TOP TEN CRIMINAL CASES

2014 WINTER REGIONAL CONFERENCES

HORSESHOE BAY MARRIOTT
HORSESHOE BAY, TEXAS
JANUARY 23-24, 2014

Moody Gardens Hotel
Galveston, Texas
February 20-21, 2014

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TABLE OF CONTENTS

Scope of Paper

This paper discusses all published cases decided by the Texas Court of Criminal Appeals in 2013. Also included are selected unpublished cases decided by that Court, and some other cases decided by intermediate courts of appeals during the same time period.

APPEAL

1. Yes, a portion of the record was lost, and no, it was not the fault of the defendant; reversal was not required, though, because the lost portion was not necessary to the appeal.

***Nava v. State*, 2013 WL 6636809 (Tex. Crim. App. 2013)**

The record reflected that several jurors made statements that might have subjected them to challenges for cause when initially examined. Further examination was conducted at the bench, but this portion of the record was lost because of some mechanical malfunction that was not the fault of the defendant or his lawyers. The defense complained on appeal that the lost record entitled it to reversal under TRAP 34.6(f). The court of appeals disagreed and affirmed the convictions, and the court of criminal appeals affirmed the affirmances.

One of the requirements for reversal under the rule is that the lost record "is necessary to the appeal's resolution." The defense said it was, for two reasons. First, without the lost portion of the record they were unable to show that the judge erroneously denied several challenges for cause. Second, the missing record was necessary to show that counsel was ineffective for not preserving error concerning their challenges for cause.

To show harm based on the erroneous denial of a challenge for cause, the defendant must: : "(1) use a peremptory strike against the prospective juror upon whom the challenge for cause had been made, (2) exhaust his peremptory strikes, and (3) request an additional peremptory strike to use upon a specifically identified objectionable prospective juror, who, because the extra strike was denied, actually sits on the jury." In this case the recollections and the notes of everyone was less than perfect. The trial judge, though, clearly remembered that the defense never identified an objectionable juror. The question of first impression in this case was whether a trial judge may rely on her recollection when

determining that the lost record was not necessary for resolution of the appeal. Here the judge recalled "a single, discrete fact . . . with certainty and precision." None of the attorneys contradicted the judge's memory, and nothing in the record causes the court to doubt that recollection.

The court also rejected the defense's ineffective assistance claim based on counsel's failure to preserve error by identifying an objectionable juror. There are many reasons why reasonable counsel would not have identified an objectionable juror. Maybe they were satisfied with the jurors selected. Maybe the jurors after those who were selected were worse than those selected. Based on this record, the defense failed to meet its burden of showing deficient performance.

2. When the appellate record lacks a certification of the defendant's right of appeal, the proper remedy is not to dismiss the appeal, but to order the trial court to supplement the record.

***Cortez v. State*, 2013 WL 5220904 (Tex. Crim. App. 2013)**

Cortez timely filed his notice of appeal in the court of appeals, but the record, when transmitted to that court, did not contain a certification of the defendant's right of appeal. So, the court of appeals dismissed his appeal. The court of criminal appeals granted Cortez's petition for discretionary review and reversed.

> We hold that, instead of dismissing the appeal, the court of appeals should have ordered the trial court to supplement the trial record with a certification of the defendant's right of appeal. We therefore reverse the court of appeals's dismissal and remand this case to that court so that it may order the trial court to submit a supplemental record that contains the certification.

3. The court of appeals erred when it parsed the defendant's trial objections, and utilized "the kind of hyper-technical analysis" repeatedly rejected by the court of criminal appeals.

***Everitt v. State*, 407 S.W.3d 259 (Tex. Crim. App. 2013)**

Everitt was arrested for DWI and admitted on the videotape that he had ingested hydrocodone. Over Everitt's objection, the state was allowed to introduce the admission, and expert testimony concerning the effects of combining hydrocodone and alcohol. He was convicted and complained on appeal that the trial court had erroneously admitted this evidence, but the court of appeals disagreed, holding that his trial objection was insufficient to preserve error.

The court of criminal appeals disagreed, reversed the judgment of the court of appeals, and remanded the case to that court to consider the merits of the argument – whether the trial court abused its discretion in admitting the challenged evidence.

In this case, Everitt filed a motion to suppress and the trial court conducted a hearing it called a "702 hearing," and the court ordered the state to "call [its] expert regarding Kelly Daubert." After the hearing, the trial court announced its intention to admit the videotape and the expert's testimony before the jury. The defense objected at this time, and later in front of the jury "on the *LaRue* and *Layton* issue," and because of lack of foundation.

The court of appeals found fault with Everitt's trial objection because the ruling it secured dealt only with the relevance of the evidence and not with its reliability. The court of criminal appeals found this holding to be "the kind of hyper-technical analysis that we have repeatedly rejected." The objection was both timely and specific because it "let the trial judge know what he wants, why he thinks he is 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." That is all the law requires.

> The court of appeals erred in distinguishing between admissibility based on relevance and admissibility based on reliability. Under Rule 702 and our precedent, both relevance and reliability of the expert testimony are components of a trial court's Daubert/Kelly ruling on admissibility. [citations omitted] The trial court's suppression hearing referred to *DeLarue*, a case requiring that evidence be reliable, and *Layton*, a case requiring that evidence be relevant.

4. *DeGarmo* is given "the burial it so richly deserves."

***Jacobson v. State*, 398 S.W.3d 195 (Tex. Crim. App. 2013)**

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.

Under the *DeGarmo* doctrine, as it has come to be known, all error that might have occurred at the guilt/innocence phase of the trial is waived if the defendant later admits his guilt during the punishment phase. Since *DeGarmo* was decided, the court of criminal appeals somewhat restricted its reach by holding that error is not waived when the error was of some fundamental character. 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?" Yes, the court answered, putting the final nail in *DeGarmo's* coffin.

"Our criminal justice system makes two promises to its citizens: a fundamentally fair trial and an accurate result. If either of those two promises are not met, the criminal justice system itself falls into disrepute and will eventually be disregarded." Although *DeGarmo* might arguably promote accuracy at the guilt stage, it may also negate "the equally important societal goal of a fair trial [and] at the sentencing stage, it negates the interest in accuracy."

The court of appeals here held that the right in question – namely the defendant's right not to be struck at over counsel's shoulders was only a "small right," and that therefore the defendant waived his right to complain when he admitted his guilt. "This dichotomy does not make sense. Reversible error is reversible error, regardless of the character of the right being substantially gouged." Additionally, the cruel trilemma" rationale for rejecting *DeGarmo* in *Leday* applies with equal force to any error, whether fundamental or not.

> We have not relied upon the *De Garmo* doctrine even once in the fourteen years since we severely limited it in *Leday*. If a trial judge's legal ruling is wrong, appellate courts should address that legal ruling (if properly preserved by objection) and explain why it is wrong. But if that ruling did

not "affect substantial rights," *i.e.*, it did not seriously affect the verdict or render the trial fundamentally unfair, then it is deemed harmless. The harmless-error rule, not the *De Garmo* doctrine, protects the criminal-justice system from unwarranted or undeserved reversals for improper closing arguments.

For these reasons we extend the reasoning and analysis set out in *Leday* to all rights, great and small, and give the *De Garmo* doctrine the burial it so richly deserves. We reverse the judgment of the court of appeals and remand this case to that court for consideration of the merits of appellant's sole claim.

5. Don't say "no objection" unless you mean it, but just in case you do say it when you don't, remember that this case says the courts must look to the entirety of the record when determining whether abandonment was intended or understood.

***Thomas v. State*, 408 S.W.3d 877 (Tex. Crim. App. 2013)**

Thomas moved to suppress the marijuana, and immediately after her motion was denied, she pleaded guilty to the court. During the punishment portion of the plea proceeding, the state offered various exhibits, including the DPS lab report identifying the material seized as marijuana. At that time, the defense stated: "I don't have any objection to that, Your Honor. Mr. Martindale has been kind enough to let me see them before this afternoon and we have no objections." Thomas then appealed the trial court's ruling on the motion to suppress.

The court of appeals affirmed, without reaching the merits of the argument, holding that Thomas has waived her objection by stating "no objections." The court of criminal appeals reversed and remanded the case to the court of appeals to decide the merits of Thomas's suppression argument.

The general rule is that an adverse ruling on a pretrial motion to suppress will preserve error on appeal. Counsel must not, however, affirmatively indicate that he has "no objection." The court acknowledged that some commentators have disagreed with the "no objection" exception to the general rule, but it was not called upon to decide that exception's continued viability. Instead, the court made clear that, like all rules

concerning error preservation and waiver, this one should be applied, not with hair-splitting rigidity, but rather "with comparable flexibility."

> We therefore hold that, as with error preservation in general, the rule that a later statement of "no objection" will forfeit earlier-preserved error is context-dependent. By that we mean that an appellate court should not focus exclusively on the statement itself, in isolation, but should consider it in the context of the entirety of the record. If the record as a whole plainly demonstrates that the defendant did not intend, nor did the trial court construe, his "no objection" statement to constitute an abandonment of a claim of error that he had earlier preserved for appeal, then the appellate court should not regard the claim as "waived," but should resolve it on the merits. On the other hand, if from the record as a whole the appellate court simply cannot tell whether an abandonment was intended or understood, then, consistent with prior case law, it should regard the "no objection" statement to be a waiver of the earlier-preserved error. Under the latter circumstances, the affirmative "no objection" statement will, by itself, serve as an unequivocal indication that a waiver was both intended and understood.

In this case there was no question that neither Thomas nor the trial court regarded the "no objection" statement as an abandonment of Thomas's suppression argument. After the punishment hearing concluded the court admonished Thomas of her right to appeal, and commented that he thought his ruling was a close call, and he set an appeal bond.

The state also pointed to Thomas's boiler plate waiver of appeal as some evidence of abandonment. The court disagreed on the facts of this case. Thomas gained nothing in the way of a favorable punishment recommendation by abandoning her right to appeal, and she conspicuously failed to sign a separate dedicated waiver of appeal. The trial court did not review an appellate waiver with Thomas during the plea colloquy, nor did either party object when the court latter advised that Thomas would be allowed to appeal its ruling on the motion. Finally, the state did not argue this in the court of appeals. Accordingly, the court of criminal appeals saw this as nothing more than inadvertent and an oversight, cand clearly not a knowing and voluntary waiver.

6. Although district courts may use either reporters or recorders to memorialize trial testimony, the reporter's backup audio proceedings do not do this, and are not a part of the official record, and may therefore not be reviewed by the

court of appeals.

***Ex parte Hollowell*, 392 S.W.3d 661 (Tex. Crim. App. 2013)(Johnson, J., concurring to denial of petition for discretionary review)**

Judge Johnson, joined by Judges Hervey and Cochran, concurred to the court's refusal to grant Hollowell's petition for discretionary review, and wrote "to clarify the status of electronic recordings as admissible evidence."

