RECENT DECISIONS
FROM THE
TEXAS COURT OF CRIMINAL APPEALS

[through and including May 25, 2011]

Texas Association Of
Appellate Court Attorneys

Annual Meeting
June 1, 2011
Austin, Texas

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Scope of Paper

This paper discusses all published cases decided by the Texas Court of Criminal Appeals between June 2, 2010 and May 25, 2011. Also included are selected non-published cases decided by that Court, and some other cases decided by the United States Supreme Court and by intermediate courts of appeals during the same time period.

A copy of this paper can be downloaded from my website, www.markstevenslaw.com/cle.aspx. A copy of the powerpoint that accompanies this paper can be found by clicking first on the "Motions, Etc." tab, then on "Recent PowerPoint Presentations."

ACCOMPLICE WITNESSES

1. A witness who has been indicted for the same offense as the accused is not automatically an accomplice witness.

***Smith v. State*, 332 S.W.3d 425 (Tex. Crim. App. 2011)**

Sherry Smith was indicted for the capital murder of her husband Carey, and his father, Charles. Her former husband, Gardner, testified against her. Gardner had been indicted for the capital murder of the two men, but those indictments were dismissed and he pleaded guilty to a drug offense before appellant's trial. The trial court denied appellant's request to instruct the jury that Gardner was an accomplice as a matter of law; instead, the jury was instructed to determine whether Gardner was an accomplice in fact.

The court of appeals reversed, holding that the trial court erred when it refused to instruct that Gardner was an accomplice as a matter of law, and that the evidence was insufficient to corroborate Gardner's testimony.

The court of criminal appeals reversed the reversal.

A person is an accomplice as a matter of law if he is indicted for the same offense as the defendant against whom he testifies. The person is no longer an accomplice as a matter of law if the charge is dismissed before he testifies, unless the charge was dismissed in exchange for an agreement to testify. In this case, although it was possible to infer that the capital murder charges against Gardner were dismissed because of his testimony, it was not a "necessary inference," and the trial judge was not bound to infer that he was an accomplice as a matter of law.

> We hold that the trial judge did not err in refusing to instruct the jury that Gardner was an accomplice as a matter of law. The evidence at trial failed to

definitively establish that the State dismissed the capital murder charge against Gardner in exchange for his testimony at Sherry's trial. We also hold that the court of appeals erred in concluding that the non-accomplice evidence was insufficient to tend to connect Sherry to the murders as required by Article 38.14, Texas Code of Criminal Procedure.

APPEAL

1. Sometimes simple justice triumphs over "the orderly administration of justice."

***Campbell v. State*, 320 S.W.3d 338 (Tex. Crim. App. 2010)**

Campbell was convicted of an enhanced drug offense and sentenced to 99 years imprisonment and he sought to appeal, *pro se*. Specifically, he placed a copy of his *pro se* motion for new trial in the prison mailbox, along with a certification of the date this was done, which was the 30th day following his sentencing. The motion was not actually received by the trial court, though, for another 12 days, which is two days after the 10 days specified by the "mailbox rule" found in Texas Rule of Civil Procedure 5, and Texas Rule of Appellate Procedure 9.2(b)(1). The court of appeals held that Campbell's notice of appeal was untimely because his previously filed motion for new trial had been untimely and dismissed his appeal for want of jurisdiction. Campbell filed a petition for discretionary review.

Campbell argued that a different mailbox rule should apply for prisoners. Specifically, he advocated a bright-line rule that focused on when the prisoner delivers the document to prison officials. This would be the time of filing, regardless of how long thereafter it took the document to reach its destination. The state argued that the traditional mailbox rule should apply, contending "that strict application of the filing deadlines, including the ten-day receipt requirement, will preserve the orderly administration of justice and suggests that appellant's remedy is to seek an out-of-time appeal through habeas corpus."

The court of criminal appeals agreed with Campbell and reversed the court of appeals. "We hold that the pleadings of pro se inmates shall be deemed filed at the time they are delivered to prison authorities for forwarding to the court clerk."

2. The state thinks we need a new test to determine harm from an improper argument.

***Snowden v. State*, 2010 WL 2927472 (Tex. App. – Dallas 2010, pet. granted)(not designated for publication)**

The court of appeals found that this argument by the prosecutor was an impermissible comment on the weight of the evidence:

> And he doesn't give two hoots about the mother of his baby or his baby because he looks her in the eye and punches her in her 38-week-old stomach without remorse, just like he is today.

The court of appeals went on to find the improper argument harmful, using the familiar test for harm, recognized in *Harris v. State*, 790 S.W. 2d 568, 587-88 (Tex. Crim. App. 1989), which held that the reviewing court must not focus on the propriety of the outcome at trial:

> Instead, an appellate court should be concerned with the integrity of the process leading to the conviction." Id. The court should examine (1) the source of the error, (2) the nature of the error, (3) whether or to what extent it was emphasized by the State, (4) its probable collateral implications, (5) the weight a juror would probably place upon the error, and (6) whether declaring the error harmless would encourage the State to repeat it with impunity. See id. In summary, the reviewing court should ask "whether the error at issue might possibly have prejudiced the jurors' decision-making; it should ask not whether the jury reached the correct result, but rather whether the jurors were able properly to apply law to facts in order to reach a verdict.

The court of criminal appeals granted the state's petition to consider this question: "Should this Court reconsider the appropriateness of the factors set forth in *Harris v. State*, 790 S.W.2d 568 (Tex. Cr. App. 1989), to assess the harmfulness of trial court error?"

3. Four dissenters believe that a motion for rehearing may be filed following a Rule 50 opinion, despite that rule's prohibition of further opinions.

***Witkovsky v. State*, 327 S.W.3d 741 (Tex. Crim. App. 2010)(Keller, P.J., dissenting)**

In response to the state's timely filed petition for discretionary review, the court of appeals filed a new opinion, as permitted by Rule 50 of the Texas Rules of Appellate Procedure. The state filed a motion for rehearing which was overruled. Within 30 days of the overruling of the motion for rehearing, but more than 30 days after the issuance of the Rule 50 opinion, the state filed its subsequent PDR.

The court of criminal appeals dismissed the subsequent petition. According to Judge Keller, who was joined by Judges Meyers, Hervey, and Keasler, the subsequent petition was

dismissed as untimely filed, because the majority believed that motions for rehearing are not authorized following Rule 50 opinions, and that therefore the state's subsequent petition was due within 30 days of that opinion, and that this time was not enlarged by the unauthorized motion for rehearing. The dissenters acknowledged the language in Rule 50(a) that says that once a Rule 50 opinion issues, no further opinions are authorized by the court of appeals, but believed that this language did not prevent the filing of a motion for rehearing.

4. The state must also abide by rules of procedural default.

***State v. Rhinehart*, 333 S.W.3d 154 (Tex. Crim. App. 2011)**

The trial court granted Rhinehart's motion to quash his indictment on the grounds that the state did not use due diligence in proceeding with his case in juvenile court before his 18th birthday. the state's only argument at this hearing was that it had used due diligence. The state appealed to the court of appeals claiming, first, that the district court had proceeded without jurisdiction because Rhinehart had no statutory authority to appeal the sufficiency of evidence in the juvenile court prior to being convicted in district court, ans second, that sufficiency of the evidence supporting the juvenile court's transfer order is not a valid grounds for granting a motion to quash. The court of appeals reversed the trial court's order.

The court of criminal appeals reversed the court of appeals's judgment. "[I]n this case, we apply ordinary rules of procedural default to decide that the State, as the losing party in the criminal district court, could not raise for the first time on appeal a claim that there was no valid basis for the criminal district court to have quashed the indictment."

5. The court of appeals has no jurisdiction to issue an opinion under Rule 50 more than 60 days after the state files a petition for discretionary review.

Griego v. State, 2011 WL 1662378 (Tex. Crim. App. 2011)

Originally the court of appeals found the evidence factually insufficient and reversed and remanded the case to the trial court for a new trial. The court also found the evidence legally insufficient to support enhancement to a third degree felony. The state filed a petition for discretionary review and more than 60 days later, the court of appeals issued another opinion, reforming the conviction to a class B misdemeanor.

The court of criminal appeals ordered the second opinion withdrawn, since the court of appeals had no jurisdiction to issue it more than 60 days after the state filed its PDR. The court of criminal appeals then summarily granted the state's petition and remanded the case to the court of appeals to reconsider its earlier holding in light of *Brooks*, which held that *legal* sufficiency is the only standard for reviewing sufficiency in criminal cases.

ASSISTANCE OF COUNSEL

1. Proving that a defendant was prejudiced by trial counsel's errors is "more difficult" than merely proving that the evidence that was introduced was harmful under Rule 44.2.

***Ex parte Martinez,* 2011 WL 93009 (Tex. Crim. App. 2011)**

The state introduced gang-involvement and Martinez was convicted of capital murder and sentenced to life imprisonment. The court of appeals originally reversed, holding that this evidence had been improperly admitted and that it was harmful. The court of criminal appeals reversed the reversal after determining that trial counsel failed to properly object to the inadmissible evidence. Martinez then filed a writ, asserting that her trial counsel had been ineffective in not properly objecting.

The court of criminal appeals denied relief. The non-gang related evidence in this case was strong and was sufficient to convict Martinez as a party. Although the gang-related evidence was admitted without context, it constituted a small percentage of the total evidence introduced at trial. The court of criminal appeals said that it could not ignore the court of appeals's finding that this evidence had harmed Martinez at her trial. Even so, the test for prejudice under *Strickland* "presents a more difficult burden than does the harm analysis under Rule 44.2 of the Texas Rules of Appellate Procedure."

> We conclude that Applicant has not proven by a preponderance of the evidence that she was prejudiced by Counsel's performance. Therefore, Appellant has failed to demonstrate that she received ineffective assistance of counsel.

2. Ineffectiveness is hard to prove.

***Ex Parte Niswanger,* 2011 WL 891285 (Tex. Crim. App. 2011)**

Facing habitual enhancement and a minimum of 25 years, Niswanger pleaded guilty to impersonating a public servant and a recommendation of 10 years to do. He later filed a writ, asserting that his trial lawyer was ineffective for several reasons, including that the lawyer coached a guilty plea even though Niswanger had not violated the statute for several different reasons, and that the lawyer failed to allege a criminal act.

The court of criminal appeals denied relief. Counsel had to balance two important issues: "the uncertainty of trial and the possible range of punishment." Counsel could not

know what facts would be developed at trial, or how the jury would decide. On the other hand, counsel knew for certain that the minimum punishment would be 25 years. It was therefore reasonable for counsel to advise a guilty plea here in exchange for a 10 year sentence. The records shows that Niswanger was agreeable to the advice and voluntarily followed it. Although an argument could be made that counsel should have attacked the indictment before advising a guilty plea, the state would have likely re-indicted, and if it did, the 10 year plea offer might not have been available.

AUTHENTICATION

1. "If you ain't blasting, you ain't lasting:" Authenticating MySpace pages.

***Tienda v. State*, 2010 WL 5129722 (Tex. App.-Dallas 2010, pet. granted)(not designated for publication)**

Tienda was charged with murder and there was evidence that people involved were "throwing gang signs." The sister of the deceased testified that she found Tienda's MySpace pages and no other person identified the pages. The state subpoenaed records associated with ID user numbers associated with Tienda's MySpace account. The trial court admitted these records over Tienda's objection. Several profiles of Tienda were found. His names was listed as "ron Mr. T.," and "Smiley Face," his city was listed as "D Town," and "dallas," and various email accounts incorporated the name "Smiley," (Tienda's nickname) and "Ronnie Tienda, Jr." The MySpace pages had photos of Tienda and captions, such as, "If you ain't blasting, you ain't lasting," and references to the deceased and the shooting. A police officer testified that the MySpace photos and captions showed Tienda's membership in the Dallas branch of the Tango Blast gang.

Tienda argued on appeal that the trial court improperly admitted the MySpace evidence because it was not authenticated. Specifically, according to Tienda, there was no proof that he created or maintained the pages in question. The court of appeals disagreed, and affirmed the conviction. The evidence showed that the holder of the account identified himself as Smiley or Ronnie Tienda, Jr, from Dallas, and Tienda's photos and references to the murder were on the pages.

> The inherent nature of social networking websites encourages members who choose to use pseudonyms to identify themselves by posting profile pictures or descriptions of their physical appearances, personal backgrounds, and lifestyles. This type of individualization is significant in authenticating a particular profile page as having been created by the person depicted in it. The more particular and individualized the information, the greater the support for a reasonable juror's finding that the person depicted supplied the information.

[citations omitted] Having reviewed the details of the MySpace pages admitted into evidence in this case, we conclude that the trial court did not abuse its discretion in admitting the evidence.

The court of criminal appeals granted Tienda's petition for discretionary review to consider this issue: "The Court of Appeals erred in finding that it was not an abuse of discretion to admit, over objection, MySpace evidence without proper authentication."

CAPITAL MURDER

1. Evidence admitted at the punishment phase of a capital murder trial that defendant was a Satanist did not violate the First Amendment, or Rules 401 or 403 of the Texas Rules of Evidence.

***Davis v. State*, 329 S.W.3d 798 (Tex. Crim. App. 2010)**

Davis was convicted of capital murder during the course of aggravated sexual assault in June, 2002. This conviction was reversed and remanded for a new punishment hearing, at which time the state introduced evidence that Davis had become a Satanist while imprisoned on death row. Specifically, the state introduced several Satanic books, writings and drawings found in Davis's cell, forced Davis to show to the jury a pentagram etched into his chest, and sponsored expert testimony from an expert on Satanism. Davis objected that this evidence violated the First Amendment and Rules 401 and 403 of the Texas Rules of Evidence.

The court of criminal appeals affirmed Davis's death sentence. The constitution protects an individual's right to join groups and associate with others with similar beliefs, but it does not erect a *per se* barrier to admission of evidence about those beliefs merely because they are protected by the First Amendment. Such evidence may be admissible if relevant to future dangerousness in a capital murder case.

"In order to prove the relevance of a defendant's membership in an organization or group, the state must show: (1) proof of the group's violent and illegal activities, and (2) the defendant's membership in the organization."

Here the state introduced prison records showing Davis had identified himself as a Satanist since 2005. The state's expert testified that some members of that religion advocate violence, and that its religious publications discuss "'rituals of destruction' for performing 'human sacrifice' on 'undesirable [and] obnoxious individual[s],' and that various people had committed murder and mutilation 'in the name of Satan.'" The trial court did not abuse its discretion when it decided that the Satanic evidence in this case was "relevant to the issue

of future dangerousness and outside the protection of the First Amendment."

Nor did the admission of this evidence violate the rules of evidence. The tattoo, books, writings, and drawings were indicative of Davis's character, were relevant to future dangerousness, and were admissible under Rule 401. Nor was the evidence excludable under Rule 403, because it was not "so prejudicial that there was a clear disparity between the degree of prejudice and its probative value."

2. Evidence admitted at the guilt/innocence phase of defendant's first trial is also admissible at the punishment phase of the retrial.

***Davis v. State,* 329 S.W.3d 798 (Tex. Crim. App. 2010)**

Davis's first death sentence was reversed and the cause was remanded for a punishment trial only. The state offered pictures which were introduced during the guilt/innocence phase of the first trial, and when Davis objected, the state argued that the court had no jurisdiction over anything but punishment, and that the evidence had already been admitted and was therefore admissible now. The trial court agreed.

The court of criminal appeals affirmed. "The trial court did not abuse its discretion by admitting the photographs that had been previously admitted at the 2002 trial. *See Russeau v. State*, 291 S.W.3d 426, 432 (Tex. Crim. App. 2009) (when a case is on remand to the trial court for a new punishment hearing, the trial court's jurisdiction is statutorily limited to punishment issues)."

3. Bad jokes are admissible at the punishment phase of a capital murder trial.

***Davis v. State,* 329 S.W.3d 798 (Tex. Crim. App. 2010)**

The state recorded two (moronic) jokes Davis told his brother while incarcerated, then played them for the jury at the punishment phase of his capital murder trial. Davis's contentions that this violated his rights under the First Amendment and under Rules 401 and 403, and that this punished him for his thoughts, were rejected.

> The jokes at issue, which appellant told while incarcerated after raping, beating, and murdering a 15-year-old female, demonstrated the opposite. This evidence showed that appellant found the topics of violence and disrespect towards women to be humorous. The trial court did not abuse its discretion in admitting this evidence over appellant's First Amendment objection.

Nor did the jokes – as stupid as they were – violate the Rules of Evidence.

4. No matter how heinous the crime, the prosecutor must prove a real threat of future violence to obtain a death sentence.

***Coble v. State*, 330 S.W.3d 253 (Tex. Crim. App. 2010)**

In this case, Coble proved that he had behaved very well on death row for 18 years, and now more than 60 years old he was sick with a heart condition. The state proved that he had committed three heinous murders, had a history of being violent toward women, and that after being sentenced to death he had pictures of scantily clad females in his cell.

> [The future dangerousness] question is essentially a normative one as the Legislature declined to specify a particular level of risk or probability of violence. But the "future dangerousness" special issue ensures that no defendant, regardless of how heinous his capital crime, will be sentenced to death unless the jury finds that he poses a real threat of future violence.

Texas juries must focus on the defendant's character for violence, not merely on the institutional restraints that are put on him. They must consider the probability of future violence, in whatever society the defendant finds himself. Good behavior in prison is relevant and indeed, important, but it is not the exclusive focus of the future dangerousness issue.

In this case the jury heard the evidence and found it sufficient. "[T]here was ample evidence to support its finding, beyond a reasonable doubt, that appellant had not experienced a conversion on the road to Damascus; rather, he had the same character for violence at age 60 that he did at ages 15, 19, and 40, despite his spotless prison record."

5. Will Dr. Coons be looking for a new job?

***Coble v. State*, 330 S.W.3d 253 (Tex. Crim. App. 2010)**

In 1990, Dr. Coons testified that, in his opinion, Coble would probably be dangerous in the future. He gave the same opinion in Coble's retrial trial in 2008. Coble challenged the admissibility of this opinion testimony. The court of criminal appeals found that Coons was undoubtedly a forensic psychiatrist, but next considered whether, under Rule 702, his testimony was "based upon the scientific principles of forensic psychiatry."

The court could not tell what principles of forensic psychiatry Coons's testimony was

based upon, because he cited no books, articles, journals, or other forensic psychiatrists who did what he does. There is no objective source material to substantiate Coons's methodology as appropriate in the field of forensic psychiatry, other than his own *ipse dixit* claims that he properly relied on and utilized the principles involved in his field. He agreed that his methodology is idiosyncratic and is one he has developed in the last 20 or 30 years. Although there is a substantial body of literature concerning the empirical accuracy of clinical predictions versus actuarial and risk assessment predictions, Coons did not rely on these and professed unfamiliarity with studies shown him by the prosecution. He claimed to rely on a variety of seemingly common-sensical factors, including history of violence, attitude toward violence, the crime itself, personality and general behavior, conscience, and where the person will live in the future. "[A]re they ones that the forensic psychiatric community accepts as valid? Have these factors been empirically validated as appropriate ones by forensic psychiatrists? And have the predictions based upon those factors been verified as accurate over time?" Coons's factors have great intuitive appeal, "but are they actually accurate predictors of future behavior?" Coons admitted that he does it his own way, and that he has never tried to determine whether any of his prior predictions have proven accurate. He did not perform any psychiatric assessment on Coble during his 18 years of incarceration on death row, nor did he refer to any psychological testing that might have occurred during this time.

The court of criminal appeals concluded that, based on the above problems, "the prosecution did not satisfy its burden of showing the scientific reliability of Dr. Coons's methodology for predicting future dangerousness by clear and convincing evidence during the Daubert/Kelly gatekeeping hearing in this particular case [and] the trial judge therefore abused his discretion in admitting Dr. Coons's testimony before the jury."

The court went on to find that this non-constitutional error was harmless, since it did not affect Coble's substantial rights to a fair sentencing trial. There was ample evidence that Coble would be dangerous in the future, including evidence from other mental health experts, apart from Coons, that came in without objection. And Coon's testimony was "not particularly powerful, certain, or strong," and came at the end of a long and convoluted hypothetical. Furthermore, Coons's testimony was refuted and rebutted by Dr. Mark Cunningham, a psychologist who testified for the defense that Coble was a low risk for future violence. Finally, the state did not rely "heavily" on Coons during its closing argument.

"Given these particular circumstances, we conclude that the error in admitting Dr. Coons's testimony did not have a 'substantial and injurious' effect upon the jury's deliberations concerning the future dangerousness special issue."

6. Challenging Coon's unreliability on habeas.

***Ex parte Ramey*, 2011 WL 1288284 (Tex. Crim. App. 2011)(not designated for publication)**

In *Coble*, the court of criminal appeals held that Dr. Coons's testimony on future dangerousness was inadmissible under Rule 702 of the Texas Rules of Appellate Procedure. Ramey's habeas petition raising the same challenge was filed in 2008, and was pending and being reviewed by the trial court when *Coble* was decided.

> This Court has determined that the case should be filed and set on the following issue in allegation 21: Whether the trial court erred in admitting testimony of Dr. Richard Coons with regards to the future dangerousness of applicant because Coons' testimony violates the Eighth Amendment and applicant's rights to due process.

7. Did we have it exactly backwards all these years: is there in fact "lessened reliability" in capital cases?

***Coble v. State*, 330 S.W.3d 253 (Tex. Crim. App. 2010)**

Coble complained that A.P. Merillat's testimony was inadmissible because it did not meet the "heightened reliability" requirements that apply in a death penalty case. The court of criminal appeals disagreed, noting that Coble cited no authority for increasing the requirements for admitting evidence in a death sentencing trial. "Indeed, some state and federal courts have suggested that the Confrontation Clause, the Rules of Evidence, and the rule against hearsay do not apply with full force in capital murder sentencing trials. We express no opinion on that matter, but we reject appellant's Eighth Amendment claim. . . ."

