TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

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Topic:
Case Law Update

Speaker: Mark Stevens
310 S. St. Mary's Suite 1920
San Antonio, Texas 78205
210.226.1433 phone
mark@markstevenslaw.com email

CASE LAW UPDATE

25TH ANNUAL
RUSTY DUNCAN
ADVANCED CRIMINAL LAW COURSE

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Mark Stevens
310 S. St. Mary's, Suite 1920
San Antonio, Texas 78205
(210) 226-1433

mark@markstevenslaw.com

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Scope of Paper

This paper discusses all published cases decided by the Texas Court of Criminal Appeals between May 4, 2011 and April 25, 2012. Also included are selected non-published cases decided by that Court, and some other cases decided by intermediate courts of appeals during the same time period.

A copy of this paper can be downloaded from my website, www.markstevenslaw. com. 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."

APPEAL

1. 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*, 337 S.W.3d 902 (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The court of criminal appeals ordered the second opinion withdrawn, since the court of appeals had no jurisdiction to issue it more than 60 days after the state filed its PDR.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.

2. Burdens are tricky things, and the prosecutors usually win.

***Davis v. State*, 345 S.W.3d 71 (Tex. Crim. App. 2011)**

Davis escaped from jail in Texas and fled to Oklahoma, where he was arrested, and then sent back to Texas pursuant to the Interstate Agreement on Detainers Act (IADA). The state asked for a continuance beyond the time specified for trial in the IADA, and apparently argued that the fact that it had re-indicted Davis constituted good cause. The defense filed a motion to dismiss, which was denied by the trial court. Unfortunately, there was no court reporter at that hearing. The court of appeals reversed, holding that the trial court failed to meet its burden of making a determination on the record of good cause to justify the continuance.

The court of criminal appeals reversed the reversal. The court of appeals erroneously held that the trial court had any burden under the IADA. In fact, the state had the burden at trial to show

good cause for the continuance. Davis, though, "as the appealing party, had an obligation to present a record in the court of appeals that demonstrates that he is entitled to appellate relief." Even though Rule 13.1 of the Rules of Appellate Procedure dispenses with the requirement that a party request the presence of a court reporter, Davis here had the duty to object to the absence of the court reporter, and when he did not, he failed to carry his burden of presenting a record which demonstrated his entitlement to relief.

3. The state may perfect an interlocutory appeal even though the record does not reflect what evidence the trial court suppressed; certification by the prosecuting attorney that the suppressed evidence is of substantial importance is enough.

***State v. Chupik,* 343 S.W.3d 144 (Tex. Crim. App. 2011)**

The trial court granted Chupik's motion to suppress some small amount of evidence in a DWI case, and the state appealed, at the same time certifying that the appeal was not taken for the purposes of delay, and that the suppressed evidence was os substantial importance in the case. The court of appeals affirmed, holding that the state's appeal presented nothing for review because there was nothing in the record to show that the trial court's ruling would result in the exclusion of any evidence at trial.

The court of criminal appeals granted review to determine whether, in a state's appeal from a pretrial order granting a motion to suppress evidence, the record must reflect the evidence that was suppressed. The court held that there is no such requirement. "It is sufficient that the prosecuting attorney certifies that the suppressed evidence is of substantial importance in the case."

4. Appellate counsel has the duty to advise an appellant who was unsuccessful on appeal that he has the right to file a petition for discretionary review *pro se*.

***Ex parte Herrera,* 2011 WL 2473114 (Tex. Crim. App. 2011)(not designated for publication)**

Herrera lost in the court of appeals, and his lawyer advised him when that court affirmed the conviction, and advised him of his right to petition the court of criminal appeals for discretionary review. Counsel erred, however, by not advising Herrera, who claimed indigence, that he had a right to petition *pro se*. Because of this, the court found counsel ineffective and allowed Herrera to file an out-of-time petition.

5. The court of appeals had no jurisdiction to consider the state's appeal from the trial court's decision that the evidence was insufficient after jeopardy had attached, even though the trial court intended to rule in such a way that preserved the appeal.

***State v. Blackshere,* 344 S.W.3d 400 (Tex. Crim. App. 2011)**

Four days before trial the police discovered that the methamphetamine Blackshere was

accused of possessing was missing from their vault. The defense filed a motion to suppress evidence relating to the methamphetamine, and the trial court carried the motion with trial. The jury was sworn and after the first six witnesses had testified, the state rested on its motion. The trial court ruled that it would suppress the evidence and dismiss the jury. At the request of the state, the court also stated that it was not dismissing the case, or directing a verdict, so that the state could appeal the decision. Still later, the court issued a written order that stated it had found bad faith and dismissed the charges and discharged the jury because the state had otherwise insufficient evidence to convict.

The state appealed, and the court of appeals reversed, holding that the defense had not adequately proved bad faith, and that the court had erred in declaring a mistrial. Blackshere filed a motion for rehearing in which he complained for the first time that the court of appeals had no jurisdiction because article 44.01 of the code of criminal procedure does not allow the state to appeal a motion to suppress after jeopardy has attached.

The court of criminal appeals reversed the reversal. Article 44.01 expressly limits a state's appeal of the grant of a motion to suppress to cases in which jeopardy has not attached, and jeopardy had clearly attached in this case, after the jury was sworn. In this case, various labels were attached to the trial court's actions, but labels can not trump the prohibition against double jeopardy. There is little doubt in this case that the trial court did not to acquit Blackshere. The intent and the form of its actions, though, are subordinate to the substance of the protections afforded by the Double Jeopardy Clause. Regardless of intent, the trial court ultimately terminated the prosecution based on a finding that the evidence was legally insufficient to convict. This finding resulted in a finding, correct or not, that the evidence was insufficient, and was "functionally an acquittal for purposes of double jeopardy. Whether there was an underlying error in suppressing evidence is irrelevant; such an underlying error cannot be reviewed after an acquittal for insufficient evidence."

6. The court of appeals erred in not addressing appellant's claim that the evidence was insufficient to support an order that he reimburse the county for attorneys fees.

***Armstrong v. State,* 340 S.W.3d 759 (Tex. Crim. App. 2011)**

The court of appeals erred in holding that a claim of insufficient evidence to support a requirement that the defendant reimburse the county for attorney fees, as mandated by a clerk's bill of costs, did not present a criminal law matter. The court of appeals should have addressed Appellant's claim.

7. How not to win friends and influence people.

***State v. Sanavongxay,* 2012 WL 204260 (Tex. Crim. App. 2012)**

The trial court orally ruled that the state would not be able to admit DNA evidence because it did not timely provide the results to the defense, and the state appealed. The Fort Worth Court of Appeals dismissed the state's appeal, holding that it had no jurisdiction since the trial court's ruling was not memorialized in a written order.

The state filed a petition for discretionary review, raising these four questions:

> 1. Did the Court of Appeals err in concluding that a trial court can effectively interfere with or deny the State's right to appeal as legislatively provided for under Tex.Code Crim. Proc. Ann. Art. 44.01(a)(5) (Vernon Supp.2010), simply by refusing to sign a written order memorializing its ruling to exclude or suppress the State's evidence?
>
> 2. Should *State v. Rosenbaum*, 818 S.W.2d 398 (Tex. Crim. App.1991) and all its progeny generated statewide be revised to cover situations where a trial court refuses to sign a written order excluding or suppressing evidence in order to interfere or deny the State the right to appeal under Tex.Code Crim. Proc. Ann. Art. 44.01(a)(5) (Vernon Supp.2010)?
>
> 3. Where a trial court intentionally refuses to sign a written order to exclude or suppress evidence, is the oral order sufficient to grant the Court of Appeals jurisdiction on a State's appeal made pursuant to Tex.Code Crim. Proc. Ann. Art. 44.01(a)(5) (Vernon Supp.2010)?
>
> 4. Did the Court of Appeals err in inferring that a hearing was necessary at the State's behest notwithstanding [that] the appellate record[,] at the time notice of appeal was given pursuant to Tex.Code Crim. Proc. Ann. Art. 44.01(a)(5) (Vernon Supp.2010)[,] was totally devoid of any evidence supporting the trial court's action in excluding or suppressing the State's DNA evidence?

The court of criminal appeals affirmed, "conclud[ing] that the answer to each of the state's questions for review is 'no.'" The court dispatched the state's petition in short order. It refused to address the first and fourth questions at all, finding that they were raised below only in the opinions of the concurring justices. It overruled the second question, which attacked the *Rosenbaum* line of authority, finding that the ruling in *Rosenbaum* "was based on the existence of a written order, the absence of which is precisely the issue here." The court did address the third question, and squarely rejected it. Article 44.01(a)(5) of the code of criminal procedure allows the state to appeal "an order," and an oral ruling is not "an order."

> The legislature has chosen to permit appeals by the state of "an order" that meets the statutory requirements. An oral ruling is not "an order" for the purposes of establishing the decision of the trial court, precisely because of the fallibility of human memory. Further, without "an order," we have no evidence of the required finality of a ruling; an oral ruling is subject to change after further discussion or presentation of contrary law or precedent. Only a writing suffices.

The court acknowledged that the state's right to appeal "could be stymied" if the trial court refuses or fails to issue a written order, but the statute requires an order, and precedent requires that the order be in writing.

The state is not without a remedy if this should happen. "Mandamus may be appropriate when a trial court refuses to rule. But requesting such a writ creates a burden that the movant must carry before the writ may issue." First, the state must show that the oral ruling was final, something it failed to do in this case. Second, the movant must file with its petition for mandamus certified or sworn copies of every document material to its claim for relief. Here the state failed to include an order with its request for findings of fact and conclusions of law, nor did it submit suggested findings and conclusions.

> Had the state established that "what he seeks to compel is a ministerial act, not involving a discretionary or judicial decision," the state would be entitled to a writ of mandamus to compel the trial court to reduce her oral ruling to writing because such a ruling is a ministerial act that is the proper subject of a mandamus. *See State ex rel. Young*, 236 S.W.3d at 210; *Patterson*, 971 S.W.2d 442. In this case, it was not the absence of a remedy, but the State's misapplication of the available remedy, that has resulted in its failure to obtain relief from the trial court's purported conduct.

A Practice Tip on persuasive writing: In footnote 8 the court of criminal appeals made this observation: "We note that the tone and language that the state uses in both its grounds for review and its appellate brief do not always reflect well upon the author or advance the state's legitimate concerns."

8. "The standards of procedural default . . . are not to be implemented by splitting hairs in the appellate courts." An infrequent case in which the prosecutor's claim of waiver was rejected.

***Lackey v. State*, 2012 WL 716023 (Tex. Crim. App. 2012)**

The County Judge appointed Skotnik, a municipal judge, to act for her in all criminal cases. Judge Skotnik denied Lackey's motion to suppress evidence in his DWI case. Lackey did not object to the Skotnik's qualifications at that time, but did file a motion to set aside the orders denying suppression several months later. The County Judge overruled this objection and Lackey pleaded guilty, preserving his right to appeal. The court of appeals reversed, holding that Skotnik's appointment was erroneous.

The state filed a petition for discretionary review arguing, among other things, that Lackey waived error by not objecting at the hearing before Judge Skotnik. The court of criminal appeals disagreed and affirmed.

Generally, an objection must be made as soon as the claimed error becomes apparent. Timeliness is not quite as crucial at hearings before judges because judges are presumed to be able to disregard inadmissible matters. The timeliness requirement is meant to insure that the trial court will have an adequate opportunity to prevent or correct errors, that opposing counsel will have a fair opportunity to respond, and that the orderly and efficient presentation of the case before the fact-finder will be promoted. Nothing Lackey did here compromised these ideals. By raising Skotnik's

qualifications in his motion for a new suppression hearing, Lackey provided the County Judge with an opportunity to correct her error in having appointed an unqualified individual. The state was given an opportunity to respond and did respond. Nothing about this presentation hampered presentation of the case to the fact-finder – Lackey pleaded guilty the same day his motion for a new suppression was denied.

> "The standards of procedural default," we have admonished, "are not to be implemented by splitting hairs in the appellate courts." Albeit in the context of talking about the required *specificity* of objections under the predecessor to Rule 33.1, we observed in *Lankston v. State* that "all a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him *at a time when the trial court is in a proper position to do something about it.*"

9. A waiver of the right to appeal is not valid if entered before sentencing, and without an agreement on punishment.

***Washington v. State*, 2012 WL 1108417 (Tex. Crim. App. 2012)**

The state filed a motion to enter an adjudication of guilt, Washington pled true without a recommendation, and the court found him guilty and sentenced him to 20 years imprisonment and a $10,000.00 fine. Before sentencing, Washington waived his right to appeal. The court of appeals dismissed the appeal, based on the waiver.

> The court of criminal appeals reversed.
>
> But when a defendant waives his right to appeal before sentencing and without an agreement on punishment, the waiver is not valid. And contrary to the State's assertion, the record does not confirm that the State gave any consideration for Washington's waiver. So, on this record, Washington's waiver was not valid. We reverse the judgment of the court of appeals and remand this case to the court of appeals for proceedings consistent with this opinion.

10. Despite the fine print, appellant did not waive his right to appeal when everyone understood that his guilty plea would be conditioned on his right to appeal the court's pre-trial ruling.

***Lilly v. State*, 2012 WL 1314088 (Tex. Crim. App. 2012)**

The trial court overruled Lilly's motion to transfer the proceedings in his case from the prison chapel (which had been designated as a "branch courthouse") to the county seat, and Lilly pleaded guilty and gave notice of appeal. After he appealed the state argued that Lilly, as a part of his plea bargain, had signed in open court documents that waived his right to appeal.

The court of criminal appeals disagreed. The plea agreement certified Lilly's right to appeal, and it was signed by the state. The parties and the court were aware of Lilly's intention to appeal, the plea agreement discussions between the parties took place immediately after the court overruled Lilly's pretrial motion to transfer, and the trial court explicitly granted permission to appeal. "After reviewing the record, we find the State's argument is without merit, and we hold that the record contains sufficient contradictory evidence to rebut any presumption that Appellant intended to waive his public-trial claim."

11. **More proof (if more is needed) that representing the state on appeal is the easiest job in criminal law.**

***Pfeiffer v. State*, 2012 WL 1314086 (Tex. Crim. App. 2012)**

We granted the State's petition for review to resolve a split in the courts of appeals on whether the State must file a separate notice of appeal when the defendant appeals his conviction and the State wishes to appeal a ruling of law under Article 44.01(c) of the Texas Code of Criminal Procedure. We hold that the State need not file its own notice of appeal when it raises a cross-point concerning a ruling on a question of law under Article 44.01(c).

12. An appeal must be abated where the trial court's action prevents the proper presentation of the case to the court of appeals, and where the trial court is able to correct its action if the case were abated.

***Henery v. State*, 2012 WL 1414110 (Tex. Crim. App. 2012)**

Henery filed a motion to quash his information which the trial court orally denied. Later the trial court signed a written order *granting* the motion to quash. Six days after that, the trial court accepted Henery's guilty plea and sentenced him to jail. Henery then appealed, claiming that the trial court had lost jurisdiction over the case when it signed the written order quashing the information. The court of appeals agreed and reversed.

The court of criminal appeals reversed the reversal. Rule 44.4 of the Texas Rules of Appellate Procedure states that the court of appeals may not affirm, reverse or dismiss and must require the trial court to correct its error if two conditions exist: first, the trial court's erroneous action or failure to act prevents the proper presentation of the case to the court of appeals; second, the trial court can correct its action or failure to act. "Due to the mandatory language of Rule 44.4, if the preconditions are satisfied, the court of appeals must abate the case, even if neither the State nor the defendant has requested the abatement."

In this case, both conditions exist. The trial court's oral and written rulings on the motion to quash are in conflict and this conflict prevents a proper presentation of the issue to the court of appeals. And an abatement will allow the trial court, which is the only entity that can know whether it intended to grant or deny the motion, to properly resolve the apparent conflict. "We vacate the judgment of the court of appeals and remand this case to that court with instructions to abate the

appeal and order appropriate findings by the trial court."

ASSISTANCE OF COUNSEL

1. Counsel is assumed effective "if any reasonably sound strategic motivation can be imagined." (Emphasize "any")

***Lopez v. State*, 343 S.W.3d 137 (Tex. Crim. App. 2011)**

The court of appeals found that trial counsel did not object to improper outcry testimony and to inadmissible opinion testimony about the child's truthfulness. That court reversed, holding that Lopez was denied his right to effective counsel. The court of criminal appeals reversed the reversal. Appellate courts must strongly presume that trial counsel was effective, and, when direct evidence of incompetence is unavailable, "will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined." It is "rare" that counsel's ineffectiveness will be so apparent from the record that this determination will be successfully made on direct appeal. The record in this case is silent as to why trial counsel failed to object, Lopez failed to meet his burden, and the court of appeals erred in holding otherwise. The court did note this though: "Unlike other claims rejected on direct appeal, claims of ineffective assistance of counsel rejected due to lack of adequate information may be reconsidered on an application for a writ of habeas corpus."

2. The mere appearance of unfairness will not overcome the Sixth Amendment's presumption that a defendant has the right to counsel of choice, unless there is also an actual conflict of interest, or a serious potential conflict of interest.

***Bowen v. Carnes*, 343 S.W.3d 805 (Tex. Crim. App. 2011)**

Charles and Jennifer Bowen were charged with capital murder and hired Robert Phillips as their lawyer. The state filed a motion to disqualify Phillips, asserting that Ballenger, a jailhouse informant, would be a witness against Charles, and that Phillips's ability to cross-examine him would be compromised, because Phillips had previously represented Ballenger on an unrelated criminal case. Both Bowens, and Ballenger waived their rights to conflict-free representation, and the defense filed an *ex parte* document in which they said that Ballenger would not be a hostile witness against them in the trial. The trial court granted the state's motion to disqualify, purportedly because of its concern with public perception. The Bowenses filed an original petition for mandamus in the court of criminal appeals and they won.

The court of criminal appeals found no actual or serious potential for conflict based on the facts before it. Because Ballenger's case was wholly unrelated to the Bowenses, "the likelihood is exceedingly remote" that Phillips would have to use confidential information on Ballenger to defend his new clients.

It appears that the trial court disqualified Phillips, not because of an actual or serious potential for conflict, but instead based on it concern for public perception. Although the trial court's concern for public perception is not trivial or immaterial, it does not outweigh the Bowens's

Sixth Amendment right to choose their lawyer. The constitutional presumption in favor of counsel of choice is overcome only by an actual conflict or a serious potential conflict of interest.

3. *Ake* error was forfeited where trial counsel's request for additional experts was not presented to the trial court in writing and adequately supported by the facts; nor was there a "failure of forensics" resulting from the combined effects of various actions by trial counsel.

***Ex parte Jimenez,* 2012 WL 1414119 (Tex. Crim. App. 2012)**

Jimenez was charged with murdering a 21 month old child by forcing paper towels down his throat. The state put on three expert witnesses to support its case. Jimenez called Dr. Ira Kanfer, a medical examiner from Connecticuit, who, according to the Austin Chronicle, "suffered a near-meltdown under cross-examination by Assistant District Attorney Allison Wetzel . . . ." Later, while off the stand, Kanfer was overheard saying that Wetzel and her trial partner could "go fuck [them]selves." When Kanfer resumed his testimony, Wetzel asked him about his commentary, and he readily confessed, saying "That's an exactly correct quote." Jimenez was convicted of murder and sentenced to 99 years.

Jimenez filed an application for writ of habeas contending that she had been denied due process and the effective assistance of counsel, and a hearing was held before Judge Charlie Baird who recommended that relief be granted. Among other things, Judge Baird found that relying on Kanfer was probably worse than having no expert at all: "To the extent Dr. Kanfer's testimony had any persuasive value (which is highly doubtful), the Court finds that it was completely and 100% undermined by [his] unprofessional conduct at trial."

The court of criminal has ordered the application filed and set for submission.

> We order that this application be filed and set for submission to determine whether this Court should review Applicant's due process claim for the first time in an application for a writ of habeas corpus and whether Applicant was denied due process under *Ake*. This application is also filed and set to determine whether trial counsel rendered ineffective assistance by: (1) hiring Dr. Ira Kanfer as an expert; (2) not hiring qualified experts; (3) not making an adequate written request for expert assistance; and (4) not objecting and requesting a mistrial or continuance in response to Dr. Kanfer's conduct. The parties shall brief these issues.

The court of criminal appeals denied all relief requested by Jimenez.

First, the court of criminal appeals agreed with Judge Baird that Jimenez did not establish her actual innocence. "'Because rational people can sometimes disagree, the inevitable consequence of this settled law is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold.' We, like the court of appeals and the habeas judge, are legally constrained to uphold the jury's verdict in this case."

Second, the court of criminal appeals found no violation under *Ake v. Oklahoma*. The trial judge here appointed two experts, but Jimenez said he should have appointed more, including an expert on choking, to "level the playing field." The court of criminal appeals disagreed. An indigent defendant is entitled to the appointment of experts necessary to prevent an inaccurate verdict, but the court need not appoint all the experts that a wealthier defendant could afford. If the judge appoints one expert and the defendant requests another, the judge may deny further assistance unless the defense proves that the original expert could not adequately assist. "'Just as a defendant who relies on counsel at public expense must accept a competent lawyer, rather than Clarence Darrow, so a defendant who relies on public funds for expert assistance must be satisfied with a competent expert.'" Here habeas counsel maintained that the trial lawyers wanted a particular expert, but there is nothing in the record to show that the trial court refused to appoint anyone. Although Jimenez's trial attorney claimed for the first time on habeas that he had an "informal" discussion with the trial judge in which he requested appointment of a certain expert, no such request was made in writing, or appears on record, and the *Ake* claim was not made on direct appeal. In Texas, an *Ake* claim must be submitted to the trial court in writing, and must have adequate factual support. " In this case, applicant forfeited consideration of her *Ake* claim on habeas review because she failed to preserve her constitutional claim in the trial court by filing a proper written Ake motion and ensuring that the trial judge formally ruled on it."

Finally, the court of criminal appeals considered Jimenez's claim that trial counsel was ineffective. Specifically, habeas counsel complained of a "failure of forensics" because of four interrelated deficiencies by trial counsel: (1) that counsel hired Dr. Kanfer; (2) that counsel failed to object and request a mistrial and continuance in response to Kanfer's cross-examination; (3) that counsel failed to retain other qualified experts; and, (4) that counsel failed to make a written request for the appointment of other experts. The court rejected this argument.

Trial counsel were experienced and were not deficient in their pretrial preparation or in their focus on the primary contested issue. Kanfer was not a pediatric specialist, but he was an experienced forensic pathologist and forensic pathologists are ideally suited to determine the cause and manner of suspicious deaths. Counsel were not ineffective for retaining him as their expert. The real problem in this case was Kanfer's "unfortunate remark." The court acknowledged that this was a problem, and in fact apparently found the particular verb Kanfer used so offensive that it did not quote it in the opinion. Although this was an "infelicitous incident" that was "probably quite damaging" to Kanfer's credibility as a neutral expert, it did not mean that trial counsel was ineffective. " In hindsight, counsel clearly should not have let Dr. Kanfer come anywhere near the prosecutor during any breaks, but that single failure does not make counsel ineffective." Nor was trial counsel deficient for not asking for a mistrial or continuance, since the prosecutor was entitled to impeach Kanfer for his inappropriate remark to show his bias. And the trial team was not ineffective for requesting additional experts. Although habeas counsel makes a compelling argument that the defense was "outclassed and outmatched by the State's numerous experts," the issue is whether the constitution requires either absolute or even rough equivalency of experts. "We cannot find that *Ake* stretches that far. Instead, we must conclude that applicant does not have a constitutional right to a "team of experts" paid for by the taxpayers, and applicant's counsel is not ineffective in failing to request such a team." The question here is whether counsel's failure to hire

or request funding for additional experts created " a high risk of an inaccurate verdict," and that was not proven here.

4. Trial counsel ineffective for inaccurately communicating the terms of the plea bargain to the defendant.

***Ex Parte Wells*, 2011 WL 5429588 (Tex. Crim. App. 2011)(not designated for publication)**

The state offered to recommend 45 years and be silent on whether he had used a deadly weapon, and counsel only conveyed half the offer. He forgot the deadly weapon offer, and Wells declined. Just before trial, counsel moved for a continuance and informed the court that he had mis-conveyed the offer, and that Wells now wanted to accept. The continuance was denied, Wells pleaded guilty, and he was sentenced to 50 years, without an affirmative finding. He filed a writ complaining that he had received ineffective counsel.

The court of criminal appeals granted relief. Just as the complete failure to convey a plea bargain can amount to deficient performance, so can conveyance of inaccurate information about the terms of the offer. Wells depended on counsel's accurate communication of the substance of the offer so that he could make an informed decision on whether to accept or reject it, and counsel gave incorrect information about the deadly weapon finding. This was deficient. It was also prejudicial. Wells established that he would have accepted the plea bargain had he known about the state's position on the deadly weapon. His decision to reject the plea bargain was based on erroneous information, and by the time the correct terms were conveyed, it was too late. Wells was remanded to answer the charges against him, and the state was ordered to reinstate its 45 year offer.

5. The question whether a trial court may refuse to appoint two lawyers in a death penalty case when the defendant is represented by *pro bono* counsel is interesting, but is not appropriate for mandamus relief.

***Garcia v. White*, 357 S.W.3d 373 (Tex. Crim. App. 2011)(Cochran, J., concurring)**

After almost 20 years on death row, Garcia was granted a new punishment trial by the Fifth Circuit. Garcia was indigent, and when he was returned to Dallas County for retrial, Danalynn Recer took on the role of *pro bono* lead counsel. For more than a year she litigated numerous pretrial motions and supervised the work of investigators. Then she was diagnosed with cancer, and, uncertain about when she would be able to resume representation, the organization Recer worked with requested that Bobby Mims be appointed, and he was, and he served in this capacity for seven months. When Recer recovered, she filed notice of her intent to return to the case as lead counsel, alongside Mims. The trial court advised that it would no longer pay Mims if Recer returned, but that if Mims remained as lead counsel, it would appoint a second attorney to assist him. Garcia objected, insisting that he wanted Recer to return as lead counsel, and that he wanted Mims to remain on the case as well. The court denied this request, and ordered Mims removed from the case. Garcia then filed this mandamus action.

The court of criminal appeals denied leave to file an application for writ of mandamus. Judge Cochran concurred and was joined by Judges Johnson and Alcala. These judges agreed that mandamus was inappropriate because Garcia failed to show a clear right to relief, since the difficult issues of constitutional law he raised involve novel or unsettled law, and are unsuited for mandamus relief, and since he has not yet suffered irreparable harm. The concurring judges ruminated on some of the unsettled issues that this case raised. Although a defendant does not have the right to appointed counsel of his choice, a judge may not arbitrarily remove appointed counsel whom the defendant has grown to accept and has gained confidence in. In this case, the law is unsettled whether the trial court could remove Mims. Part of the problem is that article 26.052 states that the trial judge shall appoint two attorneys to an indigent defendant against whom the state seeks a death sentence, and there are no exceptions, even when that defendant has a *pro bono* attorney. This statute, though, does not address the situation in Garcia's case. Is this statute satisfied where an indigent capital defendant has obtained the services of one *pro bono* counsel? The concurring judges believed that mandamus relief is inappropriate here because the court has not previously addressed this question, and the answer is not so obvious as to be beyond all reasonable dispute.

6. Capital lawyers have heavy responsibilities to conduct independent investigation, and may not rely "blindly" upon either the prosecutor's file or their on client's version, but these responsibilities are not unlimited.

***Gobert v. State*, 2011 WL 5881601 (Tex. Crim. App. 2011)(not designated for publication)**

Gobert's cellmate testified that Gobert had confessed the capital murder to him. To explain how the cellmate could have found out about this crime without Gobert having told him, Gobert called Lass, a jailer who testified how small the cells were. After Lass testified, Gobert's lawyer requested that she be allowed to remain in the courtroom, and this aroused the prosecutors's suspicions. They investigated Lass, and then recalled her as their witness in the punishment phase to testify that she had had an improper relationship with Gobert, that she had smuggled in a cell phone for his use, and that, among other things, Gobert had confided in her his plans to assault another jailer and escape. The defense requested time to investigate Lass, calling her testimony "'highly inflammatory' and 'devastating, to say the least. . . . I mean, for all we know she may be psychotic.'" The trial court recessed for a day, but Gobert was still given the death penalty, and he appealed

Gobert raised a number of issues, including that his trial lawyers were ineffective for not investigating Lass before calling her as a witness. The court of criminal appeals rejected this argument. Counsel has a duty to make an independent investigation, and cannot rely blindly on either his client's version, or the prosecutor's file. Even so, counsel's duty to investigate his own witnesses is not absolute; he need only make a reasonable investigation. Gobert himself knew of his relationship with Lass, but the facts in question here were so unusual and unlikely that an objectively reasonable counsel is not deficient for failing to investigate them. The only two people who knew about the relationship were Gobert and Lass, and if he did not want the relationship exposed, he should not have suggested calling her as a witness.