Formerly the Texas Rules of Appellate Procedure required court *reporters* when memorializing court proceedings. Now all district courts can use either *reporters* or *recorders*, in their discretion, as long as the recording conforms to the requirements of Rule 13.

> That said, Rule 13 does not apply to the facts of this case. The record created by either a stenographic reporter or an electronic court recorder memorializes the testimony and other evidence presented at trial. It is part of the record on appeal. The electronic recording sought in this case is not the stenographic official record that was made, but the reporter's backup audio recording of the proceedings, which is not a part of the official reporter's record and thus is not a part of the appellate record. The court of appeals properly refused to review the backup recording, even if for a reason that no longer applies.

7. The court of appeals loses jurisdiction after a petition for discretionary review is filed, and any opinion it issues after that is unauthorized and must be withdrawn.

***Ex Parte Shaw*, 395 S.W.3d 819 (Tex. Crim. App. 2013)**

Formerly, the court of appeals could issue an opinion after a party filed its petition for discretionary review in the court of criminal appeals. This rule, however was changed effective July 12, 2011. Accordingly, the opinion by the court of appeals here, which was issued after the state's petition for discretionary review was filed, is unauthorized and must be withdrawn.

8. Appellate practice tip: make sure your petition for discretionary review requests all the relief you need.

Alford v. State, 400 S.W.3d 924 (Tex. Crim. App. 2013)

The state argued that Alford's motion to suppress should be denied because the police were justified in stopping her under the community care-taking exception. The trial court agreed and denied Alford's motion to suppress. She was convicted and she appealed.

On appeal the state argued the community care-taking exception, but added another reason why the trial court erred—because the encounter was consensual. The court of appeals reversed, holding that the trial court erred when it found that this seizure was justified as community care-taking. The court refused to consider the state's alternative argument – consent – because this argument had not been made in the trial court. However, after holding that the consent theory had been procedurally defaulted, the court of appeals went on to consider – and reject – it on the merits.

The state's PDR raised only one complaint – that the court of appeals had erred when it found the state procedurally defaulted by not arguing consensual encounter in the trial court. The court of criminal appeals granted the state's petition, but affirmed the court of appeals's reversal.

The good news for the state was that the court of appeals had erred when it found a procedural default. Generally the rules of procedural default apply differently to the winner and loser on appeal. That is, only the loser defaults by not raising an argument in the trial court. "The rationale for this rule is that an appellee, satisfied with the trial court's ruling in his favor, generally does not make a 'complaint on appeal.'"

The bad news for the state, though, is that after incorrectly ruling that the state should lose based on procedural default, the court of appeals went on to consider the state's consensual encounter argument and reject it on the merits.

There was more bad news for the prosecution. The state's petition complained only of the procedural default; it did not challenge the court of appeals's merits analysis regarding the consensual encounter. "Because it has already rejected the merits of the

State's consensual-encounter theory and the State did not challenge that analysis in its petition, we need not remand this case for the court of appeals to re-analyze that theory."

9. The failure of a defendant to object in the trial court to the imposition of court costs does not waive the right to raise this complaint on appeal where the defendant was not given the opportunity to object at trial.

***Landers v. State,* 402 S.W.3d 252 (Tex. Crim. App. 2013)**

The elected district attorney recused himself and an attorney pro tem was appointed to prosecute Landers. She was convicted and the judge sentenced her to two years imprisonment and a $10,000.00 fine, and made no mention of imposing court costs. The written judgment included $4,562.50 in court costs that were handwritten, but the record does not show whether the handwriting was added before or after Landers signed the judgment. Six days after the judgment was imposed a Bill of Costs was issued, itemizing $3,718.50 for the attorney pro tem, and $440.00 for the prosecutor's investigative costs, but this document was not provided to Landers or her lawyer.

Landers complained about the assessment of the fees but the court of appeals held that she had waived error by not making a timely objection in the trial court. The court of criminal appeals granted Landers's petition for discretionary review to determine whether an objection is required to preserve error concerning the imposition of the special prosecutor's costs.

The court of criminal appeals reversed. Generally a timely objection is required to preserve error. This, however, assumes that the appellant had the opportunity to object in the trial court. The sentence included costs of $4,562.50, but there was no indication of what the court costs were for. Later the costs were enumerated in the Bill of Costs, but notice was not give to Landers or her attorney, and no further proceedings were held. "Consequently, the appellant was not given an opportunity to object to the imposition of these costs. Since she was not given the opportunity, the absence of an objection is not fatal to her appeal." ***See also Sturdivant v. State,* 411 S.W.3d 487 (Tex. Crim. App. 2013)(vacated and remanded to the court of appeals "for that court to consider the effect of *Landers,* if any, on its reasoning and analysis in this case.")**

ASSISTANCE OF COUNSEL

1. Counsel was not ineffective for not objecting to judge's threat to put two jurors in jail.

***Ex parte Parra*, 2013 WL 5221110 (Tex. Crim. App. 2013)**

The jury convicted Parra of aggravated sexual assault and during the punishment phase it sent out this note: "[Two named jurors] are going to walk out, and want to talk to the judge. They want to know the consequences. We are still deliberating, but they do not want to hear anymore." The judge brought all the jurors back in and told them he was going to give them the choice of either breaking for the day or continuing to deliberate. He then told them: "We have provided for you as nice an accommodation as I possibly can. If you don't want those, I will put you in the county jail and bring you tomorrow so that you can continue to deliberate with your fellow jurors." Trial counsel did not object to the note, the jury elected to continue deliberating, and 30 minutes later it returned a verdict: life imprisonment. After exhausting his direct appeals, Parra filed a writ alleging that counsel was ineffective: for not objecting that the judge's response was coercive; for not objecting that the response was in violation of article 36.27, and for not to discovering that one of the jurors was biased.

The court of criminal appeals disagreed with all three assertions and denied relief.

As to the first assertion – that counsel should have objected that the judge's response was coercive – the court disagreed that it was coercive. Judges have power to hold jurors in contempt who threaten to impede the judicial process. The response here was directed, not at the entire jury, but only the two who threatened to walk out, and it answered, "albeit assertively," the question that the jurors asked, namely what would be the consequences if the two walked. Nor was the response directed at the verdict. It simply informed the jury he would not tolerate jurors threatening to walk out. "Given the nature of the neutral and appropriate, albeit strongly worded, response, we find that the judge's admonishment was not coercive nor did it deprive Parra of a fair trial. Because the judge would not have committed error in overruling an objection on that basis, Parra is unable to establish that counsel was deficient for failing to assert these objections."

The court also rejected the second assertion, that the trial court failed to give counsel notice of the jury's note before reading and responding to it in open court, contrary to article 36.27. Although the record is unclear whether the judge gave notice or not, counsel certainly had an opportunity to object, and he did not. Moreover, since the response was not coercive, there is no showing that the result would have been different had counsel objected, so he is not ineffective for not having objected.

Nor was the court persuaded by Parra's third point – that counsel should have rooted out a juror's prejudice in the voir dire process. The record does not show that the juror was biased, and it also does not show that Parra was prejudiced in any way by the juror's service.

2. Is the statute of limitations for aggravated assault two years or three, and could you be ineffective for not knowing?

***State v. Bennett*, 2012 WL 11181 (Tex. App.-Dallas 2012, pet. granted)(not designated for publication)**

After Bennett was convicted of aggravated assault he filed a motion for new trial complaining that his lawyer had been ineffective because he did not file a motion to quash because the statute of limitations for this offense was two years, and it had expired. The trial court granted the motion and the state appealed.

What is the statute of limitations for aggravated assault? According to the Dallas Court of Appeals, Texas law is unsettled. On the one hand, article 12.01 of the Code of Criminal Procedure enumerates different time periods for specific offenses, and then concludes with the catch-all, "*three* years from the date of the commission of the offense: all other felonies." *See* TEX. CODE CRIM. PROC. art. 12.01(7). And there are cases from the court of criminal appeals holding that the statute of limitations for aggravated assault is three years. On the other hand, article 12.03(d) provides: "Except as otherwise provided by this chapter, any offense that bears the title 'aggravated' shall carry the same limitation period as the primary crime." If the "primary crime" in this case is "assault," a Class A misdemeanor, then its statute of limitation is *two* years. *See* TEX. CODE CRIM. PROC. art. 12.02(a). In this case, then, under 12.03(d) the statute of limitations for "aggravated assault" would be two years. And there is at least one case from the court of criminal appeals holding that the statute of limitations for the felony offense of aggravated perjury is two years, since that is also the limitation for the misdemeanor offense of perjury. *See Ex parte Matthews*, 933 S.W.2d 134 (Tex. Crim. App. 1996).

For two reasons, then, the court of appeals reversed the trial court. First, precedent from the court of criminal appeals suggests the statute of limitations for aggravated assault is three years, and trial and intermediate courts are bound to follow precedent. Second, even if the later case involving aggravated perjury could be interpreted as having overruled those cases that specifically provided for a three year limitations period in

aggravated assault cases, "counsel could not have been ineffective for not preserving for appeal a claim that the two-year limitations period applies to aggravated assault. Counsel is not liable for an error in judgment on an unsettled proposition of law."

Bennett filed a petition for discretionary review raising these issues:

> 1. There is a conflict between the court of appeals' analysis in this opinion, that the statute of limitations applicable in this case is unsettled, and the analysis in this Court's opinion in *Ex parte Matthews*, 933 S.W.2d 134 (Tex. Crim. App. 1996).
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> 2. The court of appeals' analysis flies in the face of Texas jurisprudence requiring that effective trial counsel must learn the appropriate limitation period and timely urge its expiration.

3. Trial counsel who failed to secure the testimony of a critical witness for trial, and neither sought to take this witness's deposition, or a continuance, performed deficiently under the Sixth Amendment.

***Frangias v. State*, 392 S.W.3d 642 (Tex. Crim. App. 2013)**

Frangias owned a hotel in Houston and was tried for sexually assaulting a guest. The guest testified that Frangias followed her inside her room and attacked her. Frangias testified to an entirely different version, namely that the guest was intoxicated and called down to the desk for towels, which he delivered at her door, and that he neither went inside the room nor sexually assaulted her. Trial started on Tuesday. The Friday before, according to trial counsel, they had learned that Sotomayor, a former employee of the hotel, could corroborate Frangias's version – that he delivered the towels, but that he did not go inside the guest's room – and, they said, they planned to produce Sotomayor at trial. On Tuesday, however, trial counsel announced to the court that Sotomayor was being treated for cancer in El Paso and he was unable to travel at that time to Houston to testify. In lieu of his live testimony, counsel sought to provide his testimony by telephone. The trial court denied this request, and another one made later in the trial, Frangias was convicted, and he appealed, asserting, among other things, that trial counsel were ineffective for not securing Sotomayor's testimony at trial, or moving for a continuance. The court of appeals disagreed that trial counsel performed deficiently and affirmed the conviction.