8. A.P. Merillat's "incorrect" testimony about TDCJ's classification rules concerning persons sentenced to life without parole warranted a new punishment hearing.

***Estrada v. State*, 313 S.W.3d 274 (Tex. Crim. App. 2010)**

The defense put on a punishment witness to testify that a person sentenced to life without parole could earn no better than a G-3 status which governs restrictions on his housing, job placement, movement, recreation, and commissary. The state put on A.P. Merillat, a rebuttal witness, who, without objection, contradicted the defense witness and testified that such an inmate could earn a more favorable status after 10 years. The jury sent out notes during deliberations asking what to do if it could not reach a decision on future dangerousness, and questioning whether, in light of the testimony of the two witnesses,

Estrada might receive a more favorable status after 10 years.

It turns out Merillat's testimony was "incorrect." A TDCJ regulation unambiguously states that persons sentenced to life without parole "will not be classified to a custody less restrictive than G3 throughout their incarceration." The court of criminal appeals believed that there was a fair probability, based on the jury notes, that Estrada's death sentence was based on Merillat's "incorrect" testimony. The court further believed "that the Supreme Court would find this to be constitutionally intolerable." Although our court did not explicitly say so, apparently it agreed that this was intolerable, because it reversed Estrada's death sentence and remanded for a new punishment hearing.

The court reversed the sentence even though Estrada made no objection at trial. The state seems to have suggested that the court could suspend its rules regarding error preservation under Rule 2 of the Texas Rules of Appellate Procedure, but the court found no need to address this suggestion:

> Appellant had no duty to object because he could not reasonably be expected to have known that the testimony was false at the time that it was made. This case also not only involves the erroneous admission of evidence . . . it also involves the State's duty to correct "false" testimony whenever it comes to the State's attention.

9. Future danger considers the threat to society "whether in or out of prison."

***Estrada v. State*, 313 S.W.3d 274 (Tex. Crim. App. 2010)**

Estrada argued that, in light of the 2005 change in Texas law enacting life without parole as an option for those convicted of capital murder, evidence that a defendant will be dangerous outside of prison in the future is legally insufficient unless the state can prove beyond a reasonable doubt that the defendant is likely to escape or be released from prison. The court of criminal appeals disagreed. "We reaffirm this Court's prior holdings that the future-dangerousness special issue asks a jury to determine whether there is a probability that the defendant would constitute a continuing threat to society 'whether in or out of prison.'"

10. *Roe v. Wade* is not violated by prosecution under statute that proscribes killing mother and unborn child.

***Estrada v. State*, 313 S.W.3d 274 (Tex. Crim. App. 2010)**

Estrada was prosecuted for the capital murder of a mother and her unborn fetus, and

complained on appeal that TEX. PENAL CODE § 1.07(a)(26), which defines "individual" violates *Roe v. Wade*. The court of criminal appeals disagreed. "*Roe* 'has no application to a case that does not involve [a] pregnant woman's liberty interest in choosing to have an abortion' and that *Roe* has no application 'to a statute that prohibits a third party from causing the death of [a] woman's unborn child against her will.' *See Lawrence v. State*, 240 S.W.3d 912, 917 (Tex.Crim.App.2007), *cert. denied*, 553 U.S. 1007, 128 S.Ct. 2056, 170 L.Ed.2d 798 (2008)."

11. Can "probability" mean "one in a million;" is article 37.071 unconstitutional as applied to this defendant because it requires a mandatory sentence of death even if the jury believed defendant should not die?

***Ex parte Williams*, 2010 WL 4679956 (Tex. Crim. App. 2010)(not designated for publication)**

The court of criminal appeals ordered this application for writ of habeas corpus filed and set for submission to consider seven issues, including these two:

1. "Counsel failed to object when the prosecutor told veniremen that the term 'probability,' as applied to the special issue on future dangerousness, could mean 'one in a million.'"

2. " Article 37.071 of the Texas Code of Criminal Procedure is unconstitutional as applied to applicant because it requires a mandatory death sentence if the jury answers the special issues in the affirmative even if the jury believed that applicant did not deserve to die."

12. Trial court without authority to conduct a pretrial hearing to determine a defendant's "as-applied" challenge to the Texas Death Penalty Scheme.

***State ex rel. Lykos v. Fine*, 330 S.W.3d 904 (Tex. Crim. App. 2011)**

After the state gave notice of its intent to seek the death penalty, but before the trial began, Green filed a motion to declare the death penalty unconstitutional because application of the Texas statute has created a substantial risk that innocent persons have been, and will be, convicted of capital murder and executed. The state filed petitions for writs of mandamus and prohibition to bar an evidentiary hearing which the court of criminal appeals initially denied as premature. A hearing began, and after the defense put on several witnesses, the state filed a motion asking that the court of criminal appeals reconsider, and it did so. On reconsideration, the court conditionally granted the state's petitions for mandamus and prohibitions.

First, the state has no adequate remedy at law to a decision by the trial court granting the relief requested by the defense, since it could not appeal from such a decision. Second, because there is no authority for the trial court to conduct a pretrial hearing to determine the "as-applied" constitutionality of a Texas statute, the state has demonstrated a clear right to relief.

13. Various issues raised and rejected in this punishment retrial.

***Martinez v. State*, 327 S.W.3d 727 (Tex. Crim. App. 2010)**

Several issues were addressed in this death penalty decision, which was a punishment retrial of a case originally tried in 1984, then tried again in 1989:

The court overruled Martinez's challenges to the legal sufficiency of the punishment evidence.

The court rejected Martinez's assertion that the evidence was *factually* insufficient to prove the deliberateness issue that was submitted in this case because it arose at a time when deliberateness was a special issue. In light of *Brooks*, there is no longer a factual sufficiency challenge available to deliberateness evidence.

The trial court properly admitted punishment evidence that Martinez threatened the unborn child of an obviously pregnant witness who had previously testified against him.

At Martinez's former trial the state elicited testimony from DeAnda, who had died by the time of this trial. The trial court found that DeAnda was unavailable and admitted his previous testimony over Martinez's confrontation objection. Specifically, Martinez objected that he had not had a similar motive to cross-examine DeAnda concerning mitigating evidence at the earlier trial because the mitigation issue submitted at the earlier trial was different than that issue submitted at the later trial. The court disagreed. The jury was charged on mitigation at the earlier trial, and, although the instruction was different at the later trial, "the parties, issues, and underlying purpose of the jury charge were the same in both" trials. " That appellant is now dissatisfied with the depth of prior counsel's cross-examination of DeAnda does not affect that motive."

14. Dissenters believe that *Indiana v. Edwards* is "new law" that justifies a subsequent writ; the majority does not.

***Ex parte Panetti*, 326 S.W.3d 615 (Tex. Crim. App. 2010)**

The majority dismissed Panetti's second subsequent writ of habeas corpus, finding

that his "claims fail to meet the dictates of Article 11.071, § 5."

Judge Holcomb, joined by Judge Johnson, dissented.

> Given the Supreme Court's decision in *Indiana v. Edwards*, I would file and set Scott Louis Panetti's first subsequent application for writ of habeas corpus in order to consider his claim that the trial court violated the Eighth Amendment when it allowed him, though severely mentally ill, to represent himself at his capital murder trial.

The court had previously rejected this *Edwards* claim by Panetti in his first subsequent writ, finding that it was not based on "new law." The dissenters believed that the court had erred, that *Edwards* was in fact "new law," since it was the first time the Supreme Court had recognized that mental illness could limit a person's right to insist on self-representation, and that the previous decision to the contrary was erroneous. The dissenters would have reconsidered the previous writ on the court's own motion.

> The Eighth Amendment requires heightened reliability in the adjudicative process leading up to a death sentence. [citations omitted] Such heightened reliability is inconsistent with allowing a severely mentally ill defendant to represent himself at trial, *Faretta* notwithstanding, no matter how well he may appear to the trial court at that time. The risk of an unfair trial is too great to tolerate. The trial record in this case establishes conclusively that Panetti is severely mentally ill and has been so for a very long time. The Eighth Amendment was thus violated when the trial court permitted Panetti to represent himself.
>
> In addition, the judiciary has an independent interest in ensuring that criminal trials appear fair to all who observe them. [citations omitted] That interest was not served by what occurred at Panetti's trial.

15. Another unremarkable death penalty case is affirmed.

***Freeman v. State*, 2011 WL 891266 (Tex. Crim. App. 2011)**

The question is not whether one convicted of capital murder would be a continuing threat to prison society, but whether he would be a continuing threat whether in or out of prison. Here the evidence was sufficient that he would be.

The prosecutor's argument that Freeman tried "to commit the worst criminal act on law enforcement ever in the United States' history" was neither in evidence nor inferable

from the evidence, and was therefore erroneous. But it was harmless.

CHARGING INSTRUMENTS

1. Altering an indictment that serves as a judicial confession supporting a guilty plea does not require compliance with the rules on amending an indictment.

***Puente v. State*, 320 S.W.3d 352 (Tex. Crim. App. 2010)**

Puente's indictment alleged super-aggravated sexual assault, asserting that the complainant was under six years old. The minimum punishment for this offense is 25 years. Plea negotiations began, and the parties agreed that Puente would plead to unenhanced aggravated sexual assault and would receive 21 years imprisonment. The state orally moved to amend the indictment in accordance with the agreement, and the court approved the amendment, but the state did not physically amend the indictment on its face. Instead, the prosecutor merely struck the enhancing language – "a child younger than six years of age" – from the judicial confession that was contained in the plea papers.

On direct appeal, Puente argued that the prosecutor had amended the indictment, and that the amended indictment charged only sexual assault, a second degree felony, and that the 21 year sentence exceeded the statutory maximum for that offense. The court of appeals agreed and reversed and remanded.

The court of criminal appeals disagreed and reversed the reversal. A victim under six is also under 14. That is, aggravated sexual assault is a lesser included offense of super aggravated sexual assault. The original indictment was already sufficient to authorize conviction for aggravated sexual assault, without the necessity of amendment. If the indictment in this case was never amended, then there is nothing illegal about Puente's 21 year sentence. The question, then, is whether the indictment was amended, and the court found that it was not, since it was not amended on its face. "We agree with the State that an amendment to the written judicial confession that was introduced in support of the guilty plea does not amount to an amendment to the indictment."

2. Yes, the trial court erred when if failed *sua sponte* to instruct the jury that it could not convict this adult defendant for offenses committed before he turned 17, and no, the error was not harmful.

***Taylor v. State*, 332 S.W.3d 483 (Tex. Crim. App. 2011)**

Taylor began sexually assaulting the complainant when he was 15 or 16, and continued on beyond his 17th birthday. No instruction was given to the jury that it should not consider, as a basis for conviction, acts committed by appellant before his seventeenth

birthday. Appellant did not object to the charge on this basis.

The court of appeals reversed, holding that appellant was egregiously harmed by the trial court's failure to instruct on the age-based defense in § 8.07 of the Texas Penal Code.

The court of criminal appeals reversed the reversal. Under article 8.07(b) of the Texas Penal Code, one may not be prosecuted or convicted for offenses committed before reaching the age of 17, absent a waiver of jurisdiction by the juvenile court. Since that is Texas law, the trial court has a duty to so instruct the jury under article 36.14 of the code of criminal procedure, even if not requested to do so by the defense. Considering the entire record, though, the court concluded the error was harmless. "The defensive theory was that no sexual abuse occurred at any time. It is unlikely that the jury believed that Appellant sexually assaulted the victim before he turned 17 years old but not after. In this case, the jury either believed Appellant or believed the victim."

COMPETENCY

1. Trial court need not *sua sponte* order competency hearing just because defendant testifies he has no memory of the offense due to use of drugs and alcohol.

***Gonzales v. State*, 313 S.W.3d 840 (Tex. Crim. App. 2010)**

Gonzales testified at the punishment phase of his murder trial that he suffered amnesia and blackout from drinking and drugs and therefore did not remember the incident. "Must a trial judge conduct a competency hearing on his own initiative after hearing evidence that, due to alcohol or drug abuse, the defendant suffered amnesia with respect to events giving rise to the charged offense? We answer that question, 'No.'"

A competency inquiry must be made when there is sufficient evidence to raise a bona fide doubt about the defendant's legal competency. Truly bizarre behavior, or a recent history of severe mental illness, or at least moderate mental retardation, may cause a bona fide doubt. Language in previous cases has noted the possibility that there might be some "extraordinary" case in which amnesia might constitute incompetency, but in this case the court pointedly mentioned that it has never held that such an extreme situation could ever exist.

"If an extraordinary situation involving amnesia does exist, it would have to be where the amnesia compromises a defendant's ability to think rationally. That is not the claim here, nor is it the case. Appellant's asserted present inability to remember the events surrounding the murder does not impair his rational thought process and therefore does not render him

incompetent."

CONFESSIONS

1. There is no need to scrupulously honor a defendant's request to terminate questioning when the defendant is not in custody.

***Estrada v. State*, 313 S.W.3d 274 (Tex. Crim. App. 2010)**

Estrada, who according to the court of criminal appeals was not in custody, repeatedly stated his desire to end the interrogation and go home, and each time the officers neatly side-stepped the requests, and kept him talking. The court rejected various challenges to the admissibility of his confession, including that the police had not scrupulously honored his right to terminate questioning. "The need to scrupulously honor a defendant's invocation of Miranda rights does not arise until created by the pressures of custodial interrogation. Without those pressures, the police are free to attempt to persuade a reluctant suspect to talk, and the immediate termination of the interrogation after the invocation of rights is simply not required."

2. "I should have an attorney" was not a clear request for counsel.

***Davis v. State*, 313 S.W.3d 317 (Tex. Crim. App. 2010)**

When a defendant undergoing custodial interrogation makes an unequivocal request for counsel, interrogation must cease. In this case, Davis said "I should have an attorney." "We hold that appellant's statement was not, under the circumstances presented here, a clear request for counsel."

3. Confession following an illegal arrest was admissible because of attenuation.

***Monge v. State*, 315 S.W.3d 35 (Tex. Crim. App. 2010)**

It was undisputed that Monge was illegally arrested without a warrant, and that sometime after this illegal arrest, he confessed. The trial court admitted the confession, and the court of appeals affirmed. The court of criminal appeals affirmed the affirmance.

In *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975), the Supreme Court set forth four factors to determine whether a confession following an illegal arrest is the inadmissible fruit of that arrest, or whether the taint of the illegal arrest was attenuated, and the confession therefore admissible. The *Brown* factors are: "(1) whether Miranda warnings were given;

(2) the temporal proximity of the arrest and the confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the official misconduct."

In Monge's case, only one factor favored him — temporal proximity. He was informed of his arrest at approximately 7:00 am, and he confessed about two hours later. Unfortunately for Monge, this is "not a strong determining factor." And, three of the four factors weighed in the state's favor. The *Miranda* warning was given. And there was an intervening circumstance, namely, Monge's co-defendant confessed and implicated Monge. According to the court, Monge's "subsequent confession flowed at least as much from being confronted with his co-defendant's untainted confession as from his arrest." Finally, the court considered the "one of the most important factors:" purpose and flagrancy, and it weighed against Monge. The police had probable cause to arrest Monge. The arresting officer testified that he misunderstood article 14.03(a)(6) to allow a warrantless arrest. Monge went to the police station voluntarily and was cooperative, and the officers were civil and non-coercive. That Monge was told he was being arrested for murder, not capital murder, was of no importance.

"Three of the four Brown factors weigh in favor of the state. Weighing the factors together, we are satisfied that the confession in this case was sufficiently attenuated from the taint of the illegal arrest. We affirm the judgment of the court of appeals."

4. Trial court erred when it refused to instruct the jury on the voluntariness of defendant's confession under article 38.23 where he testified that he confessed because the police threatened to arrest his wife.

***Contreras v. State*, 312 S.W. 3d 566 (Tex. Crim. App. 2010)**

A defendant is entitled to a jury instruction on the voluntariness of his confession in three situations: a general instruction on voluntariness, pursuant to article 38.22, § 6; a warnings instruction, pursuant to article 38.22, § 7, and a "specific voluntariness instruction for constitutional due process," pursuant to article 38.23.

The question in this case was whether Contreras was entitled to relief under article 38.23. The trial court is required sua sponte to give a 38.23 instruction when "(1) evidence heard by the jury raises an issue of fact, (2) the evidence on that fact is affirmatively contested, and (3) the contested factual issue is material to the lawfulness of the challenged conduct in obtaining the statement claimed to be involuntary."

The evidence here did raise a fact issue whether the police threatened to arrest and prosecute Contreras's wife and whether this rendered his confession constitutionally involuntary. The case is remanded to the court of appeals for a harm analysis.

Contreras did receive an instruction under article 38.22 concerning the administration of warnings and waiver of rights, including his right to counsel. The court rejected Contreras's complaint that he was entitled to a separate 38.23 instruction because he requested an attorney and did not get one. The failure to scrupulously honor the invocation of right to counsel under *Miranda* does not constitute a violation of the United States Constitution, and therefore an instruction under article 38.23 is not required. " Article 38.22, not article 38.23, is the appropriate vehicle for obtaining a jury instruction regarding a purported violation of Miranda, to the extent such a vehicle is available."

5. Did the trial judge improperly influence the defendant's decision to testify by telling him and his lawyer: "In all candor, I would kind of like to know what he's been doing for the last eighteen years."

***Johnson v. State*, 2011 WL 72197 (Tex. App.– Dallas 2011, pet. granted)(not designated for publication)**

Johnson was arrested for a drug crime, then fled and was not prosecuted for another 18 years. The jury found him guilty, and the defense elected to go to the court for punishment. When the defense rested without calling the defendant, the court asked: "Your client doesn't want to testify?" At first the defense lawyer said: "No, Your Honor." The court asked, "Is that right, sir," and then advised: "In all candor, I would kind of like to know what he's been doing for the last eighteen years." Johnson reconsidered and testified, and the judge accused him of lying. The judge assessed 10 years imprisonment, giving as one of his reasons that Johnson had lied under oath.

The court of appeals reversed, holding that the trial court had improperly influenced him to testify in violation of his right to remain silent. A defendant has a right to remain silent at the punishment phase of his trial, and this right must be expressly waived. A failure to object does not constitute an express waiver. Although voluntarily taking the witness stand and testifying may sometimes constitute a waiver, it does not here. Counsel twice informed the court that the defendant did not want to testify, and Johnson testified only after the court informed him that he wanted to hear his testimony. "Viewing this record, we cannot conclude appellant knowingly and voluntarily waived his right to remain silent." The court could not find this constitutional error harmless beyond a reasonable doubt because the court stated its sentence was based in part on its belief that Johnson had been untruthful.

The court of criminal appeals granted the state's petition for discretionary review to decide this issue: "The Court of Appeals erred by remanding the case for a new punishment hearing because the trial court did not improperly influence Appellant to testify in violation of his right to remain silent."

CONFRONTATION

1. Is the Confrontation Clause satisfied when the trial court allows the state to present the videotape of its child-witness, supplemented with written interrogatories of the child submitted by defense counsel, and asked by a neutral questioner?

***Coronado v. State*, 310 S.W.3d 156 (Tex. App.–Amarillo 2010, pet. granted)**

Based on the testimony of a child psychologist the trial court determined that requiring the child-complainant to give testimony in Coronado's presence, or even by closed circuit television would have a significant traumatic impact on the child. Accordingly, the court concluded the child was "unavailable to testify" under article 38.071, and that therefore the state could offer the child's videotape, made by a forensic examiner, at trial. The court also allowed Coronado's lawyer to submit a list of written questions which were asked of the child by a "neutral questioner," and this was also played for the jury, in lieu of the child's live testimony.

The court of appeals affirmed Coronado's conviction.

First, the court agreed that the forensic interview was "clearly testimonial hearsay for Confrontation Clause purposes." Its primary purpose was to preserve a record of past facts or events for the purposes of a later criminal prosecution, and the follow-up interview was done to comply with article 38.071. The accuracy and truthfulness of the child's statements were crucial to the state's case.

The court-ordered procedure, here, however, was not error. "Here the trial court made a case-specific determination, based upon competent testimony, that the child was unavailable. Appellant was accorded the opportunity to, and did, submit questions to the child through the use of written interrogatories under the procedure outlined by section 2(b). Under the facts of this case, we find no error in the trial court's decision to allow cross-examination through written questions only."

The court of criminal appeals granted Coronado's petition for discretionary review to determine this question: "Does a videotaped interview of the complainant by a neutral questioner, with a list of questions submitted by the defendant over objection, satisfy the Sixth Amendment right to cross-examination in the form of 'rigorous testing in the context of an adversary proceeding?'"

2. The mere fact that a juvenile is on probation does not establish a potential bias or motivation to testify for the state; the defense must show a causal connection

or logical relationship in order to cross-examine.

***Irby v. State*, 327 S.W.3d 138 (Tex. Crim. App. 2010)**

Irby was charged with sexually assaulting a 16 year old, and his lawyer wanted to cross-examine the complainant with the fact that he was on deferred adjudication probation for aggravated assault with a deadly weapon. According to the defense, the complainant's "vulnerable status" was relevant to show bias and motive under *Davis v. Alaska*, 415 U.S. 308 (1974). The trial court found that the complainant's probation was "completely separate" from Irby's case, and therefore irrelevant to show a possible motive to fabricate., and disallowed the proposed cross-examination.

The court of criminal appeals affirmed. The mere fact of probationary status is not always and inevitably sufficient to establish bias and motive to curry favor. *Davis* is not a "blunderbuss" that trumps all other statutes and rules, but rather "a rapier that targets only a specific mode of impeachment – bias and motive – when the cross-examiner can show a logical connection between the evidence suggesting bias or motive and the witness's testimony." Here, because Irby failed to make a logical connection between the complainant's testimony concerning his encounters with Irby and his entirely separate sexual probationary status, the trial court did not abuse its discretion in excluding this impeachment evidence as irrelevant.