7. Worried about being found ineffective? Relax.

***Hatcher v. State*, 2011 WL 6225406 (Tex. Crim. App. 2011)(not designated for publication)**

Hatcher was convicted of possession with intent to deliver cocaine and sentenced to 30 years imprisonment. His conviction was affirmed on appeal, and he later filed a writ, complaining of ineffective assistance of counsel. The trial court made findings of fact and recommended that relief be denied. The court of criminal appeals disagreed with some of the findings, but also denied relief. The court considered and rejected a variety of specific complaints by Hatcher, including the following:

- Counsel sought a continuance on the morning of trial and advised the court that he had not prepared for trial because he believed Hatcher would accept the state's plea offer and he did not want the offer revoked, which he feared would happen if the state found out he was getting ready for trial. In asserting that he was not ready, counsel told the court that "trial at this point would be a rubber stamp" and that Hatcher would be convicted after about an hour's deliberation. The motion was denied and trial began the next day, at which time counsel announced that the state had or would comply with the "standard discovery order." At the writ hearing, the trial court found that counsel did prepare for trial, and that he did a reasonable job with the hand he was dealt. The court of criminal appeals found that counsel was not deficient, and that, even assuming he was, prejudice was not shown.

- Hatcher complained that counsel elicited damaging testimony about his prior incarcerations when he asked his mother, "how long has he lived in the Abilene area?", and she responded: "All his life, except when he was incarcerated." She made that point two or three more times before she left the stand. The court of criminal appeals found that trial counsel clearly did not elicit this harmful information, in light of the mother's unresponsive answers.

- Counsel failed to request an accomplice-witness instruction based on the testimony of one who was clearly an accomplice as a matter of law. Counsel claimed strategy, believing that such an instruction would not be helpful, and would only call attention to the witness's testimony. The court of criminal appeals found this conduct deficient. "Intentional or not, trial counsel's failure to request an accomplice-witness instruction on the State's star witness was deficient conduct. . . . Applicant was entitled to the instruction, and it could only have benefitted the defense." Nonetheless, Hatcher was not entitled to relief because he could not show prejudice in light of ample other evidence that tended to connect him to the offense.

- Finally, the court rejected Hatcher's contention that his lawyer was ineffective for conceding that he was a drug dealer and that the accomplice witness was credible. The courts will second-guess counsel's summation strategies "only if the attorney's actions are without any plausible basis." Here, counsel's summation did have a "plausible basis" in the record. "Counsel acted with undivided allegiance for a client who demanded a trial despite extensive evidence of his guilt and no plausible defense. It is hard to make a silk purse out of a sow's

ear."

8. *Ex parte Evans* is overruled; where eligibility for parole is "succinct and clear," clients need correct advice, and lawyers are required to give it.

***Ex Parte Moussazadeh*, 2012 WL 468518 (Tex. Crim. App. 2012)**

Moussazadeh was indicted for capital murder when he was a juvenile. He pleaded guilty to murder without a sentencing agreement and was sentenced to 75 years imprisonment. Later he filed a writ alleging that his plea was involuntary because his lawyer had given him misinformation about his eligibility for parole. Specifically, counsel had advised him that he would be eligible for parole in 15 years, when in fact he had to serve a minimum of 30 years before becoming eligible. He asserted in his writ that he would not have pleaded guilty had he had correct information about his eligibility, or lack thereof.

Ex parte Evans, 690 S.W.2d 274 (Tex. Crim. App. 1985) had held that, because parole eligibility is so speculative, counsel's incorrect advice about same will not render a plea involuntary unless it is proven by a preponderance of the evidence that eligibility was a term or essential element of the plea bargain, or that either the judge or the prosecutor caused him to plead guilty based on an understanding of Texas parole law. Relief was initially denied in this case pursuant to *Evans*.

Later, the court of criminal appeals granted reconsideration on its own motion, overruled *Evans*, and granted Moussazadeh relief.

Although the *attainment* of parole is speculative, *eligibility* for parole is not, contrary to the holding in *Evans*. Eligibility for parole is straightforward because it is based on the law in effect on the date of the offense. Defendants who plead guilty likely consider when they will become eligible for parole and they need accurate information in this regard. "In situations in which the law is not clear, counsel should advise a client that pending criminal charges may carry a risk of other serious consequences. When a serious consequence is truly clear, however, counsel has an equally clear duty to give correct advice. Both failure to provide correct information and providing incorrect information violate that duty."

Consequently, and contrary to *Evans*, it doesn't matter whether parole eligibility was a term or essential element of the plea bargain (whatever that means) or that the judge and prosecutor had nothing to say about the subject. Counsel is ineffective, and a defendant is entitled to relief, if counsel performed deficiently, and, in the context of an involuntary plea, counsel's bad advice caused the client to plead guilty instead of go to trial.

In this case, the parole-eligibility statute was "succinct and clear," and counsel could easily have determined his client's eligibility by reading the text of that statute. Counsel was deficient by providing incorrect advice that essentially doubled the length of time the client had to serve before becoming parole-eligible. Prejudice was established by Moussazadeh's affidavit in which he asserted he would not have pleaded guilty if he had known how long it would take him to become

eligible.

9. It is hard to show on direct appeal that counsel was ineffective at trial.

***Menefield v. State*, 2012 WL 1314083 (Tex. Crim. App. 2012)**

A laboratory report was admitted into evidence, but the analyst who conducted the test and prepared the report did not testify. We hold that the defendant's trial counsel has not been shown to have performed deficiently in failing to object to the report on Confrontation Clause grounds when the record does not contain counsel's reasons for failing to object and does not establish whether the analyst could or would have testified if an objection had been lodged.

AUTHENTICATION

1. "If you ain't blasting, you ain't lasting:" Authenticating social network content can be done circumstantially and requires prima facie proof of authorship initially before the gatekeeper; it then becomes a matter of weight for the jury.

***Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. 2012)**

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 court of criminal appeals granted Tienda's petition for discretionary review but affirmed the court of appeals.

Relevance is always a "bedrock condition of admissibility." "Evidence has no relevance if it is not authentically what its proponent claims it to be." The trial court must perform a gatekeeping function under Rule 104, but it need not be persuaded that the evidence is authentic. Instead, the trial court must simply decide, "whether the proponent of the evidence has supplied facts that are sufficient to support a reasonable jury determination that the evidence he has proffered is authentic."

Evidence can be authenticated by direct evidence based on personal knowledge, by comparison, or circumstantially. Although electronic technology, including information found on social networking websites is relatively new, "the rules of evidence already in place for determining authenticity are at least generally 'adequate to the task.'" *Lorraine v. Markel American Insurance Co*. 241 F.R.D. 534 (D.Md.2007), is "[w]idely regarded as the watershed opinion with respect to the admissibility of various forms of electronically stored and/or transmitted information," and it holds that "there is no single approach to authentication that will work in all instances." The most appropriate method for authentication will depend on the nature of the evidence and the circumstances of the case.

Other courts, in and out of Texas, have held that electronic evidence can be authenticated in a number of ways, consistent with Rule 901. For example, the purported sender might admit to authorship, or might be seen composing the material in question. Business records of an internet service provider or cell phone company might show that the message originated with the purported sender's personal computer or cell phone under circumstances indicating that only this person would have had access to the device in question. Sometimes the communication contains information only the purported sender could be expected to know. Sometimes the purported sender responded in ways that indicate authorship circumstantially.

The court acknowledged that, since the provenance of some electronic writings is sometimes open to question – "computers can be hacked, protected passwords can be compromised, and cell phones can be purloined – " sometimes the authentication offered will be insufficient. "That an email on its face purports to come from a certain person's email address, that the respondent in an internet chat room dialogue purports to identify himself, or that a text message emanates from a cell phone number assigned to the purported author—none of these circumstances, without more, has typically been regarded as sufficient to support a finding of authenticity."

In this case the court bulleted some 25 instances of photographs, content, and music from the internal content of the MySpace postings in issue as "ample circumstantial evidence—taken as a whole with all of the individual, particular details considered in combination—to support a finding that the MySpace pages belonged to the appellant and that he created and maintained them."

Although it was within the realm of possibility that some bad guy conspired to set Tienda up, that would have been "an alternate scenario whose likelihood and weight the jury was entitled to assess once the State had produced a prima facie showing that it was the appellant, not some unidentified conspirators or fraud artists, who created and maintained these MySpace pages."

BAIL

1. When article 17.151 says that a defendant "must" be released on bond if the state is not ready to try a felony case within 90 days of arrest, does "must" mean must.

***Ex parte Kretzer*, 2011 WL 2732598 (Tex. App.–Beaumont 2011, pet. granted) (not designated for publication)**

Kretzer was on bond for two offenses of aggravated sexual assault when he was arrested for the instant offense of indecency with a child, and his bond was set at $500,000.00 on the new charge. He filed an application for writ of habeas corpus asserting that, under article 17.151, he was entitled to be released on a personal recognizance bond since he had no ability to make bond, and the state was not ready for trial within 90 days of his arrest. The trial judge reduced his bail to $250,000.00, and he appealed.

The court of appeals affirmed. Article 17.151 says that a person "must" be released on bond if the state is not ready for trial within 90 days of arrest, with exception of a few instances not applicable to this case. The court of appeals acknowledged this language, but then focused on article 17.15, which, among other things, also contains mandatory language that requires the trial court to consider the future safety of a victim and the community.

> We hold that the trial court properly considered the future safety of the victims and the community in determining the amount of appellant's bail and did not abuse its discretion by setting appellant's bond at $250,000."

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

1. The decision of the Court of Appeals in this case conflicts with the decisions of numerous other Courts of Appeal regarding the application of Article 17.151 of the Texas Code of Criminal Procedure in holding that the statute is not mandatory in that the trial judge has discretion to set Appellant's bond in an amount higher than he can afford if releasing Appellant on an affordable bond or a personal bond might affect the safety of the community or a victim.

2. The decision of the Court of Appeals conflicts with the past decision of the Texas Court of Criminal Appeals in Rowe v. State, 853 S.W. 2d 581 (Tex. Crim. App. 1993) regarding the mandatory nature of Article 17.151of the Texas Code of Criminal Procedure.

3. The Court of Appeals has misconstrued and misapplied Article 17.15(5) of the Code of Criminal Procedure in apparently finding that the Legislature intended Article 17.15(5) to apply as an exception to the release of Appellant because of delay under Article 17.151 of the Texas Code of Criminal Procedure.

CAPITAL MURDER

1. More Coons error, more harmlessness.

***Gobert v. State*, 2011 WL 5881601 (Tex. Crim. App. 2011)(not designated for publication)**

As in *Coble*, the court of criminal appeals found that the trial court abused its discretion when it admitted Dr. Coons's opinion about the future dangerousness of this capital defendant. "Here, as in that case, Dr. Coons provided no scientific, psychiatric, or psychological research or studies to support his idiosyncratic methodology for predicting whether a hypothetical person would commit future acts of violence." As in *Coble*, though, the error was found harmless. "Given the overwhelming evidence of appellant's life-long penchant for violence, the circumstances of the capital murder, the evidence of his conspiracy to commit capital murder to effectuate his escape from jail, his own testimony concerning his prior violence in prison and toward anyone–including his own mother–who angers him, we are confident that this error did not affect appellant's substantial rights to a fair sentencing trial."

2. 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."

3. Capital murder conviction and death sentence affirmed; no right to lesser included offense of injury to a child; *Berry* distinguished, again.

***Lucio v. State*, 351 S.W.3d 878 (Tex. Crim. App. 2011)**

- The court rejected Lucio's complaint that the trial court erred in not submitting the lesser included offense of injury to a child because her brief contained no argument or citation to authority that, if guilty, Lucio was guilty only of the lesser. "We decide that this point of error is inadequately briefed and presents nothing for review as this Court is under no obligation to make appellant's arguments for her." Having said that, the court then curiously acknowledges in a footnote that although it is "possible" that a rational jury might find Lucio guilty only of the lesser from the state's evidence alone, it believed that the only "realistic chance" that a jury would convict of the lesser would require the defendant to testify and admit responsibility for that act. "And with appellant having disclaimed responsibility for

these injuries, we do not believe that a rational jury would have convicted her of any lesser-included offense." Is that a new standard of review in lesser included offenses?

- The evidence was legally sufficient to prove that Lucio would be dangerous in the future. This case is distinguishable from *Berry v. State*, 233 S.W. 3d 847 (Tex. Crim. App. 2007), in which the evidence was found insufficient.

- After the jury had returned its sentencing verdict, but before the judge signed the judgment, the defense asked the judge to find the evidence legally insufficient in light of the *Berry* case, and the trial court declined. "Appellant essentially asked the trial court to enter a judgment notwithstanding the verdict. A trial court has no such authority in a criminal case."

- Lucio complained that she was entitled to reversal because her electronically recorded statement to the police was "inaudible." The court of criminal appeals disagreed, holding that assuming that portions of the recording "are inaudible does not mean that these portions of the court reporter's record are 'lost or destroyed' for purposes of Rule 34.6(f). There is nothing missing from the reporter's record."

- Various complaints Lucio tried to raise on appeal were found either to have been waived, or to be non-erroneous, or harmless, or all of the above.

- The evidence was legally sufficient to prove capital murder, and the court refuses to consider factual sufficiency after *Brooks*.

- "We do not review the factual sufficiency of the evidence to support a jury's answer to the future-dangerousness special issues.

4. Court finds it "prudent" to review the DNA statute because of recent changes.

***Skinner v. State*, 2011 WL 5437544 (Tex. Crim. App. 2011)(not designated for publication)**

After being convicted of capital murder and sentenced to death and exhausting his appeals, Skinner sought DNA testing under chapter 64, and the trial court denied relief. The court of criminal appeals stayed his execution pending resolution of this appeal.

> Texas Code of Criminal Procedure Chapter 64, which provides for DNA testing, has undergone several changes since its creation, but those changes have never been reviewed in the particular context of this case. Because the DNA statute has changed, and because some of those changes were because of this case, we find that it would be prudent for this Court to take time to fully review the changes in the statute as they pertain to this case.
>
> Furthermore, in denying the motion for DNA testing, the convicting court has failed

to enter determinations under Texas Code of Criminal Procedure article 64.03. The convicting court shall enter an order containing the relevant Article 64.03 determinations within 15 days of the date of this order. That order shall then be included within a supplemental clerk's record, which record shall be forwarded to this Court within 30 days of the date of this order.

5. Mitigating evidence not considered.

***Ex parte Rachal*, 2012 WL 333860 (Tex. Crim. App. 2012)(not designated for publication)**

The court of criminal appeals granted Rachal's subsequent application for habeas corpus and remanded to the trial court for a new capital punishment hearing, finding that his mitigating evidence of low intelligence, head injury, and troubled childhood were the types of evidence that could not have been properly considered by the jury under the former Texas Special Issues.

6. Does Denkowski's Settlement Agreement merit habeas reconsideration?

***Ex parte Escobedo*, 2012 WL 982907 (Tex. Crim. App. 2012)(not designated for publication)**

Escobedo was convicted of capital murder and the death sentence was imposed. While the trial court was considering his initial writ of habeas corpus, he filed a subsequent writ alleging that his execution was barred because he was mentally retarded. The court of criminal appeals ordered the trial court to consider the subsequent writ, and the state's expert was George Denkowski. In 2007 the court of criminal appeals denied relief. In April, 2011, Denkowski entered into a Settlement Agreement with the Texas State Board of Examiners of Psychologists in which his license was reprimanded, and subsequently, Denkowski agreed not to accept any engagement to perform forensic psychological services for evaluating persons for mental retardation in criminal cases. Escobedo then submitted a suggestion that the court of criminal appeals reconsider its previous ruling on its own initiative.

While the Rules of Appellate Procedure do not permit a motion for rehearing following a denial of post-conviction relief, the court may choose to reconsider on its own initiative. This authority should be exercised only "under the most extraordinary of circumstances."

The court exercised its authority to reconsider in light of Denkowski's Settlement Agreement. The case was remanded to the trial court to allow it to re-evaluate its initial findings, conclusions, and recommendation in light of Denkowski's Settlement Agreement. "This cause will be held in abeyance pending the trial court's compliance with this order."

7. Judge needs to learn the difference between "granted" and "denied."

***Ex parte Wesbrook*, 2012 WL 982945 (Tex. Crim. App. 2012)(not designated for**

publication)

Murphy was convicted of capital murder and sentenced to death. He filed a writ of habeas corpus that was denied, and then a subsequent writ. The court of criminal appeals dismissed the second and third claims in the subsequent writ, but remanded the first claim – based on *Brady* and the presentation of false evidence – to the trial court and ordered that findings of fact and conclusions of law be made. The trial court held a hearing, and afterwards, it "signed two conflicting orders, one adopting the State's proposed findings and conclusions recommending that the claim be either dismissed or denied, and the other recommending a new trial on punishment." The court of criminal appeals again remanded the application to the trial court, this time for claridication about which relief it meant to recommend: dismissal, denial, or granting relief. This time the trial court made supplemental findings "in which it stated that it 'intended to adopt the State's proposed findings that were signed by the [trial court] on May 10, 2011,' and that it 'had no intention of recommending a new punishment hearing in this case.'"

8. Remanded after a full hearing in the trial court to consider *Briseno* factors.

***Ex Parte Sosa,* 2012 WL 1414121 (Tex. Crim. App. 2012)**

Sosa was convicted for killing a police officer shortly after committing a bank robbery in 1983 and sentenced to death. Years later he filed a writ asserting that he was actually innocent and that his execution was barred because he was mentally retarded. The habeas court heard evidence for several days, and rejected Sosa's actual innocence claim, but recommended relief be granted because of his mental retardation. The court of criminal appeals remanded "this case to the convicting court for the judge to consider the factors we established in *Ex parte Briseno*."

The court began by stating its understanding of the *Atkins* case, where the Supreme Court held that it violates the Eighth Amendment to execute a mentally retarded person. Because there is "still disagreement 'in determining which offenders are in fact retarded,' [the Supreme Court] left to the states "the task of developing appropriate ways to enforce the constitutional restriction."

The court of criminal appeals then referred to its seminal case of *Ex parte Briseno*, 135 S.W. 3d 1 (Tex. Crim. App. 2004), where, in the absence of legislation, the court established guidelines "for determining whether a defendant had 'that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty.'" In *Briseno*, the court "adopted the definition of 'mental retardation' then in use by the American Association on Intellectual and Developmental Disabilities (AAIDD), [which] had three parts: (1) significantly subaverage general intellectual functioning, generally shown by an IQ of 70 or less, (2) accompanied by related limitations in adaptive functioning, (3) the onset of which occurs prior to the age of 18."

The court in *Briseno* listed seven non-mandatory factors that trial and habeas courts might look at when considering adaptive functioning, the "exceedingly subjective" second factor. These "*Briseno* factors indirectly get to the question: Are the defendant's limitations in adaptive

functioning the sort of limitations that result in his being less morally culpable, less responsive to deterrence, and less capable of assisting in his own defense, such that it would violate the Eighth Amendment to execute him?" In severe cases of retardation, the answer will certainly be yes, but in "borderline cases . . . it is important to recognize that "the mentally retarded are not 'all cut from the same pattern. . . .'"

In the *Sosa* writ hearing, two experts testified – one for the defense and one for the state – and they had different views about whether Sosa was mentally retarded. The trial court found the defense's expert more credible and found that Sosa had proven his retardation by a preponderance of the evidence and she discussed all seven of the *Briseno* factors. According to the court of criminal appeals, the trial court found that the seventh factor ("Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?") ""conflicts with the AAIDD, which specifically states that the complexity of the crime is not something that needs to be evaluated."

The court of criminal appeals disagreed with the trial court's conclusion that "the facts of the offense are categorically irrelevant to the determination of mental retardation for Eighth Amendment purposes."

> There appears to be a marked inconsistency between the evidence of the applicant's actions adduced at the applicant's 1984 trial and the evidence of his abilities adduced at his 2008 habeas hearing. In the current record, we have no basis on which to make a determination of whether a man who committed the offense that a jury found beyond a reasonable doubt in 1984 could have had the disabilities that the applicant proved by a preponderance of the evidence to a habeas judge in 2008.
>
> We remand this case so that the judge of the convicting court can gather information and provide findings as to whether the symptoms of mental retardation that the applicant has alleged are inconsistent with his being able to commit the crime of which he was convicted, and whether, considering the facts of the offense and the applicant's role in the offense, the judge still finds that the applicant is mentally retarded.

CHARGING INSTRUMENTS

1. Amendment or abandonment?

***Balentine v. State,* 2011 WL 2732146 (Tex. App.– Beaumont 2011, pet. granted)(not designated for publication)**

Balentine's robbery indictment initially alleged that he caused bodily injury to the complainant "by resisting arrest by Robert Rhodes and causing Robert Rhodes hand to be sprained during the resisting." After trial began, the state sought to delete the italicized phrase, and Balentine objected that this would be an untimely amendment under article 28.10 of the Texas Code of

Criminal Procedure. The trial court overruled the objection, finding that the phrase was surplus.

The court of appeals affirmed. An alteration to an indictment that constitutes an abandonment, rather than an amendment, does not invoke the requirements of article 28.10. The phrase the state sought to delete was merely a statement of one of the means of causing bodily injury. The alteration here did not prejudice the substantial rights of the defendant.

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

1. The Court of Appeals erred in their finding that the phrase the State deleted from the indictment, ". . . and causing Robert Rhodes hand to be sprained . . ." was an abandonment of another manner and means and was not a substantial amendment.

2. The Court of Appeals erred in finding that Balentine's substantial rights were not prejudiced by the State's alteration to the indictment.

3. The Court of Appeals erred in not finding that the evidence was insufficient to support Balentine's conviction for robbery.

CONFESSIONS

1. This statement from the trial judge – "In all candor, I would kind of like to know what he's been doing for the last eighteen years" – did not improperly influence the defendant to testify.

***Johnson v. State*, 357 S.W.3d 653 (Tex. Crim. App. 2012)**

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. The Texas Court of Criminal Appeals disagreed and reversed the reversal.

Although one who seeks the protection of the Fifth Amendment must ordinarily affirmatively assert the right, one exception is the "classic penalty situation," where the defendant is foreclosed from making a free decision to invoke his privilege because he is faced with a new or additional penalty for exercising his constitutional right. In the face of such a penalty, the failure to

affirmatively invoke the right is excused. The question here was whether Johnson voluntarily testified or whether he was coerced to testify against his will.

In this case, there was no *direct* evidence that Johnson testified because he feared he would be penalized for remaining silent. The court never told Johnson he would receive a greater sentence if he remained silent, and neither Johnson nor his lawyer made any comment indicating they believed this. Nor was Johnson confronted with penalty by *implication*. The judge's statements cannot be interpreted as an intent to inflict harm.

Neither statement made by the trial court amounted to a threat to penalize Johnson for exercising his constitutional right to silence. Instead, the record indicates that Johnson and his lawyer saw this as an opportunity to offer mitigating evidence in the hope of leniency at sentencing. "Because [Johnson] was not confronted with the 'classic penalty situation,' he forfeited his Fifth Amendment right to remain silent when he voluntarily took the stand in his own defense."

2. Whether the defendant was intoxicated, though irrelevant under the federal constitution, is relevant to whether he voluntary waived his rights under the Texas confession statute.

***Leza v. State*, 351 S.W.3d 344 (Tex. Crim. App. 2011)**

Leza was arrested for capital murder and gave confessions to the police. He complained that he did not knowingly, intelligently, and voluntarily waive his *Miranda* rights, because he was not informed that the true object of the interrogation was capital murder (as opposed to a traffic offense) and he was under the influence of heroin. The trial court admitted the confessions, and the court of criminal appeals affirmed, finding that the waiver was voluntary, knowing, and intelligent.

The state has the burden to prove by a preponderance of the evidence that a waiver of *Miranda* is voluntary, on the one hand, and knowing and intelligent, on the other. It is immaterial that the police did not expressly inform him that he was being interrogated about murder instead of the traffic offense for which he was arrested, since he was told that *anything* he said would be used against him and the police did nothing to deceive him into believing otherwise.

Nor does it avail Leza that he was allegedly under the influence of heroin. Since the police had nothing to do with this, it has no bearing on whether the waiver was *voluntary*. Intoxication potentially is relevant to whether the waiver was knowing and intelligent, but the trial court did not abuse its discretion when it found a proper waiver, in light of testimony from police officers was awake, alert, coherent, and appeared to understand their warnings.

In addition to complaining under the federal constitution, Leza also argued that he did not voluntary waive his *statutory* rights under article 38.22, § 3(a)(2) of the Texas Code of Criminal Procedure. A statutory claim of involuntariness "need not be predicated on police overreaching." "Circumstances unattributable to the police that nevertheless adversely impact an accused's ability to resist reasonable police entreaties to waive his statutory rights, such as intoxication, are 'factors' in

the voluntariness inquiry, though they 'are usually not enough, by themselves, to render a statement inadmissible under Article 38.22 [.]'" The trial judge here, though, could have reasonably concluded from the totality of circumstances, that Leza's heroin intoxication "was not so acute as to overcome his capacity to resist reasonable, non-coercive tactics by the police to persuade him to waive his statutory rights."

Finally, the court rejected Leza's complaint that article 38.22 was violated because the police did not obtain an *express* waiver on the recording. Although the preferred way to obtain a waiver is expressly, Texas has held that waivers may be inferred from the actions and words of the person being interrogated.

3. Who is "law enforcement" for purposes of article 38.22?

***Elizondo v. State*, 338 S.W. 3d 206 (Tex. App.–Amarillo 2011, pet. granted)**

Elizondo was caught shoplifting in Old Navy and signed a Civil Demand Notice handed her by Mora, the store's loss prevention officer. Afterwards, Mora called the Lubbock Police, who came to the store and arrested Elizondo. At her trial for theft, the state introduced the Civil Demand Notice, in which Elizondo, among other things, had admitted to the theft at Old Navy. The trial court overruled Elizondo's objection that the statement did not comply with article 38.22 of the Texas Code of Criminal Procedure because it did not it did not contain the *Miranda* warnings, and Elizondo was convicted.

The court of appeals affirmed, holding that article 38.22 does not apply to non-law enforcement personnel who are not acting as government agents. Here, although the state and the police were aware of Old Navy's policy of obtaining such notices, and sent their investigator to the store to acquire the document before trial, that did not make Mora an agent of law enforcement. Neither the police nor the DA were aware of Mora's conversation with Elizondo until after it was over, nor were they involved in the investigation in any way. There was no evidence that anyone at Old Navy had any agreement with, or had received any instructions from, the state regarding Elizondo's questioning. There is no evidence that the police were present during the questioning, or that they provided implicit or explicit instructions to get certain information from Elizondo. Mora did not obtain the statement "pursuant to a police practice." Mora did not believe he was acting as an agent of the state; he was merely doing what was required by his employment. The purpose of the notice was to seek civil damages against the shoplifter. Although the store's policy manual included maintaining a good rapport with law enforcement, preventing defense attorneys from discrediting store employees, and helping prosecutors obtain convictions, these mixed motives were not enough to make Mora an agent. Finally, a reasonable person in Elizondo's position would not have perceived Mora an agent of the state. He was not in uniform and he identified himself as a loss preventiion officer for the store. He stopped Elizondo outside the store.

The court of criminal appeals granted Elizondo's petition for discretionary review to answer this question: "Did the lower court err in determining that an agency relationship did not exist between the Loss Prevention Officer and the Lubbock Police Department and the District Attorney's

Office?"

4. Clarifying the distinction between "trial" counsel and "interrogation" counsel under the Federal Constitution. But what about state law?