The court of criminal appeals reversed, finding that trial counsel did perform deficiently, and remanded to the court of appeals for a prejudice determination.

Appellate counsel who challenge trial counsel as ineffective must show both that they performed deficiently, and that this deficient performance prejudiced the defense. In this case the court of appeals did not reach the prejudice prong, and so, neither did the court of criminal appeals.

Absent record evidence showing that counsel's performance was not based on an informed strategic or tactical decision, the reviewing court must presume the performance was adequate "unless the challenged conduct was so outrageous that no competent attorney would have engaged in it." Apparently, the court of criminal appeals found trial counsel's conduct sufficiently "outrageous" here.

Certainly in this case, counsels's failure to procure Sotomayor's testimony was not strategic; "it is evident that they believed his testimony was a critical component of their defense and that they fervently wished to present it."

> Not surprisingly, then, the court of appeals did not purport to rely on the ordinary appellate presumption that trial counsel's omission was the product of a legitimate trial strategy. Instead, the court of appeals seems to have determined that, once their initial gambit for executing that strategy—remote sworn testimony via telephone, web-cam, or video link—failed, the appellant's trial counsel made a reasonable decision not to pursue any other tactic to ensure that the jury would be able to hear Sotomayor's admittedly "critical" testimony. Because neither a deposition nor a continuance was a feasible alternative, the court of appeals held, trial counsel did not perform deficiently by failing to ask for them. We agree with the appellant, however, that the abandonment of alternative ways of implementing a particular trial strategy is reasonable only if trial counsel have undertaken reasonable efforts to pursue those alternatives—by conducting a reasonable investigation and then bringing a professionally appropriate level of knowledge and skill to bear—before deciding to abandon them. If the likelihood that the trial court would not have granted a request for a deposition or continuance in the appellant's case is itself attributable to trial counsel's lack of diligence in preparing for the contingency that their first gambit might fail, we cannot fairly characterize trial counsel's performance as reasonable for Sixth Amendment purposes.

The court of appeals here noted that depositions are extraordinary, and the court of criminal appeals agreed. The high court also observed, though, that while there is no statutory procedure in Texas for admitting telephonic testimony, chapter 39 does specifically permit depositions, in certain circumstances. "We do not think it was reasonable for trial counsel to prefer the first, unregulated method for implementing their trial strategy to the exclusion of the second, statutorily authorized method."

Trial counsel also asserted that the jury should be able to see their witness, and that they would not have been able to see him via deposition. "But, given the unique importance of Sotomayor's testimony to the appellant's defense, we would not regard this as a choice that any reasonable trial attorney would make. The appellant had absolutely nothing to lose by admitting Sotomayor's deposition, even if it constitutes a sub-optimal form of testimony. For these reasons we reject the only explanation that trial counsel offered for failing to seek a deposition."

The court of appeals had also held that the trial court would have acted within its discretion in denying the deposition because of untimeliness. The court of criminal appeals criticized the cases relied on by the intermediate court. Those cases appear to hold that a trial court may deny a deposition that is "an abusive attempt at discovery," but that was clearly not the purpose of Sotomayor's deposition. Rather, effective counsel could have made a good argument that this deposition was "a reasonably timely attempt to preserve critical testimony that might otherwise be lost. Chapter 39 imposes no hard and fast deadline for the filing of an application for deposition. It is far from a foregone conclusion that the trial court would have denied an application to depose Sotomayor as time-barred on the facts presented. Indeed, the trial court might well have granted it, and trial counsel cannot be excused from making the attempt, if only to preserve the issue for appeal."

4. Does the trial court violate a defendant's Sixth Amendment right to counsel by excluding counsel from a Rule 601 hearing to determine the competency of a child witness?

***Gilley v. State*, 383 S.W.3d 301 (Tex. App.–Fort Worth 2012, pet. granted)**

Gilley was charged with aggravated sexual assault of a child who was six years old at the time of trial. The court examined the child in chambers to determine his competency under Rule 601 and allowed both sides to submit written questions, but

excluded counsel from the hearing. Gilley objections under the Sixth Amendment and Article I, § 10 of the Texas Constitution, and article 1.25 of the Code of Criminal Procedure were overruled. Gilley was convicted and he appealed.

The court of appeals affirmed his conviction. Rule 601 neither prevents nor requires attendance by counsel. Nor did excluding counsel violate Gilley's right to confront or cross-examine the child. And if there was error, it was harmless beyond a reasonable doubt.

The court of criminal appeals granted Gilley's petition for discretionary review to determine this question: "Whether an accused's Sixth Amendment right to counsel is denied if the trial court excludes counsel for the accused from attending a Rule 601 determination of the competency of child witness? See Tex. R. Evid. 601; U.S. Const. Amend. VI."

5. The client owns the file.

***In re McCann*, 2013 WL 6081455 (Tex. Crim. App. 2013)**

Turner was convicted of capital murder and sentenced to death, and the trial court ordered trial counsel to turn over Turner's file to the lawyer appointed to handle the writ, so that that lawyer could conduct the necessary investigation. Trial counsel took the position that the file belonged to Turner, the client, and refused to turn the file over without a release signed by Turner. Turner refused to sign the release, trial counsel refused to turn over the file, and the trial court held the trial lawyer in contempt. Petitions for mandamus and prohibition seeking emergency relief were filed, and the court of criminal appeals stayed enforcement of the contempt order. The court of criminal appeals granted the petitions.

"Today we reaffirm that a client owns the contents of his or her file."

> Assuming Turner is legally competent (as the trial court found in this case), he is entitled to choose not to turn over his trial file; and McCann, as Turner's former counsel and agent, must honor that decision for the reasons that we have explained. If, however, McCann, Rytting, or another interested party with standing believes that Turner is legally incompetent, that person

can seek to have a guardian appointed.

Turner is presumed competent and has been found competent by the trial court. He has declined to permit counsel to turn over the file to habeas counsel. Since he owns the file and has not been found to be incompetent, McCann was right not to turn over the file, and the trial court had no authority to hold counsel in contempt.

6. *Ex parte Lemke* is overruled; Now, one who would show that his counsel was ineffective during plea bargaining must prove prejudice, and this requires proof of a reasonable probability that he would have accepted the plea, and that the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it.

***Ex parte Argent,* 393 S.W.3d 781 (Tex. Crim. App. 2013)**

Argent rejected a plea bargain of eight years, then pleaded open to aggravated sex case and got 20 years imprisonment. He later filed writs alleging that his trial counsel had been ineffective. The trial court agreed, finding that counsel had incorrectly told him that he was eligible for probation and shock probation, when, under Texas law, only a jury's verdict recommending probation could have resulted in shock probation, and the trial court could only have ordered deferred adjudication. Argent contended that he would have accepted the eight year offer if he had known this.

In light of the recent cases of *Frye* and *Lafler* from the United States Supreme Court, the court of criminal appeals held that it had no choice but to overrule its earlier, more lenient holding in *Ex parte Lemke*, 13 S.W. 3d 791 (Tex. Crim. App. 2000):

> We hold that to establish prejudice in a claim of ineffective assistance of counsel in which a defendant is not made aware of a plea-bargain offer, or rejects a plea-bargain because of bad legal advice, the applicant must show a reasonable probability that: (1) he would have accepted the earlier offer if counsel had not given ineffective assistance; (2) the prosecution would not have withdrawn the offer; and (3) the trial court would not have refused to accept the plea bargain.

Judge Johnson dissented, wondering how a habeas applicant can ever meet his

burden of proving that the prosecution would not have withdrawn the offer, and that the trial court would not have refused to accept the plea bargain. "Frye and Lafler make a mockery of that entitlement by imposing, on an applicant who is asserting ineffective assistance of counsel during that process, a burden so onerous that it can never be met."

7. Trial counsel performed deficiently by not investigating the defendant's mental health history, but there was no prejudice because there was not a reasonable probability that, but for the deficient performance, the defendant would have been found incompetent at an incompetency trial.

***Ex parte LaHood,* (Tex. Crim. App. 2013)**

LaHood was convicted and sentenced to thirty years imprisonment for aggravated sexual assault and aggravated kidnapping. He filed an application for writ of habeas corpus asserting that his trial counsel was ineffective for failing to investigate his mental health history, and the trial court recommended that relief be denied. The court of criminal appeals fond that counsel was deficient for not investigating, but denied relief because there was no showing that counsel's deficient performance prejudiced LaHood.

As to deficient performance, the court noted that trial counsel saw signs of mental health issues before trial, and during both the guilt and punishment phases of the trial that her "failure to follow up on the various indicia of his alleged incompetency fell below prevailing professional standards and, as a result, her performance was constitutionally deficient." This was especially true when counsel based her belief about a medical issue on her own lay opinion, even though she knew LaHood had prior mental health issues and was taking medications. His medical records from the jail were easily accessible and contained significant information, including a suicide attempt during trial, that would have permitted counsel to assert incompetency. "After reviewing the quantum of evidence known to counsel before and during trial, and whether the known evidence would lead a reasonable attorney to investigate further, we conclude that trial counsel's failure to further investigate was unreasonable under the circumstances."

The court further held, however, that the deficient performance did not prejudice LaHood because he failed to show a reasonable probability that, but for counsel's deficiency, LaHood would have been found incompetent at an incompetency trial.

BAIL

1. Article 17.151 means what it says: If the state is unready for trial after 90 days, the court must order personal recognizance or bail in an amount the defendant can meet, and it may not detain the defendant based on concerns for safety of the community or victim.

***Ex Parte Gill*, 2013 WL 6081449 (Tex. Crim. App. 2013)**

Article 17.151 of the code of criminal procedure requires the trial court to grant the defendant a bond he can make if the state is not ready for trial within 90 days of his arrest on a felony charge. The Gill brothers were charged with murder and held beyond 90 days, but their writs under article 17.151 were denied because the trial court found that the bonds were justified under article 17.15, based on the criminal records of the defendants, and other aggravating factors. The court of appeals affirmed, finding that article 17.15 required consideration of the safety of the victim and the community. The court of criminal appeals granted the Gills's petitions for review and reversed.

Article 17.15 contains factors to be considered when deciding the reasonableness of bail, and includes the safety of the community and the safety of the victim. The Gills argued that article 17.151 prohibits consideration of these factors, and the court of criminal appeals agreed. Under the plain language of the later statute, when the state is not ready for trial within 90 days of arrest the court must either release the defendant on a personal bond or reduce bail to an amount he can make. "We hold that the court of appeals erred in concluding that the judge properly considered other factors not found in article 17.151."

Alternatively, the state argued that article 17.151 is unconstitutional because it unduly infringes on the trial court's power to set bail and is therefore violative of the state constitution's separation of powers provision. The court disagreed. "We hold that article 17.151 does not unduly interfere with the Judiciary's effective exercise of its constitutionally assigned power and therefore does not violate the separation of powers provision of the Texas Constitution."