3. Memory loss does not render a witness absent for *Crawford* purposes, and defendant was estopped from complaining about the witness's actual absence because he did not accept the court's offer of attachment.

***Woodall v. State*, 2011 WL 709712 (Tex. Crim. App. 2011)**

Woodall was charged with aggravated promotion of prostitution and engaging in organized crime. She called Pinedo, a former dancer, but before Pinedo testified, the state advised the defense that she had no memory of the events in question because of an automobile accident. In fact that is what she said on the witness stand. After she testified she was ordered to stay in the courthouse in case she was needed to testify further, but she did not. The next day the state attempted to recall Pinedo, and when she could not be found, it introduced her grand jury testimony in which she admitted that she had danced at Woodall's club when she was a minor, and that she had had sex with customers and had allowed them to touch her for extra money. The trial court overruled Woodall's confrontation objection, and offered to attach Pinedo. Woodall declined, asserting that this would be a futile act since Pinedo's loss of memory would prevent meaningful cross-examination. Woodall was convicted, and the state relied on Pinedo's testimony to argue against probation.

The court of appeals reversed and remanded for a new punishment hearing. The state acknowledged that the grand jury testimony was testimonial under *Crawford*, and that Woodall had not had an opportunity to cross. The court of appeals went on to find that Pinedo was absent due to her memory loss, and that use of the grand jury testimony violated Woodall's right to confront and cross-examine.

The court of criminal appeals disagreed and reversed the reversal. Pinedo's loss of memory did not render her absent as that word is contemplated in *Crawford*. Pinedo was, however, actually absent at the time the state read her grand jury testimony. Woodall, however, was estopped from complaining about this absence because he did not request an attachment.

CONTINUANCE

1. A reminder: An oral motion for continuance preserves nothing.

***Wilkins v. State*, 2010 WL 4117677 (Tex. Crim. App. 2010)(not designated for publication)**

Wilkins orally moved for a continuance during trial so he could have time to get a "symbolism expert" to rebut evidence put on by the state about his tattoos and his membership in a Satanic cult, and the motion was denied.

The court of criminal appeals affirmed. "If a party makes an oral motion for continuance and the trial court denies it, the party forfeits the right to complain about the trial court's ruling on appeal."

CRIMINAL MISCHIEF

1. You don't have to be an expert to testify to how much it costs to repair your damaged property.

***Holz v. State*, 320 S.W.3d 344 (Tex. Crim. App. 2010)**

Holz was charged with criminal mischief for allowing her dogs to remain in and damage Lawrence's mobile home by urinating and defecating on the carpet. The sole source of evidence about the pecuniary loss suffered was from Lawrence, who testified that he had obtained an estimate that it would cost $2,100.00 to replace the carpet.

The court of criminal appeals distinguished the issues of admissibility and sufficiency. The evidence was *sufficient*, even though Lawrence was not an expert. Expert

testimony is not required to prove the cost of repair in a criminal mischief case.

Cases like this might pose an *admissibility* problem, though. Specifically, evidence might be inadmissible if it is from an unqualified lay person who merely states his opinion or conclusion about what the damages might be. Likewise, the evidence might be inadmissible hearsay if it is what someone else said the damages might be.

Although an objection is not required to preserve a sufficiency claim on appeal, claims involving the qualification of a witness to testify, or that the evidence is hearsay must be preserved by proper objection. No objection was made here. The case was remanded to the court of appeals to determine the sufficiency of the admitted evidence.

DISCOVERY

1. *Pena* is back, this time to consider a *Brady* claim.

Pena v. State, 2010 WL 2306699 (Tex. App. – Waco 2010, pet. granted)(not designated for publication)

Pena continues. Jose Pena was arrested in 1998 in Leon County and charged with possessing more than 50 pounds of marijuana. He was convicted and sentenced to life imprisonment. Twice the Waco Court of Appeals reversed his conviction, finding that the Due Course of Law provision of the Texas Constitution provided more protection than did the Due Process Clause of the United States Constitution. Twice the Texas Court of Criminal Appeals reversed the court of appeals, finding that the state constitutional error was not properly briefed and preserved. That court remanded to Waco, and this time Pena lost there as well.

Among other things, the court of appeals rejected Pena's *Brady* claim that his due process rights were violated when the state failed to disclose to him the audio portion of a videotape depicting his arrest which contained exculpatory statements made by Pena denying that the material he possessed was marijuana, and demanding that the material be tested. According to the court of appeals, *Brady* applies only to evidence known to the state, but unknown to the defense. *Brady* does not apply to a statement made by the defendant to law enforcement. Simple logic makes it clear that a defendant who made a statement to the police knew of both the existence and the content of the statement because he was there when it was made. "The same reasoning applies to the audio recording of Pena's conversation with Trooper Asby. Thus, we overrule Pena's first point."

The court of criminal appeals granted Pena's petition to consider this question "Whether the Court of Appeals erred in concluding that the due process protections

afforded under *Brady v. Maryland* did not apply when the State failed to disclose or provide to Appellant, after specific request, the audio portion, containing exculpatory statements made by Appellant to police, of a videotape used by the State before the jury.

2. The trial court has the authority to order the district attorney to provide copies of witness interviews recorded on DVD.

***In re District Attorney's Office of the 25th Judicial District,* 2011 WL 1235027 (Tex. Crim. App. 2011)**

The child advocacy center made a DVD recording of the complaining witness in a sexual assault case and gave a copy to the state. The trial court ordered the state to make a copy of the recording for defense counsel, and the state sought a writ of mandamus to compel the court to rescind its order. Mandamus was denied.

"The issue is whether the order to make the defense a copy is permitted under the language of the discovery statute, article 39.14(a) of the Code of Criminal Procedure." The court did have this discretion. "The court's order for the State to make the copy, which is a task both easy and inexpensive, was reasonable. It also was authorized by the statute."

DNA

1. In the densest case of the year (so far), the court holds that the state did not destroy evidence in bad faith, the state's witness did not commit perjury, and trial counsel was not ineffective.

***Ex parte Napper,* 322 S.W.3d 202 (Tex. Crim. App. 2010)**

Napper was convicted of aggravated sexual assault and aggravated kidnapping, and his appeal, in which he argued, among other things that his trial lawyer had been ineffective in several respects, including the manner in which he dealt with DNA evidence, was rejected. Later, "widespread problems were discovered with the HPD Crime Lab," and the so-called Bromwich Report was commissioned and conducted, and Napper filed a writ of habeas corpus in which he asserted, among other things, that the state consumed the entire DNA sample in bad faith, that a state's chemist perjured himself, and that his trial counsel was ineffective. "We conclude that, despite problems with the lab, applicant's claims are without merit."

The habeas court recommended that relief be granted because the state destroyed "potentially useful evidence" in bad faith, in violation of *Arizona v. Youngblood*, 488 U.S. 51 (1988) and *Illinois v. Fischer*, 540 U.S. 544 (2004). After pages and pages of discussing

what the phrase "potentially useful evidence" might mean, the court finally decided not to decide whether the consumed DNA evidence in this case met the threshold showing of potential usefulness. Although that showing might be a "worthy concept to apply in a future case," the court moved on to the question of bad faith, and found none.

The habeas court found that the chemist's frequency estimate at trial did not constitute false testimony or possible perjury, and the court of criminal appeals agreed. The court discussed variously the different standards for: the knowing use of perjured testimony on direct appeal; the knowing use of perjury on habeas corpus; the unknowing use of perjured testimony on habeas corpus; false testimony as opposed to perjured testimony; and false testimony in the actual innocence context. The court decided that for Napper to obtain relief under the most favorable standard, he would have to show that the witness was a member of the prosecution team, that he committed perjury, and that he did not have an opportunity to discover the perjury to present his claim in an earlier proceeding. Napper loses here because he did not prove perjury.

Finally, the habeas court determined that trial counsel was not ineffective, and the court of criminal appeals agreed. The court did find that he performed deficiently in not hiring a consulting DNA expert, in not acquiring sufficient DNA knowledge on his own, in not presenting his own expert testimony on DNA, and in not adequately cross-examining the state's DNA expert. Napper loses this argument, though, because he cannot show prejudice.

2. "There is no free-standing due-process right to DNA testing."

***Ex parte Gutierrez*, 2011 WL 1662383 (Tex. Crim. App. 2011)**

Gutierrez was convicted of capital murder and sentenced to death. After the court of criminal appeals affirmed his conviction and denied relief on his application for writ of habeas corpus, he filed a motion for post-conviction DNA testing under article 64 of the code of criminal procedure. The trial court denied the motion, and the court of criminal appeals affirmed.

"There is no free-standing due-process right to DNA testing, and the task of fashioning rules to 'harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice' belongs 'primarily to the legislature.'"

The trial judge here did not err in refusing Gutierrez's request to appoint counsel because "reasonable grounds" did not exist for filing the motion for post-conviction DNA testing. A chapter 64 proceeding is not a criminal trial, and therefore, when deciding

whether there are reasonable grounds for testing, the trial court may properly consider accomplice witness testimony and statements by the defendant that would not be admissible at the trial on the merits. Here, this evidence was highly probative on the issue of the murderer's identity, which is a necessary consideration in determining the right to DNA testing.

Additionally, Gutierrez was "at fault" in not seeking DNA testing at his trial. Instead he made a strategic decision to argue to the jury that the local police department "fell down on the job." The trial judge therefore did not err in finding that Gutierrez failed to meet the unavailability test.

Nor did Gutierrez establish by a preponderance of the evidence that he would not have been convicted if DNA testing provided exculpatory results. The DNA testing Gutierrez sought would not have established his innocence. First, the scenario that Gutierrez relies upon as proof of his innocence is not plausible, and the trial judge was not required to accept it. Secondly, even if it were plausible, it does not disprove his guilt as a party. "statute does not authorize testing when exculpatory testing results might affect only the punishment or sentence that he received."

> In sum, granting DNA testing in this case would "merely muddy the waters." Appellant does not seek testing of biological evidence left by a lone assailant, and a third-party match to the requested biological evidence would not overcome the overwhelming evidence of his direct involvement in the multi-assailant murder.

3. Can the trial court order a new trial based on post-conviction DNA testing.

***State v. Holloway*, 329 S.W.3d 247 (Tex. App.–Texarkana 2010, pet. granted)**

Holloway was convicted of manslaughter, his case was affirmed on appeal, and the mandate issued in 2004. Six years later the trial court heard a motion for post-conviction DNA testing and then ordered a new trial after finding that Holloway would probably not have been convicted in light of the results.

The court of appeals reversed. The trial court lost its plenary power to grant a new trial 75 days after convicting and sentencing Holloway. Nor does Chapter 64 authorize the trial court to grant a new trial. This statute for DNA testing, but does not provide a vehicle for relief based on that testing. "The vehicle for relief after obtaining test results that constitute affirmative evidence of innocence is article 11.07 for noncapital felonies and article 11.071 for capital murder." The court of appeals also disagreed with the trial court's conclusion that the fact that the victim's blood or DNA was not found on the knife entitled

Holloway to relief. "The fact that the victim's blood or DNA was not found on the knife in Holloway's vehicle does not create a reasonable probability that Holloway was innocent."

The court of criminal appeals granted Holloway's petition for discretionary review to determine these two issues:

1. The Sixth Court of Appeals erred when it determined that the trial court had no jurisdiction to order a new trial under Chapter 64 of the Texas Code of Criminal Procedure.

2. The Sixth Court of Appeals erred when it determined that the trial court erred when it concluded that there was a reasonable probability that Holloway would not have been convicted if the DNA results had been available at trial.

DRUG OFFENSES

1. Are EMIT tests reliable enough to be admitted without confirmation?

***Somers v. State*, 333 S.W.3d 747 (Tex.App.–Waco 2010, pet. granted)**

Somers was tried for intoxication manslaughter and sought to admit evidence that the complainant was using cocaine at the time of the accident. DPS analyzed the complainant's blood by performing an enzyme-multiplied immunoassay technique (EMIT) which screens for classes of drugs. The test was positive for cocaine, its metabolites, and the amphetamine class. A year or so later, DPS conducted a gas chromatograph test to confirm the presence of the drugs, but this test was negative. Since the confirmatory test was negative, DPS could not testify that the complainant had cocaine in her system. DPS also testified that the failure to find cocaine in the blood a year later could have been because the sample had no preservative in it. The trial court excluded the EMIT test results.

The court of appeals affirmed. "EMIT test results are not reliable without a positive confirmation test. The trial court did not abuse its discretion in excluding the test results."

The court of criminal appeals granted Somers petition for discretionary review to decide this question: "Did the Court of Appeals err in holding that EMIT test results are not reliable without a confirmation test and therefore deny appellant his constitutional rights to present a defense?

DWI

1. Must the affidavit that supports a search warrant for blood state the time the

defendant was stopped or arrested?

***Crider v. State*, 2010 WL 1294094 (Tex. App.–Dallas 2010, pet. granted)(not designated for publication)**

Crider was arrested on June 6, 2008, for DWI, field-tested, and he refused the breath test. The arresting officer prepared an affidavit to search for blood, and the warrant was signed at 1:07 am on June 7, 2008. Crider argued in his motion to suppress that the affidavit was insufficient because it did not state the time he was arrested or stopped. The court of appeals disagreed:

> Viewing the facts and circumstances within the four corners of the affidavit, specifically the factual time-line given by the officer, interpreting the affidavit "in a common sense and realistic manner," and drawing all reasonable inferences, we conclude the June 7, 2008, 1:07 a.m. finding of probable cause by the magistrate was of reasonable proximity to the June 6, 2008 arrest of appellant. We cannot say it was unreasonable for the magistrate to presume some evidence of intoxication would be found in appellant's blood when the warrant was signed.

The court of criminal appeals granted Crider's petition for discretionary review to determine this question: "Because the affidavit did not contain the time that Appellant was stopped or arrested, did the search warrant issue without probable cause?"

2. Merging from right to left is not a "turn" that requires a signal.

***Mahaffey v. State*, 316 S.W.3d 633 (Tex. Crim. App. 2010)**

Mahaffey was driving in the right hand lane when he came upon a sign that said: "Lane Ends-Merge Left," and that is what he did, though without a signal. The police officer stopped Mahaffey because he merged without signalling, and later arrested him for DWI. The trial court denied Mahaffey's motion to suppress, and the court of appeals affirmed, finding that Mahaffey's merge-movement constituted a "turn," and that it therefore should have been accompanied with a turn signal.

The court of criminal appeals disagreed. "No statute provides or suggests that a driver who follows the directions of a highway traffic sign stating "Lane Ends-Merge Left" is making a "turn" under the plain language of the Transportation Code. We therefore reverse the contrary holding of the court of appeals."

The court refused the state's suggestion to affirm the decision below because

Mahaffey's movement was a "lane change," and that this required a signal. The court did not grant review on that question.

3. Reasonable suspicion, a minimal level of justification.

***Foster v. State*, 326 S.W.3d 609 (Tex. Crim. App. 2010)**

The trial court found that the police had reasonable suspicion to detain Foster because he "lurched" forward when stopped at a red light at 1:30 am on Sixth Street in Austin. The court of appeals disagreed and reversed.

The court of criminal reversed the reversal. Reasonable suspicion requires only "some minimal level of objective justification" for the stop in this case, and the court found the police had reasonable suspicion to believe Foster may have been intoxicated, based on the time of night, the location, the officer's training and experience, and Foster's aggressive driving. The officer here articulated "something more than an inchoate and unparticularized suspicion or hunch" that objectively justified appellant's detention.

4. Intoxicated on alcohol, or controlled substances, or drugs, or all of the above.

***Ouellette v. State*, 2010 WL 3377774 (Tex. App. – Austin 2010, pet. granted)(not designated for publication)**

The police arrested Ouelette for DWI and a search of her car disclosed Soma and Darvocet pills. She admitted they were her pills, but denied having taken them in the past month. The trial court instructed the jury that "[i]ntoxicated means not having the normal use of physical or mental faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, or a combination of two or more of those substances into the body." On appeal, Ouelette complained that there was no evidence at trial to support submission of this instruction, since no one testified that these drugs could have an intoxicating effect, or that her behavior was consistent with one who was intoxicated on drugs or drugs and alcohol.

The court of appeals affirmed the conviction. First, the state was not required to prove the substance causing intoxication. Second, assuming the type of intoxicant was relevant, the charge in this case was proper because, notwithstanding Ouelette's denial, there was evidence that medications were found in the car, these medications were prescribed to her, she had taken them in the past, and she was intoxicated. Finally, Ouelette was not harmed by this charge, since the recognition of intoxication requires no expertise, and since there was sufficient evidence of her intoxication by reason of her consumption of alcohol.

The court of criminal appeals granted Ouelette's petition for discretionary review to consider the following questions:

1. In a driving while intoxicated case, where the evidence is legally sufficient to support a conviction on the theory that the defendant was intoxicated by reason of the introduction of alcohol into her body, is it proper for the trial court, in its charge, to also authorize a conviction on an alternative theory that the defendant was intoxicated by reason of the introduction of a drug, or a combination of alcohol and a drug into her body, where the evidence merely shows that medications prescribed for the defendant were found in her car after her arrest?

2. Assuming that it was error for the trial court to authorize a conviction on the alternative theory that the defendant was intoxicated by reason of the introduction of a drug, or a combination of alcohol and a drug into her body, did the Court of Appeals conduct a proper harm analysis?

5. Who has what burden to prove that blood was taken by a qualified person?

***State v. Robinson,* 334 S.W.3d 776 (Tex. Crim. App. 2011)**

The state stipulated that there was no arrest warrant and accepted the burden of going forward by calling Vercher, the arresting officer. Among other things, the officer testified that he did not get the name of the person who took Robinson's blood, nor did he know that person, but that the person was a nurse. The trial court granted Robinson's motion to suppress the blood test, finding that the state did not meet its burden of proving that a qualified person took the blood.

The state gave notice of appeal, and the court of appeals affirmed.

> Based on the trial judge's statements and the record as a whole, we disagree with the State that the motion to suppress was granted only because the alleged nurse did not testify. It instead appears that the trial court did not believe the State met its burden of proof because Vercher's testimony about who drew the blood was inconsistent, not credible, or both. Because we must almost totally defer to the trial court's evaluation of Vercher's credibility and demeanor, and the State assumed the risk of nonpersuasion, we cannot say that the trial court erred or abused its discretion in granting the motion to suppress. We overrule the State's issue and affirm the trial court's order.

The court of criminal appeals reversed. When the state stipulated that this was a warrantless arrest, it relieved the defense of proving that the seizure violated the Fourth

Amendment. The issue here, though, was whether the blood draw was done by an unqualified person, in violation of the statute, not the constitution. The defense had the burden of establishing this *statutory* violation, and it failed to meet that burden here. "Vercher's testimony that he did not remember who drew the blood sample is not evidence of a statutory violation. Even if the trial court disbelieved that part of Vercher's testimony stating that a nurse drew the blood, there is still no evidence that the person who drew the blood was not qualified. Since appellee never produced evidence of a statutory violation, the State never had the burden to prove that the blood sample was drawn by a qualified person."

6. Can the trial court define "operate" in its charge to the jury?

***Kirsch v. State*, 2010 WL 4354033 (Tex. App.-Texarkana 2010, pet. granted)(not designated for publication)**

A deputy was dispatched to an intersection where he saw Kirsch sitting atop his motorcycle trying, unsuccessfully, to kick start it. No one saw the motorcycle running. The trial court charged the jury that "operate" means "to exert personal effort to cause the vehicle to function." The court of appeals found no error in this instruction.

The court of criminal appeals granted Kirsch's petition for discretionary review to answer these questions:

> 1. Is it necessary to define the term "operate" in the guilt/innocence jury charge in a DWI case?
>
> 2. Did the Court of Appeals err in approving a definition of "operate" in the guilt-innocence jury charge in a DWI case?

7. Yes, the officer did stop the defendant based on a "hunch" arising from a report from an anonymous tipster, but no, that was not a problem, since the stop was "consensual," and because, when questioned about his involvement in an accident the defendant said, "Yes, I'm drunk and should not have been driving," all of which renders any concern about lack of personal knowledge and reasonably trustworthy information "an academic exercise."

***State v. Woodard*, 2011 WL 1261320 (Tex. Crim. App. 2011)**

The police received a call from an anonymous tipster reporting a one car accident at an intersection in Burkburnett, and two officers were dispatched in separate cars. On the way they received another dispatch that the driver was leaving the scene dressed in a black

t-shirt and jeans, and had been last scene at another intersection. One of the officers headed in that direction and saw Woodard walking on the sidewalk about six to eight blocks from the accident scene, and he matched the "broad" description given by the tipster. Acting on a "hunch" that Woodard was the one he was looking for he stopped him and asked if he had been involved in the accident, and Woodard answered, "Yes," and "I'm drunk and should not have been driving." The officer observed all the usual symptoms, and was advised by a fellow officer that the wrecked car contained alcoholic beverages, he asked Woodard to perform field sobriety tests, and, based on Woodard's performance, he arrested him for DWI.

The trial court granted Woodard motion to suppress, but the court of appeals reversed, finding the initial encounter "consensual." The court of criminal appeals affirmed.

The officer was freed to stop, approach, and question Woodard. There was no display of a weapon, physical touching, multiple officers, or otherwise offensive contact, so this was not a seizure, as a matter of law. As a result, the officer did not need any information to justify the stop and inquiry. Any concern about the lack of credible information originating from an anonymous tipster and the officer's lack of personal information "are red herrings," and "immaterial."

EXPERTS

1. Expert testimony is admissible if it assists the jurors; that is, if it "can expand their understanding in a relevant way."