***Pecina v. State*, 2012 WL 204293 (Tex. Crim. App. 2012)**

Several days after his wife was stabbed to death, the police obtained an arrest warrant and went, along with the magistrate, to the hospital where Pecina himself was being treated for stab wounds. The Spanish-speaking magistrate read a Spanish version of article 15.17, and then asked Pecina if he wanted a court-appointed attorney. He said he did. She then asked him if he wanted to speak to the police, and he said he did. The police then read the *Miranda* rights in Spanish, and Pecina "waived" those rights and answered questions about his wife's death. He was later charged with murder, his confession at the hospital was introduced into evidence, and he was convicted.

The court of appeals reversed, holding that Pecina's confession should have been suppressed because he invoked his right to counsel when he asked the magistrate for an appointed attorney.

The court of criminal appeals granted the state's petition for discretionary "review to discuss the distinct Fifth and Sixth Amendment rights to counsel after *Montejo* and to apply those differences to custodial interrogation." The court reversed the reversal.

The court began by noting the "complex and confusing" history of the intertwinement of the Fifth and Sixth Amendment rights to counsel, and observed that the Supreme Court had "disentangled" and "clarified" the separate purposes of these to constitutional provisions in *Montejo v. Louisiana*, 556 U.S. 778 (2009).

The Fifth Amendment protects a person's right to remain silent with regard to "interrogation" counsel, and comes into play as soon as a person is taken into custody. The Sixth Amendment protects a person's right to "trial" counsel, and comes into play as soon as formal adversary proceedings begin. Whether a person wants a lawyer to be with him at trial "is an entirely different question from whether he wants a lawyer to be with him during any police questioning." The court of criminal appeals found that, under the totality of circumstances, an objective and reasonable police officer conducting a custodial interrogation would conclude that Pecina had voluntarily waived his right to "interrogation" counsel, even though he had just plainly asserted his right to "trial" counsel.

The court of criminal appeals believes that the statement "Yes, I want a lawyer," is "fatally ambiguous because it may mean 'I want a lawyer for these judicial proceedings,' or 'I want a lawyer before I talk to the police,' or 'I want a lawyer for all purposes and I do not want to say anything more to anyone-you or the police-until I have one.'" The court believed that, after *Montejo*, "this ambiguity is easy to resolve." A request for counsel at a 15.17 hearing is a request for trial counsel. If the defendant (who is not a lawyer, usually, at least) wants also to invoke his right to interrogation counsel, he may, but he cannot do so "anticipatorily." Instead, he must do so when the police

"embark upon custodial interrogation." Invocation of right to counsel after being advised by the magistrate "says nothing" about a person's desire for counsel during custodial interrogation. These are "two separate events."

Practice Tip: Judge Alcala, joined by Judge Johnson, concurred, agreeing that there was no violation of the *Federal* Constitution in this case, as interpreted by *Montejo*. If counsel had complained under state law, specifically the *Texas* Constitution and article 15.17, it might have been different. That statute provides additional rights than does the Fifth and Sixth Amendments. The statute, unlike the Federal Constitution, may have been violated here because the magistrate advised Pecina of his right to have an attorney for interrogation, but counsel was not provided. The "clear intent" of the statute "is to ensure that a defendant is advised of his rights to an attorney for interrogation and courtroom proceedings." A defendant who is warned accordingly, but then gets no lawyer "might reasonably surmise that the government does not really intend to provide him an attorney during questioning because his first request for an attorney during questing was ignored."

5. Despite our "confusing and conflicting" precedent, from now on Texas employs an objective test to determine whether questioning falls within the "booking question exception" to *Miranda*, or whether it is designed to elicit an incriminating response and therefore requires *Miranda*.

***Alford v. State*, 358 S.W.3d 647 (Tex. Crim. App. 2012)**

Alford was arrested for evading detention or arrest and taken to the police station. After removing him from the patrol car, the arresting officer searched the backseat and found a plastic baggie containing some pills, and, directly underneath the baggie, a "thumb drive." As Alford was being searched during the booking process, the arresting officer showed him the thumb drive and asked him what it was. When Alford told him it was a memory drive, the officer asked if it was his, and Alford said that it was. At that time he had not been given his so-called *Miranda* warnings.

The pills turned out to be ecstasy. Alford was indicted, and he moved to suppress the statements he had made regarding the thumb drive. The arresting officer testified that it was departmental policy to inquire about personal property to determine whether it belonged to prisoners, in which case it would be put in their property. When Alford admitted that the thumb drive was his, the officer put the drive in his property, and never saw it again. The motion was denied, he was convicted, and he appealed, arguing that the statements were the product of custodial interrogation and were inadmissible since there was no *Miranda*.

The court of appeals disagreed and affirmed, and the court of criminal appeals affirmed the affirmance.

There was no question here but that Alford was in "custody." The only question is whether he was subjected to custodial "interrogation." Certain types of questions, "normally attendant to arrest and custody," do not constitute "interrogation within the meaning of *Miranda*." "Routine booking questions," such as those asking about name, address, height, weight, eye color, date of

birth, and address, are "reasonably related to the police's administrative concerns," and do not ordinarily require *Miranda* warnings. Just because a question is asked during the booking process, however, does not alone exempt it from *Miranda*. For example, the police may not ask questions that are designed to elicit incriminatory admissions.

The court in this case recognized that the law in Texas and throughout the United States is "confusing and conflicting." Considering prior decisions in and outside of Texas, the court adopted an objective test. Specifically, the question here is whether the officer's question about the ownership of the thumb drive "was objectively, reasonably related to a legitimate administrative interest."

> In this case, the record undisputedly shows that, as appellant was being booked into the jail, Officer Ramirez asked appellant if the non-contraband item discovered in the patrol car belonged to him. Upon confirming that it did, Officer Ramirez gave the item to facility personnel, who placed it with appellant's personal property for safekeeping. Based on our de novo review of the record, we find that the totality of the circumstances objectively show that Officer Ramirez's questions were reasonably related to a legitimate administrative concern.

6. Pre-arrest, pre-*Miranda* silence can be used as substantive evidence of guilt even if the defendant does not testify.

***Salinas v. State*, 2012 WL 1414133 (Tex. Crim. App. 2012)**

Salinas voluntarily accompanied the police to the station and answered all their questions for about two hours, until they asked him whether the shotgun shells found at the murder scene would match the shotgun found at his house, at which time he became silent. At his murder trial the state introduced this pre-arrest, pre-*Miranda* silence as evidence of his guilt, over Salinas's Fifth Amendment objection. He was convicted and the court of appeals affirmed.

The court of criminal appeals affirmed.

The Fifth Amendment states that no person shall be compelled to be a witness against himself. The Supreme Court has interpreted this to mean that the state may not comment on a defendant's refusal to testify at trial. Whether the Fifth Amendment protects pre-trial silence varies depending on whether the defendant is in custody, whether he has received the *Miranda* warnings, and whether his silence is offered as substantive evidence of guilt or is elicited from a testifying defendant.

- The Fifth Amendment is violated when the state uses post-arrest, post-*Miranda* silence to impeach a testifying defendant.

- The Fifth Amendment is not violated by the use of post-arrest, pre-*Miranda* silence to impeach a testifying defendant.

- The Fifth Amendment is not violated by the use of pre-arrest, pre-*Miranda* silence to impeach a testifying defendant.

- Article I, § 10 of the Texas Constitution prohibits the state from using post-arrest silence for any purpose, including impeachment.

The precise question in this case – whether the state can use pre-arrest, pre-*Miranda* silence, not for impeachment, but for substantive evidence of guilt against a non-testifying defendant has not previously been decided by the court of criminal appeals.

> The plain language of the Fifth Amendment protects a defendant from compelled self-incrimination. In pre-arrest, pre- *Miranda* circumstances, a suspect's interaction with police officers is not compelled. Thus, the Fifth Amendment right against compulsory self-incrimination is "simply irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak."
>
> We hold that pre-arrest, pre- *Miranda* silence is not protected by the Fifth Amendment right against compelled self-incrimination, and that prosecutors may comment on such silence regardless of whether a defendant testifies. The trial court did not err in allowing the State to do just that. We affirm the appellant's conviction.

CONFRONTATION

1. Powerful language from the court of criminal appeals that makes it clear that the Constitution sometimes means what it says: The Confrontation Clause is not 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*, 351 S.W.3d 315 (Tex. Crim. App. 2011)**

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, § 2 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 reversed, holding that, although there must be a balance between a defendant's right of confrontation and society's need "to protect fragile and traumatized child victims," article 38.071, § 2 does not constitutionally strike that balance. In *Maryland v. Craig*, 497 U.S. 836 (1990), the Supreme Court "pulled back from" an *absolute* position on the Confrontation Clause, holding that in some special cases where the state showed a compelling interest, the a defendant may not be entitled to actual face-to-face confrontation. There, based on a therapist's testimony about potential damage to the young child complainant, the Court upheld a procedure that allowed the child to testify via a one-way camera, in which the defendant could see the child, but the child could not see him. In *Coronado*, the court of criminal appeals noted that *Craig* preceded *Crawford*, and said this: "The Supreme Court has never overturned the holding in *Craig*, but, beginning with *Crawford v. Washington*, the Supreme Court has nibbled it into Swiss cheese by repeating the categorical nature of the right to confrontation in every one of its more recent cases."

> The court of appeals in this case, without citing to any of the *Crawford* line of cases, concluded that written interrogatories, propounded by a forensic child-sexual-abuse examiner some fifteen months after the child's initial videotaped interview that the State wished to introduce, were a sufficient substitute for live, adversarial cross-examination to satisfy a defendant's right to confrontation. But we are "not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings." Cross-examination means personal, live, adversarial questioning in a formal setting. It cannot have one meaning for some witnesses and another meaning for others.
>
> We are unable to find any post- Crawford precedent from any jurisdiction that states, or even suggests, that a list of written interrogatories, posed by a forensic examiner to a child in an ex parte interview, is a constitutional substitute for live cross-examination and confrontation. Had he been forced to accept such a pallid substitute for the real thing, Sir Walter Raleigh would once more rattle his chains and cry out from the Star Chamber, "[L]et Cobham be here, let him speak it. Call my accuser before my face [.]" A few written interrogatories sent off to the Tower for the warden to ask Lord Cobham in his cell would not satisfy Sir Walter or the Confrontation Clause his trial engendered.

"On federal constitutional matters, we are obliged to follow the dictates of the United States Supreme Court regardless of our own notions." Does this suggest that the court had some notion of how this case should have been decided that was at odds with "the dictates of the United States Supreme Court?" Perhaps the court is anticipating some political backlash.

CONTROLLED SUBSTANCES

1. Don't let your clients plead guilty to a drug offense before the lab has tested the evidence.

***Ex Parte Frederick,* 2011 WL 4484737 (Tex. Crim. App. 2011)(not designated for publication)**

Less than a month after she was arrested, Frederick pleaded guilty to possession of a controlled substance and was sentenced to six months in the state jail facility. Four months later the evidence was tested and it turned out not to be a controlled substance. The court of criminal appeals found Frederick actually innocent and granted her habeas relief. Not, unfortunately, in time to spare her lawyer from some apparently well-deserved embarrassment.

DISCOVERY

1. A great case that both thoroughly discusses the *Brady* doctrine, and grants relief to a man who has fought for years to have his questionable conviction overturned.

***Pena v. State,* 353 S.W.3d 797 (Tex. Crim. App. 2011)**

Jose Pena was arrested in 1998 in Leon County and charged with possessing more than 50 pounds of marijuana. Before trial, Pena filed a *Brady* motion, and the state produced a copy of the arresting officer's dash-mounted videotape. The defense was concerned because there was no audio component, and when questioned, the prosecutor confirmed that there was no sound on the recording. The soundless video was played before the jury, and the officer admitted that Pena had vehemently denied that the substance found in his car was marijuana. The officer testified that he could not recall, however, whether Pena had asked at the time of the stop that the substance be tested. "That could be correct. I don't remember." During his closing arguments, the state accused Pena's lawyers of "trickery" for the defensive theory they mounted – that the material was not marijuana. After the parties argued, while the jury deliberated, the defense and the prosecutors somehow discovered that the videotape that was introduced in evidence did in fact have some audio on it. The jury never heard the audio., and Pena was convicted and sentenced to life imprisonment.

Pena filed a motion for new trial that asserted, among other things, that trial counsel had been ineffective for not presenting to the jury exculpatory audio portions on the videotape, and also at least suggested that there could be a *Brady* problem. The motion was denied, and Pena appealed.

Twice the Waco Court of Appeals reversed his conviction, without reaching the *Brady* claim,

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 for discretionary review, reversed the court of appeals's affirmance, and remanded the case to the trial court for a new trial. The court made several points.

Pena properly preserved his *Brady* claim, by objecting as soon as the grounds for objection became apparent. At that time, it was too late to re-open the case, but he filed a motion for new trial claiming counsel had been ineffective. Although the motion did not explicitly present this as a *Brady* claim, it is clear from the record that both the prosecutor and the trial court were aware of the purported error. "Straightforward communication in plain English will always suffice."

The audio portion of this tape was, or at least should have been known, to the state. Even if the prosecutor himself did not know, the videotape was created and preserved by law enforcement officers, and this means that the state failed to disclose the evidence.

The court of appeals erred when it held that the audio portions of the video were not *Brady* simply because they were Pena's own statements. Although Pena might have known that he had made exculpatory statements, he was unaware that the state had captured those statements on its videotape.

The evidence was "favorable" to Pena because it was both exculpatory and impeachment evidence. It was exculpatory because Pena's continual denials that the substance was marijuana and his insistence that it be tested supported his defense that he had not intentionally and knowingly possessed marijuana. The tape could also have been used to impeach the officer who had testified that he could not remember if Pena had requested the material be tested. This was even more significant since the state argued in its closing that the defense and Pena had never requested testing until they knew the material had been destroyed.

The audio was material since its nondisclosure undermines confidence in the outcome of the trial. Had this evidence been disclosed, Pena could have focused on his lack of requisite intent, and

not on the destruction of the evidence.

Finally, the suppressed evidence would have been admissible. Specifically, Rule 107, the so-called "rule of optional completeness" would have allowed the audio portion of the videotape in after the state offered the videotape, and the officer testified that he could not recall whether Pena asked for testing.

2. Dirty, lying, rotten, cheaters.

***Ex Parte Sims*, 2011 WL 5437548 (Tex. Crim. App. 2011)(not designated for publication)**

> Applicant contends, inter alia, that the prosecution withheld favorable material evidence from the defense prior to trial. The State agrees that it had in its possession prior to trial a lab report indicating that biological evidence was obtained pursuant to a medical examination on the night of the incident. At trial, the State represented that no biological evidence existed in this case. Pursuant to post-conviction DNA testing, Applicant was excluded as a contributor to that biological evidence. The trial court urges this Court to grant relief and all parties agree. Applicant is entitled to relief.

DNA

1. A trial court may order post-conviction DNA testing under Chapter 64, but it has no jurisdiction to grant a new trial based on the results of that testing.

***State v. Holloway*, 360 S.W.3d 480 (Tex. Crim. App. 2012)**

Holloway was convicted of manslaughter, and four years after his direct appeals were final he filed a motion under Chapter 64 requesting that the knife be tested for DNA. The trial court granted the motion and when the testing revealed that the blood on the knife did not belong to the victim, that court granted a new trial. The state appealed, and the court of appeals reversed, holding that the trial court did not have jurisdiction to grant a new trial under Chapter 64, and that the absence of the victim's blood on the knife, by itself, did not support the trial court's finding.

The court of criminal appeals granted Holloway's petition for discretionary review, but later affirmed the court of appeals.

Chapter 64 of the Texas Code of Criminal Procedure allows convicted persons to move for DNA testing of biological evidence under certain circumstances, but it "is notably silent . . . with respect to what remedial action, if any, the convicting court may take on the basis of its finding. . . ." A trial court's plenary jurisdiction to entertain a motion for new trial lapses, at the latest, when the appellate record is filed. The new trial granted in this case was far beyond that time, and thus untimely under Rule 21 of the Rules of Appellate Procedure. Nor is there anything in Chapter 64 that confers jurisdiction on the trial court to grant a new trial. By its plain language, Chapter 64

merely authorizes a convicted person to seek post-conviction DNA testing.

"The proper and exclusive vehicle for obtaining judicial relief from a felony conviction on the basis of a favorable finding under Article 64.04 is a post-conviction application for writ of habeas corpus returnable to this Court under Article 11.07 or Article 11.071."

Having found that trial court had no jurisdiction to grant the new trial, the court of criminal appeals next found that the court of appeals erred when it addressed the trial court's finding on the merits. This was "advisory in nature," and its resolution "should await such time as an applicant may seek post-conviction habeas corpus relief."

DOG OFFENSES

1. Is the death-by-dog statute unconstitutionally vague?

***Smith v. State*, 2011 WL 310962 (Tex. App.–Eastland 2011, pet. granted)**

A seven year old boy was mauled to death by Smith's dogs, and Smith was convicted of attack by dog resulting in death, a violation of TEX. HEALTH & SAFETY CODE § 822.005(a)(1).

The court of appeals rejected Smith's vagueness challenges. The statute provides fair notice of the proscribed conduct: failing to secure your dog when you ought to be aware of the risk that your dog will attack without provocation. Nor is the statute unconstitutionally vague because the terms "unprovoked," and "attack" are undefined. Nor, according to that court, did the conviction violate the state constitutional requirement of a unanimous verdict, or the federal constitution's "substantial majority" requirement. Regardless of where the attack began, all 12 jurors were required to find that an attack occurred somewhere off Smith's premises.

The Texas Court of Criminal Appeals granted Smith's petition for discretionary review to decide these issues:

> 1. Texas Health and Safety Code Section 822.005 is unconstitutionally vague and therefore void.
>
> 2. Mr. Smith's conviction violates both the unanimous jury guarantee of the Texas Constitution and the "substantial majority" requirement of the Sixth Amendment of the United States Constitution.

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's 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. The affidavit that supported the search warrant for blood was insufficient because it did not state the time the defendant was stopped or arrested.

***Crider v. State*, 352 S.W.3d 704 (Tex. Crim. App. 2011)**

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, holding that, viewing the facts and circumstances within the four corners of the affidavit, and interpreting that affidavit in a common sense and realistic manner, and drawing all reasonable inferences, the magistrate's finding of probable cause was in reasonable proximity to Crider's arrest, and it was not unreasonable for the magistrate to presume that some evidence of intoxication would be found in the blood when the warrant was signed.

The court of criminal appeals reversed. The affidavit must set out sufficient facts to support the belief that the object of the search will be there when the search is executed. That depends on what is being searched for. There are no hard and fast rules. "The hare and the tortoise do not disappear over the hill at the same speed." Because alcohol disappears quite rapidly, the facts supporting such a search "become stale quite rapidly." It is "exceedingly unlikely" that alcohol will be found after 24 hours. "[T]he affidavit in this case is not sufficient to show probable cause because there could have been a twenty-five-hour gap between the time the officer first stopped appellant and the time he obtained a search warrant for blood.

2. Where a defendant appears to be intoxicated and the police find in her car drugs that

could cause the intoxication, the trial court may authorize a conviction based not only alcohol, but also on the use of controlled substances, or drugs, or all of the above, even though there is no direct evidence that the defendant consumed the drugs.

***Ouellette v. State*, 353 S.W.3d 868 (Tex. Crim. App. 2011)**

The police arrested Ouellette 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, Ouellette 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, holding, among other things, that, presuming the state was required to prove the substance that caused the intoxication, the charge in this case was proper because, notwithstanding Ouellette'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.

The court of criminal appeals granted Ouellette's petition for discretionary review and affirmed.

> In short, the appellant appeared intoxicated, police found in her vehicle a drug that could have produced the observed symptoms of intoxication, and she refused a blood test. Although there was no direct evidence that the defendant consumed the drug, there was evidence from which a rational juror could have found that the defendant did so.
>
> The jury charge in this case reflected the law as it applied to the evidence produced at trial. We affirm the judgments of the courts below.

3. The trial court erred by defining "operate" in its charge to the jury in a DWI case.

***Kirsch v. State,* 357 S.W.3d 645 (Tex. Crim. App. 2012)**

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. At the state's request, and over Kirsch's objection, 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 reversed and remanded for a harm analysis. Two important points were made.

First, the trial court erred when it defined "operate." This term is not defined by the Texas Penal Code, nor has it acquired a technical meaning. The general rule is that jurors are permitted to "freely read [undefined] statutory language to have any meaning which is acceptable in common parlance." Although case law from the court of criminal appeals has articulated a definition of this statutorily undefined word, this definition was meant to help the courts assess the sufficiency of the evidence. Despite this caselaw definition, the trial court improperly commented on the weight of the evidence when it gave the definition to the jury, for at least two reasons. For one thing, this was simply one definition that a jury might have selected; it should have been free to assign to that term "any meaning which is acceptable in common parlance." For another, the definition impermissibly emphasized evidence that tended to show that Kirsch made a "personal effort" to cause the motorcycle to function over evidence that would tend to show merely preparatory attempts to start it. Whether Kirsch was operating the motorcycle was a question of fact for the jury, and the trial court impermissibly infringed on the jury's fact-finding authority with its definition.

Second, jury charge error is unlike almost any other. The doctrine of "fundamental error" has almost entirely disappeared from Texas criminal jurisprudence; almost nothing can be reviewed on appeal absent an objection. "However, all alleged jury-charge error must be considered on appellate review regardless of preservation in the trial court." While properly preserved error is subject to a more favorable harm analysis, even unpreserved error must be reviewed. Preservation was at issue in this case because even though Kirsch's lawyer made an objection, the court of appeals concluded that his objection was not the proper one. Although the court of criminal appeals expressed no opinion on whether Kirsch "properly" objected to the instruction as a comment on the weight of the evidence, it reversed the court of appeals and remanded to that court to consider whether Kirsch suffered harm from the improper definition.

4. Harm from an erroneous synergistic instruction that emphasized a particular theory – that the defendant was intoxicated from the combination of hydrocodone and alcohol.

***Barron v. State,* 353 S.W.3d 879 (Tex. Crim. App. 2011)**

When Barron was arrested for DWI the police found some pills, and the officer claimed he remembered them being labeled "hydrocodone," although he did not seize them. The state put on a

DRE expert who testified that hydrocodone would have a synergistic effect when combined with alcohol. The trial court gave the so-called "synergistic" instruction to the jury, telling them that if the jury believed that Barron wold have been more susceptible to intoxication because she combined alcohol with a drug, "she is in the same position as though her intoxication was produced by the intoxicating alcohol alone."

The court of appeals held that the trial court erred by giving the synergistic instruction. This submission was not raised by the evidence because there was no evidence that Barron had ingested hydrocodone or any other prescription medication on the day in question. The court reversed, finding that the error caused Barron "some harm."

The court of criminal appeals affirmed, agreeing that the charge was both erroneous and harmful, although it disagreed with the harm analysis done by the court of appeals. That court's harm analysis merely repeated its error analysis. Properly, under *Almanza*, an appellate court must determine harm "in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole." The entire charge is important here, because it contained both the statutory definition of intoxication, and the synergistic instruction. The question is whether Barron was harmed by addition of the synergistic instruction. The court found that she was. At a minimum this instruction emphasized the state's evidence of combination by suggesting susceptibility through which a drug and alcohol could result in intoxication. This additional emphasis on combination was particularly important here in light of the evidence. Barron's testimony that she only had two glasses of wine was unrefuted, and the state conceded that she was not "heavily" intoxicated. The synergistic instruction supported the state's theory of intoxication despite evidence of fairly minimal alcohol consumption. The state needed evidence of the pills to prove its case.

> Harm involves more than simply expanding elements of an offense such that new facts may be used to prove the elements. Harm can also result from an instruction emphasizing a particular theory or the weight to be given to a particular piece of evidence. The "synergistic effect" instruction delivered in this case introduced a specific mode of action and supported the State's theory that the combination of hydrocodone and alcohol produced intoxication.

EVADING ARREST

1. Prior conviction for evading arrest was not an element of the crime of subsequent evading arrest.

***Ex Parte Carner*, 2012 WL 1414125 (Tex. Crim. App. 2012)**

Carner was convicted of evading arrest in 2008. In 2009 the statute was amended to make it a state jail felony for one previously convicted of evading arrest to be convicted a second time. In 2010, Carner was arrested for evading arrest, and was indicted for a state jail felony. After he was

convicted Carner filed a writ, asserting that his felony conviction was void since the offense alleged was committed before the statute that elevated this misdemeanor offense to a felony. The court of criminal appeals disagreed and denied relief. " The date of [Carner's] prior conviction is irrelevant to the State's burden of proof. The State met its second burden when it introduced proof that [Carner's] 2008 conviction for evading arrest was final at the moment he evaded arrest a second time."

EXPERTS

1. Electronic legal research gone crazy demonstrates that "grooming" is a legitimate subject of expert testimony.

***Morris v. State*, 2011 WL 6057840 (Tex. Crim. App. 2011)**

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, and the first paragraph of that court's subsequent opinion is simple and straight forward: "We granted review to determine whether the 'grooming' of children for sexual molestation is a legitimate subject of expert testimony. We hold that it is." To support this enormously unremarkable conclusion, the majority opinion then spends 23 Westlaw pages and 117 footnotes that appear to cite and discuss every single case in the United States that has ever mentioned the word "grooming."

> From our discussion, we conclude that grooming as a phenomenon exists and that a law enforcement-official with a significant amount of experience with child sex abuse cases may be qualified to talk about it.
>
> * * *
>
> We reject appellant's claim that the record failed to show the legitimacy of "grooming" as a subject of expert testimony because the legitimacy of "grooming" as a subject of expert testimony has been established sufficiently to be judicially noticed.

2. The trial court erred when it excluded Dr. Malpass's testimony on the unreliability of eyewitness testimony, because the defense proved by clear and convincing evidence that it was reliable and relevant.

***Tillman v. State*, 354 S.W.3d 425 (Tex. Crim. App. 2011)**

Dr. Roy Malpass, psychology professor at the University of Texas at El Paso was called by the defense and testified at a pretrial hearing concerning the unreliability of identification testimony.

He did not testify about the accuracy of the particular witness's testimony or about the particular lineup or photo spread used. Instead, he proposed to testify about the manner in which the lineup and photo spreads were employed. Specifically, among other things, he criticized three procedures used in this case as suggestive: using a photo spread before a live lineup; allowing a witness to view a suspect on the street, before asking him to identify the same suspect in a photo lineup; and using a lineup in which only the suspect has a particular physical characteristic, here, being clean-shaven. Malpass also criticized allowing the eyewitness to work with a sketch artist. The trial court excluded Dr. Malpass's testimony, finding his testimony not relevant, and expressing concern that he had slept during the testimony of several of the state's witnesses.

The court of appeals affirmed, concluding that the trial court had not abused its discretion when it excluded Malpass's testimony because "it would not help the jury understand other evidence or determine a fact at issue and therefore was not relevant."

The court of criminal appeals granted Tillman's petition for discretionary review and reversed the court of appeals and the trial court. The proponent of scientific testimony under Rule 702 must prove by clear and convincing evidence that the evidence is based on a reliable scientific foundation and is relevant to the issues in the case.

A psychologist's testimony about the reliability of eyewitness testimony is a "soft" science. "Consequently, to establish its reliability, the proponent must establish that '(1) the field of expertise involved is a legitimate one, (2) the subject matter of the expert's testimony is within the scope of that field, and (3) the expert's testimony properly relies upon or utilizes the principles involved in that field.'" The court found psychology to be "a legitimate field of study and that the study of the reliability of eyewitness identification is a legitimate subject within the area of psychology." The court also found that the defense properly established that Malpass properly relied upon and utilized the principles utilized in his field. Incidentally, the court recognized studies showing the high number of DNA exonerations that have involved eyewitness identifications.

The defense also proved that Malpass's testimony was relevant. "Relevance is 'a looser notion than reliability' and is 'a simpler, more straight-forward matter to establish.'" The question is whether the evidence will assist the factfinder and is sufficiently tied to the facts of the case. Malpass's testimony satisfied both those requirements.

3. A mixed bag: Yes, it is still error for an expert witness to testify that fact witnesses of a certain class – here, a mentally retarded complainant in a sexual assault case – are truthful; but no, the court of appeals used the wrong harm analysis because, apparently, that court's notion of "grave doubt" differs from that of the court of criminal appeals.