> We are troubled that a judge may order the indefinite detention of an uncharged accused on an offense the State is not ready to bring to trial on the basis of his criminal history, the nature of the alleged offense, or that he might present a danger to the victim or the community. It apparently troubled the Legislature as well. Article 17.151 was the remedy. And its assurance of an accused's release when the State was not ready to proceed

with trial after a fixed period of time had expired following the accused's arrest is not an unconstitutional violation of the separation of powers. In failing to comply with article 17.151 and order Appellants' release on a personal bond or reduce Appellants' bail to an amount they can make, the judge abused his discretion.

2. Evidence which did not substantially show defendant's guilt of burglary was insufficient to hold him without bail.

***Spell v. State*, 407 S.W.3d 264 (Tex. Crim. App. 2013)**

Under Article I, § 11a of the Texas Constitution, the state can hold a person without bail if it introduces evidence "substantially showing" his guilt of a felony while on bond for the commission of another felony for which he had been indicted. A substantial showing is "far less than proof beyond a reasonable doubt." Even so, the state failed to meet its burden here to prove that Spell was guilty of burglarizing a home and stealing its copper wiring. Although there was evidence that Spell and his girlfriend had been staying in the home without permission about a week before the burglary was discovered, that was not enough.

> But the owners of the home did not live in the home and no evidence was presented to show when they had last checked the home. There was no showing how long the home had been uninhabited so as to provide a time frame in which the theft of the copper wire could be determined. Other than Appellant's presence in the home for a week, no evidence connected him to the theft of copper wire. [citation omitted] Given the absence of evidence concerning the timing of the theft in the uninhabited home, Appellant's presence in the home, without more, does not substantially show his guilt of burglary.

3. Has the pre-trial bail process "perhaps gone astray of its original statutory purpose"?

***Ex parte Benefield*, 403 S.W.3d 240 (Tex. Crim. App. 2013)**

Benefield was charged with injury to a child and he filed a writ to reduce his bond.

Bond was reduced to $200,000.00, and he appealed to the court of appeals. He lost there and filed a petition for discretionary review which was refused. Judge Cochran wrote a concurring opinion in which she agreed that the petition was properly denied because "because his grounds for review, as written, do not merit relief." She wrote "briefly to discuss whether and why the pretrial-bail process has perhaps gone astray of its original statutory purpose."

> Setting an appropriate bail or permitting pretrial release on a personal recognizance bond is a weighty decision with important considerations and constitutional concerns on all sides. It is, however, a decision that all too often results in the pretrial detention of the accused citizen, despite compelling evidence suggesting pretrial release may be less costly to the community, fairer to the defendant, and, when appropriate conditions are attached, capable of ensuring the safety of the community. Appellate courts must provide meaningful review of the bail and pretrial-release decision to ensure that trial judges strike a constitutional balance between community safety and ensuring a defendant's appearance on one side, and the social and financial costs (both to the State and defendant) of oppressive pre-trial detention on the other.
>
> Because this petition does not clearly raise these difficult issues, I concur in the Court's decision to refuse Mr. Benefield's petition for discretionary review.

4. Challenge excessive bail with a pretrial writ of habeas corpus, not a motion to reduce.

***Ex parte Ragston*, 402 S.W.3d 472 (Tex. App.–Houston [14 Dist.] 2013, pet. granted)**

Ragston was indicted for capital murder, his bond was set at $500,000.00, and he filed a motion to reduce. The motion was denied by the trial court and he filed an interlocutory appeal with the court of appeals. The court of appeals held that it had no jurisdiction to address an interlocutory appeal from a denial of a motion to reduce bond, suggesting that the proper vehicle for raising this complaint is by a pretrial application for habeas corpus, since a ruling on this can be challenged interlocutorily.

The court of criminal appeals granted Ragston's petition for discretionary review to determine this question: "Did the Court of Appeals err in dismissing Appellant's appeal of the denial of a bond reduction motion and in concluding that the Courts of Appeals have no jurisdiction of such appeals?"

BURGLARY

Criminal trespass was not a lesser included offense of the burglary alleged in this indictment.

***State v. Meru*, 2013 WL 6182420 (Tex. Crim. App. 2013)**

Meru was convicted of burglary of a habitation. The trial court granted his motion for new trial finding that it had erred in refusing his request to submit the lesser included offense of criminal trespass. The state argued on appeal that criminal trespass was not a lesser included offense of burglary of a habitation because the former required proof of more than the latter. Specifically, according to the state, "entry," for purposes of trespass requires "intrusion of the entire body," in contrast to burglary, where "entry" requires only proof of intrusion by "any part of the body." The court of appeals rejected the state's argument and affirmed the trial court's decision to grant a new trial.

The court of criminal appeals granted the state's petition for discretionary review, and reversed. Previously the court had held that criminal trespass could be a lesser of burglary of a habitation, but the court had never before considered the the state's argument regarding the different definitions of "entry." "The facts of the present case require us to do so now."

The statutory definition of "entry" means that proof of only a partial entry is insufficient to convict for criminal trespass. But a partial entry would suffice to prove burglary. "Because criminal trespass requires proof of greater intrusion than burglary, the divergent definitions of 'entry' will generally prohibit criminal trespass from being a lesser-included offense of burglary." Criminal trespass could qualify as a lesser of burglary if the burglary indictment alleged a full-body entry into the habitation by the defendant. In this case there was no such allegation, and for that reason the court of appeals erred when it held that Meru was entitled to a lesser instruction.

CAPITAL MURDER

1. Three Judges would revisit *Ex parte Graves*.

***Ex parte Buck*, 2013 WL 6081001 (Tex. Crim. App. 2013)**

Buck was convicted of capital murder and sentenced to death in 1997, and he was unsuccessful on both direct appeal and on his initial application for writ of habeas corpus. Here, the majority dismissed a subsequent application for habeas relief, finding that it did not meet the requirements of 11.071, § 5(a).

Judge Alcala, joined by Judges Price and Johnson, filed a dissenting statement, believing that the record here "reveals a chronicle of inadequate representation at every stage of the proceedings, the integrity of which is further called into question by the admission of racist and inflammatory testimony from an expert witness at the punishment phase." The dissenters thought that Buck's initial habeas counsel was so incompetent that he failed to assert even a single legitimate claim, and that because of his errors, "and the combined force of state and federal procedural-default laws, no Court has ever considered the merits of applicant's legitimate claims for post-conviction relief." This, the dissenters beleived, is not what the legislature intended when it enacted article 11.071.

> I would take this opportunity to revisit *Ex parte Graves*, [70 S.W. 3d 103 (Tex. Crim. App. 2002)], in which this Court held that a claim of ineffective assistance of prior habeas counsel is not cognizable in a capital habeas proceeding and may not serve as a basis to consider a claim raised in a subsequent writ. *See Graves*, 70 S.W.3d at 117–18. I would hold that an applicant for habeas corpus relief under Article 11.071 is statutorily entitled to minimally competent representation by appointed counsel. See Tex.Code Crim. Proc. art. 11.071, §§ 2(a) (providing for representation by competent counsel); 3(a) (mandating that counsel "shall investigate" factual and legal bases for relief). I would further hold that, when an applicant can demonstrate that initial habeas counsel's performance fell below the minimum standards for representation set forth in Article 11.071, and when an applicant can demonstrate that, as a result of counsel's incompetence, a substantial claim for relief was forfeited, this Court may properly exercise its habeas jurisdiction to consider the merits of the underlying claim. Having concluded that the applicant in this case has made such a showing with

respect to his third claim, I would remand this application to the trial court for findings of fact and conclusions of law.

2. Defendant met his burden of making a substantial showing of incompetency to be executed where he presented evidence that, at least some of the time, because of his mental illness, he does not believe that he committed the crime and he does not think he will be executed.

***Druery v. State*, 412 S.W.3d 523 (Tex. Crim. App. 2013)**

Before his scheduled execution, Druery filed a motion to determine his competency to be executed as provided by article 46.05 of the Texas Code of Criminal Procedure. A hearing was held and the trial court found that Druery had failed to make a substantial showing of incompetency. Druery appealed to the court of criminal appeals

Article 46.05(c) requires that a motion to determine competency to be executed be sworn, and Druery's was not, and the first question in this case was whether this deprived the court of criminal appeals of jurisdiction to consider the motion. The state did not object at trial, and had a opportunity to respond, and the trial court considered the motion and supporting documentation. "We conclude that the lack of verification in this case, under these limited circumstances, does not prevent this Court from reviewing the competency motion and the proceedings in the trial court."

The court of criminal appeals next considered whether it had the authority to review the trial court's determination that a defendant failed to make a substantial showing of incompetency. When the competency statute was originally enacted the court of criminal appeals could only review determinations that the defendant was incompetent to be executed. In 2007 the statute was amended giving the defendant the right to appeal, but the amendment contained an ambiguity. "We conclude that Article 46.05 permits us to review a trial court's determination that a defendant has not made a substantial showing of incompetency."

The statute disallows consideration of a competency determination made as the result of a competency motion filed on or after the 20th day before the scheduled execution date. Druery's original motion was timely filed, but he supplemented it less than 20 days before his scheduled execution and the court had to determine whether it was barred from considering the supplemental information. Here the original motion was timely filed and

the state did not object to the supplement. The court of criminal appeals decided to consider the supplement.

Whether a defendant has made a substantial showing of incompetency to be executed is a legal question subject to de novo review on appeal. What constitutes a substantial showing of incompetency? "Under Article 46.05, a "substantial showing" requires more than 'some evidence' of incompetency, but less than establishing incompetency by a preponderance of the evidence. If resolution of the competency motion requires resolving disputed material facts and conflicting credible evidence on the question of the defendant's incompetency, then the defendant has 'made a substantial showing,' and additional fact-finding and a hearing are required under Subsection (k)."

The final question was whether Druery had met his burden, and the court held that he had. "There is evidence that Appellant is aware that he was convicted of capital murder and that, at least some of the time, he knows that he is scheduled to be executed. But because of his mental illness, at least some of the time, he does not believe that he committed the charged crime and, therefore, is not aware that he committed the offense for which he was convicted, and he does not think that he will be executed." This evidence constituted a substantial showing of incompetency. The trial court erred when it weighed evidence of competency and incompetency. The court of criminal appeals ordered that the stay of execution remain in effect pending the outcome of competency proceedings in the trial court.

3. Is the law that prohibits mandatory life without parole against juveniles retroactive?

***Ex parte Maxwell*, 2013 WL 458168 (Tex. Crim. App. 2013(not designated for publication)**

In *Miller v. Alabama*, 132 S.Ct. 2455 (2012), the United States Supreme Court held that it is cruel and unusual punishment to mandatorily sentence a juvenile to life without parole. In *Maxwell*, the court of criminal appeals set the case for submission and ordered the parties to brief the question whether *Miller* applies retroactively, and, if so, what remedy applies.