***Coble v. State*, 330 S.W.3d 253 (Tex. Crim. App. 2010)**

On appeal Coble argued that the testimony of A.P. Merilatt was inadmissible under Rule 702 because it is common knowledge that prison inmates have opportunities to be violent. The court of criminal appeals disagreed. Expert testimony need not be excluded just because the subject matter is within the general comprehension of most jurors, as long as the witness has some specialized knowledge that will "assist" the jurors. "It is only when the expert offers no appreciable aid that his testimony fails to meet the Rule 702 standard. The question under Rule 702 is not whether the jurors know something about this subject, but whether the expert can expand their understanding in a relevant way."

2. Although it may be that an indigent's motions for appointed experts and investigators need not be supported by affidavits from those experts or investigators, it may also be that the indigent bears the burden of showing his need for same in some form or fashion.

***Asberry v. State*, 2011 WL 1158587 (Tex. Crim. App. 2011)(not designated for publication)**

Charged with murder, Asberry filed motions for the appointment of an investigator and a DNA expert, which were denied by the trial court. The court of appeals affirmed, holding that Asberry failed to properly support his motions. "Asberry did not attach any affidavit, expert or otherwise, or any other evidence to support his motions, offering nothing more than counsel's undeveloped assertions."

The court of criminal appeals affirmed the affirmance. The court made it clear that an indigent is not required to provide an affidavit from an expert. But, contrary to what Asberry suggests in this case, the court of appeals did not require an expert's affidavit. Instead, that court held that Asberry's motions were insufficient to establish his needs for an expert or an investigator. "It merely required some evidence in support of the motion. Because the court of appeals did not hold that a request for an investigator or DNA testing at state expense must include an affidavit from an expert, and appellant's grounds for review are contingent upon a holding that there was such a requirement, we hold that appellant is not entitled to relief."

3. Is "grooming" evidence admissible?

***Morris v. State*, 2010 WL 2224651 (Tex. App.– Eastland 2010, pet. granted)(not designated for publication)**

A Texas Ranger was allowed to give his opinion that certain things Morris did constituted "grooming" the complainant. The court of appeals affirmed, finding that the witness's "training, background, and experience" sufficiently qualified him to give this testimony.

The court of criminal appeals granted Morris's petition for discretionary review to consider this issue: "The Court of Appeals erred in holding that purportedly expert testimony about "grooming" was admissible where there was no showing that the study of "grooming" was a legitimate field of expertise."

4. Did the trial court err when it excluded Dr. Malpass's testimony on the unreliability of eyewitness testimony?

***Tillman v. State*, 2010 WL 2103938 (Tex. App. – Houston [14 Dist.] 2010, pet. granted)(not designated for publication)**

The trial court excluded the expert testimony of Dr. Roy Malpass concerning the

unreliability of identification testimony, and the court of appeals affirmed:

> Dr. Malpass demonstrated no knowledge of the facts of this case and made no effort to connect his opinion with those facts. Instead, Dr. Malpass's opinion testimony was offered only as general educational material for the jury. Because Dr. Malpass's opinion testimony was not tied to the facts of the case, we conclude it would not help the jury understand other evidence or determine a fact at issue and therefore was not relevant. [citation omitted] Accordingly, we hold the trial court's decision to exclude Dr. Malpass's testimony was within the zone of reasonable disagreement and overrule appellant's first issue.

The court of criminal appeals granted Tillman's petition for discretionary review to consider the following issue: "The Court of Appeals upheld the trial court's decision to disallow the testimony of Dr. Malpass based largely on the fact that Dr. Malpass "demonstrated no knowledge of the facts of this case and made no effort to connect his opinion with those facts." This is incorrect. This ruling appears to conflict with this Court's ruling in *Kelly v. State*, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992).

EXTRANEOUS OFFENSES

1. Prosecutors need not give notice of intent to use "same transaction context evidence" at the punishment phase of the trial.

***Worthy v. State*, 312 S.W.3d 34 (Tex. Crim. App. 2010)**

Appellant pleaded guilty to sexual assault and went to the jury for punishment. The state offered evidence that appellant conducted at least part of the sexual relationship at the home of his brother, a registered sex offender. Among other things, appellant objected that the state had not provided notice of its intent to use this extraneous misconduct, as required by article 37.07, § 3(g) of the code of criminal procedure.

The court of appeals and the court of criminal appeals affirmed the trial court's decision to admit this misconduct. "[W]e hold that Article 37.07, § 3(g), which explicitly states that the notice requirement applies 'in the same manner required by Rule 404(b),' refers to the scope of the evidence offered as well as to the timing of the evidence offered. Therefore, because pretrial notice of 'same-transaction contextual evidence' is not required under Rule 404(b), it is also not required under Article 37.07, § 3(g)."

FALSE STATEMENT TO OBTAIN PROPERTY OR CREDIT

1. The best indicator of the allowable unit of prosecution is the focus or gravamen of the offense – here the act of making a materially false statement.

***Jones v. State*, 323 S.W.3d 885 (Tex. Crim. App. 2010)**

Jones made two loan applications for two loans, and on each application he made three false statements. The state obtained six convictions – one for each false statement – and Jones appealed, asserting that double jeopardy principles limited his exposure to one conviction per loan application. The court of appeals agreed and reversed the extra convictions.

The court of criminal appeals reversed the reversal. To determine how many offenses Jones committed, the court must determine "the allowable unit of prosecution for the statute that proscribes the offense." This is purely a question of statutory construction.

> We conclude that the appropriate unit of prosecution is the "materially false or misleading statement," not the loan application. Each "materially false or misleading statement" constitutes a separate offense.

FORGERY

1. Why you became a criminal lawyer: to learn about *ejusdem generis* and commercial instruments.

***Shipp v. State*, 331 S.W.3d 433 (Tex. Crim. App. 2011)**

As Shipp was pushing a shopping cart with a computer out the front door of Wal-Mart he was confronted by a clerk who asked for a receipt. Shipp presented a receipt, that turned out to be forged, and he was arrested and later charged with forgery. Specifically, the amended indictment alleged that he passed a "commercial instrument," namely a store receipt, that purported to be a valid Wal-Mart receipt indicating the sale of merchandise.

Shipp argued on appeal that the receipt was not a "commercial instrument," but was instead only a "writing," and that therefore he should have been tried for a misdemeanor, not a felony. The court of appeals agreed, and found the evidence insufficient to support the verdict. In so deciding, the court of appeals relied on its interpretation of the doctrine of *ejusdem generis*. Specifically, a receipt is not a commercial instrument because, unlike the other items expressly mentioned in the statute in question – wills, codicils, deeds, deeds of trust, mortgages, security instruments, security agreements, security instruments, checks, credit cards, etc. – it did not grant or cede a present or future benefit or right.

The court of criminal appeals disagreed and reversed the reversal. *Ejusdem generis* is merely an aid to statutory construction, and not an end in itself. It must also be remembered that penal code statutes are not to be strictly construed, and that, when interpreting a statute, the court is required to apply the Code Construction Act, which includes a reference to legislative intent.

> We conclude that the particular "commercial instruments" delineated by Section 32.21(d) are not so distinctly and narrowly drawn as to define a class to which a store receipt plainly does not belong. To invoke the rule of *ejusdem generis* to exclude such a patent example of a "commercial instrument" would serve to defeat rather than effectuate the intent of the Legislature to impose a higher range of penalty for any forgery that involves, as the Practice Commentary characterized it, "documents of commerce." We hold that a store receipt does constitute an "other commercial instrument" for purposes of Section 32.21(d). The court of appeals erred to conclude otherwise.

GANGS

1. Injunctions against "gang signs" and "gang clothing" are not unconstitutional.

Martinez v. State, 323 S.W.3d 493 (Tex. Crim. App. 2010)

A district court in Wichita Falls entered a temporary order enjoining Martinez and certain members of the Varrio Canales street gang from engaging in certain activity, including going to certain places without other gang members, and from using words, phrases, gestures, and signs known to be identified with the gang. Martinez, through his attorney, agreed with the order, and agreed he had no right to appeal. Later Martinez was charged with violating various provisions of the temporary injunction by entering the property of another gang member, by making hand gang signs and other forms of prohibited communication or wearing clothes that identify membership within the gang, and by associating, driving, or appearing in public view in a gang zone with another defendant identified in the gang. In another case Martinez was charged with violating the permanent injunction.

Martinez was convicted in the trial court and the court of appeals affirmed. The court of criminal appeals affirmed.

Martinez was estopped from raising any claims under the permanent injunction because he agreed to it in order to terminate the litigation.

Martinez raised three challenges to the prosecutions based on the temporary injunction: separation of powers, violation of the First Amendment, and void for vagueness. The court of criminal appeals rejected each challenge.

"Because the Legislature has established a policy and has set forth a primary fixed standard, we hold that there is no separation of powers violation."

The court found that the provision in question was content-based, and that therefore, it had to be narrowly tailored to serve a compelling state interest. And it was. First, there was a compelling state interest: the street gang constituted a public nuisance, and the state has a recognizable compelling interest in insuring the safety of citizens in the safety zone by preventing crime. Second, the provision was narrowly tailored, preventing a particular type of conduct and communication based on relevant circumstances, and it was narrowed by geography.

Finally, the provision was not void for vagueness. Ordinary persons had fair warning of what was prohibited. Explicit standards were provided for the law's application. It was sufficiently clear that Martinez could understand that hand gang signs and clothing were prohibited. Nor did the law permit arbitrary and discriminatory enforcement.

GRAND JURY

1. Questioning by unauthorized persons was harmless error where it had no substantial and injurious effect on the grand jury's decision to indict.

***Mason v. State*, 322 S.W.3d 251 (Tex. Crim. App. 2010)**

After learning that two police officers asked several question of Mason when he testified before the grand jury, counsel filed a motion to quash the indictment, which was overruled. The court of appeals reversed the conviction for capital murder, and the court of criminal appeals reversed the reversal.

Article 20.04 strictly defines those who may question witnesses before the grand jury, and, as the state here conceded, the two police officers do not satisfy the definition. This is a statutory violation, so harm is determined by reference to Rule of Appellate Procedure 44.2(b) which asks whether a substantial right was affected when the error had a substantial or injurious effect or influence.

> The issue presented in this case is what should be examined for evidence of an effect or influence? Should the subject of our harm analysis be the grand

> jury's decision to indict or the petit jury's guilty verdict? The court of appeals chose to direct its attention to the product of the grand jury proceedings, while the State asserts that the harm analysis should focus solely upon the verdict.

The court of criminal appeals agreed with the court of appeals: "the proper subject of a harm analysis is the product of those proceedings: the charging decision." The higher court, however, disagreed with the result reached by the court below. The error was harmless because the court could not detect a substantial and injurious effect on the grand jury's decision to indict Mason. The details before the grand jury were established by the prosecutor, and the grand jury could indict without the additional evidence elicited by the policemen. "Therefore, we cannot say that 'the violation substantially influenced the grand jury's decision to indict' Appellant, nor is there 'grave doubt as to whether it had such effect.'"

HABEAS CORPUS

1. Appellate court had jurisdiction to hear appeal from denial of pretrial writ asserting that the initial indictment could not toll a subsequent indictment for a different offense.

***Ex parte Brooks*, 312 S.W.3d 30 (Tex. Crim. App. 2010)**

Brooks's original indictment for theft was dismissed, and after she was re-indicted for aggregated theft, she filed a pretrial writ of habeas corpus, asserting that the second indictment was barred by the statute of limitations, and that the first indictment could not toll the statute because it charged a separate offense, and addressed different conduct, acts, and transactions than the second indictment. The court of criminal appeals reversed the court of appeals which had held that it had no jurisdiction to hear the claim because it was merely an attack on the sufficiency of the state's anticipated tolling argument. The case was remanded to the court of appeals to consider Brooks's argument.

2. An application for writ of habeas corpus may be sworn to by the petitioner himself, or his lawyer.

***Ex parte Rendon*, 326 S.W.3d 221 (Tex. Crim. App. 2010)**

Rendon filed an application for habeas corpus under article 11.07, but it was signed and sworn to only by his lawyer, and not by Rendon himself. This appears to be permissible under articles 11.12 and 11.13. Another provision, though – article 11.14 says that the application must be signed and sworn to, "according to the belief of the petitioner."

The court of criminal appeals ordered that the application be filed and set for submission to determine whether an applicant must himself sign an application presented on his behalf.

> We hold that the applicant need not personally verify a post-conviction writ application; by express statutory provision, a petitioner who is not the applicant may verify the application, and may do so "according to [his] belief[.]" This is so regardless of whether the applicant has exclusive personal knowledge of the facts underlying his habeas claim or claims. Nevertheless, we hold that the writ application was not properly verified by the applicant's attorney in this case. Because this deficiency arose from a problem with our prescribed writ application form, however, and through no fault of the applicant or his attorney, we will dismiss this writ application without prejudice so that the applicant can re-file the application in accordance with the instructions to follow.

3. Recusal rules apply in habeas proceedings.

***Ex parte Sinegar*, 324 S.W.3d 578 (Tex. Crim. App. 2010)**

Sinegar was first placed on deferred adjudication, then adjudicated and sentenced to 75 years imprisonment. One of the allegations in the motion to adjudicate was that Sinegar had threatened the trial judge. Eventually he filed an 11.07 writ in which he alleged, among other things, that his lawyer was ineffective because he did not try to recuse the judge. The same trial judge also heard the writ. Sinegar moved to recuse the judge from hearing the habeas, and the court of criminal appeals set the matter to determine whether Sinegar's pleadings complied with Rule 18a, and, if so, whether the trial court was required to address the motions as dictated by Rule 18a before the court of criminal appeals decides other issues raised in the writ.

> We hold that the requirements of Rule 18a, regarding the recusal of judges, apply in habeas proceedings conducted at the trial level and that applicant satisfied those requirements here. Consequently, we remand this case for the trial judge to rule on applicant's motion to recuse pursuant to Rule 18a(c).

4. Defendant who pleaded guilty to felony DWI, but who had only one prior conviction, was actually innocent of the felony, and was not estopped from challenging the felony by a writ.

***State v. Wilson*, 324 S.W.3d 595 (Tex. Crim. App. 2010)**

Wilson pleaded guilty and agreed to four years probation. The state filed a motion to revoke, and Wilson filed an application for writ of habeas corpus, asserting that one of the two priors was a probated sentence in 1983 that had never been revoked, and was therefore not available to enhance. The trial court agreed and granted relief on the writ. The court of appeals affirmed, and the court of criminal appeals affirmed the affirmance.

In a case like this, "actual innocence" means "'guilty only of' a lesser-included offense or 'ineligible for' the sentence assessed, or both." The state had only one conviction to enhance with, and therefore Wilson's enhanced DWI was a class A misdemeanor, not a felony.

The court also rejected the state's argument that Wilson was estopped by contract from challenging his felony conviction, since he benefitted from the original plea bargain. "Regardless of any benefit that may have accrued as a direct result of the plea agreement, when a defendant has been convicted of an offense for which he claims that he is 'actually innocent, and he proves it, he will be relieved from the restraint of the conviction even though he may have pleaded guilty and confessed.'" Here, Wilson proved that he was not guilty of the felony, and even though he pled guilty pursuant to a plea bargain, "the trial court correctly relieved him from the restraint of the felony conviction."

5. Testimony can be proven scientifically to be wrong, but it may not be "false," and, even if it is, it can still be harmless.

***Ex parte Chavez*, 2010 WL 4638619 (Tex. Crim. App. 2010)(not designated for publication)**

Chavez was arrested for aggravated sexual assault in 1992. The complainant identified him, and a criminalist for the Houston Police Department testified that, based on a microscopic examination, one hair found at the scene was "consistent" with a known hair sample pulled from Chavez's head. On cross-examination she admitted that she "cannot identify it as Mr. Chavez's hair." The witness also testified that there was not enough root on the hair to perform a DNA analysis. The prosecutor emphasized the witness's testimony during summation, arguing that hair found in the complainant's apartment "matched or was consistent with" Chavez's hair. Chavez was convicted and sentenced to 35 years imprisonment.

In 2006 Chavez filed a motion to have the hair tested for DNA and the motion was eventually granted. The results excluded Chavez as the source of the hair the criminalist testified at trial was "consistent" with his. Chavez then filed a writ asserting that he was entitled to a new trial because the criminalist had presented false testimony when she testified that the hair was consistent with Chavez's. The trial court recommended that relief

be granted.

The court of criminal appeals denied relief. "'Testimony that is untrue' is one of many ways jurists define false testimony." However perjury or false testimony are defined, though, the criminalist's testimony "was not proven to be false." She clearly stated that she could not positively identify the hair as belonging to Chavez, and that it consistent and similar. "Lind's testimony is not false just because post-conviction DNA testing later proved that the hair did not come from Chavez.FN14 The similarities between the physical characteristics of the unknown hair and Chavez's hair identified by Lind at Chavez's trial have not been refuted."

Furthermore, even if a due process violation were shown, the applicant must still show the error was harmful. The DNA results do not exonerate Chavez. Just because this was not his hair does not "conclusively" prove that he did not commit the sexual assault. And, the complainant's "consistent and repeated identifications militate against a finding of harm." Although the court did not say it directly, it did suggest that these factors and others were "overwhelming" evidence of Chavez's guilt independent of the hair testimony. Finally, the court of criminal appeals reconsidered the alibi evidence Chavez presented at trial and found it not believable. "Based on the foregoing, even if we assumed that Chavez has shown a due process violation, we conclude he cannot show harm."

6. The district clerk has a ministerial duty to file applications for writs of habeas corpus even when earlier applications in the same cause are pending.

***Benson v. District Clerk*, 331 S.W.3d 431 (Tex. Crim. App. 2011)**

The parties were ordered to address whether a district clerk has a ministerial duty under Art. 11.07 of the Texas Code of Criminal Procedure, to receive, file, and timely forward to this Court applications for writs of habeas corpus when earlier applications in the same cause are pending before this Court.

The district clerk responded that such a duty exists under Tex.Code Crim. Proc. art. 11.074 § 3(b). We agree.

7. Where a habeas applicant demonstrates a reasonable likelihood that the state's evidence knowingly gave the jury a false impression, relief will be granted without the need of showing harm, if the state has hidden the evidence of its wrongdoing so effectively that the issue could not have been raised on direct appeal.

***Ex parte Ghahremani*, 332 S.W.3d 470 (Tex. Crim. App. 2011)**

Ghahremani was convicted of sexually assaulting two young girls, and one of their fathers testified at punishment that his daughter's behavior had changed afterwards, and that she had been hospitalized, had had therapy, left school, and was sent away to wilderness school for treatment. Ghahremani was sentenced to 28 and 20 years imprisonment, and he later filed a writ. His lawyer obtained the DA's file by Public Information request and inside was a folder marked "work product" that contained a police report reflecting a call made to the girl's home where her father had reported that, after the incident with Ghahremani, but before trial, the girl had had a lengthy sexual relationship with a different adult male, had been involved with a gang and illegal drugs. It was clear that an assistant district attorney knew about this police report before trial. The prosecutor who tried the case also knew about the police report but believed it was irrelevant. He doubted the truth of his complainant's allegations against the second man, and he acknowledged that he could have intended to convince the jury that Ghahremani was solely responsible for the psychological injuries to the complainant.

Ghahremani's writ asserted that the state had failed to disclose favorable evidence, and had misled the jury by suggesting that all the girl's problems were caused by him when in fact her problems could have been partly due to mistreatment from the other man. The trial court recommended that relief be granted, and the court of criminal appeals agreed.

Ghahremani's claims were "legally discrete." The court disagreed that the undisclosed evidence was *Brady*, since it was not "inherently exculpatory," nor would it have generally impeached any witness. Instead the court addressed the matter as a "false-testimony claim."

Using false testimony either to convict or to punishment is a due process violation. There is no requirement that the testimony be "perjurious;" it is enough that it give the jury a false impression. Texas goes beyond federal precedent, allowing a defendant to prevail even when the state did not knowingly present false evidence. The state's knowledge is still relevant, though, when determining the standard of review. When the state knew that its evidence was false, the applicant must prove a "reasonable likelihood" that the evidence affected the outcome.

The state argued that it did not mislead the jury because the relationship with the second man was the product of the sexual assault by Ghahremani. The convicting court rejected this argument and the court of criminal appeals deferred to that determination. There is a reasonable likelihood that this misleading evidence resulted in a harsher punishment. And, even though the false testimony did not directly involve the second complainant, there was also a reasonable likelihood that it affected the verdict in that case

too.

Two different standards of harm apply, depending on whether the applicant had the opportunity to raise the issue on direct appeal. Where he did have that opportunity, to prevail on habeas, he must prove by a preponderance of the evidence that the false evidence contributed to the sentence. Where he was unable to raise the issue on direct appeal, he need not show harm. This case falls into the latter category. Relief is granted, and a new punishment hearing is ordered.

8. Proving actual innocence: "A Herculean task."

***Ex parte Spencer*, 2011 WL 1485448 (Tex. Crim. App. 2011)**

Spencer's writ of habeas corpus asserted, among other things, that he was actually innocent, and the trial court recommended that relief be granted. The court of criminal appeals disagreed.

There are two types of actual innocence claims. In the *Schlup*-type claim, innocence is tied to a showing of constitutional error; the applicant must show that the constitutional error probably resulted in the conviction of one who was actually innocent. The *Herrera*-type is a bare innocence claim based solely on newly discovered evidence, and has two prongs. First, the applicant must show the evidence is newly available or newly discovered, and that it "unquestionably establishes his innocence." Then, and only then, the court must compare the new evidence to the evidence presented at trial to determine whether the applicant has shown by clear and convincing evidence that no reasonable juror would have convicted in light of the new evidence.

The trial court recommended that relief be denied on Spencer's *Schlup* claim because the *Brady* and the ineffective assistance claims were unfounded. The court of criminal appeals agreed.