***Barshaw v. State*, 342 S.W.3d 91 (Tex. Crim. App. 2011)**

The complainant in this sexual assault case was a 21-year old mentally retarded woman who functioned at approximately a ten-year-old level. The state called a mental-retardation psychologist

who had worked with the complainant, and who testified that, in her experience, "folks with mental retardation can be painfully honest, really." The trial court overruled Barshaw's objection that testimony a class of people are truthful was inadmissible.

The court of appeals reversed the conviction and remanded for a new trial. The court of criminal appeals reversed the reversal. The court agreed that "[e]xpert testimony that a particular class of persons to which the victim belongs is truthful is not expert testimony of the kind that will assist the jury," and is therefore inadmissible under Rule 702.

However, the court of criminal appeals disagreed with the harm analysis done by the lower court. Non-constitutional error requires reversal when the reviewing court, after examining the record as a whole, "has grave doubt that the result of the trial was free from the substantial effect of the error. 'Grave doubt' means that 'in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error.'"

The court of appeals examined the evidence in the case and expressly concluded that it had a "grave doubt" as to the error's harmlessness. According to the court of criminal appeals, though, the analysis was flawed. "Upon reviewing the record as a whole, we find that additional evidence exists that should have been considered in the court of appeals's harm analysis . . ." The case was reversed and remanded for the court of appeals to "conduct a full harm analysis based on the entirety of the record. ."

4. The trial court erred when it excluded the defense's expert testimony about the harmful effects that an inappropriate relationship with an older female had had on the defendant.

***Olsen v. State*, 2012 WL _____ (Tex. Crim. App. 2012)**

Olsen was convicted of capital murder. At the punishment phase the defense proffered the testimony of Donna Vandiver, Ph.D., concerning female sex offenders and grooming. Olsen wanted to argue that he had been the victim of a female sex offender who had been grooming him since he was 14, and that her negative influence over him was a mitigating circumstance and was relevant to future dangerousness. The trial court excluded Vandiver, finding her unqualified under Rule 702 to render what was "more of a psychological opinion."

The court of criminal appeals disagreed and reversed and remanded for a new punishment hearing. When considering expert testimony, a trial judge must "make three separate inquiries, all of which must be met before admitting expert testimony: '(1) the witness qualifies as an expert by reason of his knowledge, skill, experience, training, or education; (2) the subject matter of the testimony is an appropriate one for expert testimony; and (3) admitting the expert testimony will actually assist the fact-finder in deciding the case.' These inquiries are commonly referred to as qualification, reliability, and relevance, respectively." Even though the standard of review is abuse of discretion, the court found that Olsen met his burden with regard to all three inquiries.

The court also rejected the state's argument under Rule 403. This evidence was neither unfairly prejudicial, nor was it cumulative of other evidence or confusing.

Finally, the erroneous exclusion of this constitutionally relevant mitigating evidence was harmful under Rule 44.2(a). Olsen's inappropriate relationship with the older woman in question "and its potential negative effect on him, were the core of the defense's case at punishment." Without this testimony the jury was unable to fully comprehend the mitigating potential of the evidence in the case, Olsen was unable to respond to the state's evidence and argument that discounted its mitigating potential, and he could not explain or rebut the state's future dangerousness evidence and argument. "Because we are unable to determine beyond a reasonable doubt that the erroneous exclusion of Dr. Vandiver's testimony did not contribute to the punishment, we sustain issues fifteen and sixteen."

EXTRANEOUS OFFENSES

1. Reasonable notice requires "where, when, and at whom the extraneous conduct was directed."

***Leza v. State*, 351 S.W.3d 344 (Tex. Crim. App. 2011)**

Article 37.071, § 2(a)(1) of the code of criminal procedure and Rule 404(b) of the Texas Rules of Evidence require that the state give reasonable notice in advance of trial of its intent to offer extraneous misconduct, but they do not "directly speak to a level of specificity." Case law requires "the date on which and the county in which [the extraneous misconduct] occurred and the name of the alleged victim of the [extraneous misconduct].'"

> We fail to see how the State's notice could reasonably be deemed deficient. By April 19th—almost three weeks before trial began—the appellant had been formally informed of all of the information statutorily essential to "reasonable notice": where, when, and at whom the extraneous conduct was directed. What the conduct included was also substantially supplied, along with the caveat that the quoted threat may be an approximation—"something to the effect of" the language conveyed in the notice. By three days prior to the first day of trial, the only information missing from the State's notice was the express death threat. But by that time the appellant had long been informed that the State intended to prove that he had promised to "do something bad" to Porter. Under these circumstances, the record fails to support the trial court's conclusion that the State failed to provide "reasonable notice" of Porter's testimony in contemplation of Articles 37.071, Section 2(a)(1), Article 37.07, Section 3(g), and Rule 404(b). It was not inadmissible on that account.

GUILTY PLEA

1. Plea was involuntary where the agreement was that his state sentence would run concurrently with his federal sentence but the federal judgment required the federal sentence to begin when the state sentenced expired.

***Ex parte Ramirez*, 2012 WL 982904 (Tex. Crim. App. 2012)(not designated for publication)**

Ramirez pleaded guilty to possession of a prohibited item in a correctional facility and was sentenced to four years imprisonment. He later filed a writ of habeas corpus in which he complained that this plea was involuntary because it was pursuant to an agreement that the four year state court sentence would run concurrently with a federal sentence.

> The federal judgment, however, requires the federal sentence to begin when the state sentence expires. Because the plea agreement is not enforceable, the trial cour recommends relief be granted. This Court agrees, and relief is therefore granted.

2. Plea was involuntary where trial counsel incorrectly advised defendant that he would be eligible for shock probation.

***Ex parte Farrow*, 2012 WL982901 (Tex. Crim. App. 2012)(not designated for publication)**

Farrow pleaded guilty to six counts of deadly conduct and did not appeal. Later he filed a writ of habeas corpus asserting that his plea was involuntary because his trial counsel had incorrectly advised him he would be eligible for shock probation, and that he would not have pleaded guilty had he known that his plea agreement rendered him ineligible for shock probation because he had used a deadly weapon. Based on trial counsel's statement, and the record, the trial court recommended that relief be granted, and the court of criminal appeals agreed.

3. Plea was involuntary where sentence agreed to in plea bargain was not authorized by law.

***Ex parte White*, 2012 WL1142353 (Tex. Crim. App. 2012)(not designated for publication)**

White pleaded guilty to the failure to comply with sex registration requirements, a third degree felony, and was sentenced to four years imprisonment. The proper offense level for his offense, though, was a state jail felony. The plea was involuntary because the sentence agreed to was not authorized by law.

HABEAS CORPUS

1. Reminders about cognizability, and procedural bars.

***Ex parte Irvan*, 2011 WL 2378184 (Tex. Crim. App. 2011)(not designated for publication)**

The court of appeals denied habeas relief under article 11.071, and made the following observations. A petitioner's complaint that he was denied his *federal* right to a speedy trial *is* cognizable in state habeas; the same complaint under the *state* constitution is *not* congizable. Also, a ground for relief that could have been raised on direct appeal is procedurally barred. And, a ground that was raised and rejected on direct appeal is procedurally barred.

2. Despite the fact that the forensic pathologist on whose testimony "the State's case largely depended" later changed her opinion, this defendant got no relief, since he could not meet the "Herculean"standard for actual innocence, and because the pathologist's testimony did not meet the definition of "false."

***Ex parte Robbins*, 2011 WL 2555665 (Tex. Crim. App. 2011)**

Doctor Patricia Moore, forensic pathologist and an assistant medical examiner for Harris County, testified at trial that, in her opinion, the cause of the child's death was asphyxia due to compression of her chest and abdomen, and that the manner of death was homicide. Another forensic pathologist, Doctor Robert Bux, testified for the defense that, in his opinion the cause of death could not be determined. Robbins was convicted of capital murder and automatically sentenced to life imprisonment, and his conviction was affirmed on direct appeal.

Later, Doctor Dwayne Wolf, deputy chief medical examiner for Harris County, re-evaluated Moore's autopsy findings and concluded that her observations did not support a finding of death asphyxiation by compression, or from any other specific cause; Wolf concluded the cause of death should properly be listed as "undetermined." Doctor Joye Carter, who had been Moore's supervisor when Moore did the autopsy was asked to review the case by the District Attorney, and she too disagreed with Moore, finding that the cause of death was undetermined. The DA next asked Moore to review her own findings, and after doing so, Moore changed her opinion, stating that in light of her additional experience, the most appropriate finding was undetermined. Moore admitted that the bruises she had seen on the child could have resulted from aggressive CPR.

Robbins filed a writ asserting that he was actually innocent, and that his conviction violated due process because it had been largely based on "false" testimony. Initially the state agreed that Robbins was entitled to relief, and the parties submitted agreed findings to the trial court. Instead of signing these, though, the trial court appointed Doctor Thomas Wheeler, chairman of the pathology department at Baylor College of Medicine to review the case, and he agreed with the defense: the cause of death was undetermined. Doctor Linda Norton, a private forensic pathologist, then conducted an "independent forensic investigation," and she found that the death was a homicide, and

that the manner of death was asphyxia by suffocation. Norton could not conclude beyond a reasonable doubt that Robbins and Robbins alone caused the death. Norton was paid $22,907.50 by the county, but, when summoned for a deposition, she advised the court through counsel that she "could not currently be medically cleared to participate in a deposition."

The trial court made detailed findings of fact and conclusions of law and recommended that Robbins be granted a new trial because he had been denied due process and due course of law, and had not had a fair and impartial trial. The court recommended that relief be denied on his actual innocence claim. The court of criminal appeals denied all relief.

To prevail on Robbins's actual innocence claim he must show "'clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence.'" The trial court recommended that relief be denied on this ground, and the court of criminal appeals agreed. Assuming this evidence was previously "unavailable," the new evidence did not "unquestionably" establish Robbins's innocence. Moore cannot stand by her trial testimony, but she did not completely retract her opinion at trial. Rather, she merely now believes she cannot determine the cause of death. "In all, when the newly available evidence is viewed in the context of the inculpatory evidence in the trial record, it cannot be said that [Robbins's] innocence has been unquestionably established because a juror could reasonably conclude that [he] intentionally asphyxiated [the child].

Nor did the state use false evidence to obtain a conviction in violation of due process and due course of law. Testimony need not be perjurious to be "false." Untrue testimony, and "'improper suggestions, insinuations and, especially, assertions of personal knowledge' constitute false testimony." On the other hand, "Moore's trial testimony is not false just because her re-evaluation of the evidence has resulted in a different, 'undetermined' opinion, especially when neither she nor any other medical expert can exclude her original opinion as the possible cause and manner of death." Although Moore gave her professional opinion at trial, she did not rule out any other reasonable hypothesis of death. Additionally, although various experts opined that the autopsy findings did not support Moore's conclusions, none stated that the child could not have been intentionally asphyxiated. And one expert – Norton – did conclude the child died by asphyxiation. Nor did Moore's testimony give the jury a "false impression." She testified "openly" about her autopsy findings and about her professional opinion, and she did not omit "pertinent facts."

3. Yes, this petitioner's execution without a hearing will violate a treaty obligation that is binding on Texas, and no, he has no remedy under state law.

***Ex parte Humberto Leal*, 2011 WL 2581917 (Tex. Crim. App. 2011)(not designated for publication)**

Leal is a Mexican citizen convicted of capital murder in 1995, and set to be executed on July 7, 2011. In his second subsequent application for writ of habeas corpus he asserted that his right to consular notification was violated, and that the International Court of Justice's decision in the *Avena* case entitles him to a new review of his case. Although there is presently no procedure in place to implement this review, legislation is now pending in Congress to establish such a procedure, but the

legislation is not likely to be passed until the end of the calendar year.

The court of criminal appeals dismissed his subsequent application, finding that he failed to meet the requirements of article 11.071, § 5 of the Texas Code of Criminal Procedure, apparently because *pending* legislation does not constitute new law or new facts that would entitle Leal to relief. The court also refused both to consider this application under its original habeas corpus jurisdiction (apparently because article 11.071 provides the exclusive habeas review for applicants sentenced to death) or to reconsider the claim under a previously filed 11.071 applications.

4. The testimony of a habeas applicant in an 11.072 proceeding may be sufficient all by itself to support relief.

***Ex parte Garcia,* 353 S.W.3d 785 (Tex. Crim. App. 2011)**

Twenty-three years after she was convicted of felony theft and given probation, Garcia filed an application for writ of habeas corpus under article 11.072 of the Texas Code of Criminal Procedure. She testified at the habeas hearing that her plea had been involuntary, and the trial court granted her relief. The court of appeals reversed, holding that the only evidence came from Garcia's sworn testimony, and that this evidence was insufficient, by itself to support relief.

The court of criminal appeals disagreed and reversed. Although sworn pleadings by themselves are an insufficient basis upon which to grant habeas relief, there is no question that relief may be granted based on testimony that supports the pleadings, if the testimony is believed by the habeas court, and there is no reason for a different rule just because the testimony comes from the habeas applicant herself. The general rule is that appellate courts will give almost total deference to a trial court's findings of historical facts when the record supports those findings, especially when the findings are based on credibility and demeanor. In an 11.07 habeas proceeding, the court of criminal appeals is the finder of fact, but it generally accepts the trial court's findings of historical facts that are supported by the record. There is even less leeway to disregard fact-findings in an 11.072 proceeding, where the trial court is the sole fact-finder, and the appellate courts act in a truly appellate fashion.

5. It's not easy doing what we do. A "proper" application for writ of habeas corpus "must contain sufficient specific facts that, if proven to be true, might entitle the applicant to relief." Any thing else might have very bad consequences for habeas counsel and client.

***Ex parte Medina*, 2011 WL 4809808 (Tex. Crim. App. 2011)**

Medina was convicted of capital murder and sentenced to death, and his conviction and sentence were affirmed on direct appeal. Different counsel was appointed to file an application for writ of habeas corpus and he filed a "document" complaining that Medina was illegally restrained for ten reasons, all of which involved ineffective assistance of counsel. The document was only four pages long and stated only legal and factual conclusions. For example, one of counsel's reasons asserted this:

> Applicant's death sentence violates the Sixth Amendment to the United States Constitution because Applicant was deprived of the effective assistance of counsel at the punishment phase of his trial in that his defense attorney failed to exhaust all available avenues to procure the attendance of necessary witnesses for the defense in time to meet reasonable trial settings of the court.

The state moved to dismiss because the document did not properly plead facts, and habeas counsel filed a lengthy response in which he argued that Texas law did not require him to be any more specific. The state argued, and the trial court found, that the document was not a proper application for writ of habeas corpus because it set out any specific facts, or contain any exhibits, affidavits, or memorandum of law that addressed any facts. The writ lawyer argued that he had a good faith belief that his document sufficiently pleaded cognizable grounds for habeas corpus relief and that the law was not settled as to the need to plead facts any more specifically. Counsel apparently felt that the policies and attitudes of the court favor resolving habeas claims in summary fashion and without a live hearing, and that such a resolution in his client's case would be very bad for the client. Counsel appears to have very strongly felt that his approach to this case was a legitimate tactic which would improve Medina's chances of getting a live hearing, and having relief granted in his case.

The court of criminal appeals disagreed very strongly with habeas counsel. "In sum, we reiterate today what we have long held: an application for a writ of habeas corpus, whether filed under Article 11.07 or 11.071, must contain sufficient specific facts that, if proven to be true, might entitle the applicant to relief."

> Under these unique and extraordinary circumstances, involving not habeas counsel's lack of competence but his misplaced desire to challenge the established law at the peril of his client, we conclude that under Article 11.071, § 4A(a), counsel failed to file a cognizable writ application. Thus, we shall proceed pursuant to Section 4A(b)(3). Under that section we shall appoint new counsel, specifically the Office of Capital Writs, to represent applicant. We establish a new filing date for the application to be filed in the convicting court as being 180 days from the date of this order. We dismiss applicant's pro se Motion to Amend the Petition for State Habeas Corpus. We hold original habeas counsel, Mr. Robin Norris, in contempt of court and enter an order denying him compensation under Section 2A of Article 11.071.

6. A habeas applicant is entitled to receive copies of the state's response, and the trial court's recommendations, without cost, and before those are forwarded to the court of criminal appeals for final resolution.

***Ex Parte Castillo*, 353 S.W.3d 163 (Tex. Crim. App. 2011)**

Castillo filed an 11.07 writ and the state responded, the trial court recommended that relief be denied, and the materials were forwarded to the court of criminal appeals. That court notified Castillo that his application had been received, and, a month later the court denied relief. Castillo

filed a motion for reconsideration asserting that he had not received the state's response, or the trial court's recommendation, or the district court's notice of filing of his writ. He also asserted that when he received notice from the court of criminal appeals that his writ had been received, he wrote to the district clerk and requested a copy of the trial court's order recommending that relief be denied, and was informed that, even though indigent, he was not entitled to free copies. The court granted reconsideration and ordered the clerk to explain her policy. Again the court of criminal appeals denied relief.

Judge Cochran, joined by Judge Johnson, concurred, noting that Castillo did receive the materials to which he was entitled, "eventually," and that his claims were reconsidered after he received them. These two judges pointed out, however, that 11.07 §7 is a mandatory statute, and requires that a habeas applicant receive the motions, responses and orders that are relevant to his writ, without the requirement of paying money. And it is only fair that he receive these materials before the writ and associated materials are forwarded to the court of criminal appeals for final resolution.

7. How to fix a late filing: Act fast and pray for rain.

***Ex parte Gobert*, 2012 WL479689 (Tex. Crim. App. 2012)(not designated for publication)**

This death penalty writ was filed one day late, on January 26, 2012. Immediately upon realizing this, the lawyer submitted a motion to file an out-of-time writ, explaining that he had delivered the completed writ application to Federal Express on January 24, but, because of heavy storms in the Dallas/Fort Worth area and flooding in Austin, the overnight delivery was a day late.

> Because the circumstances were primarily outside of counsel's control, and because counsel was extremely diligent in alerting this Court to the problem, we find that he has shown good cause for his failure to timely file an application on applicant's behalf.

8. *Ex parte Evans* is overruled: where eligibility for parole is "succinct and clear," clients need correct advice, and lawyers are required to give it.

***Ex Parte Moussazadeh*, 2012 WL 468518 (Tex. Crim. App. 2012)**

Moussazadeh was indicted for capital murder when he was a juvenile. He pleaded guilty to murder without a sentencing agreement and was sentenced to 75 years imprisonment. Later he filed a writ alleging that his plea was involuntary because his lawyer had given him misinformation about his eligibility for parole. Specifically, counsel had advised him that he would be eligible for parole in 15 years, when in fact he had to serve a minimum of 30 years before becoming eligible. He asserted in his writ that he would not have pleaded guilty had he had correct information about his eligibility, or lack thereof.

Ex parte Evans, 690 S.W.2d 274 (Tex. Crim. App. 1985) had held that, because parole eligibility is so speculative, counsel's incorrect advice about same will not render a plea involuntary unless it is proven by a preponderance of the evidence that eligibility was a term or essential element of the plea bargain, or that either the judge or the prosecutor caused him to plead guilty based on an understanding of Texas parole law. Relief was initially denied in this case pursuant to *Evans*.

Later, the court of criminal appeals granted reconsideration on its own motion, overruled *Evans*, and granted Moussazadeh relief.

Although the *attainment* of parole is speculative, *eligibility* for parole is not, contrary to the holding in *Evans.* Eligibility for parole is straightforward because it is based on the law in effect on the date of the offense. Defendants who plead guilty likely consider when they will become eligible for parole and they need accurate information in this regard. "In situations in which the law is not clear, counsel should advise a client that pending criminal charges may carry a risk of other serious consequences. When a serious consequence is truly clear, however, counsel has an equally clear duty to give correct advice. Both failure to provide correct information and providing incorrect information violate that duty."

Consequently, and contrary to *Evans*, it doesn't matter whether parole eligibility was a term or essential element of the plea bargain (whatever that means) or that the judge and prosecutor had nothing to say about the subject. Counsel is ineffective, and a defendant is entitled to relief, if counsel performed deficiently, and, in the context of an involuntary plea, counsel's bad advice caused the client to plead guilty instead of go to trial.

In this case, the parole-eligibility statute was "succinct and clear," and counsel could easily have determined his client's eligibility by reading the text of that statute. Counsel was deficient by providing incorrect advice that essentially doubled the length of time the client had to serve before becoming parole-eligible. Prejudice was established by Moussazadeh's affidavit in which he asserted he would not have pleaded guilty if he had known how long it would take him to become eligible.

9. Actual innocence relief granted to defendant when alleged drugs were tested after conviction and found not to be a controlled substance.

***Ex parte Robinson*, 2012 WL 1059887 (Tex. Crim. App. 2012)(not designated for publication)**

Robinson pleaded guilty to possession of less than a gram of cocaine and was sentenced to seven months imprisonment. After his conviction, the alleged cocaine was tested and found not to be a controlled substance. Robinson filed a writ of habeas corpus asserting that his plea was involuntary because newly available evidence showed he did not possess a controlled substance. The trial court found that Robinson proved by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence, and the court of criminal appeals granted him relief.

The court granted relief even though Robinson's writ application was "non-compliant" because it failed to allege facts in support in the "appropriate place," and because it alleged multifarious grounds for relief. The court reached the merits of this "non-compliant" application because the state did not move to dismiss and conceded Robinson was entitled to relief, and because the trial court made relevant findings of fact and there was adequate proof in the record to support the claim.

IMMIGRATION

1. Is *Padilla* retroactive?

***Ex parte De Los Reyes*, 350 S.W.3d 723 (Tex. App.–El Paso 2011, pet granted)**

De Los Reyes has been a permanent resident since 1993. In 2004 he plead guilty to his second misdemeanor theft, and was sentenced to one day in jail and ordered to pay a fine. ICE took him into custody in 2010 because federal law requires deportation of an alien who has been convicted of two or more crimes of moral turpitude not arising out of a single scheme of misconduct. He filed an application for writ of habeas corpus alleging that his plea to the 2004 conviction was involuntary because his lawyer failed to advise him that this plea would lead to deportation. The lawyer filed an affidavit admitting that he did not properly investigate De Los Reyes's history, and he later testified that he did not discuss immigration consequences or advise him "of any type of immigration consequences or deportation at all." The trial court denied the application, noting that the written plea agreement contained the boilerplate immigration admonishment and that this was sufficient, despite counsel's failure.

The court of appeals reversed, holding that counsel was ineffective for failing to advise his client that his guilty plea to theft made him subject to deportation.

First, the court held that *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), did not establish a "new rule," as that phrase is defined in *Teague v. Lane*, 489 U.S. 288 (1989), and that, as a result, it could be applied retroactively in habeas proceedings. "We agree that the rule announced in *Padilla* was not a 'new rule' as defined by *Teague*, but an instance where the well-established standard for determining claims of ineffective assistance of counsel was applied to a specific circumstance; i.e., counsel's responsibility to inform a non-citizen of the potential impact a guilty plea may have on his or her immigration status."

Second, under *Strickland v. Washington*, 466 U.S. 668 (1984), counsel's performance was both constitutionally deficient and prejudicial. Although *Padilla* made a distinction between "succinct and straightforward" immigration laws, and "complex and fluid" immigration laws, that distinction was irrelevant in light of counsel's testimony. "[I]t is clear that regardless of the complexity of the immigration law involved, a complete failure by defense counsel to inform or advise a defendant regarding the potential effect on his immigration status constitutes a deficient performance under the first prong of *Strickland*." And the deficient performance was prejudicial. Given the "near certainty' of deportation, the boilerplate admonishment that the plea "may" result in deportation "was not sufficient to alleviate the prejudice arising from counsel's failure to advise

"Appellant of the plea's immigration consequences."

The Texas Court of Criminal Appeals granted the state's petition for discretionary review to answer this question: "Did the Court of Appeals err in holding that *Padilla v. Kentucky*, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), applied retroactively to the collateral review of state convictions that were final when the *Padilla* opinion was issued?

IMPROPER PHOTOGRAPHY

1. Judge Keller believes the Improper Photography statute "is virtually unbounded in its potential application" and should be reviewed for constitutionality under the First Amendment.

***Ex parte Nyabwa,* 2012 WL 1019967 (Tex. Crim. App. 2012)(Keller, P.J., dissenting)**

Nyabwa was charged with Improper Photography and filed a pretrial writ of habeas corpus asserting that TEX. PENAL CODE § 21.15 (b)(1) is facially unconstitutional. The court refused the petition, and Presiding Judge Keller dissented.

> This statute is virtually unbounded in its potential application. The photographing of anyone, anywhere, and under any circumstances can be an offense so long as the photograph was taken without consent and the actor harbored the requisite sexual mental state. Photography has been recognized as a form of expression protected by the First Amendment.
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> *** * ***
>
> [I]n the statute before us, the person photographed could be a fully-clothed adult walking down a public street. The breadth of this statute is breathtaking, and the type of intent that it regulates is not inherently exempt from First Amendment protection.
>
> *** * ***
>
> I would grant review to address whether the statute violates the First Amendment. Because the Court does not, I respectfully dissent.

JEOPARDY

1. 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.

2. An excruciatingly dense journey through dozens of cases from the court of criminal appeals, the Fifth Circuit, and the Restatement of Judgments, providing more than almost anyone would care to know about collateral estoppel.

***York v. State*, 342 S.W.3d 528 (Tex. Crim. App. 2011)**

York was first tried for the misdemeanor offense of failure to identify. The trial court granted his motion to suppress, seeming to base his decision on two factors: the officer was out of his jurisdiction when he detained York; and the officer was unable to articulate sufficient facts about the offense he was investigating. Having granted the motion, the court then granted York's motion for instructed verdict since, in light of the suppression order, the state had no evidence. The state did not appeal.

The state next tried York for possession of methamphetamine, a case which arose out of the same incident as did the earlier-tried misdemeanor. At a motion to suppress hearing the state put on evidence, and York introduced the record from the record in the misdemeanor case, and argued that there was no reasonable suspicion for his detention, and that suppression was required by *res judicata* and collateral estoppel. The district judge denied York's motion to suppress.

The court of appeals affirmed, holding that there was reasonable suspicion for the investigation, and that collateral estoppel did not apply because the legality of the detention was not an element of possession of methamphetamine. The court of criminal appeals affirmed.

To reach its decision, it was necessary to "deconstruct earlier opinions from this Court and

re-analyze the question from scratch." The resulting discussion, which examined multiple prior decisions from the court of criminal appeals, the Fifth Circuit, and the Supreme Court, as well as various sections of the Restatement of Judgments, was excruciatingly dense and, at least for me, impossible to comprehend. "[T]he bottom-line result [is that] where a defendant seeks to bar the relitigation of suppression issues on the basis of double jeopardy. . . the State is not barred by the Double Jeopardy Clause from relitigating a suppression issue that was not an ultimate fact in the first prosecution and was not an ultimate fact in the second prosecution."

3. The court of appeals erred in not considering legislative intent in its double jeopardy analysis.

***Zuliani v. State*, 353 S.W.3d 872 (Tex. Crim. App. 2011)**

Zuliani was convicted of reckless driving and deadly conduct, and sentenced to 30 days in jail on the first case, and a year in jail on the other. The court of appeals reversed, holding that double jeopardy was violated because the two convictions constituted multiple punishments for the same offense.

The court of criminal appeals granted the state's petition for discretionary review which asserted that the court of appeals had failed to consider legislative intent in its double jeopardy analysis. The court agreed.

> In considering Appellant's double jeopardy claim, the court of appeals correctly concluded that, when the same conduct violates two different statutory provisions, the two offenses are the same for double jeopardy purposes if one offense contains all of the elements of the other. In Texas, courts focus on the elements alleged in the charging instruments, so two offenses with different statutory elements may be the same for double jeopardy purposes if, as charged, they require proof of the same facts. The court of appeals compared the elements of the two offenses, as charged, and concluded that they were the same for double jeopardy purposes in this case. This analysis was correct, but incomplete. Impermissible multiple punishment occurs when the same criminal act is punished twice under two distinct statutory provisions and the Legislature intended the conduct be punished only once. The court of appeals did not consider whether the Legislature intended the conduct to be punished only once. [citations omitted]

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*, 337 S.W.3d 903 (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. One more effort (unsuccessful, I suggest) "to clarify" unanimity.