CHARGING INSTRUMENTS

1. The trial court properly quashed the complaint where it did not give notice.

***State v. Cooper*, 2013 WL 6081452 (Tex. Crim. App. 2013)**

The issue in these cases is whether the appellee was entitled to notice of violations of a municipal code before his subsequent violations of the code could result in convictions. Holding that he was, we affirm the judgments of the courts below.

2. The fraudulent use or possession of identifying information statute is not *in pari materia* with the failure to identify statute.

***Jones v. State*, 396 S.W.3d 558 (Tex. Crim. App. 2013)**

Jones was stopped on two different occasions for speeding and both times she identified herself falsely to the officer, providing another's name, and a fictitious address. She was later indicted for the fraudulent use or possession of identifying information under § 32.51(b) of the Texas Penal Code. She filed a plea to the jurisdiction of the court, asserting that, under the *in pari materia* doctrine, she should have been charged with failing to identify under § 38.02 of the penal code. The trial court disagreed, and the court of appeals affirmed.

The Texas Court of Criminal Appeals affirmed. *In pari materia* arises "wherre one statute deals with a subject in comprehensive terms and another deals with a portion of the same subject in a more definite way." The courts must harmonize statutory conflicts when possible, but where the conflicts are irreconcilable, the more detailed enactment prevails, regardless whether it was passed before or after the more general statute, unless it appears that the legislature intended to make the general act controlling. Additionally, due process requires the state to prosecute under the special statute where two statutes are *in pari materia*.

In ruling against the defense, the court of criminal appeals looked at factors. First, the statutes appear to be aimed at different classes of people. § 32.51 applies broadly to anyone who, with illegal intent, obtains, possesses, transfers, or uses another's identifying information. § 38.02 is much narrower, applying only to persons lawfully arrested or detained who are believed to have witnessed a crime. Second, the plain language and

placement of each statute in the penal code indicate that they do not have the same subject or purpose. § 32.51 deals with the use of another's identifying information without permission. § 38.02's subject is the act of providing police officers with false information. Third, neither offense is a "more narrowly hewn" version of the other, because each offense contains elements that the other does not. Fourth, § 32.51 states that "if conduct that constitutes an offense under this section also constitutes an offense under any other law, the actor may be prosecuted under this section, the other law, or both." That statement clearly states the legislative intent to allow prosecution under either statute despite any potential conflict.

COMPETENCY

The defendant met his burden of showing he was incompetent to be tried where he proved that he was mentally ill, that he obstinately refused to cooperate with counsel, and that his obstinacy was fueled by his mental illness.

***Turner v. State*, 2013 WL 5808250 (Tex. Crim. App. 2013)**

Turner was a very difficult client, charged with capital murder, who had no history of mental illness. All his lawyers had trouble representing him, but two mental health professionals concluded he was competent to stand trial. During voir dire the trial court interrupted the proceedings and got another mental health evaluation, but refused to conduct a formal competency hearing. The case proceeded to trial and Turner was convicted and sentenced to death. He complained on appeal that the trial court erred in not holding a competency trial, and the court of criminal appeals agreed and remanded the case to the trial court. The court reminds us that the standard for getting a formal competency hearing is not an onerous one. The defendant merely must show a scintilla of evidence that would support a rational finding of incompetency, and Turner met that burden here.

> We hasten to emphasize the limited scope of our holding today. This is not a case in which there is some evidence of mental illness but no evidence from which it may reasonably be inferred that the defendant's mental illness renders him incapable of consulting rationally with counsel. Nor is it a case in which there is some evidence that the defendant obstinately refuses to cooperate with counsel but nothing from which to rationally infer that his obstinacy is fueled by mental illness. It is not even a case in which there is some evidence of mental illness, some evidence of obstinacy, but ultimately no rational basis to infer that the obstinacy is a product of the mental illness. None of these scenarios would compel a formal competency trial. Instead, this case presents one of the relatively rare instances in which there is at least some evidence from which it may rationally be inferred not only 1) that the defendant suffers some degree of debilitating mental illness, and that 2) he obstinately refuses to cooperate with counsel to his own apparent detriment, but also that 3) his mental illness is what fuels his obstinacy. Whenever a trial court's informal inquiry establishes that there is some evidence that could rationally support all three of these inferences, it should conduct a formal competency trial.

CONFESSIONS

1. Article 38.22 is mandatory and requires the trial court to make findings of fact and conclusions of law whenever the voluntariness of a statement is at issue, and this is true whether or not either party complains about the lack of findings and conclusions below.

***Vasquez v. State*, 411 S.W.3d 918 (Tex. Crim. App. 2013)**

The trial court admitted Vasquez's confession and he was convicted. The court of appeals reversed his conviction, holding that the police had obtained Vasquez's confession involuntarily by employing the two-step, "question first, warn later" technique that was condemned in *Missouri v. Seibert*, 542 U.S. 600 (2004).

The court of criminal appeals reversed the reversal because the trial court failed to make findings of fact and conclusions of law concerning the confession's voluntariness. Article 38.22 requires findings and conclusions whenever a question is raised about the voluntariness of a confession under either federal or state law. This statute is mandatory. "The statute has no exceptions." Here the trial court erred in not making the required findings and conclusions, even though neither party complained about this at the trial level or in the court of appeals.

> We vacate the judgment of the Court of Appeals and remand the case to that Court with instructions that it be abated to the trial court for findings consistent with *Carter* [*v. State*, 309 S.W. 3d 31 (2010)]. Specifically, the trial court should determine (1) whether the original, unrecorded interview was custodial in nature, (2) whether the appellant was *Mirandized* prior to his original interrogation, (3) if not, whether the police deliberately employed a two-step interrogation process, and (4) if they did, were any curative measures taken before the second confession. After these findings are filed, the case shall be returned to the Court of Appeals.

2. The court of appeals erred in being too deferential to the trial court's finding that the defendant was in custody and in not abating the appeal for more complete findings of fact.

***State v. Saenz*, 411 S.W.3d 488 (Tex. Crim. App. 2013)**

The first officer on the scene thought Saenz showed signs of intoxication, so he told him to turn of his truck and get out of the truck. The officer then placed him unhandcuffed in the back of his patrol car so he could investigate whether he was intoxicated. He called for a DWI specialist who asked Saenz questions that elicited a number of damaging answers. When Saenz failed the field sobriety tests, the second officer placed him under formal arrest for DWI. Saenz moved to suppress his statements arguing that they were the product of custodial interrogation and that he had not been *Mirandized*. The trial court granted the motion to suppress, the state appealed, and the court of appeals affirmed. The court of criminal appeals granted the state's petition for discretionary review and reversed, making two points.

First, whether Saenz was in custody when interrogated was a mixed question of law and fact that did not turn or credibility or demeanor. In such a case, the appellate courts must "(1) a deferential standard of review to the trial court's factual assessment of the circumstances surrounding the interrogation, and (2) a *de novo* review to its ultimate legal determination that appellee was in custody." Here the court of appeals erred in focusing only on the first prong and not determining *de novo* whether the facts amounted to custody under the applicable law.

Second, because the state requested the trial court to make findings of fact and conclusions of law, that court was required to make findings that would provide an appellate court with a basis upon which to review the application of law to facts, and the findings here were inadequate. The court of appeals should have abated the case for more complete findings of fact.

3. Article 38.22 is mandatory and requires the trial court to make findings of fact and conclusions of law whenever the voluntariness of a statement is at issue, and this is true whether or not either party complains about the lack of findings and conclusions below.

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CONFRONTATION

A great case in which the court reminds us of the "categorical requirement" of the Confrontation Clause, and that it is meant to expose "lapses or lies," and to explore "corruption and missteps." "The Constitution does not list exceptions, and so . . . the judiciary should not create them."

***Burch v. State*, 401 S.W.3d 634 (Tex. Crim. App. 2013)**

The state offered a one page lab report to prove that the substance in question was cocaine and the testimony of Lopez, the lab supervisor, who signed the report as "reviewer," and who testified that she "basically" double-checked the work of the "analyst," who, according to Lopez, no longer worked for the lab. Lopez did not explain what she meant when she said she basically double checked the analyst's work, and there was no evidence that Lopez saw the tests being performed or participated in them. The

trial court overruled Burch's confrontation objection and admitted the substance, the lab report, and Lopez's testimony that the substance was cocaine. The court of appeals reversed, finding admission of this testimony violated the Confrontation Clause.

The court of criminal appeals granted the state's petition for discretionary review but affirmed the reversal, and in the process, made several useful observations and holdings on confrontation:

- "'[U]nder no circumstances' shall the defendant be deprived of 'seeing the witness face to face, and … subjecting him to the ordeal of cross-examination.' The very real difficulties and costs involved in making witnesses available at trial cannot trump this categorical requirement. The Constitution does not list exceptions, and so (reasoned the Court) the judiciary should not create them."

- Although the precise determination of what constitutes "testimonial" evidence is not always easy, forensic reports, such as those identifying a substance as cocaine are testimonial. "These reports are formal and created for the sole purpose of establishing or proving a highly relevant fact to a criminal prosecution. However, the issue of exactly who is required to testify in connection with such a report has not been fully resolved."

- This case is controlled by *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011), where the Supreme Court rejected the state's argument that the analyst was only interpreting machine-generated data and that therefore the testimonial statements were from the machine. The original analyst needed to be examined so that the defendant could explore any "lapses or lies" on that person's part. " Even if the results in question involved no interpretation or discretion, the testifying reviewer could not verify that the results were properly generated. Further, the court explained that the defendant had a right to question why the testing analyst was on unpaid leave."

- Burch was entitled to cross-examine the analyst who tested the cocaine. "While we cannot say that anything would have come from a cross-examination of the original analyst, the law does not 'tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination.'"

- It is irrelevant that Lopez signed the report. "Without having the testimony of the analyst who actually performed the tests, or at least one who observed their execution, the defendant has no way to explore the types of corruption and missteps the Confrontation Clause was designed to protect against. It would not, for instance, solve the problem if a laboratory had all of its analysts sign every report. Rather, the witness being called needs to have personal knowledge of the facts in issue—the specific tests and their execution."

- The court rejects the state's attempt to base its argument on Justice Sotomayor's concurrence in *Bullcoming*. "However, this is only one justice's opinion, which does not have the weight of law even if it may indicate the Supreme Court's changing course. This is especially true given that the State concedes that such an outcome is directly in conflict with the majority's unequivocal statement that 'the accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.'"

- The court downplays the effect of *Williams v. Illinois*, 132 S.Ct. 2221(2012). "Williams was a splintered decision in which only an outcome, and not an opinion, received a majority vote. This made its full impact hard to discern." In any event, none of the rationales by the different pluralities in *Williams* "affect the result in this case."