This left the *Herrera*-type claim. Spencer brought forth several types of evidence, including from a forensic optometrist who testified that it was too dark and distant for the eyewitnesses to have actually seen what they claimed at trial to have seen. Such evidence attempts to discredit the witnesses, but it does not "affirmatively establish his innocence." As such, there is no need to compare the new evidence with the old.

Judge Price concurred, pointing out that habeas is an extraordinary remedy that seeks relief that flies in the face of the state's interest in finality. As a result, proof of a bare claim of actual innocence "should be 'a Herculean task.'" The standard is "exceedingly rigorous." He noted that two types of actual innocence are typically

presented: DNA and recantation.

HARASSMENT

1. Harassment statute not constitutional as applied to appellant.

***Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010)**

Subsection (a)(4) of § 42.07 of the Texas Penal Code makes it against the law to intend to harass, annoy, alarm, abuse, torment, or embarrass another by causing their telephone to ring repeatedly, or by making repeated anonymous telephone communications. The San Antonio Court of Appeals held that this statute was unconstitutionally vague on its face, and reversed Scott's conviction. The court of criminal appeals reversed the reversal.

The statute does not implicate the free-speech guarantee of the First Amendment because it does not apply to communicative conduct. In the usual case, violators will have the intent to inflict emotional distress, and will not have the intent to engage in the legitimate communication of ideas, opinions, or information. To the extent that the statute might cover communicative conduct, such conduct is not protected by the First Amendment because, under the circumstances here, the communicative conduct invades the substantial interests of the victim in an essentially intolerable way.

"Because § 42.07(a)(4) does not implicate the free-speech guarantee of the First Amendment, Scott, in making his vagueness challenge to that statutory subsection, was required to show that it was unduly vague as applied to his own conduct. He has not done that. Therefore, his vagueness challenge fails."

JEOPARDY

1. Previous conviction for indecent exposure, a lesser included offense of indecency with a child by exposure, bars a subsequent prosecution for the greater offense.

***Ex parte Amador*, 326 S.W.3d 202 (Tex. Crim. App. 2010)**

After Amador pleaded guilty to the misdemeanor offense of indecent exposure, he was indicted for indecency with a child by exposure, and he filed a pretrial writ of habeas corpus seeking to bar the subsequent prosecution under the Double Jeopardy Clause. The

court of criminal appeals agreed that Amador was entitled to relief. Indecent exposure is a lesser of indecency with a child by exposure, and the Supreme Court has held that Double Jeopardy is violated by convictions for both greater and lesser offenses.

2. Convictions for possession with intent to deliver methamphetamine and manufacturing methamphetamine violate double jeopardy.

***Weinn v. State,* 326 S.W.3d 189 (Tex. Crim. App. 2010)**

Appellant pleaded guilty to possession with intent to deliver methamphetamine, and to manufacturing methamphetamine, and the jury sentenced him to 30 years imprisonment, which the court ordered to be served concurrently. The court of appeals held that this constituted double jeopardy, and vacated the manufacturing charge. The court of criminal appeals affirmed.

First, the court held that there was no jeopardy problem under *Blockburger*. The test under that case "to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Possession with intent to deliver requires the proof of intent to deliver, and manufacturing a controlled substance requires proof of manufacture. Clearly, then, there is no double jeopardy violation under *Blockburger*. The *Blockburger* test, though, does "negate otherwise clearly expressed legislative intent."

The jeopardy problem in this case is based on legislative intent. "Manufacturing and possession with intent to deliver both create the singular danger that controlled substances will be distributed to society. Therefore, a single act (simultaneous manufacture and resulting possession with intent to deliver) with respect to a single quantity of controlled substances constitutes a single violation of Texas Health and Safety Code § 481.112."

Here, Weinn was charged and convicted based on the manufacture and possession of a single container of methamphetamine. The court makes it clear, though, that a person could be convicted of both manufacturing a quantity of methamphetamine, and delivery as well, if he later delivers that same quantity to a third person.

3. Can a person be prosecuted twice for stealing the same gun?

***Stokes v. State*, 2011 WL 709699 (Tex. Crim. App. 2011)(Keller, P.J., dissenting)**

Stokes was convicted once for aggravated robbery for stealing a gun, and later for theft of the same gun under the theory that he possessed it, knowing that it had been stolen.

The court of appeals upheld both convictions. The court of criminal appeals refused Stokes's petition for discretionary review. Judge Keller, joined by Judge Hervey, would have granted the petition, "[b]ecause there seems to be some question about it."

4. Was it a violation of the Double Jeopardy Clause to convict and sentence the applicant for aggravated assault and organized criminal activity based on the same aggravated assault?

***Ex parte Chaddock*, 2011 WL 1792688 (Tex. Crim. App. 2011)(not designated for publication)**

Chaddock was first convicted by a jury of engaging in organized criminal activity based on commission of aggravated assault. Later he pleaded guilty to the same aggravated assault, and was sentenced to 10 years imprisonment, and he did not appeal. He then filed an application for writ of habeas corpus asserting that because the aggravated assault was a lesser included offense of engaging in organized criminal activity, he could not be convicted of both offenses.

> We order that this application be filed and set for submission to determine whether two separate prosecutions for engaging in organized criminal activity and the underlying offense (in this case aggravated assault) violate the double jeopardy clause of the US Constitution.

JUDICIARY

1. Recusal is not easy.

***Gaal v. State*, 332 S.W.3d 448 (Tex. Crim. App. 2011)**

After this felony DWI case had "lingered" on the trial court's docket, it was set for a plea, and Gaal changed his mind. The trial court then said this: "All right. We're supposed to have a plea here today. It appears that Mr. Gaal does not want to plea. For the record, I will not accept any plea bargain in this matter, unless it's for the maximum term of ten years." Gaal filed a motion to recuse, which was denied.

The court of appeals reversed, finding that the trial court had forecasted its inability to consider the full punishment range, and that the recusal court had abused its discretion. The court of criminal appeals reversed the reversal.

"A Texas judge may be removed from presiding over a case for one of three reasons: he is constitutionally disqualified; he is subject to a statutory strike; or, he is subject to

statutory disqualification or recusal under Texas Supreme Court rules."

"Because the trial judge's remark went only to plea bargaining and was supported by facts introduced or events occurring in the course of the proceedings, the recusal judge did not abuse his discretion in denying appellant's motion to recuse."

JURY

1. There was no manifest necessity to grant a mistrial where the defense indicated its willingness to proceed with a five-person jury.

***Ex parte Garza*, 2011 WL 1663324 (Tex. Crim. App. 2011)**

During Garza's misdemeanor DWI trial, one of the jurors suffered a "cardiac event." The trial court announced it would declare a mistrial, and Garza objected, insisting that he wanted this jury to hear his case. He suggested a continuance until the juror was well, and, on one occasion, that he would be willing to proceed to trial with the remaining jurors. The judge granted the mistrial anyway, and later Garza filed a pretrial writ of habeas corpus asserting that manifest necessity was lacking and that retrial would violate double jeopardy. The court of appeals agreed and granted relief, and the state appealed.

The court of appeals affirmed. The United States Supreme Court has previously held that a defendant has a right to insist on a jury of at least six people. The Court has not held, however, that a defendant cannot waive this right. The court finds in this case that neither the federal nor the state constitutions, nor any state statute prohibits a defendant in a criminal case from waiving his right to proceed with less than six jurors in a misdemeanor case. Accordingly, there was no manifest necessity to declare a mistrial in this case.

JURY CHARGES

1. Clarification on "manner and means unknown" to the grand jury: the *Hicks* two-pronged inquiry is replaced with opportunities to challenge the pleading before trial, and again, if necessary, before the jury is charged.

***Sanchez v. State*, 2010 WL 3894640 (Tex. Crim. App. 2010)**

Appellant was charged in a multi-paragraph indictment with murdering complainant by choking her with his hands; by using a stun gun, and by manner and means unknown to the grand jury. The medical examiner gave his opinion that the complainant was asphyxiated, either from being manually choked, or from the use of a stun gun. No one from the grand jury testified that it had used due diligence but had been unable to determine

the manner and means. The trial jury returned a general verdict of guilty of murder, and appellant appealed.

The court of appeals reversed and remanded for a new trial. The evidence was legally and factually sufficient to prove murder. But when the state alleges that the manner and means are unknown to the grand jury, it bears the burden of proving it. This is usually done in one of two ways. If there is no evidence at trial of the manner and means, then a *prima facie* case is made that the manner and means was unknown to the grand jury. Here, though, the medical examiner gave his opinion that the manner and means was either by manual strangulation or by the use of a stun gun. The state then could have put on a grand juror and elicited testimony that despite the use of due diligence they were unable to determine the manner and means at the time of indictment. But there was no such testimony in this case. "Therefore, there was insufficient evidence to support the theories of prosecution alleged in the second and fourth paragraphs of the indictment. [citation omitted] Consequently, the trial judge erred in authorizing the jury to convict appellant under those theories of prosecution."

The court of criminal appeals reversed the reversal. *Hicks v. State*, 860 S.W. 2d 419 (Tex. Crim. App. 1993), a case relied on by the court of appeals "is no longer viable." And, although there was error in the jury charge, the error was harmless.

Under *Hicks*, when an indictment alleged that the manner and means of inflicting the injury was unknown, the state either had to present a *prima facie* case that the evidence was unknown to the grand jury, or it had to show that the grand jury had used due diligence in trying to determine the manner and means. This two-pronged test is now overruled and replaced with a new standard. Now, when the state alleges an unknown manner and means, the defense may challenge the propriety of this allegation before trial, and later, if necessary, at the conclusion of the evidence but before the jury is charged. The pretrial hearing will insure that the unknown allegation was in fact unknown to the grand jury, and not just being used to surprise or manipulate the defendant at trial. The hearing will "elicit all evidence that is now known so that the 'unknown' aspect of the case can be minimized or eliminated by amendment of the indictment or the presentation of a superseding indictment." And a post-evidentiary hearing can be utilized after the evidence has been presented, and both sides have rested. "This additional hearing will force both sides to revisit the 'unknown' allegation from the indictment, and clarify that it is either known, " unknown,' or unknowable, before the court completes its charge to the jury."

In this case, the "cause of death" – asphyxiation – was a medical term, and need not be proven by the state. Rather, the state must prove that appellant caused the death of the victim. Next, the court must determine whether the "manner and means" – that is, whether the death was caused by strangulation, or be a stun gun – was "unknown," or

"unknowable." Here, they were "unknowable," that is, a "known choice of several options as opposed to no evidence and no options." The jury charge was therefore erroneous because the indictment contained an allegation that the manner and means were "unknown," when in fact, they were not really unknown. This error was harmless, however, since, based on the record, Sanchez was not actually harmed. The evidence was sufficient to convict on an alternate theory in the charge besides the "unknown" manner and means.

2. Is a defendant entitled to a unanimous verdict as to the various ways to commit injury to a child.

3. *Contreras v. State*, 312 S.W. 3d 566 (Tex. Crim. App. 2010)

The felony underlying Contreras's felony murder indictment was injury to a child. The court submitted all four culpable mental states – intentionally, knowingly, recklessly, and negligently – disjunctively, and Contreras complained that this submission denied him his right to a unanimous verdict, since these varieties of injury to a child were not "morally and conceptually equivalent."

The court of criminal appeals disagreed. "We now hold that moral and conceptual equivalence is not required for underlying offenses in a felony murder prosecution under the current wording of the felony murder statute." Felony murder punishes killings in the course of serious crimes, "the exact seriousness of the underlying crime not being a particular concern, so long as it is serious enough to be considered a 'felony.'" Also, applying the moral equivalence rule is inappropriate here where the underlying offenses are greater and lesser included offenses. A juror who believes that the greatest of the underlying offenses has been committed also believes that the least was committed, "so there is no actual divergence between the jurors with respect to the underlying offense." Here the jury was at least unanimous as to negligence.

LESSER INCLUDED OFFENSES

1. A defendant may not complain for the first time on appeal about the submission of a non-lesser included offense if his lawyer "had some responsibility" for the instruction.

***Woodard v. State*, 322 S.W.3d 648 (Tex. Crim. App. 2010)**

Evidence was presented that Woodard and several others conspired to rob the complainant, and that one of the co-conspirators killed him. Woodard was charged with murder, though, not conspiracy to commit aggravated robbery. After both sides rested,

there was an on-the record discussion in which it was noted that the prosecutor and defense counsel were going to work on the jury charge, and the next day both parties returned and made requests and objections to the court's charge. Then the court asked if the defense counsel had any objections, and he said he did not. The court's charge included a conspiracy/parties instruction under § 7.02(b) of the Texas Penal Code, as well as a separate submission of the *unindicted* offense of conspiracy to commit aggravated robbery. The state argued that Woodard was guilty of murder as charged because he killed the complainant in the course of a conspiracy to rob him, in violation of § 7.02(b). The jury found Woodard guilty of conspiracy to commit aggravated robbery.

The court of criminal appeals agreed that conspiracy to commit aggravated robbery was not a lesser included offense of murder in this case, and that it was therefore error to this unindicted offense to the jury. The question, though, under *Almanza*, was harm. The court considered harm from two respects.

First, the record demonstrates that Woodard was not inadequately prepared to defend against the unindicted offense of aggravated robbery, since he knew, since at least voir dire, that it was the state's factual theory that he conspired with others to rob the complainant.

This does not end the inquiry, though. The federal constitutional rule is that a person cannot be held to answer a charge not contained in the indictment is not based entirely on his right to notice. Also implicated is the Fifth Amendment right to a grand jury indictment. The Texas Constitution contains a similar guarantee in Article I, § 10. "The issue thus becomes whether unobjected-to-jury-charge error that violates this unwaived grand jury guarantee meets the 'egregious harm' standard under . . .*Almanza*. . . ." The court held that had Woodard simply failed to object to the submission of the conspiracy to rob charge he would be entitled to reversal under *Almanza*. Conversely, had he actually requested the instruction, he would be estopped from complaining on appeal. Woodard's case falls somewhere in between. The record fairly reflects that, at the very least he had some responsibility for the jury instruction on the unindicted offense. "This is a great deal more than just simply not objecting to the charge or just stating 'no objection' to the charge." Under these circumstances, Woodard may not complain for the first time on appeal.

2. Aggravated assault was not a lesser included offense of aggravated sexual assault under the facts in this case.

***Benavidez v. State*, 323 S.W.3d 179 (Tex. Crim. App. 2010)**

Benavidez was indicted for aggravated sexual assault, and the trial court at the

state's request, and over Benavidez's objection, submitted aggravated assault as a lesser included offense. The jury convicted him of this "lesser," he appealed, and the court of appeals reversed and remanded the case for a judgment of acquittal.

The court of criminal appeals reversed the judgment of the court of appeals and remanded the case to that court on the question of the remedy. The court agreed that the trial court had erred since aggravated assault was not a lesser of aggravated sexual assault under the facts in this case. The trial court did have personal and subject matter jurisdiction, though, because of the indictment, so the conviction was not void. Instead, the error committed was trial error, and, because Benavidez objected, he was entitled to a reversal under *Almanza*, since he suffered some harm.

The state prosecuting attorney asked that the case be remanded to the trial court but the court of criminal appeals remanded it instead to the court of appeals. The jury's finding constitutes an implied acquittal of the offense of aggravated sexual assault. Benavidez complained in the court of appeals, among other things, that the evidence was legally insufficient to support his conviction for aggravated assault, and the court has not yet answered that question.

> On remand, the court of appeals may address the legal sufficiency ground, hold the evidence to be legally sufficient, and proceed to determine whether the trial error that occurred in the jury charge authorizing conviction for the lesser-but-not-included offense of aggravated assault caused the appellant "some" harm, as required by *Trejo*. In the event that the court of appeals should conclude, however, that the evidence is not legally sufficient to support conviction for the lesser-but-not-included offense, then it may reinstate its judgment remanding the cause to the trial court for entry of a judgment of acquittal.

3. Assault/offensive contact is not a lesser included offense of assault/bodily injury by kicking, or of aggravated sexual assault by compelling submission and participation by physical force and violence; assault/bodily injury is not a lesser of aggravated sexual assault by compelling submission and participation by physical force and violence.

***McKithan v. State,* 324 S.W.3d 582 (Tex. Crim. App. 2010)**

McKithian was charged with aggravated sexual assault by compelling submission and participation with physical force and violence, and the trial court refused to submit lesser included offenses of assault/offensive contact and assault/bodily injury. Welsh was charged with assault/bodily injury by kicking the complainant, and the trial court refused to

submit assault/offensive contact as a lesser. The courts of appeals affirmed the convictions and the court of criminal appeals consolidated the PDRs and affirmed the affirmances.

Regarding McKithian, the allegation of physical force and violence is not functionally equivalent to an allegation of bodily injury, and the state was not required to prove bodily injury to prove physical force and violence. Nor is the allegation of physical force and violence the functional equivalent of offensive contact, and the state was not required to prove offensive contact when proving physical force and violence.

Regarding Welsh, the allegation that he caused bodily injury to the complainant by kicking her is not the functional equivalent of an allegation that he knew or should have known that she would regard this conduct as offensive or provocation, nor was the state required to prove this.

4. Reckless driving is not a lesser included offense of aggravated assault with a deadly weapon considering the indictment in this case.

***Rice v. State*, 333 S.W.3d 140 (Tex. Crim. App. 2011)**

The court of criminal appeals employed the "cognate-pleadings" test and determined that, in this case, reckless driving is not a lesser included offense of aggravated assault with a deadly weapon, namely, a car. "We believe that the aggravated-assault indictment does not reasonably give rise to a deduction that Appellant committed all of the constituent elements of the lesser-included offense of reckless driving. Because the conduct alleged in the aggravated assault indictment was not sufficiently detailed or complete that it can reasonably be deduced that Appellant "drove the vehicle" such that he would be liable for reckless driving, it cannot be said, under Hall's cognate-pleadings approach, that the traffic offense is a lesser-included offense of aggravated assault with a deadly weapon."

MANDAMUS

1. Leave to file an application for writ of mandamus will be denied unless accompanied by motion for leave to file.

***Ex parte Barrientos*, 2011 WL 101511 (Tex. Crim. App. 2011)(not designated for publication)**

In a concurring opinion, Judge Johnson reminds that an application for writ of mandamus must be accompanied by a motion for leave to file the petition, or leave to file the application will be denied.

PAROLE

1. Yes, TDCJ is flagrantly violating constitutional and statutory law, and, no, this defendant cannot complain about it.

***Ex parte Bohannan*, 2011 WL 1775727 (Tex. Crim. App. 2011)**

Bohannan was convicted of aggravated rape in 1983 and sentenced to 25 years imprisonment. In 2009 he was found to be a violent sexual predator, and was civilly committed for outpatient treatment and supervision. Four days later he was released to mandatory supervision. A few months later a district judge issued a warrant for Bohannan's arrest for violating the terms of his civil commitment. On April 1, 2009 TDCJ issued a parole violator warrant which was executed the same day, and on April 27, Bohannan was indicted for violating the terms of his civil commitment, a third degree felony. On January 14, 2010, Bohannan was given a preliminary hearing which was not held earlier because of TDCJ's policy of not holding such hearings while new criminal charges are pending.

Bohannan filed a writ of habeas corpus even though he had been given a preliminary hearing, arguing that "the issues involved herein are clearly capable of repetition yet evading review due to the fact that when a writ of habeas corpus is filed seeking to insure the constitutional right to a preliminary hearing, [TDCJ] now convenes a late preliminary hearing." Bohannan also asserted that TDCJ's failure to give him a prompt preliminary hearing violated *Morrissey v. Brewer*, 408 U.S. 471 (1972), which, according to Bohannan, has been "encoded" in Texas law by the passage of section 508.2811 of the Texas Government Code. The state agreed that TDCJ policy violated a clear reading of the statute, but argued that this mere statutory violation was not cognizable on a writ of habeas corpus. TDCJ filed an amicus brief in which it conceded that the issue was justiciable, but nonetheless claimed that its policy was lawful.

The court of criminal appeals dismissed Bohannan's application for writ of habeas corpus. Absent a class action, the "capable of repetition, but evading review" doctrine is limited to cases in which two elements combine: "1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and 2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Otherwise, the case is moot and not justiciable, and must be dismissed. That is the case here. The court cannot assume that Bohannan will be placed in custody in the future facing the prospect of a preliminary hearing to determine whether there is probable cause to believe he violated a condition of his parole. And he has already received a preliminary hearing on the violation that has already been alleged against him. Because the case is moot the court does not address Bohannan's due-process claim.

> While we must dismiss the due-process claim because it is not justiciable pursuant to habeas corpus, we note that *Morrissey* and *Cordova* are still the law, and we remind TDCJ that it must conduct preliminary hearings, as required by Tex. Gov't Code § 508.2811, within a time frame that meets the demands of due process, as set out in *Morrissey* and *Cordova*, so that releasees will not be required to seek this Court's intervention to enforce these rights.

Judge Keasler, joined by Judges Price, Hervey, and Cochran, agreed that the claim was non-justiciable and should be dismissed, but noted that someone in Bohannan's situation is not without a remedy. Parolees have a constitutional right to a preliminary hearing. TDCJ "continues to flagrantly violate, clearly established constitutional law." Although article 11.07 provides no remedy, "mandamus clearly does."

> And in response to any future alleged violations on mandamus, as time is of the essence, it may be necessary and appropriate for TDCJ and the Board, through their legal representatives, to appear before us in person to answer any allegation that *Morrissey 's* mandate is being disobeyed.

