilty plea must be made freely, voluntarily, and without coercion.⁸

Our only option was to go to trial. Our client was terrified to announce to the court that she wanted a jury trial, but she understood the reasons. I filed a notice of our intent to use the insanity defense, and we started preparing. As the next court date got closer, the prosecutor reached out to me and asked about the case. I went to his office and asked for a dismissal once more. He told me that he didn’t agree with the conclusions that the forensic psychologist had made. I reminded him that such findings of insanity are incredibly rare and

⁶ *Five Surprising Facts about Insanity Defenses*, THE LAW DICTIONARY, <https://thelawdictionary.org/article/five-surprising-facts-insanity-defenses/> (last visited May 10, 2023).

⁷ Tex. Penal Code Ann. § 8.01.

⁸ See *Machibroda v. United States*, 368 U.S. 487 (1962).

suggested that he would have little chance at defeating the report in a trial with the testimony of the expert that the State chose.

After a little more back and forth, the prosecutor finally agreed to dismiss the charges against our client, so long as I could show some mitigating factors.⁹ I readily agreed to his conditions and left to call my client. She and I assembled a packet that included the documents he requested. The packet showed that she is now under the care of a psychiatrist, taking her prescribed medication, that she has taken an anger management course, and that she has remained gainfully employed throughout this entire process, despite the difficulty of obtaining and keeping a job with a pending felony charge.

On the day of her final hearing before trial, I submitted the documents to the prosecutor, and he presented me with the order for dismissal of the charge. I was absolutely thrilled. Originally, we told the client that her request for a sanity evaluation would likely not result in anything substantive. However, she believed that she was not in her right mind at the time of the incident. I'm so glad that I listened! Without her insistence of obtaining a psychiatric evaluation, she could very well be stuck with a plea deal that she did not deserve.

Six years is a long time to be on probation, and people often have difficulty completing the terms successfully. Because she would have been pleading guilty to a second degree felony, she could have faced anywhere between 2 to 20 years in prison if her probation was ever revoked for any reason. Unfathomable!

The morning that I received the dismissal sheet from the prosecutor was wonderful. I hugged the client in the hallway, told her how proud I was that she had believed in herself, and how glad I was that she got us to pay attention to her. She now has her entire future ahead of her.

IV. ACTUAL INNOCENCE

During law school, I had the incredibly good fortune of working with Professor Cheryl Wattley, one of the founding directors of the Joyce Ann Brown Innocence Clinic at the UNT Dallas College of Law. Professor Wattley has been successful in helping to exonerate at least four people who were wrongfully convicted.

⁹ A mitigating factor is a circumstance in a defendant's life which may explain their behavior in a more favorable light. Here, my client was able to show that she was proactively treating her mental health issues under the care of a doctor, which helped the prosecutor see that she was taking this charge seriously and doing something about it.

With Professor Wattley's guidance, I had the opportunity to work on a case through the school's innocence clinic. Through that work, I was able to see firsthand how critical it is to present a case correctly the first time. When our client was 16 years old, he was convicted of murdering a woman, even though he was nowhere near the property where the victim died at the time she was shot. He has consistently insisted on his innocence from the beginning. Fortunately, he was granted parole on his 55-year sentence, but he seeks an actual innocence finding from the courts in order to clear his name.

I fully believe that our client was wrongfully convicted nearly thirty years ago. There were several errors made by the client's previous attorney. First, the attorney failed to follow up on the client's alibi. He missed crucial opportunities to talk to witnesses who could have placed our client away from the scene of the crime at the time of the crime. The few witnesses he did talk to, he failed to put many of them on the stand. Our client's conviction was largely based on the testimony of one woman, who testified that she saw the backside of a person resembling the client shoot toward the victim. The witness never saw the shooter's face—in fact, it was getting dark outside—and she was looking at the scene from a distance, behind an obstruction that the shooter could not see.

Additionally, police named our client as the main suspect within 24 hours of the crime; his name was published in the newspaper, and he was arrested shortly afterward. Essentially, the police failed to pursue any other potential leads. Because the eyewitness's testimony fit well enough with the description of the person police had described, and was the only evidence presented, the jury convicted the client.

At the time of his trial, our client was very young, and he was scared of what was happening. It is unknown whether he adamantly insisted on his innocence to his attorney; the trial was thirty years ago. The questions remain, however: What if his attorney had asked more questions? What if the attorney had listened a little more closely to his client, and fought a little harder? Would our client had received a conviction for murder with a 55-year sentence at the age of 16?

The consequences of a wrongful conviction are dire. According to the Innocence Project, between 2–10% of all incarcerated persons in the United States are actually innocent.¹⁰ How

¹⁰ Innocence Staff, *How Many Innocent People are in Prison?*, INNOCENCE PROJECT (Dec. 12, 2011), <https://innocenceproject.org/how-many-innocent-people-are-in-prison/>.

has the system failed to allow such a high number? The National Association of Criminal Defense Lawyers cites that more than 97% of federal criminal cases were resolved by a plea, and fewer than 3% of federal criminal cases resulted in a trial.¹¹

Many times, the criminal defense attorney is the only person standing between the client and the State, who intends to convict the defendant so that they receive the highest sentence possible by law. It is crucial to develop a good working relationship with the prosecutor. I have found that prosecutors are often willing to listen to a defendant's mitigating circumstances and reasonable requests if you can approach them with respect, and ready to speak knowledgeably about your client's case.

V. CONCLUSION

All attorneys are called upon to represent their clients with zealous advocacy.¹² As defense attorneys, it is critical that we listen carefully to our clients. As their attorneys, we are the only ones who stand between them and the State. Each story is different, each client is unique. Every one of our clients deserves zealous advocacy. Although we may not be able to get each case dismissed, or save every client from a harsh sentence, if we listen carefully to the details of our clients' cases, we have a much better chance of advocating for them and getting them the just result that they deserve.

¹¹ NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 14 (2018), <https://www.nacdl.org/getattachment/95b7fof5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf>.

¹² MODEL CODE OF PROF'L CONDUCT r. 1.3 cmt. (AM. BAR ASS'N 1983), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence/comment_on_rule_1_3/.