DWI

1. A DWI case that discusses the differences between "accident" and "involuntariness," and "involuntary intoxication."

***Farmer v. State*, 411 S.W.3d 901(Tex. Crim. App. 2013)**

Farmer rear-ended one car, left the scene, and crashed into a light pole at 8 am. He showed signs of intoxication and agreed to a blood test, which showed therapeutic levels of Ultram, (a painkiller) and Ambien (a sleeping pill). He had prescriptions for these and other medications and testified that, although he did not remember taking either on the day of his accidents, he "obviously" had. He had taken the Ultram and Soma (a muscle relaxant) for years for chronic back pain. He had been prescribed the Ambien just four days before the accidents, but he had never before that day taken an Ambien. He had no

memory of taking any medication before his accidents, which happened in the morning, when he was on the way to work. He had no memory of the accidents. His wife testified that she had put out his Ambien and Ultram pills the night before, intending that he take the Ultram before work, but the Ambien at the end of the day, before bed time. She felt responsible because the two pills look alike, and she did not separate them far enough from each other. The trial court refused to instruct the jury that it would be a defense if Farmer involuntarily took the Ambien because he thought it was his muscle relaxant. Farmer was convicted of DWI, and he appealed.

The court of appeals reversed the conviction, holding that Farmer was entitled to an instruction on voluntariness. The court of criminal appeals granted the state's petition for discretionary review and reversed the reversal.

The defense of accident was abandoned by the legislature years ago. Two separate defenses have now replaced what used to be the defense of accident. The first is "involuntary act," which focuses solely on the physical acts of the defendant, and is provided for by § 6.01(c) of the Texas Penal Code. The second is that the defendant lacked the requisite culpable mental state, as provided for by § 6.02 of the Texas Penal Code.

Voluntariness under § 6.01(c) "'refers only to one's own physical body movements[,]' and . . . a movement is considered involuntary only if that movement is 'the nonvolitional result of someone else's act, [was] set in motion by some independent non-human force, [was] caused by a physical reflex or convulsion, or [was] the product of unconsciousness, hypnosis or other nonvolitional impetus. . . .'" An act can be voluntary even if it was accidental or non-intentional. In this case, Farmer claims that he took the pills by mistake, but did not voluntarily take the Ambien. But whether he took the Ambien by mistake or on purpose is irrelevant. Mistake of fact is only a defense to crimes that require a culpable mental state, and DWI does not. "The proper inquiry in this case is whether [he] voluntarily picked up and ingested prescription medication."

> Appellant may have mistakenly taken the wrong prescription medication, but the evidence supports the conclusion that he voluntarily picked up the prescription medication from the microwave and ingested it.FN9 Stated another way, this is not a case of unknowingly or unwillingly taking pharmaceutical medication (similar to Torres); this is a case of knowingly taking pharmaceutical medication but mistakenly taking the wrong one. While we may be sympathetic to a "mistake," Appellant was involved in two

accidents because of his "mistake." Even if Appellant took the medication in error, that error was made because Appellant did not take the time to verify the medication he was taking, although he knew that he was prescribed medications that could have an intoxicating effect.

* * *

We conclude that Appellant's action in taking the Ambien pill was a voluntary act because Appellant, of his own volition, picked up and ingested the Ambien pill. It is of no consequence that Appellant mistakenly took the wrong prescription medication when he knew that he was taking a prescription medication and was aware that he was prescribed medications with intoxicating effects.

Judge Cochran concurred. She noted that although several courts of appeals have held that the affirmative defense of involuntary intoxication is not applicable to DWI prosecutions, the court of criminal appeals has not previously considered that question.

There is nothing in the common law, our law, or the laws of other states that suggest that the affirmative defense of involuntary intoxication does not or should not apply to DWI prosecutions. To punish a person who has acted innocently, without negligence, and while taking all reasonable precautions "would restrain neither him nor any other man from doing a wrong in the future; it could inflict on him a grievous injustice, would shock the moral sense of the community, would harden men's hearts, and promote vice instead of virtue." It also promotes disrespect for the law.

For these reasons, I conclude that Texas does permit the affirmative defense of "involuntary intoxication" in DWI cases. Because appellant offered some evidence of both prongs of the "involuntary intoxication" defense and his first requested jury instruction raised that issue, even if it was not entirely correct, I think that the trial judge erred in refusing any jury instruction on involuntary intoxication. But, because appellant did not raise any issue concerning that particular jury instruction on appeal, he has forfeited that claim now. I therefore agree with the majority's disposition of this case because appellant was not entitled to a jury instruction on a voluntary act under Section 6.01(a) of the Penal Code.

2. This EMT, who in reality was a phlebotomist, was statutorily qualified to take mandatory, involuntary, warrantless blood draws.

***Krause v. State*, 405 S.W.3d 82 (Tex. Crim. App. 2013)**

The officer who arrested Krause for DWI sought a mandatory, involuntary blood draw, without obtaining a warrant, pursuant to § 724.012(b) of the Texas Transportation Code. Krause moved to suppress the blood results because Lopez, the person who drew the blood, was an EMT, and "emergency medical services personnel" are explicitly excluded as persons who are "qualified" to take blood without a warrant under chapter 724. *See* Tex. Transp. Code Ann. § 724.017. The trial court denied the motion to suppress.

Krause was convicted and he appealed. The state argued that the EMT here was qualified because she not "emergency medical services personnel" because she worked in a hospital and regularly performed blood draws. The court of appeals disagreed and reversed. The court was troubled by the fact that in some cases EMTs may be more qualified to take blood than some of those personnel who are permitted by the statute to do so. Nonetheless, the statute unambiguously excludes EMTs, and this is a bright line rule for peace officers to follow that does not lead to absurd results. The court refuses the state's invitation to judicially rewrite this plainly written statute, since that is something that only the legislature can properly do.

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

> The questions in this case are whether, under § 724.017 of the Transportation Code, Lopez was "emergency medical services personnel" and, if so, whether that fact renders her unable to be a "qualified technician" authorized to take blood specimens in driving-while-intoxicated cases. After reviewing Lopez's job duties, we hold that she was not "emergency medical services personnel" and that she was a "qualified technician" within the meaning of the statute.

Although Lopez's job title was EMT-I, her job did not involve emergencies.

Instead, she was a qualified phlebotomist, namely, a technician who draws blood. In fact, Lopez testified that she took anywhere between 50 and 100 blood draws per day. Drawing blood was all that she did, professionally. "Because Lopez did not function as emergency services personnel, § 724.017(c) and its restrictions on emergency services personnel are not applicable in this case."

EVADING ARREST

Is the 2011 enactment of Evading Arrest unconstitutional because it violates the single-subject rule?

***Ex Parte Jones*, 410 S.W.3d 349 (Tex. App.–Houston [14 Dist.] 2013, pet. granted).**

> Appellant is charged with evading arrest–use of vehicle, a third-degree felony. *See* Tex. Penal Code Ann. § 38.04 (West Supp.2012). In a pre-trial application for writ of habeas corpus, appellant argued he is illegally restrained because the legislative bill which amended punishment for his offense violated the "single-subject rule" of the Texas Constitution. *See* Tex. Const. art. III, § 35. Specifically, appellant contends that, because the subject

of Senate Bill 1416 ("SB 1416") was tire deflation devices, the inclusion of an additional subject in the bill—amending punishment for evading arrest–use of vehicle—violated the single-subject rule. The trial court denied appellant's application, and appellant filed this accelerated appeal. See Tex.R.App. P. 31.2. We affirm.

The court of criminal appeals granted Jones petition for discretionary review to determine whether "The court of appeals erred in finding that SB 1416, which amended Penal Code Section 38.04(b), did not violate the 'Single Subject' provision of the Texas Constitution, Art. III, Section 35."

EXPERTS

1. Due process was violated where the forensic scientist at DPS did not follow accepted standards when analyzing evidence and where the sample in question was destroyed and cannot be retested.

***Ex parte Turner,* 394 S.W.3d 513 (Tex. Crim. App. 2013)**

Turner was convicted of possession of a controlled substance and later filed an application for writ of habeas corpus.

> Applicant contends that her due process rights were violated because a forensic scientist did not follow accepted standards when analyzing evidence and therefore the results of his analyses are unreliable. * * * The DPS report shows that the lab technician who was solely responsible for testing the evidence in this case is the scientist found to have committed misconduct, and the evidence in this case has been destroyed and therefore cannot be retested. Applicant is therefore entitled to relief.

2. Due process was violated where the forensic scientist at DPS did not follow accepted standards when analyzing evidence even though evidence was available to retest, because that evidence was in the custody of the lab technician who committed the misconduct, thereby compromising the custody.

***Ex parte Hobbs,* 393 S.W.3d 780 (Tex. Crim. App. 2013)**

Hobbs was convicted of possession of a controlled substance and later filed an application for writ of habeas corpus.

> Applicant contends that his due process rights were violated because a forensic scientist did not follow accepted standards when analyzing evidence and therefore the results of his analyses are unreliable. A Department of Public Safety report shows that the lab technician who was solely responsible for testing the evidence in this case is the scientist found to have committed misconduct. While there is evidence remaining that is available to retest in this case, that evidence was in the custody of the lab technician in question. This Court believes his actions are not reliable; therefore custody was compromised, resulting in a due process violation. Applicant is therefore entitled to relief.

EXTRANEOUS MISCONDUCT

Admission of 9,900 images of pornography in sexual assault cases violated Rule 403 because of its sheer volume.

***Pawlak v. State*, 2013 WL 5220872 (Tex. Crim. App. 2013)**

Over Pawlak's objections, the court admitted approximately 10,000 pornographic images during his trial for sexual assault, sexual assault of a child, and attempted sexual assault. Some of these depicted "gay porn," and some child pornography. The court of appeals affirmed, and the court of criminal appeals reversed the conviction, finding that the trial court abused its discretion under Rule 403 of the Texas Rules of Evidence when it " admitted all 9,900 images of pornography in the form of extraneous-offense evidence, including homosexual child pornography."

The court agreed that the state might have needed the male pornography to rebut Pawlak's claims that he was not interested in men. However, he this evidence did not show that the charged offenses – assault or attempted assault – were more likely to have occurred. Additionally, five complainants testified about specific instances of sexual misconduct, and the similarities in their stories were striking, so this was not a "he said, she said" situation. Furthermore, the potential of this extraneous evidence to prejudice the jury in some irrational but unforgettable was high, given the inherent prejudice involved with sexual misconduct and crimes against children. Although Rule 403 does not allow the exclusion of evidence merely because it is prejudicial, evidence can become *unfairly* prejudicial by its sheer volume.