POLYGRAPHS

1. Are polygraph results always inadmissible?

***Leonard v. State,* 315 S.W.3d 578 (Tex. App.–Eastland 2010, pet. granted)**

The trial court adjudicated Leonard guilty and revoked his probation after finding that he had been unsuccessfully discharged from sex offender treatment for failing five polygraph examinations. The court of appeals wrote this:

> This case presents an interesting paradox: courts routinely require sex offenders on community supervision to take and pass polygraph exams-even though their mere existence, let alone results, is inadmissible. The propriety of that practice is not at issue here. If the trial court can order a polygraph but is prohibited from hearing any polygraph evidence, how does it monitor compliance and is there any consequence to lying during an exam?

Texas law clearly holds that polygraphs are inadmissible for all purposes because they are unreliable. The trial court, therefore, abused its discretion when it considered his

failure in revoking probation. The court of appeals did not hold that polygraphs may not be ordered and used in treating probationers, or that the failure to take a test is inadmissible, or that the failure to take a polygraph test would not support revocation.

The court of criminal appeals granted the state's petition for discretionary review to determine these questions:

1. Did the Court of Appeals err in concluding, that in adjudication proceedings, a sex offender treatment provider was not permitted to testify to the results of polygraph examinations conducted as part of sex offender treatment, which were a condition of probation, and were admitted as a "fact or data" pursuant to Tex. R. Evid. 703 & 705(a) to support his expert's opinion as to why appellant was terminated from the mandated sex offender treatment program?

2. Did the Court of Appeals err in concluding this Court's holding, "that the existence and results of a polygraph examination are inadmissible of all purposes," applies to situations under Tex. R. Evid. 703 & 705(a), when an expert, in an adjudication proceeding, considers those results as a basis for rendering an expert opinion as to why a probationer was terminated for a order [sic] sex offender treatment program?

3. Did the Court of Appeals err in ruling that this Court's holding in *Tennard v. State*, 802 S.W.2d 678, 683 (Tex. Crim. App. 1990) and its progeny takes precedence over Tex. R. Evid. 703 & 705(a) in an adjudication proceeding?

4. Did the Court of Appeals err in not holding that Tex. R. Evid. 703 & 705(a) take precedence over *Tennard v. State*, 802 S.W.2d 678, 683 (Tex. Crim. App. 1990) and its progeny?

5. Did the Court of Appeals err in holding that the admission of polygraph results are always inadmissible notwithstanding a valid condition of community supervision required that the Appellant submit to and show no deception on a polygraph examination and other diagnostic tests or evaluations as directed by the Court of supervision officer?

RECKLESSNESS

1. How certain must recklessness be alleged in a discharging a firearm case?

***State v. Rodriguez*, 2011 WL 1261309 (Tex. Crim. App. 2011)**

The information charged that appellee did "recklessly discharge a firearm inside the corporate city limits of a municipality having a population of One Hundred Thousand

(100,000) or more, namely: the City of San Antonio, by pulling the trigger on a firearm which contained ammunition and was operable." Appellee filed a motion to set aside this information asserting that it did not allege any act with reasonable certainty that would show he acted recklessly, in violation of article 21.15 of the Code of Criminal Procedure. The trial court agreed, and the state appealed.

The court of appeals affirmed, rejecting the state's assertion that the information was sufficient simply because it alleged Rodriguez pulled the trigger of a loaded gun containing operable ammunition. "The State's information, however, did not inform Rodriguez of the circumstances that indicate he pulled the trigger of a loaded firearm in a reckless manner." Pulling the trigger of a loaded firearm within city limits is not reckless per se.

The court of criminal appeals affirmed. "Everyone who discharges a firearm pulls the trigger, and every firearm that is discharged contains ammunition and is operable if it discharges. The State has, in essence, pled a tautology: The defendant recklessly discharged a firearm because he discharged a firearm." The allegation of recklessness here tells the defendant nothing more than that he fired a gun within the city limits. This offense is not a strict liability offense. Obviously, not every time a person fires a gun within the city limits does one act recklessly. Only when he is reckless in the manner that he pulls the trigger is an offense committed.

"The issue in this case is not 'how' did the defendant discharge a firearm (by pulling the trigger), but how did he act 'recklessly' in discharging the firearm. When it is alleged that the accused acted recklessly, Article 21.15 of the Texas Code of Criminal Procedure requires additional language in the charging instrument." And "there is some conceptual difficulty about the specific terms used in Article 21.15." When recklessness is a element of an offense, the charging instrument "circumstances" indicating that the defendant acted recklessly, or, in this case, something about the setting or circumstances of the discharge that demonstrates disregard of a known and unjustifiable risk. For example, shooting into a crowd of people, or shooting in a residential neighborhood, or in a a business district, or on school grounds. "These are the sorts of actions that might entail a known and unjustifiable risk of harm or injury to others, risks that the ordinary person in the defendant's shoes probably would not take." The charging instrument must allege facts about this particular discharge that permit the jury to infer that the defendant was acting recklessly instead of perfectly properly, such as lawfully defending himself, or performing a lawful activity like shooting at a practice range.

SEARCH AND SEIZURE

1. Front license plates must be displayed at the foremost part of the car.

***Spence v. State*, 325 S.W.3d 646 (Tex. Crim. App. 2010)**

The police found drugs on Spence after stopping his car because its front license plate was behind his windshield, and not mounted in the foremost part of the car. The court of criminal appeals upheld the stop, holding that § 502.404(a) of the Transportation Code, (which says that license plates shall be displayed "at the front . . . of the vehicle") "means the foremost part or beginning of a vehicle, not in the front half, facing the front, or in the front portion." And because the proper location of a license plate is a question of law, not fact, Spence was not entitled to a jury instruction under article 38.23.

2. The court of appeals was hypertechnical when it strictly applied rules of grammar and syntax.

***State v. McLain*, 2011 WL 1376724 (Tex. Crim. App. 2011)**

The affidavit in support of the search warrant asserted that: "In the past 72 hours, a confidential informant advised the Affiant that Chris was seen in possession of a large amount of methamphetamine at his residence and business." The trial judge granted McLain's motion to suppress the more than 100 grams of methamphetamine seized, and the court of appeals affirmed. The affidavit is not specific as to when the informant saw the drugs. A plain, common sense reading of the quoted language is that the informant and the affiant spoke in the preceding 72 hours, but there is no information as to when the information saw the drugs. The court rejected the state's suggestion that the implication was that the drugs were seen within the last 72 hours. "However, such an implication is not supported by the plain text of the affidavit. We agree with the trial court that, given a common sense reading, the affidavit's reference to the "past 72 hours" speaks to when the affiant spoke to the confidential informant, not when the confidential informant acquired the information."

The court of criminal appeals disagreed, and reversed both the trial court and the court of appeals.

"The court of appeals violated the prohibition on "hypertechnical" review of a warrant affidavit when it strictly applied rules of grammar and syntax in its analysis. Further, the court of appeals reviewed the affidavit by focusing on what the officer "implied" rather than on what the magistrate could have reasonably inferred." Although the "plain meaning" of the statement in question, when "read literally", fails to clearly indicate when the informant observed McLain in possession, the court believes that the magistrate, by considering all the fact in the affidavit, could have reasonably inferred that it had occurred within the past 72 hours. If there was any doubt, both the trial and appellate courts should have deferred to the magistrate's judgment, and they did not.

Additionally, other information in the affidavit, from "unknown callers" that McLain was storing and selling methamphetamine at his residence and business, combined with the affiant's statements about surveillance and observations consistent with ongoing drug activity could also justify the magistrate's conclusion that methamphetamine was probably at the place described in the warrant.

"The opinion of the court of appeals chose the 'hurried' words of the officer over reasonable inferences that the magistrate could have made." The trial court and the court of appeals erroneously reviewed the affidavit in search of what the affiant conveyed, instead of the reasonableness of the conclusions drawn by the magistrate. "Reviewing courts should only be concerned with whether the magistrate's determination in interpreting and drawing reasonable inferences from the affidavit was done in a commonsensical and realistic manner. And reviewing courts should defer to all reasonable inferences that the magistrate could have made."

3. Officer detained defendant without reasonable suspicion where he shined his patrol car lights in defendant's direction and said, in a way sounding like an order, "come over here and talk to me."

***Crain v. State,* 315 S.W.3d 43 (Tex. Crim. App. 2010)**

The officer caused Crain to yield to his show of authority when he shined his patrol car's overhead lights in his direction and requested, in a way that sounded like an order, for Crain to "come over here and talk to me." This, then, was a detention, and not merely an encounter, and required reasonable suspicion to be legal. But walking late at night in a residential neighborhood where burglaries occur most often after midnight, and reaching toward one's waistband when an officer drives by, do not constitute reasonable suspicion to believe the suspect is engaged in criminal activity. The resulting discovery of a handgun was illegal.

4. Police may seize items in plain view if it is immediately apparent that these items are contraband, even if further, limited, investigation is necessary.

***State v. Dobbs*, 323 S.W.3d 184 (Tex. Crim. App. 2010)**

The police came to Dobbs's home with a warrant authorizing a search for drugs and found two new sets of golf clubs and some golf shirts within areas they were permitted to search. Although they had no probable cause to believe that these items were stolen, they called dispatch and inquired about recent burglaries, and were advised that a country club bearing the same name as the name on the shirts had been burglarized.

The court of criminal appeals found the discovery of the stolen items to be authorized by the plain view doctrine, which permitted the officers, who were legitimately on the premises, to seize anything in plain view if it was "immediately apparent" that it was contraband.

> We now hold that, so long as probable cause to believe that items found in plain view constitute contraband arises while police are still lawfully on the premises, and any further investigation into the nature of those items does not entail an additional and unjustified search of, or unduly prolonged police presence on, the premises, the seizure of those items is permissible under the Fourth Amendment.

To the extent *White v. State*, 729 S.W.2d 737 (Tex. Crim. App. 1987) is inconsistent with this holding, it is disavowed.

5. Is consent of the business owner needed for dogs to sniff the exterior of an unoccupied vehicle in the business's parking lot?

***State v. Weaver*, 2010 WL 3518743 (Tex. App. – Beaumont 2010, pet. granted)(not designated for publication)**

The court of criminal appeals granted the state's petition for discretionary review to answer this question: "May police conduct a dog sniff of the exterior of an unoccupied vehicle in the parking lot of a business without the permission of the owner of the business?"

6. "Strangely persistent," but non-criminal behavior can give rise to reasonable suspicion that a defendant is about to engage in criminal activity, and thereby constitute reasonable suspicion for a detention.

***Derichsweiler v. State*, 2011 WL 255299 (Tex. Crim. App. 2011)**

Derichsweiler was driving around the parking lots of two adjacent businesses, McDonalds and Wal-Mart, pulling up beside other cars, staring, smiling, and just acting odd. One of the motorists called the police, and reported the odd behavior along with a description of the car. The police stopped the car and arrested defendant for felony DWI.

The court of appeals reversed, holding that the police lacked reasonable suspicion to believe that Derichsweiler was engaging in, or had been engaging in, or would soon be engaging in some particular and distinctively identifiable, penal offense.

The court of criminal appears reversed the reversal. "A police officer has reasonable suspicion to detain if he has specific, articulable facts that, combined with rational inferences from those facts, would lead him reasonably to conclude that the person detained is, has been, or soon will be engaged in criminal activity." Unlike when dealing with probable cause to arrest, it is not necessary for an officer to point to a specific offense about which he has a reasonable suspicion. "It is enough to satisfy the lesser standard of reasonable suspicion that the information is sufficiently detailed and reliable- i.e., it supports more than an inarticulate hunch or intuition-to suggest that something of an apparently criminal nature is brewing."

Calling this a "close call," the court of criminal appeals nonetheless found Derichsweiler's behavior "while not overtly criminal in any way, was bizarre, to say the least." Here "the totality of circumstances, including the appellant's strangely persistent, if admittedly non-criminal, behavior, gave rise to a reasonable suspicion that he was about to engage in criminal activity."

7. Checkpoint search approved where the trial court implicitly found that its primary purpose was not to detect crime, but to verify licenses and registrations.

***Lujan v. State*, 331 S.W.3d 768 (Tex. Crim. App. 2011)**

Six to seven officers, including a supervisor and a K-9 unit stopped every car going north and south bound, allegedly targeting uninsured motorists and unlicensed drivers. Drivers with licenses and insurance were waved through. Lujan was not so lucky. he did not have a license, so he was pulled aside, and he and his passenger were questioned. Then Lujan was patted down, for safety reasons, and the police found $1,562.00. This cash, and Lujan's extremely nervous demeanor, caused the officer to request permission to search, which was granted, and which turned up cocaine.

"A checkpoint to verify drivers' licenses and vehicle registration is permissible, but a checkpoint whose primary purpose is to detect evidence of ordinary criminal wrongdoing is not. The legality of the checkpoint in this case turns on whether its primary purpose was to check drivers' licences and insurance, or whether the primary purpose was general crime control." [citations omitted] Here the trial court implicitly found that the primary purpose of this stop was to check insurance and licenses, and this finding is supported by the record. Two officers gave what could be described as conflicting testimony about the purpose, and the court of appeals believed one. Credibility, though, is for the trial court, and the court of appeals erred when it rejected the trial court's implicit fact-finding.

8. This consensual encounter did not require reasonable suspicion, but if it did, there was reasonable suspicion, and, in any event, the cocaine was voluntarily abandoned before there was a seizure.

***State v. Castleberry,* 332 S.W.3d 460 (Tex. Crim. App. 2011)**

While patrolling an area where burglaries had recently occurred, an officer encountered Castleberry and another walking behind a closed business and asked them for identification. Castleberry reached for his waistband and the officer ordered him to raise his hands. Castleberry reached for his waistband and threw down a baggie of cocaine.

The trial court granted Castleberry's motion to suppress and the court of appeals affirmed. The court of criminal appeals reversed.

This was a consensual encounter between citizen and officer and therefore did not require reasonable suspicion. The officer was free to ask Castleberry for his identification and ask him why he was there at that time of night. A reasonable person would have felt free to terminate this encounter, even though it occurred at 3:00 am behind a closed business.

The trial court and the court of appeals also concluded that Castleberry's conduct in reaching for his waistband did not provide reasonable suspicion. The state asserted that the court of appeals and the trial court employed an improper inference when they determined that the act of reaching for his waistband was innocent conduct. "Once again, the State is correct." A reasonable person in the officer's circumstances would have been warranted in believing his safety was in jeopardy.

And there is an additional reason for reversing the two lower courts. There is no seizure when a defendant refuses to yield to an officer's show of authority. Despite the officer's repeated demands that Castleberry raise his hands, he ignored the orders and tossed the cocaine, and it was then that he was arrested. "Under the Fourth Amendment, Castleberry was not seized until he was arrested. Because Castleberry voluntarily abandoned the cocaine before he was arrested, the cocaine was not the fruit of a seizure."

9. Contrary to how some people read *Schmerber v. California,* blood may be drawn by police in a non-medical environment.

***State v. Johnston,* 2011 WL 891262 (Tex. Crim. App. 2011)**

Two police officers, both certified EMTs, got a search warrant and held Johnston down and took her blood at the police station in Dalworthington Gardens. The state offered

evidence at the suppression hearing that the department's blood draw program had been designed by a experience emergency room physician, who had also trained and certified the two officers as venipuncture technicians.

In *Schmerber v. California*, 384 U.S. 757 (1966), the Supreme Court upheld a warrantless seizure of blood from a person suspected of DWI that was conducted in a hospital by medical personnel. The Court did note, however, that it was "not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment"

So what about blood drawn by police officers in a police station? The court of criminal appeals found no problem with the draw in Johnston's case.

Schmerber created a two part test. First, the police must be justified in requiring the suspect to provide blood. The police had probable cause in *Schmerber*, and they had both probable cause and a warrant in Johnston's case. Second, the means and procedures used to take the blood must be "reasonable" under the Fourth Amendment. In *Schmerber* they were, because blood tests are commonly done and do not usually involve "virtually no risk, trauma, or pain," and the test was taken in the hospital, by medical personnel.

But that is not the only way that a draw's means and procedures can be acceptable.

Section 724.017 of the Transportation Code, which requires that blood be taken by certain people in a sanitary place, does not provide the exclusive means of taking blood pursuant to a warrant under the Fourth Amendment. And, neither the Fourth Amendment nor *Schmerber* require that blood be taken in a hospital environment by medical personnel. Here, the officer's specific training and experience as and EMT qualified him to take blood, and the jail was a safe place to take blood. "Under the totality of the circumstances, we hold that Johnston's blood was drawn in accordance with acceptable medical practices and was therefore reasonable. The deviation of the circumstances here from those in Schmerber did not 'invite an unjustified element of personal risk of infection or pain.'"

10. "Interactions" with the police, and the burdens of proof in suppression hearings.

***State v. Woodard*, 2011 WL 1261320 (Tex. Crim. App. 2011)**

Woodard won his motion in the trial court, but lost in the court of appeals and the court of criminal appeals. The initial stop was consensual, and required no information at all on the part of the police officer. By the time the officer detained Woodard for the field

sobriety tests, he had at least reasonable suspicion, and probably probable cause. The court did make some useful statements about the three different encounters between police and citizen, and about the burdens of proof at motions to suppress.

> Law enforcement and citizens engage in three distinct types of interactions: (1) consensual encounters; (2) investigatory detentions; and (3) arrests. Consensual police-citizen encounters do not implicate Fourth Amendment protections. Law enforcement is free to stop and question a fellow citizen; no justification is required for an officer to request information from a citizen.
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> * * *
>
> When a defendant asserts a search and seizure violation under the Fourth Amendment, the defendant bears the burden of producing evidence to rebut the presumption of proper conduct by law enforcement. A defendant can satisfy this burden with evidence that the seizure occurred without a warrant. If the defendant satisfies the initial burden, the burden then shifts to the State to establish that the seizure was nevertheless reasonable under the applicable standard—either reasonable suspicion or probable cause.

11. Don't tase me bro.

***Hereford v. State*, 2011 WL 1266550 (Tex. Crim. App. 2011)**

Officers arrested Hereford for outstanding traffic warrants, placed him in handcuffs, and then saw him chewing something. When he refused to spit out whatever it was that he was chewing they pulled him from their car, pushed him into the trunk, and tased his leg, a method of "pain compliance." They grabbed him by the neck and shook him, then tased him again. After considering their options for 15 or 20 minutes, the officers took Hereford to the hospital, where they turned him over to off-duty officer Arp, who was then working security. Ammonia capsules did not induce Hereford to open up, so Arp tased him several more times, including at least once to the groin area. Finally Hereford opened up long enough for the removal of 7.1 grams of cocaine from his mouth, and later some more from his hand and buttocks. He filed a motion to suppress, asserting that the force used was excessive under the Fourth Amendment. The trial court denied the motion to suppress, but the court of appeals reversed. The court of criminal appeals affirmed the reversal.

> This Court finds that the circumstances presented by this case show an excessive use of force that violated the Fourth Amendment prohibition against unreasonable seizures. Officer Arp deliberately chose to administer numerous electrical shocks to an area of appellant's body chosen by him

because of its exceptional sensitivity, long after the initial arrest was made, when there admittedly was no ongoing attempt by appellant to destroy the evidence, little concern about a drug overdose, and while appellant was restrained in handcuffs behind his back. The unreasonableness of this behavior is shown by comparison with the decisions made by his fellow officers, who stopped using the Taser when its use failed to effect compliance. While those officers could have chosen to continue to shock appellant in order to recover the crack, they chose to pursue other methods. Officer Arp should have done the same.

12. Reasonable suspicion does not depend on the officer's subjective belief.

***State v. Elias*, 2011 WL 1267248 (Tex. Crim. App. 2011)**

The officer testified that he passed by Elias as he sat stationary at a stop sign and that after proceeding on about 30 yards, Elias turned right. He testified that the subjective reason he stopped Elias was because he did not signal a right turn from a stationary position at a stop sign, and he admitted that he did not know whether Elias used his signal after he turned right, but only that he had no turn signal on as he sat at the stop sign. The trial court granted the motion to suppress and the court of appeals affirmed. The court of criminal appeals reversed.

The court held that the officer's subjective reason for stopping Elias was irrelevant. All that mattered was that there was in fact a lawful basis that gave him reasonable suspicion for the stop. Here the offense is failing to signal a turn within 100 feet of turning, and the officer had reasonable suspicion to believe that this offense had been committed when he saw Elias at the stop sign without a signal. The court of appeals erred in affirming the trial court without remanding the case to that court for specific findings whether Elias signaled his turn within 100 feet of turning.

And the court of appeals erred in not addressing the state's arguments that the existence of traffic warrants attenuated the taint of the initial illegality, and that the actions of a narcotics dog provided probable cause for a warrantless search under the automobile exception.

14. "Do you mind if I look?" "I guess," or "yes," may mean, "no, I don't mind, please go ahead and search," thus constituting, clear and convincing evidence of consent.

***Meekins v. State*, 2011 WL 1663151 (Tex. Crim. App. 2011)**

The officer asked Meekins six times if he could search, and Meekins was evasive. Finally the officer asked, "Do you mind if I look, and Meekins replied, either, "I guess," or "yes." The trial court found this to be a voluntary consent, and denied Meekins motion to suppress. The court of appeals disagreed, and reversed. The court of appeals reversed the reversal.

"Officer Williams's question is hardly a model of clarity, and appellant's answer is fraught with ambiguity." Regardless of whether Meekins said "I guess," or "yes," it was the trial judge's duty to decide what a reasonable person in the officer's situation would have concluded the response meant. Apparently the officer thought the response was consensual, since he immediately asked Meekins to exit. And Meekins did exit. "If appellant had intended to refuse consent, it seems reasonable that he would have objected, complained, or refused to get out of his car. Instead, he readily complied." The trial court did not abuse its discretion.