***Young v. State*, 341 S.W.3d 417 (Tex. Crim. App. 2011)**

Young, a registered sex offender, was charged in a two paragraph indictment with failing to notify the Sheriff's office seven days prior to changing his address *or* with failing to provide the Sheriff's office with proof of identity and residence seven days after the move. The jury charge submitted these allegations disjunctively, thereby permitting a conviction if the jury believed that he failed to report a change of address, but not requiring unanimity on whether the failure to report was *before* or *after* moving. The court of appeals affirmed the conviction, and the court of criminal appeals affirmed the affirmance.

The jury must unanimously agree about the occurrence of a single criminal offense, but it need not be unanimous about the specific manner and means by which that offense was committed. The court acknowledged that this rule is not as clear as it seems, and that it continues to address questions about "precisely what it is the jury must unanimously agree on." "To clarify" this difficulty, the court noted distinctions between the three general categories of criminal offenses: "result of conduct" crimes; "nature of conduct" crimes; and "circumstances of conduct" crimes.

> [I]n "result of conduct" offenses, the jury must be unanimous about the specific result required by the statute. With "nature of conduct" crimes, the jury must be unanimous about the specific criminal act, and with "circumstances surrounding the conduct" offenses, unanimity is required about the existence of the particular circumstance that makes the otherwise innocent act criminal.

Whatever the category, "the key concept remains the same:" look to the gravamen or focus of the crime, and determine, is it the result of the act, the nature of the act, or the circumstances surrounding the act?

Here, the state alleged one specific circumstance or duty – to report a change of address – and two specific failures to fulfill that duty: before moving and when the change of address was completed. The gravamen or focus of the offense is to fail to inform about an impending or completed change of residence. The unit of prosecution is one offense for each change of address, and this can be accomplished in either of two ways. "The focus of the statute is on giving notification to law enforcement and not the means by which a sex offender failed to do so."

2. Yes, the jury charges were erroneous because they allowed for the possibility that the jury rendered non-unanimous verdicts, convicting appellant of single crimes based on multiple instances of criminal behavior, but no, the unobjected-to error was not egregiously harmful.

***Cosio v. State*, 353 S.W.3d 766 (Tex. Crim. App. 2011)**

Cosio was charged in a four-count indictment that alleged various acts of sexual misconduct against a former girlfriend's daughter. Count I alleged aggravated sexual assault by oral penetration on July 31, 2007. Count II alleged aggravated sexual assault by several means, including penetration of the sexual organ on July 31, 2007. Count III and IV alleged indecency with a child by contact on July 31, 2004. The jury was separately charged on each count, and at the end of each of these charges it was instructed that its verdict must be unanimous. Cosio made no objection that the jury charge permitted non-unanimous verdicts, and he was convicted on all four counts.

The court of appeals reversed, holding that the trial court's instructions permitted non-unanimous verdicts. Specifically, the evidence presented showed multiple acts of misconduct supported each count, but the trial court failed to instruct the jury that it had to be unanimous about which instance constituted the commission of the offenses for purposes of each of the individual counts.

The court of criminal appeals reversed the reversal, holding that, although the charge was erroneous, Cosio was not egregiously harmed.

"Texas law requires that a jury reach a unanimous verdict about the specific crime that the defendant committed. This means that the jury must 'agree upon a single and discrete incident that would constitute the commission of the offense alleged.'" The court observed that it has previously recognized three ways in which unanimity issues can arise. (1) " First, non-unanimity may occur when the State presents evidence demonstrating the repetition of the same criminal conduct, but the actual results of the conduct differed." (2) "Second, non-unanimity may occur when the State charges one offense and presents evidence that the defendant committed the charged offense on multiple but separate occasions." (3) "And third and finally, non-unanimity may occur when the State charges one offense and presents evidence of an offense, committed at a different time, that violated a different provision of the same criminal statute."

Here, the problem was that discussed in item 2: Each count charged a single instance of criminal behavior – either aggravated sexual assault or indecency with a child – but the evidence at

trial showed multiple instances of such behavior. The court of appeals here correctly found that "[t]he jury could have relied on separate incidents of criminal conduct, which constituted different offenses or separate units of prosecution, committed by Cosio to find him guilty . . . ." The charges were erroneous because they allowed for the possibility that the jury rendered non-unanimous verdicts. The boilerpoate instruction that the verdicts must be unanimous did not cure the error because the jury might have thought only that this meant all 12 must agree as to the defendant's guilt on each count, and not that all had to agree on the particular instance of criminal activity.

Elections and jury unanimity are jury charge issues, and are governed by *Almanza*. That is, Cosio did not absolutely waive his right to argue error on appeal because his trial lawyer did not object. Rather, the failure to object meant that he had to show "egregious" harm, and he failed to do so here.

Cosio did make the general request that the state should be required to elect as to the counts. This request, however, was not specific enough to put the court and the state on notice that the state should have to choose between the several different criminal acts it intended to rely on for conviction. It is significant to note that, if Cosio had preserved this error with a proper objection, he would have been in a much better position. Then he could have argued that this state constitutional error required reversal unless the record demonstrated the error harmless beyond a reasonable doubt.

3. Jury need not be unanimous about whether defendant committed capital murder as a principal actor or party.

***Leza v. State*, 351 S.W.3d 344 (Tex. Crim. App. 2011)**

> [S]everal courts of appeals in Texas have concluded that the Legislature did not intend that a jury should have to achieve unanimity with respect to whether an accused was guilty of capital murder as a principal actor or as a party, or with respect to any particular statutory alternative by which he might be found liable as a party. We agree, and hold that there was no error in the jury charge.

4. Not an impermissible comment on the weight of the evidence to respond to a jury's question that the law does not prohibit a family member from testifying at sentencing if the family member has relevant testimony to give.

***Lucio v. State*, 353 S.W.3d 873 (Tex. Crim. App. 2011)**

During sentencing deliberations, the jury asked first, "Are there any limitations on who can speak as a character witness during the sentencing phase?" (which the judge deflected in the standard way, and then, "Does the law prevent a family member from speaking during the sentencing phase, for the defendant?" This time, after an extensive discussion with counsel, the court answered, as follows: "The law does not prohibit a family member from testifying on behalf of a defendant so long as the witness has relevant evidence related to an issue in the case. You have

heard all of the witnesses who have been called to testify. Please continue your deliberations." Lucio was sentenced to 60 years imprisonment and appealed.

The court of appeals affirmed, holding that the law permits a court to respond to the jury's question with a correct statement of the law provided that the answer expresses no opinion on the weight of the evidence and does not assume the existence of a disputed fact. The court of criminal appeals affirmed.

> We conclude that the general rule that prohibits the court from singling out a particular piece of evidence in its instructions to the jury given prior to jury deliberations does not necessarily apply when the court merely responds to the jury's question concerning a subject identified by the jury alone. Nothing in the trial court's answer focused the jury on the fact that none of appellant's family members had testified during the punishment phase. Rather, the jury alone focused on that fact, which prompted its note to the trial court, perhaps because of evidence supplied by appellant's girlfriend, who testified that appellant "only associated with his family." In response to the jury's question, the trial court merely provided a correct statement of law that family members with relevant evidence were not prohibited from testifying. From this, the jury could have permissibly inferred either that none of the available family members could provide relevant information or that appellant did not call the available family members to testify because they would supply evidence unfavorable to appellant. Regardless of which inference the jury drew, neither was promoted by the trial court's answer, which did not improperly convey a "personal estimation of the strength or credibility" of evidence in its neutral and correct statement of the applicable law. We hold, therefore, that the court of appeals correctly determined that the trial court did not improperly comment on the weight of the evidence in its answer, which provided a correct statement of the law without expressing any opinion as to the weight of the evidence or assuming the existence of a disputed fact. [citations omitted]

JURY MISCONDUCT

1. Does the absurdly restrictive limitation traditionally placed on what constitutes an "outside influence" for purposes of jury misconduct violate the constitutional right to confront and cross-examine?

***McQuarrie v. State*, 2011 WL 1442335 (Tex. App.-Corpus Christi 2011, pet. granted)**

McQuarrie was convicted of sexual assault, and filed a motion for new trial. At the hearing on this motion, McQuarrie offered affidavits from two jurors who stated that a third juror had researched the effects of date rape drugs, and had relayed this information to the rest of the jury, and that this information had caused those two jurors to change their votes to guilty. The trial court refused to consider the affidavits, finding that they did not show sufficient "outside influence." The motion for new trial was denied and McQuarrie appealed.

The court of appeals affirmed. Rule 606(b) of the Texas Rules of Evidence provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror . . . .

The Corpus Christi Court of Appeals "has repeatedly held that '[a]n outside influence must emanate from outside the jury and its deliberations.'" McQuarrie urged the court to abandon this test, and replace it with one that allowed testimony from jurors provided that it did not "delve into the deliberations of the jury." The court noted that, even if it were to adopt McQuarrie's test, he would still lose, since the affidavits in question clearly required delving into the jury's deliberations.

Alternatively, McQuarrie argued that, as applied in this case, Rule 606(b) violated his right to a fair trial. The legislature may properly pass laws that promote the "purity and efficiency" of the jury system. Rule 606(b)'s limitations on the conditions that can entitle a defendant to a new trial based on jury misconduct "is nothing more than an attempt to promote the 'purity and efficiency' of the jury system."

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

1. Did the Court of Appeals violate Petitioner's federal constitutional trial rights to confrontation and cross-examination by upholding the trial court's exclusion, pursuant to Rule 606(b) Tex. R. Evid., of juror testimony and affidavits offered for purposes of Petitioner's Motion for New Trial on the ground that a juror conveyed to other jurors harmful information obtained from her internet research during an overnight beak in deliberations?

2. Did the Court of Appeals violate Petitioner's state constitutional trial rights to confrontation and cross-examination by upholding the trial court's exclusion, pursuant to Rule 606(b) Tex. R. Evid., of juror testimony and affidavits offered for purposes of petitioner's Motion for New Trial on the ground that a juror conveyed to other jurors harmful information obtained from her internet research during an overnight break in deliberations?

LESSER INCLUDED OFFENSES

1. The trial court erred when it refused to submit the lesser included offense of theft in this aggravated robbery case where a rational jury could have concluded that the theft and the assault were separate events.

***Sweed v. State*, 351 S.W.3d 63 (Tex. Crim. App. 2011)**

Sweed was indicted for aggravated robbery, and the trial court denied his request for the lesser included offense of theft. The court of appeals affirmed, holding that there was no evidence that would permit a rational jury to find that Sweed's threat to the complainant did not occur in the course of committing or in immediate flight after committing the theft.

The court of criminal appeals reversed. "The robbery element of 'in the course of committing theft' is defined as 'conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft.'" If the state failed to prove in the course of committing theft, then the theft and the assault were separate events, and Sweed could not have been convicted of robbery or aggravated robbery. Sweed did not dispute the theft; the central issue, then, was whether he pulled a knife of the complainant during or in the immediate flight after commission of the theft. "A rational jury could conclude, based upon the evidence presented, that the assault was a separate event from the theft, meaning that [Sweed] could have been guilty only of the lesser offense of theft and not aggravated robbery. The court of appeals erred in holding that theft was not raised by the evidence."

2. All the evidence admitted at trial, not just direct evidence, must be considered when determining whether the defendant was entitled to submission of the lesser included offense of criminal trespass.

***Goad v. State*, 354 S.W.3d 443 (Tex. Crim. App. 2011)**

Goad knocked on Bickle's door and asked to come inside to look for his missing pit bull. She refused and after a five minute argument, Goad left. Fifteen minutes later he returned and knocked out a window and started to climb in when Bickle and her friend started screaming, which caused Goad to run away and flee in a car. Goad was tried for burglary of a habitation, and he sought an instruction on the lesser included offense of criminal trespass, which was denied.

The court of appeals reversed the conviction, and the state filed a petition for discretionary review, questioning whether the trial court could abuse its discretion by refusing a lesser that was supported only by unrelated hearsay admitted through the victim.

The court of criminal appeals affirmed the reversal. A two part test is used to determine entitlement to a lesser included offense: "We first consider whether the offense contained in the requested instruction is a lesser-included offense of the charged offense. If so, we must decide whether the admitted evidence supports the instruction."

Criminal trespass can be a lesser included offense of burglary of a habitation, and met the first prong of the test here based on the evidence that Goad entered Bickle's home but did so without the specific intent to steal. In deciding the second prong, the court looks at all the evidence, not just that presented by the defendant, and asks whether it presents a valid, rational, alternative to the charged offense. Anything more than a scintilla of evidence is sufficient, and the court will not consider the credibility of the evidence or whether it conflicts with other evidence, or is controverted. "Bickle's testimony that Goad had told her that he was at her house to look for his dog, argued with her for several minutes because he believed she was being unreasonable, and entered her home only fifteen minutes later is affirmative evidence directly germane to whether Goad lacked intent to commit theft. This evidence would permit a rational jury to believe that Goad was only looking for his dog when he entered Bickle's home and therefore support a criminal trespass instruction." The court rejected the state's argument that there must be direct evidence of a lack of intent to steal to raise the lesser. Instead, all evidence admitted at trial must be considered.

3. Is reckless aggravated assault a lesser included offense of intentional, knowing aggravated assault?

***Hicks v. State*, 2011 WL 723507 (Tex. App.–Houston [14th Dist.] 2011, pet. granted)**

Hicks was indicted for aggravated assault by intentionally and knowingly causing bodily injury to Jackson. Over Hicks's objection, the trial court submitted a jury instruction also authorizing his conviction for *recklessly* causing bodily injury to Jackson. The jury found Hicks guilty of acting recklessly, and he appealed.

The court of appeals reversed. The range of punishment is the same for aggravated assault, regardless whether it is committed intentionally, knowingly, or recklessly. "Thus, 'aggravated assault – recklessly causing bodily injury' as set forth in the jury charge could not be a lesser-included offense of the aggravated assault charged in the indictment; rather, it was the same crime as the charged offense based on a culpable mental state that could have been but was not alleged in the indictment."

The court of criminal appeals granted both the state's and the appellant's petitions for discretionary review to determine these two questions:

State's Ground:

> "Does the Fourteenth Court of Appeals' determination that the offense of aggravated assault committed by reckless conduct is not a lesser included offense of the offense of aggravated assault committed by intentional or knowing conduct run afoul of the plain language of Article 37.09 and the spirit of *Grey v. State*, 298 S.W. 3d 644 (Tex. Crim. App. 2009)?"

Appellant's Ground:

"The Court of Appeals' panel majority erred in ordering a new trial, rather than ordering this case remanded with instructions to enter a judgment of acquittal, after petitioner's jury impliedly acquitted him of the charged offense and expressly convicted him of an improperly-submitted offense that was not authorized by the charging instrument."

PAROLE

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

***Ex parte Bohannan*, 350 S.W.3d 116 (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.

PRIVILEGES

1. Trial courts may no longer accept mere assertions that a witness fears self-incrimination, but now must conduct an inquiry into the reasonableness of that assertion.

***Walters v. State*, 359 S.W.3d 212 (Tex. Crim. App. 2011)**

West was called by the defense and, on advice of her lawyer, took the Fifth and refused to testify. Walters appealed. The Dallas Court of Appeals affirmed, holding that, "[b]ecause West's refusal to testify was asserted on the advice of her attorney, the trial court was not required to question West or make any further determination."

The court of criminal appeals affirmed, although it disagreed with the lower court's reasoning, and overruled *Ross v. State*, 486 S.W.2d 327 (Tex. Crim. App. 1972), the case that court relied on.

Under *Ross*, if a witness took the Fifth on advice of counsel, "[n]othing further [is] required of the court." *Ross*, however, conflicts with Supreme Court precedent, which extends Fifth Amendment protection "only to witnesses who have 'reasonable cause to apprehend danger from a direct answer.'" Mere assertion of the privilege, even based upon advice of counsel, is insufficient; a "trial court is required to make an inquiry into the reasonableness of a witness's assertion of the Fifth Amendment privilege against self-incrimination."

Although the court disagreed with the way in which the court of appeals reached its decision,

it did not disagree with the procedure used in the trial court. A hearing was held outside the presence of the jury and the state proffered West's expected testimony, and West's attorney explained that he feared his client might incriminate herself in the face of evidence that she had encouraged the crime that Walters was on trial for. "The trial court's inquiry into the reasonableness of West's invocation of her Fifth Amendment privilege was sufficient to establish the risk of incrimination."

PROSECUTORIAL MISCONDUCT

1. The prosecutor erred when he asked questions of the defendant during his summation that could only have been answered by the defendant, and, when coupled with the prosecutor's physical mannerisms, directly highlighted the failure to testify.

***Archie v. State*, 340 S.W.3d 734 (Tex. Crim. App. 2011)**

Archie was tried for murder, and there was evidence that he had admitted shooting the complainant as the complainant sat next to his girlfriend, who had screamed. Archie did not testify at trial. The prosecutor argued this:

> "[PROSECUTOR]: But the only person who heard her scream, the only person who said she screamed was Trent Archie. Do you still hear it, Trent? Do you still hear her screaming. How do you know she screamed?"

The defense objected and moved for a mistrial, but, before he could get a ruling, the prosecutor squeezed off one more shot:

> "[PROSECUTOR]: Because you were there that night."

At the bench the judge told the prosecutor he could not ask the defendant questions, and the prosecutor said, "I didn't. I'm making argument." When the judge persisted, the prosecutor changed his defense: "Judge, I've done it before." As brilliant as this response was, it failed to persuade the trial judge, who sustained the objection, ordered the jury to disregard, but denied Archie's motion for mistrial.

In his motion for new trial, Archie's lawyer testified that, as the prosecutor was making the argument he turned from the jury, faced the defense table, pointed and took a step or two towards Archie. The motion for new trial was denied.

The court of appeals reversed, holding that the prosecutor's argument impermissibly commented on Archie's failure to testify, and that the judge abused his discretion when he denied the motion for mistrial.

The court of criminal appeals reversed the reversal. At least portions of the argument, coupled with the prosecutor's actions, went beyond merely invoking a logical inference from the

record, and "strayed into impermissible territory." Specifically, although the first assertion, that Archie had been the only person who heard the woman scream, and the last assertion, that Archie was there that night, might have been construed as constituting reasonable deductions from the evidence. The questions in between, though, "clearly go beyond asking the jury to infer that the answer to these questions can be found in the evidence in the record." They go more immediately to Archie's "present state of mind as he sat in the courtroom, seeming to ask whether he presently harbors a guilty conscience for what transpired on the night of the murder. These questions could be answered only by the appellant, and the asking of these questions, coupled with the prosecutor's act of turning from the jury to face the defense counsel table, pointing, and taking a step or two towards the appellant, directly highlighted the fact that the appellant did not personally take the stand to testify."

The court, however, found that, under *Mosley v. State*, the trial court did not abuse its discretion when it denied the motion for mistrial. (1) the prejudice was not so great here as necessarily to render the curative instruction inefficacious, since the improper questions were embedded within other, legitimate remarks; (2) the objection was sustained, the prosecutor was ordered not to ask questions, and the jury was ordered to disregard. And the jury had previously been instructed in the court's charge not to comment on, or allude to Archie's failure to testify; (3) the evidence supporting conviction was "fairly compelling."

2. Overturning 22 years of precedent, the court of criminal appeals recognizes a new test for determining harmful, constitutional error.

***Snowden v. State*, 353 S.W.3d 815 (Tex. Crim. App. 2011)**

Snowden was charged with punching a woman who was pregnant with his child. During her summation the prosecutor argued that Snowden "doesn't give two hoots about the mother of his baby or his baby because he looks her in the eye and punches her . . . *without remorse* . . . *just like he is today*. Snowden's objection that this was an improper comment on his failure to testify was overruled, he was convicted and he appealed. The court of appeals held that the trial court erred when it overruled Snowden's objection, and, because this was constitutional error, it analyzed it for harm under Rule 44.2(a) of the Texas Rules of Appellate Procedure. The court further relied on the factors identified by the court of criminal appeals in *Harris v. State*, 790 S.W. 2d 568 (Tex. Crim. App. 1989), and reversed Snowden's conviction, finding that it could not say beyond a reasonable doubt that the error was harmless.

The court of criminal appeals reversed the reversal. The court agreed that the prosecutor's argument was constitutional error.

> Whether the appellant was presently remorseful as he sat in the courtroom was a circumstance that only he could have testified to; a jury is not entitled to infer as much from its impression of his courtroom demeanor. Therefore, the prosecutor's remark about the appellant's lack of remorse in the courtroom was an objectionable comment on the appellant's failure to testify because it highlighted for the jury the

appellant's failure to take the stand and claim present remorse.

The court, however, disagreed with both the court of appeals's conclusion that the error was not harmless beyond a reasonable doubt, and with its reliance on the 22 year old *Harris* case.

Harris had held that, in determining whether a prosecutor's erroneous argument was harmful, the appellate court should consider the following factors: (1) the source of the error; (2) the nature of the error; (3) whether (4) and to what extent the error was emphasized by the state; (5) its probable collateral implications; (6) how much weight a juror would probably place upon the error; and, (7) whether declaring the error harmless would encourage the state to repeat it with impunity.

In *Snowden* the court of criminal appeals held that "at least some of the specific *Harris* factors have no logical bearing on whether a particular constitutional error 'did not contribute to the verdict obtained.'" Specifically, the court failed to see the utility of factors (1) and (7), finding that neither told the reviewing court anything about the harmfulness of the error, but instead were meant only to punish the perpetrator. The other factors "remain as viable considerations," but neither are they the exclusive factors a court can consider, nor are they necessarily applicable "to every conceivable constitutional error that may be subject to an analysis for harm."

In this case, the court of criminal appeals agreed that the court of appeals properly considered factors (2) through (6), but believed that it "misanalyzed" these factors.

3. Remorse versus responsibility: An alibi defense denies responsibility and permits the state to argue at sentencing that the defendant should be denied probation because he failed to take responsibility.

***Randolph v. State*, 353 S.W.3d 887 (Tex. Crim. App. 2011)**

Randolph testified at the guilt/innocence phase of the trial in support of his alibi defense, claiming that he was not present at the time of the crime. He exercised his Fifth Amendment privilege at punishment and did not testify. The prosecutor argued that he did not deserve probation because he failed to accept responsibility, and the trial court overruled his objection that this impermissibly commented on his silence. The court of appeals agreed and reversed the conviction.

The court of criminal appeals reversed the reversal. Courts must view arguments from the jury's perspective, and must resolve any ambiguities in favor of finding the argument permissible. The implication that an argument refers to a defendant's failure to testify "must be a clear and necessary one." An implied or indirect allusion is not enough. "The test, then, is whether the language used was manifestly intended or was of such a character that the jury would necessarily and naturally take it as a comment on the defendant's failure to testify."

> The State's punishment argument in this case . . . explicitly referred to appellant's alibi testimony at the guilt phase and did not mention any lack of remorse. We conclude that, by testifying that he was not the person who committed this aggravated

> robbery, appellant expressly denied responsibility for the crime. The State was therefore entitled to comment on that denial of responsibility at either the guilt or punishment stage. The State did not comment on appellant's failure to testify at the punishment stage.

The court also pointed out that "remorse and responsibility are two entirely different concepts." When a defendant puts on an alibi defense (or, for example, asserts that he had an accident) he is expressly denying responsibility, and when he does, the prosecutor may properly comment on it. On the other hand, a defendant neither accepts nor denies responsibility simply by pleading not guilty.

> Thus, the State could not argue, at either the guilt or punishment stage, that the defendant denied responsibility for the crime simply because he pled not guilty. That would be an impermissible comment on the failure to testify. Similarly, a comment on the defendant's failure to show remorse is generally not proper if the defendant testifies at the guilt stage and presents some defense, but does not testify at the punishment phase.

4. This defendant hit the jackpot, establishing his right to relief under both *Brady v. Maryland* and actual innocence under *Herrera*.

***Ex Parte Miles*, 359 S.W.3d 647 (Tex. Crim. App. 2012)**

Miles was convicted of murder and attempted murder, and was denied relief on his first application for writ of habeas corpus. This was his second writ, and in it he complained of *Brady* violations, that he was actually innocent, and that the state's gunshot residue evidence was constitutionally unreliable. The trial court recommended that relief be granted, and the court of criminal appeals agreed.

Several years after Miles was convicted, Centurion Ministries, and its founder, James McCloskey, made a freedom of information request of the Dallas Police Department, and, among other things, obtained two police reports that had never previously been disclosed to the defense. One reported an anonymous tip from the ex-girlfriend of Keith Richard, aka "Six" who claimed that Richard admitted to shooting two men at a gas station near Bachman Lake, and that the police had arrested the wrong man. The other report involved an encounter five days before the shooting between the two men and Garland, who reported that one of them had pulled a shotgun and threatened him. Later, after the shooting, Garland reported that the brother of the deceased told him that someone named "Deuce" had committed the murder. Miles trial counsel submitted an affidavit asserting that the two reports were material because they would have given him other suspects to investigate, and would have allowed him to impeach the surviving shooting victim about the deceased's use of the shotgun.

A number of significant developments occurred before the case was finally decided by the court of criminal appeals:

"Six" was located and admitted to having been at the same bar the two men were at earlier the night of the shooting. "Six" also resembled a description of the shooter more nearly than did Miles.

Later, an "eyewitness" recanted his trial testimony, admitting that he had in fact been unable to identify Miles at trial, but the prosecutor directed him to identify Miles by telling him where Miles would be sitting.

Next, an expert who had testified for the state about gunshot residue submitted an affidavit in which she admitted she would testify differently now than she did at the time of trial. She conceded that, according to her laboratory's standards, both then and at the time of trial, the gsr levels were "below threshold," and should have been reported as negative.

Miles took a polygraph and passed. A fingerprint that was found in the deceased's vehicle and previously of unknown origin, was linked to another person who lived near the shooting scene, frequented the bar, and owned the same type of car that had been identified as the getaway car. This person failed his polygraph.

The court of criminal appeals granted relief on two grounds: *Brady* and actual innocence.

As to *Brady*, it was clear that the state failed to disclose evidence of the two police reports. Here, the reports were in possession of the Dallas police department, and it does not matter that the prosecutor who tried the case was personally unaware, " because '*the State*' includes, in addition to the prosecutor, other lawyers and employees in his office and members of law enforcement connected to the investigation and prosecution of the case." [emphasis supplied] And the reports were *favorable*. They contained the names of other potential suspects — Deuce, Six, and Garland; "subsequent investigation of those allegations could have led to other exculpatory evidence;" and, the reports could have impeached police detectives who testified that there were no other suspects and no one else with motives against the victims in the case, and one of the victims, who testified that he was a law-abiding citizen who kept a shotgun in his car for personal protection. Additionally, the undisclosed evidence was *material.* That is, there was a " probability of a different outcome had the information been timely disclosed to the defense is sufficient to undermine confidence in the outcome of the case." Finally, the undisclosed reports would have been *admissible*. At a minimum the reports would have been admissible to impeach the detective who testified that there were no other suspects, and the survivor, who said he had had no other conflicts with anyone else. The court went on to state the obvious: *Brady* overrides the work-product privilege found in article 39.14(a).

As to actual innocence, the court noted that there are two different standards, depending on the nature of the claim. A "procedural" claim that the defendant is innocent, does not stand alone, but is "intertwined" with another error that renders the conviction constitutionally invalid, and is governed by *Schlup v. Delo*, 513 U.S. 298 (1995), A substantive, free-standing claim of bare innocence based solely on newly discovered evidence is governed by *Herrera v. Collins*, 506 U.S. 390 (1993), and is the harder of the two to sustain, requiring a showing that no reasonable juror

would have convicted him in light of the newly discovered evidence. "Establishing a Herrera-type claim is a Herculean task." And Miles was able to do it. Most of the previous actual innocence cases relied on a single piece of evidence, like DNA. In this case, "multiple pieces of newly discovered evidence presented here (including the *Brady* evidence) amount to affirmative evidence that unquestionably establishes Applicant's innocence."