> Under these facts, the sheer volume of extraneous-offense evidence was unfairly prejudicial and invited the jury to convict Appellant of sexually assaulting or attempting to sexually assault the victims because Appellant possessed 9,900 images that included homosexual child pornography. The facts of this case do not require us to determine the exact point at which the admission of voluminous amounts of extraneous-offense character evidence crosses the threshold to unfairly prejudicial. Even if we were to decide that at least some of the extraneous-offense digital images of pornography were admissible, the trial court abused its discretion when it admitted all 9,900 images of pornography without regard to the amount of evidence, kind of evidence, or its source, and over Appellant's Rule 403 objection.

GUILTY PLEA

1. Everything you need to know about error, waiver, and harm when the trial court cuts corners when admonishing a guilty-pleading defendant about the range of punishment he faces.

***Davison v. State*, 405 S.W.3d 682 (Tex. Crim. App. 2013)**

Davison pleaded guilty to burglary of a building, ordinarily a state jail felony, and he was admonished accordingly. At the same time, though, he pleaded true to three enhancement paragraphs, which made him susceptible to second degree felony punishment. At sentencing four months later the probation officer testified that Davison was subject to punishment for a second degree felony, but she did not specify the range of punishment. Just before the parties made their closing arguments on punishment, the court remarked that the case 'was punishable by two to twenty," but he did not mention a fine or otherwise elaborate. After the arguments the court sentenced Davison to 20 years imprisonment, but imposed no fine. At no point did the court ever formally admonish Davison as to the proper range of punishment for an enhanced offense.

Davison raised two complaints on direct appeal, that the trial court failed to comply with article 26.13(a)(1) by not admonishing about the proper range of punishment, and that this failure also rendered his plea involuntary under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The court of appeal affirmed the conviction, finding that the trial court erred under both the statute and the constitution by improperly admonishing Davison about the range of punishment; that the statutory error was not waived by the failure to object but that the constitutional error was; and that both the statutory and constitutional errors were harmless.

The court of criminal appeals affirmed the result of the court of appeals, but for slightly different reasons.

The court first pointed out the differences between statutory and constitutional challenges to guilty-plea admonishments. "Although the statute is obviously intended to facilitate the entry of adequately informed pleas of guilty or nolo contendere, any claim that the trial court failed to follow the mandate of the statute is separate from the claim that the guilty plea was accepted in violation of due process."

The court of criminal appeals seemed to have no difficulty finding that the trial court erred under the statute, article 26.13. The court also rejected the state's argument that Davison had waived his right to bring this challenge on appeal by not objecting in the trial court. Article 26.13 puts a duty on the trial court to act *sua sponte*, thereby creating a right that is "waivable only." "Therefore, a breach of the statute may be raised for the first time on appeal." Unfortunately for Davison, this statutory error was harmless under Rule 44.2(b). In determining harm, the appellate courts must look at the entire record. When he entered his plea, Davison was on notice of the enhancement paragraphs in the indictment, and he acknowledged that he had read them and that they were true and correct. Later, at sentencing, when the trial court sentenced him to 20 years imprisonment he made no complaint. Although his failure to complain was not a forfeiture of his right to do so, his "nonchalance" did support the inference that, at the time he entered his plea, he must have been aware that the enhancement paragraphs served some purpose, namely, subjecting him to a higher range of punishment than "the naked charge of burglary of a building."

Davison also struck out constitutionally. As it did with regard to Davison's statutory argument, the court of criminal appeals rejected the court of appeals's holding that error was waived by the failure to object. It would be anomalous to hold that constitutional error is waivable when its statutory counterpoint is not. Unless the appellate record reveals a voluntary and understanding guilty plea, the reviewing courts must presume it was not, and rule accordingly. "The system simply will not tolerate the entry of a guilty plea on the basis of a record devoid of any indication that the defendant possessed 'a full understanding of what the plea connotes and of its consequence'. . . . [A] claim that the record is absolutely unrevealing with respect to whether a guilty plea was entered intelligently—is not subject to ordinary principles of procedural default. The court of appeals erred to the extent that its opinion may be read to conclude otherwise." Moreover, the court of appeals also erred when it found that Rule 44.2(b) is the standard for determining the harmfulness of this constitutional error. That rule expressly applies to non-constitutional error. Rule 44.2(a) governs constitutional error, and, of course, it governs this constitutional error as well.

Interestingly, though, after first determining that the court of appeals wronged Davison regarding preservation and harm, the court of criminal appeals went on to find that there was no constitutional error to begin with. As is constitutionally required under *Boykin v. Alabama*, 395 U.S. 238 (1969), Davison was admonished that his guilty plea waived his right to trial by jury, confrontation, and his privilege against self-incrimination, and, as such, "the record is not altogether silent with respect to whether the appellant understood the consequences of his plea." Even assuming, however, that a record's silence with respect to the range of punishment was " alone sufficient to trigger Boykin's appellate

presumption, the record in this case is not totally "silent" with respect to appellant's knowledge of the applicable range of punishment when he entered his plea." As noted with regard to the statutory violation, it can be inferred here that Davison was not ignorant of the range of punishment. "Thus, the record in this case fails to engage *Boykin's* appellate presumption that due process was violated because the appellant entered an unintelligent guilty plea. Nor does the record affirmatively refute the inference, deriving from the appellant's failure to protest when the greater punishment range that was mentioned during the punishment proceedings was actually imposed upon him at sentencing, that he must have been aware of his susceptibility to that greater range—even as of the time he entered his guilty plea—despite the trial court's inaccurate admonishment."

Although Davison fared poorly on direct appeal, the court did give him, and others like him, some hope for future relief in footnote 60:

> Our holding today would not foreclose the appellant from obtaining relief in a post-conviction habeas corpus proceeding in the event that he may be able to allege and prove facts beyond what is revealed in the appellate record that are sufficient to establish to our satisfaction that he was in fact unaware of the accurate range of punishment at the time he entered his guilty plea in this cause. We merely hold today that the appellate record does not trigger the *Boykin* presumption or otherwise demonstrate a violation of due process.

2. An examination of the totality of evidence reveals that boilerplate language in the written plea agreement purporting to waive the right of appeal did not override defendant's right to appeal based on the trial court's permission that he do so.

***Ex parte De Leon*, 400 S.W.3d 83 (Tex. Crim. App. 2013)**

De Leon and his brother were indicted for several sex crimes, and De Leon pleaded guilty. One of the terms of his plea bargain was that the state would dismiss the indictment against his brother. De Leon agreed at one place in the written plea agreement that he could only appeal pretrial matters that were heard by the trial court, or if the trial court gave him permission to appeal. In another place in the plea papers, De Leon "expressly" agreed to waive appeal if the trial court followed the plea bargain. Orally, the trial court admonished him that he had no right to appeal unless it involved pretrial motions ruled on by the court, or unless he was granted permission to do so. The court followed the plea

bargain, but a few days after the plea was done De Leon filed a motion to withdraw his plea, asserting that his trial counsel was ineffective. The trial court refused to allow De Leon to withdraw his appeal. The state objected to the appeal, and re-indicted De Leon's brother.

The court of appeals rejected the state's argument that De Leon had waived his right to appeal, holding that the appeal was authorized by the trial court's permission to appeal. The court of appeals affirmed the conviction, and the court of criminal appeals affirmed.

Later De Leon filed a writ of habeas corpus asserting that the state breached the plea bargain when it re-indicted his brother, and the court of criminal appeals granted relief.

The reference in the written plea bargain to waiver of appeal was not a binding element of the plea agreement. Instead, the court looks to the totality of evidence in the record and finds it clear that this written language was not intended to override the trial court's permission to appeal.

> Applicant did not breach the agreements when he obtained the court's permission to appeal and appealed. Consequently, the State breached the agreements when it reindicted Applicant's brother. The plea papers provided, and the trial judge stated, that the charges against Applicant's brother would be dismissed pursuant to the plea agreements. Once the trial court accepted the plea agreements, the State was bound to the terms, and Applicant was entitled to the benefit of his bargain, that is that his brother not face criminal charges.

HABEAS CORPUS

1. Counsel was ineffective, but applicant was not actually innocent.

***Ex parte Villegas*, 2013 WL 6636458 (Tex. Crim. App. 2013)**

Following his conviction for capital murder and life sentence, Villegas filed a writ asserting that he was actually innocent and that he had received ineffective assistance ov counsel. The trial court held a hearing and recommended that relief be granted for both reasons. The court of criminal appeals agreed that counsel was ineffective "for not presenting evidence of possible alternative perpetrators and for not discovering and presenting evidence that would have allowed the jury to give effect to the voluntary confession jury instruction submitted in this case." The court disagreed that Villegas had established his actual innocence as required by *Schlup v. Delo*, 513 U.S. 298 (1995).

> In a *Schlup* actual-innocence claim, evidence demonstrating innocence is a prerequisite the applicant must satisfy to have an otherwise barred constitutional claim considered on the merits. [citation omitted] In this case, the trial court found that Sixth Amendment ineffective assistance of counsel violations, combined with the cumulative evidence of innocence, showed that Applicant was actually innocent. Because Applicant's ineffective assistance of counsel claims are not procedurally barred as subsequent, a *Schlup* innocence claim dependent on them is improper. We further find that Applicant has not shown that new facts "unquestionably establish" his innocence. *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex.Crim.App.1996).

2. DNA testing that excluded the complainant's blood from a knife associated with the defendant did not show the defendant's actual innocence.

***Ex Parte Holloway*, 413 S.W.3d 95 (Tex. Crim. App. 2013)**

Holloway was convicted of manslaughter of Lee by stabbing him with a knife. At least six witnesses testified that they either saw Holloway with a knife, or that they saw him stab someone during the melee. Two witnesses testified that they saw Holloway stab Lee. Two other witnesses testified that they were also stabbed by Holloway. A knife was found in Holloway's car and it tested presumptively positive for blood. Several witnesses

testified that this knife looked like the one Holloway used, and a police officer testified that the knife qualified as a deadly weapon. After trial Holloway moved for DNA testing of the knife under Chapter 64, the testing was ordered, and it excluded Lee as the donor of the blood on it. Holloway then argued that this showed his actual innocence. The trial court recommended that relief be granted. The court of criminal appeals disagreed.

> However, the absence of Ashley Lee's DNA from the stains on the knife is not clearly exculpatory, as argued by Applicant. The testimony at trial indicated that Applicant stabbed at least two other people during the fight and suggested that he may also have cut his wife's hand while she was trying to extricate him from the fight. The absence of fingerprints on the knife was explained at trial by the possibility that the knife had been wiped off prior to its discovery. Such cleaning could also have removed some or all of Ashley Lee's DNA from the knife.
>
> Furthermore, even if, as Applicant argues, the knife was "the piece of tangible evidence" upon which the jury relied to convict him, there was ample "intangible" evidence that Applicant stabbed several people with a knife on the night of the offense, including the testimony of people who saw Applicant stab people, and people who were themselves stabbed.
>
> The results of the Chapter 64 DNA testing in this case do not show by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence. Even if evidence had been presented at trial that Ashley Lee's blood was not on the knife discovered in Applicant's car, it is unlikely that such evidence would have overcome the testimony of the witnesses who saw Applicant with a knife, saw Applicant use the knife, or were themselves injured by the knife wielded by Applicant, whether or not it was the same knife found in his car after the offense.