SELF-DEFENSE

1. Does self-defense apply to manslaughter cases?

Alonzo v. State, 328 S.W.3d 19 (Tex. App. – Corpus Christi 2010, pet. granted)(not designated for publication)

Alonzo was indicted for murder, and the jury was instructed on murder, manslaughter, aggravated assault, and self defense. The jury sent a note during deliberations asking if it was precluded from considering the lesser included offense if it acquitted Alonzo of murder based on self-defense. The court then instructed that self defense was not a defense to manslaughter or reckless aggravated assault. Alonzo's lawyer did not object to the supplemental instruction. He was convicted of manslaughter.

The court of appeals affirmed. "Texas courts have routinely noted that an individual cannot recklessly act in self-defense."

The court of criminal appeals granted Alonzo's petition for discretionary review to decide this issue: "The Appellate Court wrongly decided that the justification of self-defense is not available as an affirmative defense to a charge of manslaughter."

SENTENCING

1. Following a successful appeal, a judge's sentence may not be increased absent objective evidence that would justify the increase.

***Ex parte Miller,* 330 S.W.3d 610 (Tex. Crim. App. 2010)**

If a judge sentences a defendant in the first trial, and the case is remanded for a new punishment hearing after a successful appeal, the next judge may not increase the sentence unless the increase is based on conduct that occurs after the first sentence was assessed, or unless there is new evidence that the state was unaware of and could not, with the exercise of due diligence, have presented at the first sentencing hearing.

> [Miller's] appellate counsel was ineffective because he did not raise a claim that would have, at the least, resulted in a retrial on punishment with the possibility of a lesser sentence and no possibility of a greater sentence. The possibility of a greater sentence is barred by the presumption of judicial vindictiveness. In order to rebut that presumption, the state must introduce new objective information, from before or after the original punishment hearing, that would justify an increased sentence. "New" means evidence that was unknown to the state at the time of the first punishment hearing and that could not have been discovered by the state using due diligence at that time. Alternatively, the state could offer evidence that the case would not be heard by the same judge on remand. When it does neither, the presumption of judicial vindictiveness remains.

2. Life without parole is not cruel and unusual punishment for a juvenile convicted of capital murder.

***Meadoux v. State,* 325 S.W.3d 189 (Tex. Crim. App. 2010)**

Recently the legislature enacted a statute making parole available to juveniles certified as adults and convicted of capital murder. Meadoux, who was 16 at the time of his offense, was sentenced before that statute went into effect, and complains that his life-without-parole sentence was unconstitutionally cruel and unusual. The court of appeals disagreed.

The court of criminal appeals affirmed, summarizing its holding as follows:

> (1) Meadoux has not established that there is presently a national consensus against imposing life without parole on a juvenile for the offense of capital murder. (2) A juvenile capital offender's moral culpability, even if diminished as compared to that of an adult capital offender, is still great. (3) Life without parole is a severe sentence, especially for a juvenile. (4) Life without parole for juvenile capital offenders finds justification in the penological goals of retribution and incapacitation but not in the goals of deterrence or

rehabilitation. Considering and balancing these four factors together, we conclude that Meadoux has not carried his burden of showing that, according to contemporary national standards of decency, the punishment of life without parole for juvenile capital offenders is grossly disproportionate to the offense.

3. Another unsuccessful challenge by a juvenile to life without parole.

***Forcey v. State*, 2011 WL 198992 (Tex. Crim. App. 2011)(not designated for publication)**

Forcey, who was 16 when he committed capital murder, was transferred to adult court, convicted, and automatically sentenced to life imprisonment without parole. The court of appeals rejected his claim that this sentence was cruel and unusual punishment. The Supreme Court has decided that it is cruel and unusual to sentence persons under 18 to death for murder, and to life without parole for non-homicides. After Forcey's offense, the Texas legislature amended the statute to restore life with parole for juveniles, but it did not make this statute retroactive. "Given that the legislature chose not to apply the parole eligibility amendment retroactively to juveniles who have already been sentenced for a capital murder, we do not believe that it would be appropriate for this court to 'judicially amend' the statute."

The court of criminal appeals granted Forcey's petition for discretionary review, then affirmed the court of appeals. The court's recent decision in *Meadoux* required that the Eighth Amendment claim be resolved against Forcey. The court also rejected his state constitutional claim, since "Forcey has never argued that the Texas Constitution's prohibition against cruel and unusual punishment provides any greater protection than the Eighth Amendment." And "Forcey presented no evidence to support his claim that his sentence is disproportionate for the capital crime he committed."

4. State's notice of intent to use prior convictions for enhancement given after conviction, and two days prior to punishment hearing, did not violate due process right to notice.

***Pelache v. State*, 324 S.W.3d 568 (Tex. Crim. App. 2010)**

Pelache was charged with robbery, and the indictment alleged one prior conviction, elevating the charged offense to a first degree felony. He rejected a plea bargain that called for a two year sentence on a state jail felony. On April 18, 2008, Pelache was convicted of theft from person, a state jail felony, and his punishment hearing was scheduled before the court for May 2. On April 23, the state filed a motion for leave to amend the indictment,

and a motion for enhancement which notified Pelache of its intent to use two more felonies for enhancement. On May 9, the punishment hearing was held, and the trial court sentenced Pelache, for a second degree felony, to 20 years imprisonment.

The court of appeals reversed, holding that Pehache was entitled to notice of the state's intent to enhance before trial, before jeopardy attached.

The court of criminal appeals reversed the reversal. The April 23rd enhancement notice was sufficient to put Pelache on notice of the nature of the enhancement charges he was accused of. The record does not show his defense was impaired by the timing of the notice. He did not "did not request a continuance, appear surprised by the allegations, or argue that he was unprepared to defend against the prior conviction allegations."

5. Does the trial court have the power to reduce a defendant's sentence in response to his timely filed motion to reconsider and reduce the sentence, even though the parties were not present in court for the reduction?

***State v. Davis*, 2010 WL 4336168 (Tex. App. – San Antonio 2010, pet. granted)**

The trial court originally sentenced Davis to 15 years imprisonment. Less than 30 days later, Davis filed a motion for reconsideration or reduction of sentence, and 35 days after the original sentence, the trial court reduced the sentence to 12 years imprisonment. The state appealed, asserting that the trial court lacked jurisdiction to modify the sentence.

The court of appeals disagreed with the state and affirmed the trial court. "'[A] trial court retains plenary power to modify its sentence if a motion for new trial or motion in arrest of judgment is filed within 30 days of sentencing.'" The file stamp in this case shows the motion was timely filed. "Davis's motion is functionally indistinguishable from a motion for new trial; therefore, the trial court retained plenary power to modify Davis's sentence." Nor was the trial court's judgment void because it was not done in open court, with the parties present. "[T]he Texas Court of Criminal Appeals has held that the absence of the defendant at the time the trial court modifies a sentence does not result in a void judgment."

The court of criminal appeals granted the state's petition for discretionary review to consider this question: "Whether the appellate court erred in holding that the trial court had authority to grant a motion for reconsideration or reduction of sentence and modify the original sentence outside the presence of the defendant and the State."

6. Prior conviction enhanced only the level of punishment, and did not increase the offense level.

***Ford v. State*, 334 S.W.3d 230 (Tex. Crim. App. 2011)**

The court of appeals held that Joseph Clyde Ford's prior conviction for failure to comply with sex offender registration requirements increased the offense level of Ford's current offense for the same crime. We disagree. Because Article 62.102(c) states that "punishment for the offense ... is increased to the punishment for the next highest degree of felony," we hold that only the level of punishment was enhanced.

7. A trial judge may not order shock probation unless the defendant was eligible for judge-ordered probation when originally convicted.

***State v. Posey*, 330 S.W.3d 311 (Tex. Crim. App. 2011)**

Posey was convicted of two counts of criminally negligent homicide, and the jury recommended probation after finding that he used a deadly weapon, an automobile. Later his probation was revoked, and the judge suggested that he file a motion for shock probation in about 75 days. He did, and it was granted, and the state appealed.

The court of appeals agreed with the state and reversed. Because Posey was sentenced for a crime involving the use of a deadly weapon, he was ineligible for probation from the court, and this made him ineligible for shock probation.

The court of criminal appeals affirmed the reversal.

> The jury could, and did, recommend community supervision, but the jury's recommendation extends only to regular probation. We conclude that that limitation exists because a grant of regular community supervision suspends the imposition of the assessed sentence, while shock probation suspends further execution of a sentence that the defendant had already begun serving. [citation and footnote omitted] The trial judge's authority to order any form of community supervision arises from the jury's recommendation of regular community supervision and thus has the same limitations. We hold that a trial judge may not grant shock probation unless the defendant is eligible for judge-ordered community supervision.

8. Defendant was entitled to credit against his prison sentence for a lengthy period of time he was free on appellate bond, though, unbeknownst to him, the mandate had long since issued.

***Ex parte Thiles*, 333 S.W.3d 148 (Tex. Crim. App. 2011)**

We filed and set this application in order to address the applicant's claim that he is entitled to credit against his prison sentence for a lengthy period of time during which he was allowed to remain at large on an appellate bond even though, unbeknownst to him, the appellate mandate affirming his conviction had long since issued. Should he receive the credit he now seeks, the applicant will have discharged his sentence and would be entitled to immediate release. We will grant relief.

9. Be wary of using a post-conviction remedy to seek pre-trial jail-time credit.

***In re Brown*, 2011 WL 1415036 (Tex. Crim. App. 2011)**

Seventeen months after his arrest for murder, Brown was re-indicted for tampering with evidence, and, 78 days later he pled guilty to tampering. The judge gave him credit for the 78 days, and later, with a new lawyer, Brown sought credit for the 17 months, with a motion for judgment nunc pro tunc, which the trial court denied. The court of appeals denied mandamus, and the court of criminal appeals affirmed, taking this opportunity to write on the subject "alert unwary trial counsel of the need to address an issue such as the one presented in this case at the appellate level rather than relying upon the illusory promise of a post-conviction remedy." The nunc pro tunc/mandamus procedure that Brown employed will be successful only if the petitioner can show that he was "indisputably" entitled to credit on the "identical" case he was later convicted for. There is no dispute in Brown's case that the two cases arose from the "same core facts." Whether that was sufficient to make them the "same case" as is required by article 42.03, § 2(a)(1) is a matter of statutory construction, though, that is, a judicial and not a ministerial function, and that means it is not subject to correction by nunc pro tunc or mandamus.

"The moral of the story: If a claim of pre-trial jail-time credit involves a question of the proper construction of the statute, as here, trial counsel would do well to try to preserve the issue for appellate resolution. Post-conviction remedies will prove to be of no avail."

SEX OFFENDERS

1. Does the lifetime registration requirement violate substantive due process of law?

***Ex parte Chamberlain*, 335 S.W.3d 198 (Tex. Crim. App. 2011)**

Chamberlain pleaded guilty to sexual assault, a second degree felony, and was placed on four years deferred adjudication. Seven years after successfully completing the deferred, he filed a writ of habeas corpus under article 11.072, asserting, among other

things, that the lifetime registration requirement violated substantive due process as applied, because there was no mechanism permitting a risk assessment concerning the likelihood of recidivism. The trial court denied his writ, and the court of appeals affirmed, rejecting both arguments Chamberlain made. The "initial compulsory registration requirement is rationally related to and furthers a legitimate state interest, and the SORP contains a mechanism that allows sex offenders who are purportedly not dangerous and who pose a low risk of re-offending to petition for early termination of the registration requirements."

The court of criminal appeals granted Chamberlain's petition to consider whether the court of appeals erred "in holding that the lifetime registration requirement imposed on appellant did not violate substantive due process because there is a statutory mechanism by which the appellant can seek to be excused from further registration?" After the court granted Chamberlain's petition, the Council on Sex Offender Treatment (CSOT) which is designated in Chapter 62 of the code of criminal procedure, published a list of offenses that are eligible for de-registration. The list made it clear that persons convicted of sexual assault are not eligible for de-registration, and must register for life.

> The CSOT's list has altered the legal landscape for individuals eligible for early termination from the sex offender registration requirements. The court of appeals did not have the benefit of this information before it when addressing Chamberlain's due process claim. The court therefore proceeded under the theory that Chamberlain would be able to avail himself of the Code's mechanism for early termination from the lifetime registration requirement. This was the court's sole basis for concluding that Chamberlain's substantive due process rights were not violated. As a result, we determine that the court of appeals should be given an opportunity to reconsider Chamberlain's claim in light of this new information. We vacate the court of appeals's judgment and remand this case for proceedings consistent with this opinion.

2. A parolee who was not convicted of a sex offense is entitled to due process before such conditions can be imposed.

***Ex parte Evans*, 2011 WL 1662384 (Tex. Crim. App. 2011)**

Evans was convicted of a non-sex offense – recklessly causing serious bodily injury to a child – and sentenced to 10 years imprisonment. After he was released on parole, the parole division gave Evans notice it intended to impose sex offender conditions, but it did not allow him to appear at the hearing, or to present witnesses, or to confront or cross-examine the witnesses against him. Later his parole was revoked for violating these

conditions, and he filed a writ, contending that he should have been given due process and a hearing, and the trial court agreed, recommending that relief be granted. The court of criminal appeals agreed and granted relief.

SEXUAL OFFENSES

1. "16 will get you 20;" Does the defendant in a "statutory rape" offense have to know the complainant is underage?

***Fleming v. State,* 323 S.W.3d 540 (Tex. App.–Fort Worth 2010, pet. granted)**

Fleming pleaded guilty to aggravated sexual assault of a child under 14 and was given probation and required to register as a sex offender. On appeal he asserted that the statute violated Due Process and Due Course of Law because it failed to require a culpable mental state relating to the victim's age, and it failed to recognize an affirmative defense based on his reasonable belief that the child was 17 or older. The court of appeals disagreed, and affirmed the conviction.

The court of appeals rejected Fleming's state constitutional claims, finding that he had not asserted that the state constitution "is different or provides greater protections" than its federal counterpart.

The court of appeals also rejected Fleming's federal substantive due process challenges on their merits. There is no fundamental right to inclusion of a *mens rea* component or a mistake-of-age defense in a statutory rape statute. Accordingly, the state need only show the statute serves a legitimate government need. Here, the government has a legitimate interest in protecting children from sexual abuse by placing the risk of mistake on the adult offender.

Although the court of appeals ruled against Fleming, it acknowledged that this constitutional issue has never been decided by the court of criminal appeals, that "sound reasons might be advanced on either side of the argument," and that "there has been a movement away from strict liability for statutory rape in recent years."

The court of criminal appeals granted Fleming's petition for discretionary review to consider these questions:

1. Whether Section 22.021 of the Texas Penal Code is unconstitutional, under the Due Process Clause of the Fourteenth Amendment, due to its failure to

require the State to prove that Defendant had a culpable mental state ("mens rea") relating to the victim's age when engaging in the conduct alleged?

2. Whether Section 22.021 of the Texas Penal Code is unconstitutional, under the Due Process Clause of the Fourteenth Amendment, due to its failure to recognize an affirmative defense based on Defendant's reasonable belief that the alleged victim at the time was 17 years of age or older?

3. Whether Section 22.021 of the Texas Penal Code is unconstitutional, under the Due Course of Law provision of the Texas Constitution, Article I, Section 19, due to its failure to require the State to prove that Defendant had a culpable mental state ("mens rea") relating to the victim's age when engaging in the conduct alleged?

4. Whether Section 22.021 of the Texas Penal Code is unconstitutional, under the Due Course of Law provision of the Texas Constitution, Article I, Section 19, due to its failure to recognize an affirmative defense based on Defendant's reasonable belief that the alleged victim at the time was 17 years of age or older?

2. California's sexual battery is not "substantially similar" to Texas's sexual assault or aggravated kidnapping for purposes of giving a mandatory life sentence.

***Prudholm v. State,* 333 S.W.3d 590 (Tex. Crim. App. 2011)**

Prudholm was given a mandatory life sentence after being convicted of a sex offense in Texas because he had been previously convicted "under the laws of another state [California] containing elements that are substantially similar to the elements" of a Texas offense. The court of criminal appeals remanded the case for further punishment proceedings, finding that the California offense of "sexual battery" does not contain elements substantially similar to Texas's sexual assault or aggravated kidnapping.

SPEEDY TRIAL

1. Make a record on your speedy trial motion.

***Newman v. State,* 331 S.W.3d 447 (Tex. Crim. App. 2011)**

Newman filed an unsworn motion to dismiss his case that asserted that an eight year delay violated his constitutional right to a speedy trial. The trial court denied the motion,

but the court of appeals reversed, despite the "sparse" record on appeal.

The court of criminal appeals reversed the reversal. An unsworn motion, by itself, does not present a record sufficient to support a reversal. Although there was apparently a hearing in the trial court, the hearing was not transcribed, nor was there any objection to the failure to transcribe. "We decide that appellant has failed to present a record demonstrating that the trial court's decision should be overturned. With appellant having had a hearing, having lost in the trial court on his speedy-trial claim, and then having presented no record at all of a . . . hearing on this claim, appellant should also have lost on direct appeal."

STATUTE OF LIMITATIONS

1. A charging instrument based on an offense outside the statute of limitations is defective if it does not also plead the tolling provisions, but this defect must be analyzed for harm under Rule 44.2(b).

***Mercier v. State*, 322 S.W.3d 258 (Tex. Crim. App. 2010)**

Mercier was indicted for barratry, then re-indicted. The second indictment pled a date of commission outside the period of limitations, and did not plead any tolling provisions. The trial court denied Mercier's motion to quash and he appealed. The court of appeals reversed the conviction, holding that the limitations defect was one of substance and reversible without the need of a harm analysis. The court of criminal appeals reversed the reversal.

The indictment here was defective because it failed to indicate on its face that it was not barred by limitations. This is a defect of substance. The court of appeals erred when it reversed without a harm analysis. "A harm analysis under Rule of Appellate Procedure 44.2(b) is necessary when an indictment is defective due to the lack of a tolling provision."

SUFFICIENCY

1. Finally, after years of trying, a plurality of the court of criminal appeals overrules *Clewis*.

***Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010)**

In 1979, the United States Supreme Court, in *Jackson v. Virginia*, decided that appellate courts must reverse convictions if it was determined that no rational jury could have found the defendant guilty based on the evidence presented at trial. This became known as a *legal* sufficiency review.

In 1996, in *Clewis v. State*, the court of criminal appeals decided that the factual conclusivity clause of Article V, § 6(a) of the Texas Constitution gave direct-appeal courts the jurisdiction to conduct not just a legal sufficiency review, but also one based on *factual* sufficiency. Under *Clewis* and its progeny, courts were not required to review the evidence in a light most favorable to the jury's verdict, as they are required to do in *Jackson*, but instead, neutrally.

After *Clewis* there were a number of appellants who could not meet the more rigorous *Jackson* standard, but whose cases were reversed under *Clewis*; in recent years, though, almost nothing has been reversed in the court of criminal appeals for factual insufficiency. From the very beginning there were members on the court who thought *Clewis* was wrong, and in the ensuing 14 years, that faction several times had occasion to "clarify" *Clewis*, until in 2007, a majority found the factual and legal sufficiency analyses "barely distinguishable." *Rollerson v. State*, 227 S.W.3d 718, 724 (Tex. Crim. App. 2007). In *Brooks* the court pulled the plug altogether on whatever remained of *Clewis*.

> We now take the next small step in this progression and recognize that these two standards have become essentially the same standard and that there is no meaningful distinction between them that would justify retaining them both. We, therefore, overrule *Clewis* and decide that the *Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt.

The majority was authored by Judge Hervey, and joined by three others: Judges Keller, Keasler, and Cochran. The dissent, authored by Judge Price, and joined by Judges Meyers, Johnson, and Holcomb, observed that *Brooks* was a plurality decision, and this is technically true. It is also true that the two concurring Judges – Cochran and Womack – very clearly agreed with the plurality's conclusion that *Clewis* is bad law. Judge Cochran concludes her forceful concurring opinion this way: "I agree that it is time to consign the civil-law concept of factual sufficiency review in criminal cases to the dustbin of history."

Since *Clewis* is now deep in the dustbin, how will sufficiency be reviewed in the future? To be sure, there have been reversals based on legal sufficiency in the past, and there will undoubtedly be reversals in the future, based on the *Jackson v. Virginia* standard. The plurality believed that a factual insufficiency review was not "necessary to address some widespread criminal justice problem that *Jackson v. Virginia* is inadequate to address." Specifically, the plurality wrote: "It bears emphasizing that a rigorous and proper application of the *Jackson v. Virginia* legal-sufficiency standard is as exacting a standard as any factual-sufficiency standard (especially one that is 'barely distinguishable'

or indistinguishable from a *Jackson v. Virginia* legal-sufficiency standard)." Let us hope that reviewing courts will take seriously this stated obligation to conduct a "rigorous and proper application of the *Jackson v. Virginia* legal-sufficiency standard."

***see also Wirth v. State*, 327 S.W.3d 164 (Tex. Crim. App. 2010)**(remanded to the court of appeals to reconsider in light of *Brooks*).

2. Dog scent lineups insufficient evidence in a murder case.

***Winfrey v. State*, 323 S.W.3d 875 (Tex. Crim. App. 2010)**

Appellant was indicted for capital murder. A deputy sheriff conducted "scent lineups" using three dogs, and all three alerted in such a way as to cause the deputy to conclude that appellant's scent was on clothing the deceased was wearing when he died. Appellant was convicted of murder and sentenced to 75 years imprisonment, and the court of appeals affirmed his conviction.

Appellant told the police he had not seen the deceased in years and had never been in his home. The "scent testimony" provided direct evidence placing appellant in contact with the deceased's clothing. The deputy testified in detail about the training and reliability of his dogs, and the jury viewed a video of the scent lineup. Based on the scent lineup, the jury could have reasonably concluded that appellant was in the deceased's house at the time of the murder and had significant contact with the deceased. That there was no DNA evidence tying appellant to the murder did not require the jury to find appellant not guilty. In addition to the scent lineup, there was testimony that appellant shared information with another person that the jury could have concluded was known only to the murderer, and appellant identified himself to the police as the number one suspect. "After reviewing all the evidence, we hold that the evidence is legally and factually sufficient to support appellant's conviction."