PUBLIC TRIALS

1. Trial in a prison chapel is not the "public" trial envisioned by the Sixth Amendment.

***Lilly v. State*, 2012 WL 1314088 (Tex. Crim. App. 2012)**

Lilly was charged with assaulting a public official in the French Robertson Unit of TDCJ in Jones County. Previously, inmates at this unit had been tried at the Jones County Courthouse in Anson, but this not only posed security concerns, it also alarmed local residents. So it was decided that Lilly would be tried in the prison chapel at French Robertson. According to testimony, this area was theoretically open to the public, assuming those seeking to attend could get the warden's permission. Lilly's motion to transfer to the public courthouse was denied, and he appealed, arguing that this procedure denied him his right to a public trial, and that trial in the chapel violated the Establishment and Free Exercise Clauses of the federal and state constitutions. The court of appeals disagreed and affirmed.

The court of criminal appeals reversed, finding that trial in the chapel violated Lilly's Sixth Amendment right to a public trial. "We hold that Appellant showed that his trial was closed to the public, and because that closure was not justified, we reverse the judgments of the court of appeals and trial court. We remand this cause to the trial court for a new trial."

The court made several things clear. First, a plea-bargain proceeding is a trial under Texas law and therefore the right to a public trial applies to a plea-bargained bench trial in a correctional facility. Second, the right to a public trial is not absolute, and may be outweighed by competing rights, "such as interests in security, preventing disclosure of non-public information, or ensuring that a defendant receives a fair trial. However, such cases will be rare, and the presumption of openness adopted by the Supreme Court must be overcome." In this case the trial court failed to make any findings of fact that justified closing the proceedings. Finally, the court of criminal appeals held that Lilly met his burden to prove that the trial was closed to the public. Here the defense did an excellent job of making sure that the record showed how difficult it would have been for a member of the public to attend the trial. The court of appeals erroneously held that the trial was not closed because there was no evidence that anyone was dissuaded from attempting to attend, or that anyone was actually prohibited from attending. "When determining whether a defendant has proved that his trial was closed to the public, the focus is not on whether the defendant can show that someone was actually excluded. Rather, a reviewing court must look to the totality of the evidence and determine whether the trial court fulfilled its obligation 'to take every reasonable measure to accommodate public attendance at criminal trials.'"

Practice tip

In this case, Lilly wanted a public trial, he asked for it, and he won on appeal when the trial court erroneously denied his request. What if the defense wanted the courtroom closed during at least part of the trial, for example, to prevent inadmissible and highly prejudicial testimony from being disseminated during a pre-trial hearing, or a hearing held outside the jury's presence? Judges are reluctant to do this, and the press can be counted on to loudly complain, and both will assert the right of the public. The *Lilly* case says, though, "that the right to a public trial was created *for the benefit of the accused;* thus the right is a personal one." Rely on this language if you want to clear the courtroom, and are anticipating resistance from your prosecutor and judge who may be sympathetic to your concerns, but are worried that the defendant's rights are subordinate to those of the press and public. *Lilly* makes it clear that the defendant's rights are paramount, at least under the Sixth Amendment, and this suggests that he should be allowed to waive this right if it is necessary to preserve his right to a fair trial. The be prepared to balance this right against the public's right under some other law, like the First Amendment.

2. Defendant got a new trial because trial court improperly barred his family from attending voir dire, and prejudice is irrelevant.

***Steadman v. State*, 360 S.W.3d 499 (Tex. Crim. App. 2012)**

The defense requested that four of Steadman's relatives be allowed in the courtroom for voir dire. When the trial court noted that the courtroom had 48 seats for 48 venirepersons, the defense pointed out that there were 12 empty chairs in the jury box. The trial court refused to let the family sit there, vaguely citing to security concerns. The court did, however, allow the DA's investigator a seat in the jury box.

Steadman was convicted of aggravated sexual assault and sentenced to three life sentences and he appealed, complaining that the trial court had violated his Sixth Amendment right to a public trial when it excluded his four family members. The court of appeals disagreed and affirmed the conviction. The court of criminal appeals reversed and remanded for a new trial.

Earlier, this case had been remanded for fact-findings, and the trial court identified two areas of concern: jury contamination and security. Although these are "substantial concerns," the burden is squarely on the court to identify "those specific concrete facts that demonstrate that jury-panel contamination and/or courtroom security are areas of legitimate concern in the particular case." Mere "broad," or "generic" concerns will not justify closure. Here, the court never articulated any substantive "threat" to either contamination or security, and failed to make findings specific enough to permit the reviewing court to determine that closure was warranted. Nor did the court satisfy the burden unequivocally imposed by Supreme Court precedent "to consider all reasonable alternatives to closure." A Sixth Amendment violation of the right to public trial does not require proof that the defendant suffered specific prejudice.

SEARCH AND SEIZURE

1. Although the search was lawful at its inception, its lawfulness ended when its purpose did, and when the property owner thereafter indicated that he had had enough, the police violated his rights by over-staying their welcome and bringing out the drug dog.

***State v. Weaver*, 349 S.W.3d 521 (Tex. Crim. App. 2011)**

Weaver owned a welding shop in Livingston. Four narcotics officers came by looking for "Bear," who worked and hung out at the shop, and was wanted in another county for organized crime. The officers saw his car parked in front of the shop, and Weaver gave consent for them to "look around for the guy." They looked for about ten minutes, but Bear was not at the shop or in a van that was backed up in the workshop bay door. The officers, though, had information that methamphetamines were being used and distributed from the business, so they lingered in the shop. One asked Weaver "if he had any illegal guns, knives, narcotics, anything like that." He said no, except for some guns inside the office, and he showed him licensed guns in the office. Weaver refused an officer's request to search a van that he drove and his father owned. The officer then ran his drug dog around the van and the dog responded to an odor at the passenger door. The van was searched and methamphetamine was found.

The trial court granted Weaver's motion to suppress finding that the officers had exceeded the scop of their search after they failed to find Bear, and that they lacked cause to conduct the canine search on the van. The state appealed, and the court of appeals affirmed, holding that the trial court could properly have found that Weaver's consent to search for Bear had ended, and that the officers were not entitled to search for purposes unrelated to their initial search absent probable cause.

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?"

The answer to the question presented by the state is "yes." "A public parking lot is public regardless of whether a nearby business is open or not." The problem is that nobody but the prosecutor characterized the place the van was parked as a "parking lot." The trial court found that the van was located beside Weaver's shop on his property, and Weaver was entitled on appeal to "the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence." The facts support the trial court's implicit finding that the van was not parked on a public parking lot, or on any part of the business premises open to the public. Weaver gave oral consent to search the shop for Bear, then unequivocally refused to consent to a search of his van. It was objectively unreasonable for the officers to conclude that Weaver's objecting to the search of his van indicated, by clear and convincing evidence, his consent for the officers to stand around the van while one of their colleagues got a drug dog to run around the van. "A typical reasonable person would have understood – from Mr. Weaver's refusal of consent to search the van – that he had had enough."

From these facts, the trial judge could have concluded that the consent to search for "Bear" was lawful at its inception, but that it had been completed. The officers had completed their stated mission. Thus, when Mr. Weaver unequivocally said "No" to any further search of his van, the officers violated the Fourth Amendment by remaining on his private business premises and bringing in a drug dog without legal authorization. Therefore, the trial judge could have justifiably concluded that the "nonconsensual" use of the drug dog and the subsequent discovery of contraband were the product of an unconstitutional search on private premises.

2. "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*, 340 S.W.3d 454 (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.

3. The officers had apparent authority to search; it was sufficient in this case that apparent authority was shown by a preponderance of the evidence only, since appellant did not assert that the state had a higher burden – by clear and convincing evidence – under the State Constitution.

***Limon v. State*, 340 S.W.3d 753 (Tex. Crim. App. 2011)**

The police received information that the "Limon kids were involved" in a shooting, and, knowing only one Limon family in Aransas Pass, they went to that residence and knocked on the door at about 2:00 a.m.. An unknown person appearing about 13 or 14 years old answered the door. Because this person opened the door, the officer assumed that he was a resident, and asked for permission to enter. Two officers entered and, smelling an odor of marijuana, they searched the house, discovered evidence, and arrested Limon.

Limon was convicted of deadly conduct and the court of appeals reversed, finding that the search of the home was illegal. The court of criminal appeals reversed the reversal.

Voluntary consent is one of the well-defined exceptions to the general requirement that the police obtain a warrant to search a residence. Consent can be obtained from one with actual authority, and apparent authority. "Apparent authority is judged under an objective standard: 'would the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?'"

The court rejected the state's argument that it will always be reasonable for the police to believe that a person who answers the door in the middle of the night has authority to invite the police to enter. Rather, the question will be whether their belief was reasonable under the facts known to the officer. Nor did the court find it necessary to decide a *per se* rule concerning whether children may or may not give authority to enter. This too will depend on the facts of the individual case.

In this case, the court consider "five key facts" when determining that the person who opened the door of this home had apparent authority to consent. First, that person opened the door by himself, in response to a knock, which suggests a greater level of authority than if he had just verbally answered, "What do you want," or if he had had an adult in view behind him. Second, the trial court could have reasonably inferred that the person was at least a teenager of significant maturity, if not a young adult. Third, he consented to mere entry through the front door, and not through some less public area of the house. Fourth, the announced purpose was to conduct an emergency public-safety function, and it is reasonable that a teenager would have authority to permit such an entry, rather than an "entry for a salesperson to make a sales pitch." Fifth, the time of the entry – 2:00 a.m. – made it more likely that the person answering the door was a resident and not a guest.

Here is something to keep in mind for another time. Article I, § 9 of the Texas Constitution requires that voluntariness of consent must be proved by clear and convincing evidence. How about apparent authority? "Since the appellant has not argued that Article I, Section 9 offers broader protections, we analyze this case under the Fourth Amendment."

4. When challenging search warrant affidavits, think "deference," and "totality of the circumstances," and "fair probability," and "non-technical," and "common-sense," and "reasonable inferences," but whatever you think, don't think you are going to win.

***State v. Jordan*, 342 S.W.3d 565 (Tex. Crim. App. 2011)**

Jordan was arrested for DWI, and the arresting officer sought a search warrant for his blood based on an affidavit that claimed the officer had good reason to believe that, on or about the 6th day of June, 2008, Jordan committed the offense of DWI, and that he drove the wrong way on a one-way street with all of the usual symptoms of DWI. The affidavit did not specifically state that the observations were made on June 6, nor did it state the time of the observations. The search warrant was issued on 3:54 am on June 6.

The trial court granted Jordan's motion to suppress, stating that time was a critical issue and

needed to be specifically included in the affidavit. The court of appeals affirmed the suppression order because the affidavit did not establish the *date* of the observations.

The court of criminal appeals reversed both the court of appeals and the trial court. Probable cause requires an examination of the "totality of circumstances," and exists when there is a "fair probability" that evidence of a crime will be found, the magistrate must interpret the affidavit in a "non-technical, common-sense manner and may draw reasonable inferences" from what is stated in the four corners. Additionally, reviewing courts must give "great deference" to determinations by magistrates. And when you see all those soft words in an opinion, it cannot be a good sign for the defense. In this case, when the affidavit is considered in totality, there is a reasonable inference that the observations it contained occurred on the same date that Jordan was alleged to have driven while intoxicated. Additionally, the magistrate had a substantial basis for determining probable cause, even though the affidavit said nothing about the *time* of the stop. Because it alleged an offense on or about June 6, and because the warrant was issued on that same day at 3:54 am, no more than four hours could have elapsed between the observations and the issuance of the warrant. The magistrate thus had a substantial basis for determining that Jordan's blood probably held evidence of intoxication.

5. City officer had authority to arrest for any offense within the county, and there was ample reasonable suspicion for the detention here.

***York v. State*, 342 S.W.3d 528 (Tex. Crim. App. 2011)**

The city police officer in this case had authority to arrest for any non-traffic offense committed in his view anywhere in the state. And he had authority to arrest for any offense, including traffic offenses, committed in his presence within his county.

The officer had reasonable suspicion to believe that York – who was asleep in a car, with the lights on and the engine running, parked on a sidewalk in front of a gas station during the early morning hours – was publicly intoxicated.

6. What, no reasonable suspicion? An anonymous tip about "suspicious," and "unusual" behavior failed to show that the behavior was related to crime, and was therefore insufficient to justify a temporary detention.

***Martinez v. State*, 348 S.W.3d 919 (Tex. Crim. App. 2011)**

An anonymous caller reported that a male driving a blue Ford pickup truck stopped at the intersection of 17th and Main Streets in Del Rio, put two bicycles into the back of the truck, and drove away westbound. About three quarters of a mile away, a police officer saw a green Ford truck "that looked like it was blue" and began following. After a few blocks the officer stopped the truck, though he did not witness any traffic violations. Although he did not initially see them, he noticed two bicycles after the stop. Martinez was driving the truck and had bloodshot, glassy eyes and a strong odor of alcohol. Martinez was arrested and later convicted of driving while intoxicated and

possession of marijuana. He was not charged with theft of the bikes. The officer asked if the dispatcher could have the person who called in the tip come to the scene of the arrest. The caller came and confirmed the identify of the truck.

The court of appeals affirmed the trial court's order denying Martinez's motion to suppress.

The court of criminal appeals reversed. To justify a temporary detention, the state must show that the detaining "officer had specific, articulable facts that established reasonable suspicion. Those facts must show unusual activity, some evidence that connects the detainee to the unusual activity, and some indication that the unusual activity is related to crime." A tip from an anonymous caller "seldom provides reasonable suspicion for an investigatory stop." Here the caller was anonymous and did not provide the officer or the dispatcher with any identifying information, nor did he follow the vehicle, nor was he present at the time of the stop. Although he did arrive later, the sufficiency of the information is assessed at the time of the stop, and cannot be supplemented by information that becomes available later. In this case, the reported activity was "unusual,' and it was "suspicious," but there was nothing more than the officer's opinion that the unusual, suspicious activity was related to a criminal act. Additionally, the officer had very little information to connect the truck he stopped with the unusual activity, "other than the fact that appellant was driving a Ford pickup truck, similar in color to the described truck, close to the time that the unusual activity occurred, and within three quarters of a mile west of the reported incident."

> Based on our review of the totality of the circumstances, including the unknown reliability of the anonymous caller and the lack of specific, articulable facts suggesting that criminal activity was afoot, we find that Officer Hurley's investigatory detention of appellant was not supported by reasonable suspicion.

7. The law does not require a driver to signal a "lane" change when the lane he is driving in ends, and he merges into the remaining lane.

***Mahaffey v. State,* 2012 WL 1414108 (Tex. Crim. App. 2012)**

According to the arresting officer, Mahaffey passed a sign that said "Lane ends, merge left," at which time he merged from right to left, without crossing any lines dividing the lanes, and that he did not use a signal. The officer testified that he stopped Mahaffey for violating § 545.104(a) of the Texas Transportation Code which requires that drivers use signals "to indicate an intention to turn, change lanes, or start from a parked position." Mahaffey moved to suppress the stop, arguing that his conduct did not violate the statute, since he neither turned nor changed lanes. The trial court denied the motion to suppress, and the court of appeals affirmed.

The court of criminal appeals reversed.

The traffic statute here is clear and unambiguous. When the markings on the highway terminated, so did the "lane." Changing lanes, as a practical matter, requires the existence of more than one lane. Mahaffey did not change lanes; the two lanes became one. Although a signal is

required to change lanes, "no signal is required when two lanes become one." Because the officer failed to articulate specific facts that support a reasonable suspicion that Mahaffey violated the Texas Transportation Code, there was no reasonable suspicion for the initial stop, and the trial court erred when it overruled the motion to suppress.

8. Clarification, perhaps, on both the "emergency doctrine," and whether criminal trespass by police can render a seizure illegal.

***Miller v. State*, 345 S.W. 3d 616 (Tex. App.–San Antonio 2011, pet. granted)**

A little after midnight, someone called the police to report yelling, screaming, and objects being thrown inside Miller's apartment. When the police knocked on Miller's door, they heard yelling, screaming, and objects being thrown. Miller answered the door and appeared to be highly distraught and intoxicated and agreed that the officers could enter, but asked them not to wake her children. Inside, the officers saw items scattered about that looked like an altercation had taken place. When asked what had happened, Miller was vague, stating that she was upset with her boyfriend. She did not know where he was. One of the officers called dispatch to see if Miller had any warrants, and Miller asked them to leave. They did not, but instead continued to question her about whether anything violent had occurred in the apartment, and Miller denied that it had. Miller refused to give her boyfriend's name, and asked them to leave again. They refused again, insisting on talking to her boyfriend, and she continued to ask them to leave. After something less than six minutes of this, one of the officers saw drug paraphernalia in plain view, seized it, and then arrested Miller for possession of methamphetamine.

The trial court denied Miller's motion to suppress, and she appealed. The court of appeals affirmed. The police had the right to enter Miller's apartment because she consented. Although she had the right to revoke her consent, and she did so, before that the police acquired a legal basis to remain, under the "emergency doctrine." At the moment Miller revoked her consent, the officers had reason to believe she and her children were in an unsafe environment, since they did not know whether the boyfriend was still in the apartment, hiding, or whether he might return. Then they saw drug paraphernalia in plain view. The court also rejected Miller's argument that the officers were committing criminal trespass. The officer's entered pursued to Miller's consent, and were entitled to remain under the emergency doctrine.

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

1. The Fourth Court of Appeals erred in holding that a warrantless search was justified under the emergency doctrine when the emergency doctrine was not a theory urged by the State at the suppression hearing and when there was no evidence presented at the suppression hearing that officers remained in Appellant's home pursuant to the emergency doctrine.

2. Are law enforcement officers justified in remaining in a person's residence

without a warrant under the guise of conducting a 'warrant check' after the homeowner unequivocally tells officers to leave the residence?

3. When law enforcement officers remain in a person's residence without a warrant under the guise of conducting a warrant check after the homeowner unequivocally tells officers to leave the residence, are they committing the offense of Criminal Trespass which would render any evidence seized after the intrusion inadmissible?

9. The trial court has discretion to allow the state to re-open a suppression hearing, even mid-trial, to allow the state to put on additional evidence.

***Black v. State*, 2012 WL 468513 (Tex. Crim. App. 2012)**

The trial court heard Black's motion to suppress after the jury was selected, but before the trial began, and denied it. After the trial began, the state asked the judge to reopen the suppression (apparently the prosecutors did not understand that "motion to suppress, denied" was a good ruling for them). The judge granted the motion to reopen, over Black's objection, the state put on the justice of the peace who issued the warrants on which the arrest was made, and the motion to suppress was still denied.

The court of appeals affirmed, holding that the trial court properly denied the motion to suppress, and that it was within its discretion to allow the state to reopen. The court of criminal appeals affirmed.

The trial court may, but is not required to, determine a suppression motion prior to trial, pursuant to article 28.01 of the code of criminal procedure. Such a ruling is interlocutory, though, and is subject to reconsideration and revision at any time during the trial. "We therefore hold that the trial court in this cause had the discretionary authority to reopen the hearing on the appellant's motion to suppress evidence, even mid-trial, to allow the State to present additional evidence in support of the trial court's initial, interlocutory ruling to deny the motion."

10. *Lackey v. State*, 2012 WL 716023 (Tex. Crim. App. 2012)

"A ruling denying a motion to suppress evidence constitutes an interlocutory order, and a trial court may reexamine its ruling on a motion to suppress at any time prior to or during trial."

11. An affidavit that is "imprecise as to the timing of the events it described" is saved by its suggestion of a continuing criminal investigation.

***Jones v. State*, 2012 WL 1019968 (Tex. Crim. App. 2012)**

On November 6, 2007, the affiant claimed in a five-page affidavit that, among other things, he had "recently received information from a confidential informant in reference to crack cocaine

being sold out of" a particular residence. A controlled buy was then made from the residence using a different informant, and based on this information, a search warrant was obtained for the residence. Jones moved to suppress the results of the search, asserting that the affidavit failed to show that the event upon which probable cause was based occurred within a reasonable time prior to the making of the affidavit. The trial court denied the motion to suppress and the court of appeals affirmed, although it agreed that the affidavit was "not a model."

The court of criminal appeals affirmed. After "recently' receiving information, the affiant used a second confidential informant to conduct a controlled buy. Additionally, there is a reference in the affidavit that indicates the events occurred sometime during 2007, which sets the outer time limit as 10 months before the affidavit. The combination of these events is sufficient to establish probable cause that a continuing drug business was being operated from the residence, and so the maximum gap of 10 months does not "pose a staleness problem in the present case."

SELF-DEFENSE

1. Self-defense applies to manslaughter.

***Alonzo v. State*, 353 S.W.3d 778 (Tex. Crim. App. 2011)**

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 disagreed, and reversed the conviction.

The court first restated the well-established rule about the burden of proof in self-defense cases: "If there is some evidence that a defendant's actions were justified under one of the provisions of Chapter 9, the State has the burden of persuasion to disprove the justification beyond a reasonable doubt." Here the trial court's supplemental instruction to the jury that it could consider the lesser included offenses if it believed the defendant acted in self-defense misstated the burden. "The jury should have been instructed that if the State had not disproved self-defense beyond a reasonable doubt, they were to acquit the appellant of all charges in Count I."

The court of appeals also erred when it held that it was illogical for the defense to expect a self-defense instruction when the defense was charged with an offense involving the culpable mental state of recklessness. "[T]there is nothing in Penal Code Section 2.03 or Chapter 9 that limits justification defenses to intentional or knowing crimes, nor do we have a reason to infer such a

limitation." Such interpretation would permit "at least one pernicious practice:" one with a valid justification defense could be deprived of it by a prosecutor's decision simply to charge a lower culpable mental state, for example, manslaughter rather than murder. "We find nothing in the Penal Code indicating that the legislature intended Chapter 9 justifications to merely result in a lesser conviction than would otherwise have been possible."

Nor is it illogical to raise a justification defense to a reckless offense. Although a factfinder could not find that a person acted both recklessly and in self-defense, nothing prevents a defendant charged with a reckless offense from arguing self-defense. "The opposite is true: by arguing self-defense, a defendant is arguing that his actions were justified, and therefore he did not act recklessly."

Finally, the state is incorrect when it asserts that Alonzo was not entitled to a self-defense charge because he testified that he accidentally killed the complainant. "The Penal Code does not require that a defendant intend the death of an attacker in order to be justified in using deadly force in self-defense." Self-defense focuses on the actor's motives and on the level of force used, not on the outcome of that force. A rational trier of fact could have determined here that Alonzo deadly force when and to the degree he reasonably believed it necessary to prevent the deceased from using deadly force against him. "That is all that the law requires to raise the issue of self-defense in these circumstances."

> The Court of Appeals erred by holding that a defendant can be convicted for a lesser-included offense when a fact-finder has acquitted the defendant for the greater offense based on a justification defense, and by holding that a defendant cannot raise the justification of self-defense when charged with manslaughter.

2. The court construes the 2007 amendments to the self defense statute regarding the duty to retreat and the presumption of reasonableness.

***Morales v. State*, 357 S.W.3d 1 (Tex. Crim. App. 2011)**

A fight broke out between two gangs, and Lopez (the deceased) and Morales's brother fought each other. Morales shot and killed Lopez, and he was indicted for murder. The trial court instructed the jury on Morales's right to use deadly force to defend his brother. Specifically, the court instructed that Morales's right to defend his brother depended on, among other things, whether his brother "would not have had a duty to retreat." Morales objected that this instruction was contrary to the 2007 amendments to Texas's self defense law which eliminated the duty to retreat in certain circumstances. Also, the trial court did not instruct the jury that a person using deadly force in defense of a third person was entitled to the presumption of reasonableness, although Morales made no objection at trial to this omission.

The court of appeals rejected both points of error, and the court of criminal appeals granted Morales's petition for discretionary review and reversed.

As to the first error, the statute no longer contains a general duty to retreat. Although the prosecutor could argue that the failure to retreat is relevant when considering a defendant's mental state and the reasonableness of his conduct, instructing the jury is an impermissible comment on the weight of the evidence.

As to the second error, the court of appeals determined there was no duty to instruct on the presumption of reasonableness because Morales's brother was engaged in illegal conduct, namely a "riot" and that therefore, he was not entitled to the presumption. The court of appeals did not consider whether there was some evidence to support a reasonable belief that, if the belief were accurate, the brother's actions would be justified by self defense. If there is a conflict in the evidence, there may be a fact issue to support submission of this issue. "We conclude that the court of appeals's analysis on whether appellant was entitled to a presumption charge was incomplete."

SENTENCING

1. Although the trial court does have the power to reduce a sentence when timely asked to do so, this can only be done with an oral pronouncement made in the presence of both the defendant, his counsel, and the state.

***State v. Davis*, 349 S.W.3d 535 (Tex. Crim. App. 2011)**

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 and reversed the judgment of the court of appeals. "A trial court retains plenary power to modify its sentence if a motion for new trial is filed within 30 days of sentencing." A trial court may grant a new trial on punishment alone. Although Davis filed a motion to reconsider his sentence, the court's order granting this motion this was functionally indistinguishable from an order granting a new trial on punishment only. Because the motion was timely filed, the court had the power to set aside Davis's original sentence and the modified judgment of the trial court is not void.

The court did, however, have a problem with the way the court rendered its modified

judgment. Sentences in felony cases must be orally pronounced in the presence of the defendant, and the state must also be present, and the record does not show that this occurred. Because the absence of an oral pronouncement affected only Davis's sentence in this case, the proper remedy was to remand the case to the trial court for the proper assessment of punishment.

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

***In re Brown*, 343 S.W.3d 803 (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 "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."

3. Because court costs and attorneys fees are compensatory and non-punitive, they need not be orally pronounced by the court, or be incorporated by reference in the judgment, to be effective.

***Armstrong v. State*, 340 S.W.3d 759 (Tex. Crim. App. 2011)**

Because court costs and attorneys fees are compensatory and non-punitive, they need not be orally pronounced by the court, or be incorporated by reference in the judgment, to be effective.

4. An illustration of the "Fifth Amendment dichotomy" faced by probationers who must take polygraph examinations.

***Ex parte Dangelo*, 339 S.W.3d 143 (Tex. App.–Fort Worth 2010, pet. granted)**

While on deferred adjudication probation for injury to a child, Dangelo refused to answer the following questions asked in connection with the administration of a polygraph exam:

> (1) “Since you have been on probation, have you had [sic] violated any of the conditions?”; (2) “Since you have been on probation, have you had sexual contact with any persons younger than 17?”; (3) “Since you have been on probation, have you tried to isolate any child for sexual purposes?”; and (4) “Since you have been on probation, have you intentionally committed any sexual crimes?”

The trial court found that, in light of his refusal to submit to a polygraph examination, his bond conditions were insufficient, and she issued warrants for his arrest. Dangelo filed applications for writs of habeas corpus, contending that he had a constitutional right not to answer the four questions. The court of appeals agreed that Dangelo had a right not to answer the second, third, and fourth questions but found that it was permissible to require him to answer the first question.

Probationers face a “Fifth Amendment dichotomy.” They have the right to refuse to answer any question that requires them to admit to an offense that could lead to criminal charges independent of those they are serving probation for. “But to the extent that a state asks questions only about probation violations that do not comprise independent offenses, the defendant does not have a Fifth Amendment right to not answer those questions.”

Dangelo had no Fifth Amendment right regarding the first question, since it asked only about probation violations, and not about independent criminal activity.

He did have a valid Fifth Amendment claim regarding the second and fourth questions, though, since they ask about independent criminal activity.

He was also entitled to invoke his privilege to the third question, because it “exceeds asking only about a violation of appellant's community supervision and provides at least a link in the chain to appellant's responsibility for an independent offense.”

Dangelo also argued that conditions of his probation impermissibly required him to discuss the facts in four cases in which he was originally indicted, but which the state abandoned as a part of the plea bargain. The court of appeals observed that the state had made a “binding” concession in this appeal that it would never use the facts of those four cases for future criminal prosecutions. Accordingly, the court held that Dangelo could be forced to discuss the facts in those cases.

The court of criminal appeals granted Dangelo’s petition for discretionary review to consider the following issues:

> 1. The Court of Appeals decision departed so far from accepted and usual course of judicial proceedings, or sanctioned such departure by the lower court, as to call for the exercise of the Court of Criminal Appeals’ power of supervision when it granted immunity to the petitioner to require him to answer questions put to him on the allegations in the indictment for which the petitioner refused to acknowledge guilt.
>
> 2. The Court of Appeals has decided an important question of state law that has not

been but which should be decided by this Honorable Court in that it has held the petitioner may be questioned on the indictment allegations to which no plea was entered.

5. The sentence and the period of probation "are entirely different matters." And the Texas probation statute "is long, complex, and often amended, and it can confuse even the most experienced judge or lawyer. And it does."