The court of criminal appeals granted appellant's petition for discretionary review, reversed the conviction, and remanded for entry of a judgment of acquittal.

The court of criminal appeals disagreed that Winfrey's statement to the police that he was "the number one suspect," was significant to the sufficiency analysis. "This statement is not tantamount to an admission of guilt. At no time during the interview did appellant admit to any involvement. Nor did the police consider him a suspect, much less a primary one."

The high court also disagreed about the significance of the information Winfrey shared with his cellmate about the murder. "Appellant never admitted involvement in the

murder and claimed only to have heard information about the crime not known to the police. Thus, it is possible that the information appellant heard could have come from the actual murderer or murderers."

Nor was the court willing to uphold the conviction based on the dog scent lineup. Despite the fact that dogs and their handlers have "performed with distinction" in thousands of cases, "'[t]he infallible dog, however, is a creature of legal fiction.'"

> It cannot be denied that the jury and the court of appeals found the dog-scent lineup evidence in this case to be compelling. In 2004, two different dogs alerted only to the scents of appellant's son and daughter. In 2007, three different dogs alerted only to appellant's scent. But, the question essentially presented in this case is whether dog-scent lineup evidence alone can support a conviction beyond a reasonable doubt. And, while this evidence may raise a strong suspicion of appellant's guilt, we nevertheless decide that, standing alone, it is insufficient to establish a person's guilt beyond a reasonable doubt.

Now that the court of criminal appeals has done away with factual sufficiency review, the defense bar will have to look for strong statements in those rare cases that reverse for legal sufficiency, and this case contains a few such strong statements. The court began by recognizing that there is a highly deferential standard of review because the "appellate scales are supposed to be weighted in favor of upholding a trial court's judgment of conviction." The dog scent evidence here was undeniably "compelling" to both the jury and the court of appeals. Indeed, it raised a "strong suspicion of appellant's guilt." Even so, it was insufficient to establish Winfrey's guilt beyond a reasonable doubt.

Four judges concurred, agreeing that the evidence was legally insufficient, but noting also that "neither the court of appeals nor this Court has had an occasion to review or determine the admissibility of that evidence under either *Kelly v. State* or *Nenno v. State*."

3. More than "a mere modicum."

Padilla v. State, 326 S.W.3d 195 (Tex. Crim. App. 2010)

Padilla was convicted of capital murder during the course of a robbery or attempted robbery and given a life sentence, and he complained on appeal that the evidence against him was legally and factually insufficient. The court of criminal appeals found that it has no jurisdiction to address *factual* sufficiency issue in a non-death capital murder case. And it found the evidence *legally* sufficient.

The deceased was a drug dealer beaten to death in his home, with his pit bull in the

back yard. Someone named Carlos Gonzales owed the deceased $1,000.00. The medical examiner testified that the victim's skull injury could have been caused by a blunt instrument, and that all the injuries could have been made with a single instrument and by one person, although there was no way of telling how many people were involved. Padilla and a man named Gonzales lived in Mathis, about an hour's drive from the deceased's home, and within a week of the murder the police discovered that Padilla and Gonzales had been involved pawning the deceased's jewelry, and they were arrested. Six months later Padilla gave a statement to the police in which he admitted that Gonzales was one of his best friends, that they had been before to the deceased's home, and that on the day of the murder they went again, in Gonzales's mother's car. Padilla said he waited in the car, then went in at Gonzales's request and saw the deceased's body. He said he stood by the front door while Gonzales ransacked the home and took money and jewelry. Padilla said that Gonzales told him he had struck the deceased with a tire checker tool. Padilla admitted helping Gonzales dispose of evidence, and that Gonzales had given him cash and jewelry, and that he pawned some of the jewelry because Gonzales had no driver's license. Padilla said he did not know Gonzales planned to kill the deceased when they parked in front of the house.

The court decides this evidence was legally sufficient. These two best friends drove for approximately an hour, where the deceased was brutally murdered with his pit bull in the back yard, where it was usually kept when strangers came over. That was some evidence at least one stranger was in the house. Even though the medical examiner testified that he could not say how many people attacked the victim, his "testimony does support a finding that the victim could have been attacked by two people." Money and jewelry were taken immediately after the deceased was attacked, and that supports an inference that the murder occurred during the course of a robbery. The evidence also shows that Padilla and Gonzales split the money and jewelry and were involved in pawning the jewelry. Additionally, a rational jury could have found that Padilla "was less than truthful' in his statement to the police. A rational jury could have disbelieved that his best friend, Gonzales, would take a completely innocent bystander with him to a capital murder.

"We decide that the jury's verdict in this case is rationally supported by common sense, logical references from the circumstantial evidence, and legally sufficient evidence. It was not a verdict based on a 'mere modicum' of incriminating evidence."

4. Public officials beware: Do not call other officials with an intent to improperly influence the outcome of a relative's criminal case on a basis not authorized by law.

***Isassi v. State*, 330 S.W.3d 633 (Tex. Crim. App. 2010)**

Isassi, the Kleberg County Attorney, was convicted of improper influence for making some phone calls in an unsuccessful attempt to cut short a criminal prosecution of his aunt for felony evading arrest. Specifically, he called the pretrial services officer, and the assistant district attorney, and told them that the case was not going to be prosecuted because of a pending investigation against the arresting officer. He did not mention that the defendant was his aunt. He later made further calls to the pretrial services officer and assistant district attorney.

The court of appeals held that the evidence was legally insufficient to prove he made the calls with an intent to influence the outcome of the proceeding on the basis of considerations other than those authorized by law, as required by the statute. Isassi contacted the officials to advise them that the arresting officer was under investigation, and that the first assistant district attorney did not intend to prosecute. There was no evidence he offered to do anything in exchange for a favorable result. Rather, that the district attorney intended to drop the case against his aunt, was a factor the two persons were clearly authorized by law to consider in making official decision regarding the aunt's case.

The court of criminal appeals reversed the reversal. Intent is the only element at issue here. Here, intent to influence the outcome of a proceeding on the basis of considerations other than those authorized by law is not defined. The statute "prohibits any communication designed to influence the outcome on the basis of considerations other than those authorized by law." Isassi's intent was for the jury to decide.

> The jury could have decided that appellant was simply doing his routine official duty as the county attorney in communicating to pre-trial service personnel and the district attorney's office problems about any case involving Constable Campos, and it was a serendipitous coincidence that the particular defendant involved happened to be his aunt. *Sacré bleu*! The jury was, however, entitled to conclude, based upon all of the evidence and reasonable inferences from that evidence, that appellant's intent in making all of these telephone calls was to influence other public officials to dismiss the criminal case against Anna Linda Gonzalez because she was his aunt. An elected official may not manipulate and influence the judicial system to help a family member avoid conditions of pretrial supervision and prosecution for a felony. The Legislature, in this rarely invoked law, has forbidden it, and the jury, in this case, reasonably and rationally concluded, beyond a reasonable doubt, that appellant had that intent to improperly influence the outcome of his aunt's criminal case on a basis not authorized by law.

5. Does the state have to prove who owned the stolen property?

***Byrd v. State*, 2011 WL 1135366 (Tex. Crim. App. 2011)**

The information alleged that Byrd shoplifted some pants from "Mike Morales." The state presented no evidence about Morales at trial; instead it proved that Wal-Mart owned the pants.

The court of appeals rejected Byrd's sufficiency argument on appeal. Although the state must prove ownership beyond a reasonable doubt, "the owner's name is not a "substantive element" of the theft statute." So, there is no federal due process problem. Nor does this amount to a violation of state due process, since the court does not include the name of the owner in the hypothetically correct jury charge used to measure sufficiency under state law. The dissenting opinion, authored by Justice Simmons, and joined by Justice Marion and Chief Justice Stone found it "astonishing" that a person could be convicted of theft without regard to the identity of the owner. "Although this misdemeanor case seems small, the ramification of the majority opinion is large."

The court of criminal appeals "granted appellant's petition to resolve this difficult issue. We conclude that, under the principles set out in our trilogy of *Malik*, *Gollihar*, and *Fuller*, the State failed to prove its allegation that Mike Morales was the owner of the property appellant stole. Thus, the evidence is insufficient to support her conviction.

In *Malik*, the court of criminal appeals held that, under state law, sufficiency of the evidence is measured by the elements of the offense defined by the "hypothetically correct jury charge."

A "variance" is a discrepancy between an allegation in the charging instrument and the proof at trial. Variances are mistakes, and they can be "big" or "little." Big mistakes are material are failures of proof, and entitle the defendant to an acquittal. Little mistakes do not prejudice the substantial rights of the defendant, and can be disregarded.

In *Gollihar*, the court held that *Makik's* hypothetically correct jury instruction need not incorporate immaterial variances. In *Fuller* the court held that immaterial variances can be disregarded when determining the sufficiency of the evidence.

Although the name of the owner in a theft case is not a substantive element of the offense, state pleading rules require the state to plead the owner's name. And the state must prove beyond a reasonable doubt that the person or entity alleged as the owner is the same person or entitly, regardless of the name, as shown by the proof at trial. "In sum, it is the identity of the person, not his formal name, that controls and guides the sufficiency of the evidence review." The parties, the court, and the jury must know the identity of the owner, regardless of the name given in the charging instrument. Here the state failed to

prove that Byrd stole any property from Morales, the alleged owner. "Under *Malik*, *Gollihar*, and *Fuller*, the State failed to prove the specific offense charged, and appellant is entitled to an acquittal of that specifically charged offense. The State cannot reprosecute for that alleged offense. We need not address the issue of whether the State may reprosecute under a different charging instrument."

6. Evidence that defendant retaliated against an "informant" was insufficient to support the allegation that he retaliated against a "witness."

***Cada v. State*, 334 S.W.3d 766 (Tex. Crim. App. 2011)**

Cada was indicted for retaliating against Finch, because of Finch's service as a *witness*. The evidence at trial, however, clearly showed that Finch had not been a "witness." The court of appeals held that the evidence was sufficient because the statute protects "prospective witnesses" as well as "witnesses" against retaliation, and that the variance between the allegation ("witness") and the proof ("prospective witness") was not material.

The court of criminal appeals reversed and rendered. First, Finch was not a "prospective witness," but instead, an "informant." Although the statute also prohibits retaliation against informants, the state did not indict Cada for retaliating against an informant, and this was not an immaterial variance. The category of persons protected by the retaliation statute "are distinct and separate statutory elements of the offense. Under *Jackson* [*v. Virginia*], the State must prove the statutory elements that it has chosen to allege, not some other alternative statutory elements that it did not allege. The variance construct . . . simply does not override the constitutional due-process requirement that the State prove, beyond a reasonable doubt, every statutory element of the offense that it has alleged."

7. Robbery does not require that the defendant and victim interact.

***Howard v. State*, 333 S.W.3d 137 (Tex. Crim. App. 2011)**

Howard entered a convenience store with a rifle and his face concealed by a cloth. the store clerk was in an office in the store, and he locked the door and called 911 when he saw Howard on the surveillance video and through the one way glass. There is no evidence that Howard was ever aware that the clerk was in the office. Howard took the clerk's wallet from the counter inside the store and fled. He was convicted of aggravated robbery, and he complained that the evidence was legally insufficient, because there was no actual interaction between him and the clerk.

The court of criminal appeals upheld the conviction. The culpable mental state in this case – knowingly – requires that the defendant be aware that his conduct was reasonably certain to place another in fear, and that another was actually placed in fear.

> The evidence in this case included a video of the appellant, his face concealed, entering a convenience store late at night during business hours and aggressively brandishing a rifle. A rational juror could have inferred from this evidence that the appellant was aware it was reasonably certain that his actions would place someone in fear of imminent bodily injury or death. The fact that the appellant did not see Patolia-who testified that he was frightened by the appellant-does not negate the appellant's culpable mental state when he entered the store as he did and committed theft.

8. Links are affirmative enough.

***Blackman v. State*, 2011 WL 1376732 (Tex. Crim. App. 2011)**

The affirmative links rule requires the state to prove that a defendant's connection to the drugs is "more than just fortuitous" and is meant to protect an innocent bystander from conviction based on mere proximity to someone else's drugs. The court of criminal appeals found the evidence sufficient here.

> We believe that the court of appeals misapplied the *Jackson v. Virginia* standard by asking itself whether it believed that the evidence is sufficient to support appellant's guilt instead of asking whether a rational trier of fact could have found appellant guilty beyond a reasonable doubt. And we think it clear that, under a proper application of the *Jackson v. Virginia* standard, a rational trier of fact could have found appellant guilty beyond a reasonable doubt. A jury could reasonably find that appellant and the other two men traveled hundreds of miles together for the common purpose of purchasing three kilograms of cocaine. Their behavior during the time that they were under surveillance by the police, during which they did practically everything together, was consistent with this purpose. A jury could reasonably find that Gordon would not bring two innocent-bystander witnesses hundreds of miles to a large-scale narcotics transaction. A jury could also reasonably rely on the opinion of an experienced narcotics investigator that appellant and the other two men acted like narcotics traffickers. These "independent facts and circumstances" affirmatively link appellant to the contraband. A jury could reasonably find beyond a reasonable doubt that appellant's connection to the three kilograms of cocaine was much more than just a fortuitous accident. [citations omitted]

VOIR DIRE

1. Hey (said the juror) that's my yard the defendant is driving through. But that's okay, I can be fair. And because there is no implied bias in Texas, it was okay.

***Uranga v. State,* 330 S.W.3d 301 (Tex. Crim. App. 2010)**

During the punishment phase of this trial for possession of methamphetamine, the jury was shown a videotape of an extraneous offense in which the police were shown having a car chase with appellant.

> One of the jurors watching the videotaped chase was surprised to see Uranga's fleeing vehicle careen through the juror's own front yard. The juror thus learned that Uranga had been the previously unknown person who had driven through the juror's yard on that occasion, making him a victim of Uranga's extraneous offense. The juror reported his surprising discovery to the trial court. After receiving repeated assurances from the juror that he would remain impartial notwithstanding his victim status, the trial court kept him on the jury and denied Uranga's motion for a mistrial.

Appellant appealed, asserting that he was denied his right to a fair and impartial jury, and that the court should presume harm because a person he had victimized was allowed to assess his punishment. The court of appeals disagreed and affirmed appellant's conviction. There is little in Texas case law concerning "implied bias," and a majority of the United States Supreme Court has not adopted this doctrine. The Texarkana Court of Appeals refused to adopt the concept either, and, because it found no evidence in the record of actual bias, it ruled against appellant.

So did the court of criminal appeals. The only support for the notion of "implied bias" in the Supreme Court is in Justice O'Connor's concurring opinion in *Smith v. Phillips*, 455 U.S. 209 (1982).

> As the Supreme Court said in the *Phillips* opinion, the "Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias" - not the implied bias of which Justice O'Connor wrote.
>
> In this case, the trial court held a hearing during the trial on the issue of actual bias. We hold, in accordance with the Supreme Court's reasoning in *Smith v.*

Phillips, that such a procedure was appropriate and adequate. There was no requirement of a mistrial on a theory that bias must be implied to the juror.

2. Alternate jurors must not deliberate.

***Trinidad v. State*, 312 S.W.3d 23 (Tex. Crim. App. 2010)**

The trial judge instructed the alternate juror to go into the jury room with the regular 12 jurors and "be part of the deliberation process," but not vote, at both the guilt and punishment phases of the trial. Trinidad was convicted and appealed, and the court of appeals reversed his conviction.

The court of criminal appeals reversed the reversal. There was no *constitutional* violation when the trial court permitted the alternate juror to be present with the other 12 jurors. Although the alternate was present and may even have participated in deliberations, he did not vote with the others, and therefore the jury was not "composed" of more than 12. And Trinidad waived any *statutory* complaint by not objecting.

3. You might be entitled to the state's records of prior jury service if prosecutors claim they relied on these records when deciding whether to exercise a peremptory challenge.

***Storey v. State*, 2010 WL 3901416 (Tex. Crim. App. 2010)(not designated for publication)**

The trial court overruled Storey's pretrial motion requesting that the state provide the defense, before voir dire examination commenced, with records kept by its office concerning prior service of potential venirepersons. Later, Storey made a *Batson* challenge, and the prosecutor cited four reasons for exercising its peremptory challenge against venireperson Patterson, including a reference to records her office kept concerning prior jury service of persons, including the venireperson in question. Storey noted for the record that the state had previously denied his request for these records and that the trial court had also overruled the request, believing that they were work product. The prosecutor agreed to provide the records regarding the venireperson, but the record is silent on whether she did.

Storey argued on appeal that the trial court had erred by refusing to order production of the jury records. The court of criminal appeals disagreed, for two reasons. First, it has long held that such records are not generally discoverable. Second, the record here reflects that the prosecutor offered to provide the records. It was Storey's burden to show either that the records were not in fact provided, or that, if provided, they did not support the reason given by the prosecutor during the *Batson* hearing.

"Arguably, once the jury service records with respect to Patterson were expressly cited by the prosecutor during the *Batson* hearing, the trial court would have erred by denying a defense motion to disclose those records. However, appellant does not allege, and the record does not show, that he moved for disclosure at that time."

4. Not an improper commitment question: "Could you honestly ever fairly consider on an aggravated sexual assault of a child as little as five years in prison and give probation as an appropriate punishment[?]" And the trial court erred when it denied the defense's challenges for cause against those venirepersons who could not so consider.

***Cardenas v. State*, 325 S.W.3d 179 (Tex. Crim. App. 2010)**

At Cardenas's aggravated sexual assault trial, he ask the entire venire to answer the following question yes or no:

> "I want you to assume that you have found somebody guilty of sexual assault, aggravated sexual assault of a child. They intentionally or knowingly caused the penetration of the sexual organ of the complaining witness, of the victim, by the means of the sexual organ or any other [sic] or with a finger or with touching genital to genital ... Could you honestly ever fairly consider on an aggravated sexual assault of a child as little as five years in prison and give probation as an appropriate punishment[?]"

Most of his challenges for cause against almost all of the 52 venirepersons who answered "no," were overruled.

The court of appeals reversed. This single question preserved error. The question was proper because the law requires the jury to consider the full range of punishment, and the trial court erred when it denied cause challenges against those venirepersons who unequivocally stated they could not consider the full range of punishment.

The court of criminal appeals affirmed the reversal.

> A question committing a juror to consider the minimum punishment is both proper and permissible. However, counsel veers into impermissible commitment questions when he attempts to commit a veniremember to consider the minimum sentence based on specific evidentiary facts. For example, a party may ask the potential juror if he could consider the minimum of five years' imprisonment in a murder case, but he may not ask if the juror could consider five years in prison in a case in which the State alleged that the

defendant "tortured, garroted, poisoned, and pickled" the victim. The nonstatutory manner in which the defendant was alleged to have committed the offense adds evidentiary facts peculiar to the case on trial. That question, because it goes beyond the statutory elements and statutory manner or means, is improper under *Standefer*.

Once a juror expressly admits his bias against a phase of law upon which both the State and defense are entitled to rely, a sufficient foundation has been laid to support a challenge for cause. A juror who states that he cannot consider the minimum punishment for a particular statutory offense is subject to a challenge for cause. The opposing party or trial judge may then examine the juror further to ensure that he fully understands and appreciates the position that he is taking, but unless there is further clarification or vacillation by the juror, the trial judge must grant a challenge for cause if the juror states that he cannot consider the full range of punishment.

5. This is not an improper "open-ended" commitment question: "Let's talk about factors in assessing the sentence in a case of aggravated robbery with a deadly weapon, what factors do y'all think are important?"

***Davis v. State*, 2011 WL 1135373 (Tex. Crim. App. 2011)**

The judge disallowed this question: **"**Let's talk about factors in assessing the sentence in a case of aggravated robbery with a deadly weapon, what factors do y'all think are important?" The court of appeals affirmed, holding that this was an improper "open-ended" commitment question.

The court of criminal appeals reversed. Lawyers may not ask potential jurors how particular facts might influence their sentencing decisions; those would be improper commitment questions. Parties are, however, given broader latitude to ask "general background and philosophy questions," and that was what the defense was improperly prevented from asking here. "This did not ask the jurors how particular facts would influence their deliberations. This was an inquiry into the jurors' general philosophies." The "question sought to discover which factors would be important to jurors' decisions, without inquiring how those factors would influence the decision."

6. **The lack of meaningful questioning might be enough by itself for a *Batson* challenge, but it wasn't enough in this case.**

***Grant v. State*, 325 S.W.3d 655 (Tex. Crim. App. 2010)**

The prosecutor struck a black venireperson based solely on an entry in his written questionnaire which indicated that the venireperson's wife worked at the same Walmart as a girlfriend of the defendant's. No individual questions were asked of this venireperson to confirm or explore the relationship. The state's challenge was granted, and the conviction was reversed by the court of appeals, which held that "[t]he State must engage in meaningful voir dire examination on a subject it alleges it is concerned about."

The court of criminal appeals reversed the reversal. Various factors are considered when assessing the propriety of a peremptory challenge under *Batson*, and the court of criminal appeals has never held that the presence or absence of any one factor is dispositive. "We hold that a lack of meaningful questioning might be sufficient to support a *Batson* challenge under the appropriate circumstances, but the Court of Appeals erred in applying the standard of review in this case. " Here, there was a foundation in the record for the trial court's ruling that the reason given by the prosecutors was non-pretextual.

> We conclude that the Court of Appeals misapplied the standard for reviewing the trial court's ruling. Properly applying the standard of review, the Court should have given deference to the trial court's evaluation of the prosecutors' credibility and should not have given dispositive weight to the lack-of-questioning factor. Based on our review of the record, the trial court's ruling denying the appellant's *Batson* challenge was not clearly erroneous.