***Mayes v. State*, 353 S.W.3d 790 (Tex. Crim. App. 2011)**

The jury found Mayes guilty of sexual assault, and later assessed a two year term and recommended probation. The trial court decided that this sentence was illegal, since the statute provides that the minimum sentence for this offense is five years probation, and so the court ordered the jury to return and assess a sentence of at five years. The jury did, and Mayes appealed. The court of appeals agreed that the two year sentence was illegal and affirmed.

The court of criminal appeals reversed. "Article 42.12, the community supervision statute, 'is long, complex, and often amended, and it can confuse even the most experienced judge or lawyer.' And it does." The sentencing range for this offense is two to twenty years imprisonment, and the court can then order that the period of probation be between five and ten years. The sentence, though, and the period of probation are "entirely different matters." Nothing in article 42.12 suggests that the jury must assess a sentence equaling the minimum period of community supervision, or the maximum, or any period in between. The jury assesses the term of years, and recommends either for or against probation. The judge has discretion to determine the length of probation, as long as it is within the minimum and maximum statutory periods.

6. Can a habeas court consider the existence of other prior convictions even though they were not used to enhance, and is an applicant estopped from raising an illegal sentence claim when he knew the enhancement paragraph was improper, but he agreed to the sentence as a part of a plea bargain?

***Ex Parte Parrott*, 2011 WL 4484902 (Tex. Crim. App. 2011)(not designated for publication)**

Parrott complained in a writ that his 15 year sentence was illegal because the enhancements were state jail felonies and therefore unavailable for enhancement. Apparently there was another felony that the state could have properly used for enhancement, but did not.

> We order that this application be filed and set for submission to determine whether: (1) the consideration of an illegal sentence claim raised on habeas corpus is confined to the enhancement paragraphs listed in the charging instrument, or whether, if other convictions were available at the time of sentencing, the enhanced punishment range would be proper even though the convictions listed as enhancements in the charging instrument were not available to use for some reason; and (2) whether a defendant is

estopped from raising an illegal sentence claim when he knew at the time of sentencing that the enhancement paragraph as alleged was improper, but agreed to the sentence pursuant to a plea bargain agreement. The parties shall brief these issues.

7. Should the *DeGarmo/Leday* doctrine be extended to a broader class of errors than fundamental?

***Jacobson v. State*, 343 S.W. 3d 895 (Tex. App.–Amarillo 2011, pet. granted)**

Jacobson objected that the prosecutor impermissibly struck at the defendant over counsel's shoulders in his argument at the guilt-innocence phase of the trial, and the objection was overruled. Jacobson was convicted and he testified at punishment, admitting the charges against him in the process. On appeal he complained about the argument, but the court of appeals held that he was estopped from bringing this issue because it did not involve a fundamental right, and because he had admitted his guilt at punishment.

The court of criminal appeals granted Jacobson's petition for discretionary review to decide this question: "Since defendants suffer the 'cruel trilemma' created by *DeGarmo v. State*, 691 S.W. 2d 657 (Tex. Crim. App. 1985), regardless of the type of error raised, should the precautions of *Leday v. State*, 983 S.W. 2d 713 (Tex. Crim. App. 1998), be extended to a broader class of guilty-phase errors?"

8. Does the state have to prove that a probationer has the ability to pay even when he pleads true to the motion to revoke?

***Gipson v. State*, 347 S.W.3d 893 (Tex. App.–Beaumont 2011, pet. granted)**

The state filed a motion to revoke Gipson's probation alleging several violations, including that he had failed to pay court-assessed fees, he pled true to this allegation, and the trial court revoked him. No evidence was heard regarding Gipson's ability to pay or the reason for his failure to pay.

The court of appeals reversed.

> Although a plea of true is generally sufficient to support a judgment revoking community supervision, when the sole basis for revocation is failure to pay court-ordered fines and fees, there must be evidence of willful refusal to pay or failure to make sufficient bona fide efforts to pay. [citations omitted] As previously discussed, in the case at bar, no evidence was presented concerning whether Gipson willfully refused to pay or to make sufficient bona fide efforts to pay. Therefore, the trial court abused its discretion by revoking Gipson's community supervision based solely upon his plea of true to the allegation that he failed to pay court-assessed fees.

The Texas Court of Criminal Appeals granted the state's petition for discretionary review to

answer this question: "Does a defendant's plea of true to the State's allegations in a motion to revoke community supervision that the defendant failed to pay the court-assessed fine, costs, and fees relieve the State and the trial court of the requirement to establish that no payment was made despite the ability to do so, the failure to pay was willful, and no bona fide effort to pay was made before supervision can be revoked?

9. If a person is a felon at the time he is arrested for possession of a firearm, he is a felon in possession of a firearm, and if he is convicted as such, that conviction is not void if the predicate offense is later set aside.

***Ex Parte Jimenez*, 2012 WL 385121 (Tex. Crim. App. 2012)**

Jimenez was convicted of rape of a child. Later he was arrested in possession of a firearm, and based on the prior rape of a child conviction, he was charged with, then convicted of, being a felon in possession of a firearm. He did not challenge the rape of a child conviction at his trial, or on direct appeal, but only later, eight years after his conviction was final, when he filed an application for writ of habeas corpus. Relief was granted, and the rape of a child conviction was set aside, the habeas court having found that Jimenez's guilty plea to that offense was involuntary due to ineffective assistance of counsel. Later the state dismissed that case. Still later, Jimenez filed another writ, this one asserting that the felon in possession was void because the predicate offense had been set aside and dismissed.

The court of criminal appeals denied relief.

> To obtain a valid conviction for unlawful possession of a firearm by a felon, the State must prove a defendant's felony status at the time of the possession of the firearm. [citation omitted] Therefore, if the defendant had the status of a felon at the time he possessed the firearm, a conviction for unlawful possession of a firearm by a felon is not void if the predicate felony conviction is subsequently set aside.

The court distinguished *Cuellar v. State*, 70 S.W. 3d 815 (Tex. Crim. App. 2002). There, *before* Cuellar was arrested for felon in possession, he had completed probation on his prior felony offense, and the trial court had discharged the defendant, set aside the conviction, and dismissed the indictment, pursuant to article 42.12, § 20 of the code of criminal procedure.

10. Texas law does not permit the trial court to stack sentences for two crimes that originally started out as sex offenses, but were later bargained down to non-sex offenses.

***Nguyen v. State*, 359 S.W.3d 636 (Tex. Crim. App. 2012)**

Nguyen was initially charged in two separate indictments with the offenses of aggravated sexual assault and sexual assault. The prosecutors amended both indictments to injury to a child, a non-sexual offense, and Nguyen pleaded guilty and got deferred adjudication for a period of five

years. A motion to adjudicate his guilt was filed five months later, alleging that he had had contact with one of his daughters, which had been prohibited under a condition of his deferred adjudication. The trial court sentenced him to 10 years imprisonment on both cases, and stacked the sentences.

> Nguyen appealed, arguing that the state could not stack his sentences because he had been convicted of non-sexual offenses. The state argued that the plain language of §§ 3.03(b)(2)(A) & 3.03(b)(2)(B) permits stacking because the original *charges* were sexual, irrespective of what Nguyen ultimately pleaded to.

The court of appeals found that the trial court erred when it stacked Nguyen's sentences, and reversed. The court of criminal appeals affirmed the reversal. Both parties, according to the court, made plausible, but conflicting, interpretations, of the statutes. Because the statutes were ambiguous, though, the court turned to their legislative history, and concluded

> that the legislative history indicates that the amendments to Sections 3.03(b)(2)(A) & (B) in the 1997 omnibus act dealing with deferred adjudication for sex offenders authorize a trial judge to cumulate sentences when a defendant has been formally found guilty of or "entered into a plea bargain for two or more of certain specified sex offenses occurring in the same criminal episode." The statute does not authorize a trial judge to cumulate sentences when a defendant has not been found guilty of multiple specified sexual offenses, or when he has entered into a plea bargain for nonsexual offenses, regardless of the charges in the original indictment.

11. What to do about a sentence for possession with intent to deliver cocaine which does not contain a fine?

***Ex parte Villegas,* 2012 WL 566574 (Tex. Crim. App. 2012)(not designated for publication)**

Villegas pleaded guilty to possession with intent to deliver more than 400 grams of cocaine and got 20 years imprisonment. He complained on direct appeal that this sentence violated his rights to be free from cruel and unusual punishment under the state and federal constitutions, but the Dallas Court of Appeals disagreed and affirmed the conviction and sentence. Later Villegas filed a writ and changed his argument, this time asserting that the sentence was illegal since it does not contain the fine mandated by statute. The court of criminal appeals filed the application and set it for submission to determine whether "(1) the fine listed under Texas Health and Safety Code Section 481.112(f) is mandatory; (2) a claim that a mandatory fine was not assessed and therefore a sentence is illegal is properly raised for the first time on a writ of habeas corpus; and (3) if such a claim can be raised for the first time on habeas, and if it is meritorious, what the proper remedy for such a claim would be."

12. Polygraphs may be used in probation revocation proceedings, but not before juries. Not yet, at least.

***Leonard v. State*, 2012 WL 715981 (Tex. Crim. App. 2012)**

Leonard was put on deferred adjudication for a sex offense, and he "agreed" to a condition of community supervision that required him to take regular polygraph tests. When he failed the first five such tests, his psychotherapist deemed him dishonest and a threat to the community's safety, and discharged him treatment. The trial court then granted the state's motion to proceed to adjudication because of the discharge and sentenced Leonard to seven years imprisonment. The court of appeals reversed, holding that polygraphs are inadmissible for all purposes.

A bare majority of the court of criminal appeals, in a decision written by Judge Meyers, reversed.

Although there is language in this opinion suggesting that polygraphs might be admissible before a jury if the jury receives an appropriate limiting instruction, the court did insist that it "continues to support our precedent that polygraph results are inadmissible before a jury." Revocation proceedings are different, though.

> Because adjudication hearings are administrative proceedings, in which there is no jury and the judge is not determining guilt of the original offense, we hold that the results of polygraph exams are admissible in revocation hearings if such evidence qualifies as the basis for an expert opinion under Texas Rules of Evidence 703 and 705(a).

Judge Cochran, joined by Judges Womack, Price, and Johnson, dissented, believing that "this was a trial by polygraph." The dissenters looked at the "science" underlying polygraphy and concluded this:

> We should not permit or condone "trial by polygraph" or "revocation by polygraph," especially when there was not a scintilla of evidence introduced at this revocation hearing concerning the general scientific reliability of polygraph testing or its scientific reliability in this particular case."

SEX OFFENDERS

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

***Ex parte Evans*, 338 S.W.3d 545 (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.

2. One whose NCIC records shows to have previously been convicted of a sex offense in Illinois which is "substantially similar" to a Texas sex offense is not entitled to due process before the imposition of sex offender conditions in Texas.

***Ex parte Warren*, 353 S.W.3d 490 (Tex. Crim. App. 2011)**

Warren was convicted in Texas 1987 of non-sexual, physical Injury to a Child and sentenced to prison. In 1999 he was released to mandatory supervision parole, and in 2003 and 2004 TDCJ added several sex offender conditions to the conditions of his release, including that he register as a sex offender, attend sex offender treatment, and obey certain restrictions regarding computer and photo equipment. TDCJ said they imposed the conditions based on its determination that Warren had been convicted of four counts of Contributing to Sexual Delinquency of a Child in Illinois in 1972. TDCJ did not give Warren notice that the conditions would be imposed, or an opportunity to challenge the imposition of the conditions. In 2008 his release was revoked because of improper use of computer and photo equipment.

In 2010 Warren filed a writ alleging that he had been denied due process because TDCJ had not given him notice or an opportunity to respond before imposing the condition that restricted his use of computer and photo equipment. Warren claimed he had never been convicted of any crime listed in the Texas statute that mandates sex offender conditions, and that he was therefore entitled to due process.

The court of criminal appeals disagreed and denied relief.

Due process is implicated by the imposition of sex offender status upon a parolee, but entitlement to due process depends upon the parolee's criminal history. If he has never before been convicted of a sex offense, the parolee is entitled to due process, including, among other things, written notice that conditions may be imposed, and a hearing in which he may personally appear and present evidence. If he has been convicted of a sex offense, "no further process is due before imposing sex offender conditions," because such a person has "already received sufficient due process protection."

There was no question that Warren had never before been convicted of a sex offense in Texas. The questions, then, were whether there was sufficient proof that Warren had been convicted of Contributing to Sexual Delinquency of a Child in Illinois in 1972, and, if so, whether such a conviction was "substantially similar" to the elements of a Texas sex offens enumerated in article 62.011 of the Texas Code of Criminal Procedure. Both questions were resolved against Warren.

First, although TDCJ never offered final judgments to prove the Illinois conviction, it relied

on a computerized criminal history (CCH) file, maintained by DPS, which consisted of information from both state records and the FBI's NCIC database. The information contained in the CCH record was sufficiently cooroborated by information contained in Warren's original indictment and judgment; by a "Final Disposition Report" from the Chicago Police Department, and by FBI records. Although "it is not beyond the range of possibility" the Warren convicted in Illinois was different than the applicant Warren in this case, "it is not likely," and this, apparently, is close enough.

Second, although not "identical" to any Texas sex offense, Illinois's Contributing to Sexual Delinquency of a Child is "substantially similar" to Texas's Indecency with a Child, which is a reportable offense under article 62.001. The two offenses "display a high degree of likeness," and their elements are "substantially similar with respect to the individual or public interests protected as well as with respect to the impact of the elements on the seriousness of the offenses."

3. Must the state prove, as the statute seems to require, that the Texas Department of Public Safety has made a determination that a sex offense from another state is substantially similar to a Texas offense before registration is required in Texas.

***Crabtree v. State*, 2011 WL 1204332 (Tex. App.–Tyler 2011, pet. granted)(not designated for publication)**

Crabtree had been convicted in Washington of Rape of A Child in the First Degree. In this case he was convicted of failing to register as a sex offender in Texas, and he appealed, asserting, among other things, that the trial court erred in overruling his motion to quash because he could not determine whether he was charged with a state jail felony, a third degree felony, or a second degree felony, and that the evidence was legally insufficient to prove that he had a duty to register because the Texas Department of Public Safety had not determined that his prior, out-of-state convictions were substantially similar to Texas offenses.

The court of appeals disagreed with both of Crabtree's arguments and affirmed the conviction.

As to the indictment question, although the court of criminal appeals has held that the "much preferred procedure" is to plead the code subsection when charging a failure to register, the court "stopped short of requiring it." Instead, notice of the reportable conviction provides sufficient notice. Here, all Crabtree needed to do was examine the elements of the listed Washington offense, and determine that this single conviction was substantially similar to the Texas offenses of sexual assault, or aggravated sexual assault, which were sexually violent offenses, which meant that this was a third degree felony.

The court of appeals also rejected Crabtree's sufficiency argument, although it struggled to do so. The court acknowledged that, "[u]pon first reading, this statute appears to place a very large burden on the Department," namely of "keeping track of the legislative process in the fifty states, foreign country, and the U.S. federal system," both present and previous. Closer reading, though, persuaded the court otherwise. "[W]e hold that a determination by the Department that an offense is substantially similar to a Texas offense is not an element of the offense of failure to comply with

registration requirements."

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

1. Did the Court of Appeals err in concluding that, contrary to clear statutory language, Article 62.003(a) of the Texas Code of Criminal Procedure does not require the Department of Public Safety to make a finding as to the substantial similarity between an extra-jurisdictional conviction and one that would require sex offender registration in Texas in order to support a Texas conviction for failing to register as a sex offender.

2. Due to the permissive nature of the Court's holding in *Juarez v. State* regarding the specificity with which an indictment charging the offense of failure to register as a sex offender must be pleaded, a situation has been created which deprives defendants of their due process right to notice of the charge against them as well as their right to effective assistance of counsel and has resulted in the potential for unnecessary litigation and confusion among the bench and bar.

SEXUAL OFFENSES

1. "16 will get you 20;" Does the Texas Constitution require proof of a culpable mental state to "statutory rape?"

***Fleming v. State*, 341 S.W.3d 415 (Tex. Crim. App. 2011)**

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 *federal* substantive due process challenges on their merits, although it conceded 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 appeals also 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 criminal appeals disagreed, finding that "Fleming briefed the issue under both constitutional provisions, describing the pertinent history of each constitutional provision in support of his specific argument." The court therefore vacated the intermediate court's decision and remanded the case for consideration under the Texas Constitution. "In doing so, the court of appeals

will be required to decide the scope of the protections afforded by Texas's due course of law provision as it applies in this case. Thus, the court must discern whether the provision, based on Fleming's argument and supporting authority, provides greater, lesser, or the same protections as its federal analog."

2. Proving that a computer owner knowingly and intentionally possessed child pornography found in the unallocated portions of his computer.

***Wise v. State*, 2012 WL 1414128 (Tex. Crim. App. 2012)**

A forensic computer analyst found 10 child pornography images in unallocated space on Wise's computer, and he was convicted of possession by the jury. The court of appeals found the evidence legally insufficient to support the conviction.

> Here, the uncontroverted testimony that Wise bought the computer second-hand at a flea market and the State's own expert witness's testimony admitting that the computer contained viruses capable of covertly placing images on the computer; that Wise could not access the images; and that it was impossible to determine when the images were placed on to, accessed, or deleted from, the computer, do not meet the State's burden to prove beyond a reasonable doubt that Wise knowingly or intentionally possessed the images.

The court of criminal appeals granted the state's petition for discretionary review, and reversed the reversal. "We conclude the majority opinion misapplied the standard of review for sufficiency by focusing on the possible alternative explanations, rather than determining whether the jury's inference was reasonable based upon the cumulative force of all the evidence when considered in the light most favorable to the verdict."

The court of criminal appeals had never before addressed whether a person can knowingly or intentionally possess child pornography that exists only in the free space of a computer's hard drive, and there has been very little written by Texas intermediate appellate courts. The court of criminal appeals looked to decisions by courts in other states, but determined that neither of the two approaches taken in those courts was entirely appropriate for Texas. "Although these two general approaches are instructive in explaining the difficulties of establishing criminal intent in the possession of computer pornography, we conclude that each case must be analyzed on its own facts. For computer-pornography cases, like all criminal cases, a court must assess whether the inferences necessary to establish guilt are reasonable based upon the cumulative force of all the evidence considered in the light most favorable to the verdict."

In this case, the pornographic files would have been inaccessible to anyone but a highly skilled computer specialist, and it was undisputed that Wise was not such a person. " Because [Wise] was not presently able to access the images, the jury would have had to determine that, before the images were deleted, appellant knowingly or intentionally had care, custody, control, or management of the images."

In this case, the court of appeals erred by focusing on two alternative theories of innocence that were posed by the defense: that the images could have been placed on the computer without Wise's knowledge, either by a virus, or by a previous owner of the computer. By so focusing, though, the court used a sufficiency standard that was abrogated by the *Geesa* decision in 1991. Additionally, the court of appeals's analysis failed to defer to the jury's exclusive determination of the weight and credibility of the evidence. Nor did that court view the evidence in a light most favorable to the guilty verdict.

> Although the court of appeals focused on the absence of any evidence to show when or by whom the images in the free space of the computer were created or moved there, the record does contain evidence of appellant's recent interest in photos depicting the sexualization of children as well as a history of sexually assaulting children. A jury could have reasonably rejected appellant's claims that the images were due to a virus or former computer owner and instead determined that appellant had a history of and present sexual attraction to children and that he intended to possess the pornographic images of the children that were in the free space of his computer. We hold that, viewing the totality of the evidence and inferences in a light most favorable to the verdict, the jury could have reasonably inferred that appellant knowingly had care, custody, control, or management of the ten pornographic images of unknown children found on the free space of his computer.

3. Lesser included offenses are questions for the trial court, not the jury, even in continuous sexual assault cases.

***Soliz v. State*, 353 S.W.3d 850 (Tex. Crim. App. 2011)**

Soliz was indicted for the offense of continuous sexual assault of a child, and, both this offense, and the lesser included offense of aggravated assault were submitted to the jury, without objection. Soliz was convicted of the lesser offense, and he appealed, focusing on language in that statute that permits the jury to consider a lesser included offense if it " is considered by the trier of fact to be a lesser included offense of the offense alleged . . . ." Although in the usual situation, the trial court decides whether offenses will qualify and be submitted as lessers, according to Soliz, this odd phrase entitled him to have the *jury* deliberate on whether the lesser offense is in fact a lesser. The court of appeals disagreed and affirmed, and the court of criminal appeals did the same.

Although clearly perplexed by this phrase, the court looked deeply into the legislative history of the statute and concluded that the legislature did not intend to create an exception to the general rule that the trial court determines what lesser included offenses are submitted to juries.

> It would be absurd to conclude that the legislature intended to create an exception, for this statute alone, that would require the trier of fact to make a separate finding regarding an issue that is a pure question of law that, even more than in most cases, is readily apparent from the face of the indictment. We believe that "considered by the trier of fact to be" was intended to ensure that the lesser-included offense was one

that was actually submitted to the jury, "considered" by the jury, and found to be true.

4. Convictions under the Uniform Code of Military Justice are convictions "under the laws of another state" and may therefore be used to enhance a subsequent sex conviction to automatic life imprisonment under § 12.42(c)(2)(B)(v) of the Texas Penal Code.

***Rushing v. State,* 353 S.W.3d 863 (Tex. Crim. App. 2011)**

Section 12.42(c)(2)(B)(v) of the Texas Penal Code, one convicted of aggravated sexual assault of a child who has been previously convicted of certain sexual offenses in Texas, or a substantially similar offense in another "state" will be sentenced to automatic life imprisonment. Rushing's convictions were for carnal knowledge and indecent acts with a child, under the Uniform Code of Military Justice. The question was whether convictions under the UCMJ are convictions "under the laws of another state." The court of criminal appeals held that they are, and that Rushing's sentence was properly enhanced.

5. Double jeopardy was violated when the defendant was convicted of three separate crimes for exposing himself to three children at the same time.

***Harris v. State,* 359 S.W.3d 625 (Tex. Crim. App. 2011)**

Harris masturbated in his car, knowing that a six year old and two nine year olds were present. He was charged in a single indictment with three counts of indecency with a child. He pleaded guilty, he was sentenced on each of the three counts, and he appealed, asserting that he had been subjected to multiple punishments for the same offense in violation of the Double Jeopardy Clause of the United States Constitution. The court of appeals disagreed and affirmed the convictions and sentences.

The court of criminal appeals reversed. The key question here is what constitutes the "allowable unit of prosecution" for the offense of indecency with a child by exposure. This is purely a question of statutory construction. The best indicator of legislative intent here is the gravamen or focus of the offense. After considering several factors, the court determined that "the clear language of [this statute] indicates that the exposure, not the number of children present, constitutes the unit of prosecution."

> In conclusion, the gravamen of the offense of indecency with a child by exposure is the act of exposure. The allowable unit of prosecution for the offense is the act of exposure, and consequently, the child-victim's name is not a necessary element of proof. Appellant committed only one offense under Section 21.11(a)(2)(A) when he exposed himself to three children at the same time.

6. A pre-trial hearing under article 38.072 is meant to determine the reliability of the outcry witness's statement, not that person's credibility; accordingly, admission of

testimony from that hearing when the outcry witness later becomes unavailable violates the constitutional right of confrontation.

***Sanchez v. State*, 354 S.W.3d 476 (Tex. Crim. App. 2011)**

Sanchez demanded a pre-trial hearing, as allowed by article 38.072 § 2(b)(2), to determine the reliability of the state's designated outcry witness. The court heard the witness and held that she was reliable and would be permitted to testify at trial. When trial rolled around, though, the outcry witness was in jail herself, and someone had requested a competency exam for her, and it was reported that she was claimint that "famous people . . . were using the jail to change her DNA and she's now half man, half woman." The trial judge found that the witness was unavailable, and the state moved to admit her testimony from the pre-trial reliability hearing. Sanchez's objections that this would violate his constitutional right to confront and cross-examine were overruled.

Sanchez appealed and the court of appeals affirmed, holding that Sanchez had had adequate motive and opportunity to cross-examine the outcry at the pre-trial hearing, and so there was no confrontation problem.

The court of criminal appeals disagreed and reversed Sanchez's conviction. The Sixth Amendment does not bar the admissibility of non-testimonial hearsay. There is no dispute here, either that the outcry's hearsay at pre-trial hearing was testimonial, or that she was unavailable to testify. The only question was whether Sanchez had an adequate opportunity to cross-examine the outcry at the hearing. The court held that he did not.

The court declined Sanchez's invitation to make a bright-line rule that no pre-trial hearing provides an adequate opportunity to cross-examine. Attorneys at an examining trial, or a suppression hearing, might have an adequate opportunity and motive to cross-examine. This is necessarily not true about what goes on at a reliability hearing under article 38.072. The focus of the latter hearing is "exceedingly narrow," and "the only relevant question [there] is whether, based on the time, content, and circumstances of the outcry, the outcry is reliable." The trial court is not charged with determining the reliability of the statement based on the outcry witness's *credibility*. Reliability hearings must not become "elaborate mini-trials" where lawyers may cross-examine "regarding biases in order to ferret our background evidence of prompting or manipulation." Because credibility is necessarily irrelevant, the reliability hearing "does not provide an adequate opportunity for cross-examination such that testimony from the hearing is admissible at a trial on the merits."

> Because an Article 38.072 hearing provides a defendant with an inadequate opportunity to cross-examine an outcry witness's credibility, admitting testimony from an Article 38.072 hearing at a trial when the witness is unavailable violates the Sixth Amendment.

7. The medical-care defense, laypersons, penetration, and confession and avoidance.

***Cornet v. State*, 359 S.W.3d 21 (Tex. Crim. App. 2012)**

During a forensic interview to determine whether the eight year old complainant had been sexually abused by her mother's first husband, the child also implicated her mother's current husband, Cornet. The police interviewed Cornet and he admitted touching his step-daughter, but claimed he had merely conducted a physical exam to determine whether she had been sexually assaulted by her brother's. According to Cornet, who was not a doctor, his examination was "inconclusive." At his trial for aggravated sexual assault, Cornet denied putting his finger in the child's vagina, but admitted he "spread her cheeks," to look for trauma. Cornet requested a jury instruction on the medical-care defense, and this request was denied because the trial court believed it only available to licensed medical professionals.

The court of appeals affirmed, holding first that the medical-care defense was not available to Cornet because he had never admitted to improperly touching the child, and second, because he was a parent who had no medical education, training, or experience.

The court of criminal appeals granted Cornet's petition for discretionary review and reversed, and, in the process, made at least three important rulings.

First, the "medical-care defense" of § 22.011(d) of the Texas Penal Code is available when the laypersons (that is, non-medical professionals) who are trying to ascertain information regarding a relevant medical fact. The text of the statute itself makes it "abundantly clear" that it is the nature of the conduct, not the occupation of the actor, that determines the availability of the defense. And, the medical-care defense is available to persons who conduct "mere" medical inspections. Moreover, the evidence at trial – that Cornet examined his step-daughter to determine whether she had been injured – if believed, would support a reasonable inference that his touching was an inspection for a medically relevant purpose.

Second, the case gave a useful discussion concerning the non-statutory term, "penetration." "[P]enetration occurs when there is 'tactile contact beneath the fold of complainant's external genitalia,' and . . . it is not inaccurate 'to describe [conduct] as a penetration, so long as [the] contact with [the complainant's] anatomy could reasonable be regarded by ordinary English speakers as more intrusive than contact with her outer vaginal lips." The statute does not criminalize penetration of the *vagina*, but instead the "sexual organ," which is "broader conduct." "[P]ushing aside and reaching beneath a natural fold of skin into an area of the body not usually exposed to view, even in nakedness, is a significant intrusion beyond mere external contact[,]' and therefore constitutes penetration in the context of sexual assault."

Third, the case made it clear that the doctrine of confession and avoidance applies to the "medical-care defense," so that one who claims this defense must "essentially admit" to each element of sexual assault, including digital penetration. "As far as 'admitting' conduct under the doctrine of confession and avoidance, it is sufficient that the defendant point to defensive evidence, originating in his own statements, such that a trier of fact could reasonably infer that each element of the offense has been satisfied." Here the court looked at two relevant pieces of evidence to show

that Cornet admitted penetration. In his written statement he admitted that his fingers contacted the child's labia, which he spread to see if her hymen was intact, and that his fingers got wet. At trial he admitted he "spread her cheeks." This was enough for a reasonable fact-finder to infer penetration.

This was a five to four decision. Judge Cochran, joined by Judges Meyers, Keasler, and Hervey, were not persuaded. These judges saw not a scintilla of evidence that Cornet had any medical training or expertise, or that his methodology was accepted by anyone in the medical community. Nor did they think this was the type of "medical-care" envisioned by the Texas legislature when it enacted the statute. "If this description meets any common-sense description of accepted or acceptable medical care, the children of Texas are in big trouble."

SPEEDY TRIAL

1. Twenty-three year pre-indictment delay did not violate due process absent proof that the delay was caused by an improper purpose.

***State v. Krizan-Wilson,* 354 S.W.3d 808 (Tex. Crim. App. 2011)**

Almost 23 years after her husband was murdered, Krizan-Wilson was indicted, and she filed a motion to dismiss asserting that this pre-indictment delay violated due process. The trial court agreed and dismissed the case. The court of appeals reversed, and the court of criminal appeals affirmed the reversal.

Statutes of limitations are the primary means to protect citizens from stale criminal charges. The Due Process Clause of the Fifth Amendment also plays a "limited role . . . in protecting against oppressive delay." Texas follows "bright-line methodology" set out by the Fifth Circuit. Specifically, "a defendant must demonstrate that the delay: (1) caused substantial prejudice to his right to a fair trial, and (2) was an intentional device used to gain a tactical advantage over the accused." The court goes on to suggest that this second prong might be satisfied by proof, not only of an intent to gain a tactical advantage, but also for "some other impermissible purpose."

Here, Krizan-Wilson amply proved significant prejudice, showing that she had lost evidence and witnesses, that memories had faded, and that her own mental condition had deteriorated over time. Prejudice alone, though, is not enough. There was no proof that the prosecutors delayed this prosecution to gain a tactical advantage, or for any other improper purpose. Evidence at the hearing showed simply that the original prosecutors decided they could not win the case, and that newer prosecutors thought that they could. "[A]bsent proof of an improper purpose, the simple fact that a lengthy delay has occurred for no other reason than a difference of opinions amongst prosecutors does not violate due process."

STATUTE OF LIMITATIONS

1. Once the statute of limitations expires, it cannot be resurrected by subsequent legislation, and this bar cannot be waived, and it is not forfeited by the failure to object

at trial.

***Phillips v. State*, 2011 WL 2409307 (Tex. Crim. App. 2011)**

Phillips was indicted in 2007 for 12 counts of sexual offenses that allegedly occurred in 1982 and 1983. The statute of limitations in effect in 1983 was 10 years. The court of appeals held that a 1997 statute that extended the statute of limitations in sexual offenses could not resurrect theses charges, and that this was true even though Phillips did not object to this constitutional *ex post facto* violation. An absolute statute-of-limitations bar cannot be waived and it is not forfeited by the failure to raise it in the trial court. although unexpired statutes of limitations can be changed or repealed without violating the prohibition against *ex post facto* laws, prosecutions within the new time periods are permitted only if the limitations period has not already run before the law was changed.

The court distinguished *Proctor v. State*, 967 S.W. 2d 840 (Tex. Crim. App. 1998), which held that a statute-of-limitation defense is forfeited if not asserted before trial. *Proctor* governs defenses that are based on facts – such as, a challenge to a pleading that includes a tolling paragraph, or an explanatory averment, or an innuendo allegation – and not pure law. "The pleading that gives rise to a limitations factual defense is reparable. The pleading that gives rise to a statute-of-limitations bar is not."

SUFFICIENCY

1. Links are affirmative enough.

***Blackman v. State*, 350 S.W.3d 588 (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]

2. Evidence of attempted burglary of a habitation is legally sufficient.

***Gear v. State*, 340 S.W.3d 743 (Tex. Crim. App. 2011)**

On this record, we decide that a fact finder could reasonably find beyond a reasonable doubt that the recently unemployed appellant with about one dollar in his pocket intended to commit theft inside the complainant's home when he attempted to enter the home through the window that he had just broken and where the evidence also shows that appellant ran when interrupted by the complainant and that appellant gave conflicting and implausible explanations for his actions. The cumulative force of all the incriminating circumstances is sufficient to support appellant's conviction for attempted burglary of a habitation.

3. The court of criminal appeals rejects the court of appeals's finding that the evidence was legally insufficient.

***Sorrells v. State*, 343 S.W.3d 152 (Tex. Crim. App. 2011)**

The court of appeals analyzed the evidence and found it legally insufficient to prove aggravated robbery. Specifically, that court found the evidence insufficient to prove that Sorrells perpetrated the theft, or that the assault was committed in the course of theft. The court of criminal appeals granted the state's petition for discretionary review, re-analyzed the same evidence, and reached the opposite conclusion.

As to the identity of the thief, the court of appeals failed "to consider the combined and cumulative force of all the admitted evidence." Had it done so it would have seen that a rational juror could have found beyond a reasonable doubt that Sorrells committed the theft.

As to the nexus between the theft and the assault, it is sufficient to prove that the theft occurred immediately after the theft. Here the force was used before or during the theft. Under the facts in this case, a rational juror could have rationally inferred that the assault and the theft occurred simultaneously, and that therefore the assault was committed during the commission of theft.

4. The "special" owner of property who was employed by the company that actually owned the property was properly alleged as the owner and was competent to attest to the value of the property in an aggregated theft case, even though he was not employed by the company at the time many of the thefts occurred.

***Garza v. State*, 344 S.W.3d 409 (Tex. Crim. App. 2011)**

Garza was charged with aggregated theft from Leahy, an employee of Hewlett Packard, occurring over a two year period, from 2003 to 2005. Leahy was proven to be a "special owner" in relation to Hewlett Packard for a short period of time at the end of the time alleged, but it was undisputed that he was not employed by that company for the majority of that time. Garza asserted that the evidence was insufficient to prove that Leahy was the owner. The court of criminal appeals disagreed, and affirmed the conviction.

> In cases in which the actual owner of the stolen property is a single entity rather than a natural person, the better practice may be to allege the single entity, such as Hewlett Packard, as the actual owner. An employee of the entity may then testify as an agent of the entity. In this case, Leahy, as an employee of Hewlett Packard, was properly alleged as the special owner of the unlawfully appropriated money. As a proper special owner, he was competent to attest to the value of the stolen property, even though he was not employed by Hewlett Packard at the time of many of the alleged thefts. Hewlett Packard was the owner of the stolen property at the time of each theft, and, although alleged to be a special owner, Leahy functioned as Hewlett Packard's agent when he testified about the value of the total loss.

5. If the state unnecessarily pleads that a theft is without effective consent because it was induced by deception, it must prove that the theft was by deception.

***Geick v. State*, 349 S.W.3d 542 (Tex. Crim. App. 2011)**

Geick was indicted for theft of a bulldozer "by deception." None of the state's four witnesses testified how Geick acquired the bulldozer. The application paragraph of the jury charge authorized conviction if the jury found that Geick acquired the bulldozer without the effective consent of the owner, with intent to deprive, and said nothing about theft by deception. A definition in the charge told the jury that consent is not effective if induced by deception. Geick did not object to the charge and the jury convicted him of theft "as charged in the indictment."

Geick argued on direct appeal that the evidence was legally insufficient to prove deception and the court of appeals agreed, and ordered that an acquittal be entered.

The court of criminal appeals affirmed the reversal. The question on appeal is whether a rational jury could have found beyond a reasonable doubt the "essential elements" of the crime charged. To determine a crime's essential elements, the reviewing court must look at the hypothetically correct jury charge for the case. When a statute sets out several alternative methods

of committing a crime, and the indictment alleges only one of those methods, the state is bound to prove the method specified in the indictment. On the other hand, the state is not required to prove allegations that were needlessly pled and which give rise to mere immaterial variances.

A charging instrument for theft can be very simple, alleging generally the unlawful appropriation of property with intent to deprive the owner of the property. If that happens, and if the defense does not move to quash, then the state need prove nothing more specifically than it has alleged. If, however, the state chooses to allege more specifically, as it did here, with regard to the statutory alternative defining a lack of effective consent in terms of deception, then the state must prove it.

> When the State unnecessarily pleads a statutory definition that narrows the manner and means in which an offense may be committed, that definition is "the law as authorized by the indictment" and thus the allegation must be proved beyond a reasonable doubt. Because here the State unnecessarily pled that the theft was by deception but provided no proof of deception, the evidence was insufficient to support a conviction.

Practice Tip: I expect that attentive prosecutors around the state may well take Judge Womack's opinion in *Geick* as a hint to begin filing their theft cases with charging instruments that allege nothing more than the bare minimum: the unlawful appropriation of certain property with intent to deprive the owner of the property. If that happens, defense lawyers must move to set aside or quash these bare bones pleadings, demanding that the state specify what sort of appropriation it intends to rely on, and, if it relies on the lack of effective consent, why the consent is not effective. *See Geter v. State*, 779 S.W.2d 403, 407 (Tex. Crim. App. 1989)(theft indictment alleging consent was not effective must specify how the consent was not effective in the face of a motion to quash). Now that you have forced the state to *charge* more specifically, you can then force them to *prove* more specifically.

6. Remanded in light of *Geick*.

***Bozeman v. State*, 353 S.W.3d 886 (Tex. Crim. App. 2011)**

In *Geick v. State*, 349 S.W.3d 542 (Tex. Crim. App. 2011), the court of criminal appeals held that when the state pleads that a theft occurred by deception it must prove it. In *Bozeman*, the court of appeals decided otherwise, but it did so before *Geick* was handed down. The court of criminal appeals granted Bozeman's petition for discretionary review and remanded the case to the court of appeals "for further action in light of our opinion in *Geick*."

7. The evidence was sufficient to prove appellant's guilt as a party to capital murder in the course of aggravated kidnapping, even though the jury charge did not properly submit the question of his guilt as a party.

***Adames v. State*, 353 S.W.3d 854 (Tex. Crim. App. 2011)**

Adames was indicted for capital murder in the course of aggravated kidnapping. The jury charge authorized conviction in two paragraphs. The first charged capital murder as the primary actor. The second charged that Adames murder the complainant, and that he acted as a party to her kidnapping. He was convicted and appealed.

The court of appeals reversed the conviction and remanded for a new trial, finding that the jury charge was erroneous because the application paragraph did not include instructions necessary to find Adames guilty as a party to aggravated kidnapping. The court did find the evidence legally sufficient to convict Adames as a party.

The court of criminal appeals granted Adames petition for discretionary review to determine whether the court of appeals had erred when it when it refused to review the sufficiency of the evidence under the Due Process Clause of the United States Constitution. as required by *Jackson v. Virginia*. The court granted an additional ground, on its own motion, to determine whether the court of appeals had erred in failing to distinguish between a sufficiency review under *Malik v. State*, an independent state-ground for review, and *Jackson v. Virginia*, a federal constitutional review.

The court of criminal appeals affirmed the court of appeals. The court of appeals held that a rational jury could have found that Adames committed capital murder in the course of aggravated kidnapping, and the court of criminal appeals agreed.

> We hold that the court of appeals did not fail to distinguish between sufficiency reviews under *Malik* and *Jackson*. The court of appeals correctly applied the *Jackson* evidentiary-sufficiency standard to the hypothetically correct jury charge and held that the evidence was legally sufficient to support appellant's conviction . . . .

8. "This case is a mess." But the appellant is not guilty of possessing codeine.

***Miles v. State*, 357 S.W.3d 629 (Tex. Crim. App. 2011)**

There are three different codeine possession crimes in Texas, depending on the concentration of the narcotic: pure (Penalty Group 1); strong (Penalty Group 3); and weak (Penalty Group 4). In this case, the state indicted Miles for possessing codeine with intent to deliver, but the indictment said nothing about concentration. In order to determine whether the state proved its case, the court of criminal appeals first had to determine which of the three different offenses Miles had been tried for. The court held that the totality of circumstances supported Miles contention that he had been tried for possession of Penalty Group 1 codeine, and that the evidence was insufficient to prove this offense. Accordingly, the court reversed the conviction and ordered that a judgment of acquittal be entered.

This is a very difficult opinion to read. If your client is charged with possessing codeine, often in the form of so-called "purple drank," you have to read the majority opinion. Otherwise, the opening paragraph of Judge Cochran's concurring opinion sums it up nicely:

> I join the majority. I write separately because this case is a mess. The law concerning possession of codeine is confusing and incoherent. The indictment in this case is vague, insufficient, and fails to inform anyone of the precise offense charged. The jury charge tracked the indictment and was equally insufficient and deficient. And, most importantly, the State failed to prove that appellant possessed codeine in any specific one of the three possible penalty groups. Aside from that, everything's fine, except that appellant, in spite of the proof that he possessed 304 grams of a codeine mixture, is entitled to an acquittal because the State failed to plead or prove any specific codeine offense.

9. Debit card abuse: using, presenting, whatever.

***Clinton v. State*, 354 S.W.3d 795 (Tex. Crim. App. 2011)**

Hubbard's debit card was stolen from his car and given to Clinton by someone she knew was not the owner. She swiped the card at Wal-Mart to buy cigarettes, but the card was declined, Hubbard's account was not debited, and Clinton did not get the cigarettes. She did get arrested, though, and was indicted for debit card abuse by *using* the card with intent to fraudulently obtain a benefit. She was convicted in the trial court, but her conviction was reversed in the court of appeals because that court believed that *using* a credit card means that the card means that she used it to successfully complete a transaction. Any other interpretation, according to the court of appeals, would mean that *use*, and the other statutory term, *present* would overlap and render *present* meaningless.

The court of criminal appeals reversed the reversal. Overlap is not a problem. The words "use" and "present" are not defined by the statute. The court looked at the dictionary to determine that "present" means that a person must physically show or provide the card to another, but it does not require consummation of the transaction. Use also does not require consummation, but it does not necessarily require the presence of another person. Although a person who presents a card has almost always necessarily used the card, this overlap does not render the terms ambiguous. In this case, Clinton used the card when she swiped it through the card reader to purchase the cigarettes, even though cigarettes were not actually purchased.

10. If they plead it, they must prove it: A prescription is not the same as a prescription form.

***Avery v. State*, 359 S.W.3d 230 (Tex. Crim. App. 2012)**

Avery's doctor wrote her a prescription for forty 2.5 mg Lortab pills on a valid prescription form, but before presenting the prescription at the pharmacy, Avery changed the "2.5" to look like "7.5." The state indicted her for attempting to obtain a controlled substance "through the use of a fraudulent prescription form," and she was convicted. The court of appeals reversed and remanded for judgment of acquittal, finding that there was no evidence Avery had used a fraudulent prescription form.

The court of criminal appeals disagreed with the court of appeals's reasoning, but it did agree that the evidence was legally insufficient.

When a statute sets out alternative manner and means of committing an offense, the manner and means chosen by the state in a particular case becomes an essential element that must be proven beyond a reasonable doubt, and proof of a different, uncharged manner and means will be insufficient. There is a difference between a prescription and a prescription form. The information written on the prescription form becomes a part of the completed prescription, but is not the form itself, or a part of the form. It is clear that the legislature intended that the distinction between the two is legally relevant.

> The State charged the appellant with attempting to obtain a controlled substance "through use of a fraudulent prescription form." It then adduced evidence thatt the appellant fraudulently altered information that was handwritten on a legitimate prescription form. While this evidence would have supported a conviction had the State charged the appellant using other statutory manner and means that were available, the evidence does not support a conviction for the offense that was actually charged.

11. Evidence was legally sufficient to prove that appellant simulated legal process.

***Runningwolf v. State*, 360 S.W.3d 490 (Tex. Crim. App. 2012)**

A trial court awarded legal custody of a child to her great aunt and removed the child from her grandmother. Runningwolf prepared a 10-page document entitled "Non-Statutory Abatement containing legal terminology and citations, a seal, and a declaration of authority and jurisdiction, and had it delivered to Coleman, the great aunt, who had sense enough to throw it on the ground and call the police. Runningwolf was convicted of simulating legal process, and the court of appeals affirmed the conviction, holding, among other things, that the evidence was legally sufficient.

The court of criminal appeals granted Runningwolf's petition for discretionary review, but affirmed the court of appeals and the trial court.

> Based on the text of the Abatement and the circumstances surrounding the event, we conclude that it is reasonable that a similarly situated person in Coleman's position would believe that the Abatement was a legal document. Also, Appellant intended for Coleman to submit to the authority of the Abatement in violation of section 32.48. Therefore, there is sufficient evidence to support the conviction.

12. Circumstantial evidence, though not overwhelming, was legally sufficient to prove that defendant committed theft by deception.

***Wirth v. State*, 2012 WL 931978 (Tex. Crim. App. 2012)**

Wirth owned a car-leasing business that served as an intermediary between car dealerships and persons wanting to lease vehicles. Wirth's business manager testified that he was authorized to issue sight drafts to the dealerships for the cars, but not to issue checks to cover the drafts. Wirth closed the company's bank accounts and withdrew the balances, and shortly thereafter, the company closed, and the dealerships alleged that Wirth owed them more than $500,000.00. He was indicted for theft by deception and was convicted, and appealed. The court of appeals held that the evidence was legally insufficient and reversed his conviction. The court of criminal appeals reversed the reversal.

> A claim of theft made in connection with a contract, however, requires proof of more than an intent to deprive the owner of property and subsequent appropriation of the property. In that circumstance, the State must prove that the appropriation was a result of a false pretext, or fraud. Moreover, the evidence must show that the accused intended to deprive the owner of the property at the time the property was taken.

The court of appeals did not give proper deference to the jury's verdict. The evidence is not overwhelming, but it is not so weak as to require an acquittal, when the viewed in a light most favorable to the verdict. Although there was no evidence that Wirth himself signed any drafts, the jury was charged on party liability, and there was sufficient to support a finding that he authorized the transfer of vehicle titles knowing that he would be unwilling or unable to satisfy the issued drafts. Wirth was the owner of the business and he controlled every aspect of it. Although the evidence was circumstantial and could have" shown merely a failing business, the jury found otherwise, and its judgment was not so outrageous that no rational jury could agree.

13. There are three types of variances: those involving statutory language that define the offense are always material; those involving non-statutory allegations describing allowable units of prosecution elements are sometimes material and sometimes not; and, those involving immaterial, non-statutory allegations.

***Johnson v. State*, 2012 WL 931980 (Tex. Crim. App. 2012)**

The indictment charged that Johnson intentionally or knowingly caused serious bodily injury to the complainant "by hitting her with his hand or twisting her arm with his hand." The complainant testified that Johnson threw her against the wall and that hitting the wall caused her to fall to the floor and break her arm. Johnson was convicted and he appealed, contending that there was a material variance between the charge and the evidence. The court of appeals disagreed that the variance was material and affirmed the conviction. The court of criminal appeals affirmed.

When legal sufficiency is at issue, the question on appeal is whether any rational jury could have found the essential elements of the crime beyond a reasonable doubt. Essential elements are "the elements of the offense as defined by the hypothetically correct jury charge for the case." A hypothetically correct jury charge does not incorporate allegations that give rise to immaterial variances.

To summarize, variances can be classified into three categories, depending upon the type of allegation that the State has pled in its charging instrument but failed to prove at trial. First, a variance involving statutory language that defines the offense always renders the evidence legally insufficient to support the conviction (i.e. such variances are always material). Second, a variance involving a non-statutory allegation that describes an "allowable unit of prosecution" element of the offense may or may not render the evidence legally insufficient, depending upon whether the variance is material (i.e. such variances are sometimes material). Finally, other types of variances involving immaterial non-statutory allegations do not render the evidence legally insufficient. The variance in the present case falls within the third category.

14. Motive, opportunity, and other evidence, was sufficient to prove identity in this arson case.

***Merritt v. State*, 2012 WL 1314095 (Tex. Crim. App. 2012)**

Merritt was convicted of arson for burning his SUV, but the court of appeals reversed, holding that the evidence was legally insufficient to prove his guilt. The court of criminal appeals reversed the reversal, holding that the court of appeals failed to properly consider the combined and cumulative force of the evidence – including Merritt's motive and opportunity – and to view the evidence in the light most favorable to the jury's guilty verdict. The jury's verdict:

was not a determination so outrageous that no rational trier of fact could agree. The court of appeals incorrectly applied the Jackson standard when considering the circumstantial evidence supporting Appellant's conviction, and improperly employed a 'divide-and-conquer' approach. [citations omitted] Further, it improperly acted as a thirteenth juror when it speculated and focused on the existence of a reasonable hypothesis inconsistent with the guilt of the accused, thereby repudiating the jury's prerogative to weigh the evidence, to judge the credibility of the witnesses, and to choose between conflicting theories of the case.

VOIR DIRE

1. 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*, 349 S.W.3d 517 (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."

2. The trial court abused its discretion when it refused to permit the defense to discuss "preponderance of the evidence," and "clear and convincing evidence," when questioning the venire on its understanding of the term "proof beyond a reasonable doubt.

***Fuller v. State*, 2012 WL 1019964 (Tex. Crim. App. 2012)**

The trial court refused Fuller's request to "explain and define 'preponderance of the evidence' and 'clear and convincing evidence,' and ask each and every venire member if they understood that 'proof beyond a reasonable doubt,' while undefined, was the highest of all burdens in the legal system."

The court of appeals affirmed, holding that the trial court did not abuse its discretion because Fuller's explanation did not seek to elicit information, but only sought to explain the burden of proof. "Only where there is a denial of a specific question that seeks to discover a juror's views on an issue applicable to the case is there an abuse of discretion.

The court of criminal appeals granted Fuller's petition for discretionary review and reversed the court of appeals and the trial court.

The court began by citing *Woolridge v. State*, 827 S.W. 2d 900 (Tex. Crim. App. 1992), in which it had previously held that the trial court had abused its discretion when it refused to permit appellant to contrast the reasonable doubt standard with lesser standards, and when it disallowed an illusion to the standard used in federal court. The questions in *Woolridge* were proper because they sought to discover venireperson's veiws on an issue applicable to the case, they were not repetitious, and they were not in an improper form. That no definition is given to the jury by the court is irrelevant. "To the contrary, that understanding becomes more crucial to the intelligent exercise of either the State's or the defendant's peremptory challenges because there is no definition to guide what could be a juror's skewed perception of the term."

> As should be evident from the passage from Woolridge that we have quoted above, inquiry into a prospective juror's understanding of what proof beyond a reasonable doubt means constitutes a proper question regardless of whether the law specifically defines that term. The jury's ability to apply the correct standard of proof remains an issue in every criminal case. If anything, the fact that current case law has come full circle and once again provides jurors with no definition of reasonable doubt only heightens the incentive for the parties to test the understanding of the veniremembers.

> And it strikes us as particularly apt to inquire whether a prospective juror understands that proof beyond a reasonable doubt must at least constitute a more onerous standard of proof than preponderance of the evidence and clear and convincing evidence.

The court also held that this error is subject to a harm analysis, depending on the facts of the case. The case was remanded to the court of appeals to conduct this harm analysis in the first instance.

3. Concurring opinion notes that, "[i]n close calls, trial judges should always err on the side of granting a challenge for cause rather than denying one."

***Gonzales v. State*, 353 S.W.3d 826 (Tex. Crim. App. 2011)**

In this capital case the trial court denied the defense's challenge for cause against a venireperson who indicated initially that her strong feelings on the law of parole would affect her answers on the special issues. A majority of the court of criminal appeals disagreed, holding that an examination of the venirepersons entire response showed that the trial court did not clearly abuse its discretion.

Judge Johnson dissented, asserting that trial courts should liberally grant challenges for cause, and that ""[i]n capital cases, we must be especially vigilant that strong opinions, for or against the death penalty, are not glossed over by agreement with the common question, 'Can you set aside your personal feelings and follow the instructions from the judge?'" Judge Johnson believed that the venireperson in question was challengeable under *Morgan v. Illinois*, because, although she swore in good conscience that she would uphold the law, she was unaward that her dogmatic beliefs about the death penalty would prevent her from actually doing so.

Judge Cochran concurred:

> There are always more fish in the sea and more jurors in the jury panel. In close calls, trial judges should always err on the side of granting a challenge for cause rather than denying one. Reviewing courts should not be required to use their scarce judicial resources on reviewing denials of challenges for cause on "close call" venirepersons in capital cases. It is much easier and quicker to voir dire yet another venireperson than it is to retry the entire capital-murder case simply because a challenge for cause should have been granted. Denying a challenge for cause in any "close case" is "penny-wise, pound-foolish" time-savings.

4. Clarification (perhaps) on challenging so-called "vacillating" venirepersons.

***Burke v. State*, 2011 WL 3925667 (Tex. App.–Beaumont 2011, pet. granted)(not designated for publication)**

Burke was a peace officer charged with official oppression. One of the prospective jurors

admitted he did not think he could be impartial because of prior "run-ins with the law," and that he did not want to be on the jury. Later he said he could make a decision based on the evidence and follow the law given by the court. Still later he explained that he felt that a police officer once used excessive force against him, and that this would make it difficult for him to be fair, and that he did not think he could give Burke a fair shake. The trial court denied Burke's challenge for cause.

The court of appeals affirmed. Based on the "record as a whole," the court could not say that the trial court had abused its discretion. Although the venireperson "indicated" he did not think he could be fair, he had earlier stated he could follow the law and decide the case based on the evidence presented. He was not directly asked whether he would be unable to follow the instruction ultimately given by the trial court which stated "you must not consider, discuss, nor relate any matters not in evidence before you." The court of appeals noted that it defers to the trial court's decisions where the venireperson's answers are "vacillating or contradictory."

> Because the trial court, on the record before us, could reasonably conclude that prospective juror one's declaration did not clearly evince a bias against the law, the trial court was entitled to conclude that prospective juror one could actually follow its instructions if he were to be chosen to serve on the jury.

The court of criminal appeals granted Burke's petition for discretionary review decide this issue: The Court of Appeals erred in holding that the trial court did not err in denying Appellant's challenge for cause to prospective juror Yoast after his responses left no room for doubt that he could not be a fair and impartial juror given his past experience with law enforcement."

5. The federal constitution is not violated if a party uses peremptory strikes to remove Catholics from the jury. But what about Article I, § 3a of the Texas Constitution?

***Devoe v. State,* 354 S.W.3d 457 (Tex. Crim. App. 2011)**

Devoe claimed on appeal that the state impermissibly used peremptory challenges to strike five venirepersons because they were Catholics, in violation of *Batson v. Kentucky*. The court rejected this complaint, noting that it has already held – in *Casarez v. State*, 913 S.W.2d 468 (Tex. Crim. App. 1994) – that *Batson* does not apply to challenges based upon religion. According to the court, there is a difference between striking jurors on the basis of race or gender, and striking them because of the beliefs that are characteristic of their faiths.

Casarez, though, was based solely on *Batson* and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Neither *Casarez*, nor the present case, then, have decided whether a party can strike a venireperson based on religion and not run afoul of Article I, § 3a of the Texas Constitution, which provides: "Equality under the law shall not be denied or abridged because of sex, race, color, *creed*, or national origin."

6. Article 35.16(a)(10) can shut down voir dire.

***Devoe v. State*, 354 S.W.3d 457 (Tex. Crim. App. 2011)**

In this case, the juror knew something about the case from the newspapers, and had discussed it with people who lived in the area of the crime. After the state passed the venireperson, the judge asked the question in the form prescribed by article 35.16(a)(10), and the juror answered "Yes." The juror was excused, and Devoe complained that he had not had the opportunity to rehabilitate.

Devoe complained on appeal that the trial court erred when it granted the state's challenge for cause without letting the defense examine the challenged venireperson. The court of criminal appeals rejected this argument. Article 35.16(a)(10) permits parties to challenge for cause venirepersons who say that they have established in their minds such a conclusion as to the guilt or innocence of the defendant as would influence the juror in finding a verdict.

> To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in the juror's opinion, the conclusion so established will influence the juror's verdict. *If the juror answers in the affirmative, the juror shall be discharged without further interrogation by either party or the court."*

TEX. CODE CRIM. PROC. art. 35.16(a)(10)(emphasis in original).

The trial court had discretion to "clarify" the venireperson's position after the state questioned her. "Once clarified, however, any further questioning was proscribed by statute."