3. Subsequent writ must be dismissed where the applicant could not possibly establish that *Padilla* applied to the facts of his case because *Padilla* does not apply retroactively.

***Ex Parte Oranday-Garcia*, 410 S.W.3d 865 (Tex. Crim. App. 2013)**

Applicant filed an application for writ of habeas corpus under article 11.07 alleging

that his guilty plea was involuntary because his trial lawyer performed deficiently by advising him that his conviction would not result in deportation. The trial court recommended that relief be denied based on the trial lawyer's affidavit that denied applicant's allegations, and the court of criminal appeals denied relief in 2009. later the applicant filed a subsequent application relying on the same facts, but claiming that he had a new legal basis following the *Padilla* decision, and that his subsequent writ was barred under 11.07, § 4(a)(1). The court of criminal appeals disagreed and dismissed the application.

To satisfy 4(a)(1), an applicant must establish not only that a new legal basis for relief exists, but also that the facts alleged are sufficient to bring him within the ambit of that new legal basis for relief. A subsequent writ will be dismissed as abusive if it fails to make out a prima facie case for relief under the new law identified. In this case, the applicant cannot possibly establish that *Padilla* applies to the facts of his case because *Padilla* does not apply retroactively.

4. Writ lawyers beware: Do it right the first time, or fix it fast, or lose.

***Ex Parte Pond*, 2013 WL 4819719 (Tex. Crim. App. 2013)(J. Cochran, concurring)**

Pond filed his 11.07 writ in the convicting court on February 5, 2013 asserting that his counsel was ineffective. For the most part, Pond's assertions failed to show that counsel's omissions harmed him, or that there was a reasonable probability that the result of the trial would have been different absent the omissions. Twenty days after the writ was filed, the state filed its answer pointing out various deficiencies in the writ, and also filed proposed findings of fact and conclusions of law. The prosecutor certified that he sent a copy to Pond's writ lawyer, but Pond did not attempt to cure the complained-of deficiencies. Three days after the state filed its proposed findings and conclusions, the trial court signed them, and shortly thereafter the district clerk notified Pond's lawyer and forwarded the writ to the court of criminal appeals. On May 1, 2013 the court of criminal appeals denied relief, and Pond's lawyer had not tried to supplement his writ or cure any of the deficiencies pointed out by state or the trial court.

Pond's Suggestion That The Court Reconsider On Its Own Initiative The Denial Of Habeas Corpus Relief was denied without opinion. Judge Cochran, joined by Judges Johnson and Hervey, wrote "separately to address the importance of (1) filing a complete

original application for a writ of habeas corpus that contains all necessary information and materials, and (2) responding in a timely manner to the State's answer and its submission of 'Proposed Findings of Fact and Conclusions of Law.'" The materials Pond finally sent the court, along with his suggestion for reconsideration came too late:

> Applicant should have filed a complete original application for a writ of habeas corpus, including whatever briefs, memoranda, affidavits, or evidentiary materials he wished the trial judge and this Court to consider. Alternatively, he should have responded in a timely manner to the State's answer and its proposed findings of fact. Even if he had not received the district clerk's letter concerning the trial judge's signing of the State's factual findings, he was on notice that the trial judge was likely to find that there were "no controverted, previously unresolved facts material to the legality of the applicant's confinement," and therefore the trial judge would "immediately transmit" the writ record to this Court for a final determination. It is applicant's responsibility to ensure that he has submitted all appropriate materials in a timely manner to the convicting court, preferably before those materials are transmitted to this Court, but necessarily before this Court takes action on the application.

5. Can the inadvertent-use-of-false-evidence doctrine be used to make a claim against Denkowski "cognizable" in habeas corpus?

***Ex parte Gallo*, 2013 WL 105277 (Tex. Crim. App. 2013)(not designated for publication)**

In 2004 a jury answered the special issues in a way that required the trial court to sentence Gallo to death, and the same jury decided he was not mentally retarded. After losing on direct appeal, Gallo filed an application for writ of habeas corpus and sometime after this, George Denkowski entered a settlement agreement with the Texas State Board of Examiners of Psychologists in which he agreed not to conduct mental retardation evaluations in criminal cases. The writ complained that Gallo was denied a fair trial and various other enumerated constitutional rights because of Denkowski's evaluation and testimony in his case, and the trial court, in its findings of fact and conclusions of law "evaluated the merits [of Gallo's habeas claims] in light of the Denkowski Settlement Agreement," and recommended that relief be denied. Without much elaboration, the court of criminal appeals adopted most of the trial court's findings and recommendations, and denied relief.

Judge Price filed a concurring statement in which he agreed that Gallo had not shown himself entitled to habeas relief on the basis he relied on – namely that his trial and appellate counsel had been ineffective in preserving and bringing forward his claim under Rule 702 of the Rules of Evidence. Judge Price suggested, however, that Gallo may yet have a vehicle for raising this claim and making it cognizable in habeas. Judge Price referred to *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009), in which the court recognized for the first time that applicants in Texas can base habeas claims on the state's inadvertent use of false testimony. More than just a little cryptically, Judge Price ended his concurrence in this way:

> It is conceivable that the applicant could satisfy the conditions for proceeding to the merits of a claim in a subsequent writ application that are embodied in Article 11.071, Section 5(a)(1) of the Code of Criminal Procedure. After all, it is at least arguable that there exist both new facts and new law that were unavailable to him when he filed his initial writ application. I express no opinion, of course, with respect to the likelihood of success he might attain pursuing such a subsequent writ claim.

6. Although the defendant's sentence was illegally enhanced with a state jail felony, he could not show harm, since it was undisputed that he had other felony convictions that the state could have relied on for enhancement, other than the state jail felony that it actually used; "Granting relief to a defendant who is only fictionally harmed is contrary to the type of relief for which the great writ, an extraordinary remedy, was intended."

***Ex Parte Parrott,* 396 S.W.3d 531 (Tex. Crim. App. 2013)**

Parrott's indictment alleged a third degree felony and contained an enhancement paragraph that alleged a prior conviction for a state jail felony. He pled guilty to a recommended 15 year sentence, and, after admonishing him that the range of punishment, because of the enhancement, was two to twenty years imprisonment, the trial court followed the plea agreement and sentenced him accordingly. Later Parrott filed a writ of habeas corpus, asserting that his sentence was illegal because the law does not permit enhancement with a state jail felony. The court of criminal appeals denied relief.

The good news for Parrott was that the court agreed that his sentence was illegal because it was not authorized by statute, and also that this challenge to an illegal sentence

was cognizable in habeas. And that was the last good news Parrott got in this opinion.

Although Parrott's claim was cognizable, the court found it without merit because, despite the fact that he had been sentenced illegally, he failed to show that he had been harmed. This was so because, although the conviction that the state actually used in the indictment to enhance was merely a state jail felony, and therefore not properly useable for enhancement, it was shown during the habeas proceedings that Parrott had also been twice previously convicted of real felonies (besides the state jail felony that was alleged in his indictment). "Because the entirety of the record supports a second-degree punishment, applicant has not shown that he was harmed by the error."

Parrott acknowledged that his criminal history would have properly supported an enhanced sentence, but he argued that he was harmed because his indictment did not give him proper notice, since it alleged only the state jail felony. The court disagreed, observing that, while the lack of notice might result in harm (if it is shown that this had a sufficient impact on the defendant's ability to prepare a defense), "lack of notice is not, in and of itself, harm." The court pointed out that the law has changed significantly over the last 40 years. Where once it was required that a defendant be notified in his indictment of any enhancements the state intended to rely on, "times have changed." Texas law no longer requires that notice of prior convictions be provided in the indictment, or even that it be provided prior to trial, as long as the notice that is actually given is "pled in some form," and in a fashion that does not impair the defense. In this case, the state notified Parrott of its intent to use his other felony convictions when it responded to his writ, and although given the opportunity to challenge the validity of these convictions, he failed to do so.

> Applicant has failed to contest the State's evidence that establishes that his actual criminal history supports the range of punishment within which he sentenced and properly admonished. Granting applicant relief would serve only to provide him an additional opportunity to contest prior convictions that the trial court, in these proceedings, has already determined are valid. Granting relief to a defendant who is only fictionally harmed is contrary to the type of relief for which the great writ, an extraordinary remedy, was intended.

7. Article 11.07, §4 severely limits the rights of applicants to file subsequent writs of habeas corpus. Severely, indeed.

***Ex parte Sledge,* 391 S.W.3d 104 (Tex. Crim. App. 2013)**

Sledge was put of deferred adjudication for sexual assault of a child, and three days after his period of community supervision expired, the state filed a capias for his arrest based on his commission of two new offenses. The trial court entered an adjudication of guilt and sentenced Sledge to five years imprisonment. Sledge did not appeal, but later he did file an application for writ of habeas corpus claiming that the evidence was insufficient to support his conviction. The court of criminal appeals denied relief, and still later, Sledge filed a subsequent application of writ of habeas corpus, this time complaining that the trial court had no jurisdiction to enter an adjudication of guilt because the capias was not filed until after his probation period had expired.

> While we are not unsympathetic to the applicant's claim, this Court lacks the authority to grant him relief. Because this is a subsequent post-conviction writ application, we are barred by the abuse of the writ doctrine, as codified by Section 4 of Article 11.07, from reaching the merits of that claim, much less granting relief. Section 4 of Article 11.07 contains three statutory exceptions to the general rule that bars consideration of a subsequent post-conviction writ application, but the current application "contains" no "sufficient specific facts establishing" any of the enumerated exceptions. The application fails to contain facts that establish either new law, new facts, or actual innocence.

The dissent argued that even though this application did not meet the new law, the new facts, or the actual innocence exceptions, the trial court here lacked jurisdiction, and lack of jurisdiction can always be attacked collaterally. The majority disagreed.

> In Section 4 of Article 11.07, the Legislature has explicitly prescribed the only circumstances in which we may reach the merits of a subsequent post-conviction writ application. "[I]t is not for the courts to add or subtract" from that enactment. We have long held that the Legislature is authorized to circumscribe post-conviction habeas procedure in precisely this way. As none of the above statutory exceptions provides an appropriate vehicle to review the merits of the applicant's claim—much less grant relief—under Section 4,

this Court has no choice but to dismiss the instant application.

8. Don't plead without a lab report.

***Ex parte Garcia*, 2013 WL 1182735 (Tex. Crim. App. 2013)(not designated for publication)**

Garcia pled guilty to possessing more than four ounces of marijuana, a felony, and was sentenced to three years imprisonment. Later the lab report came back and showed that the amount of marijuana possessed was less than four ounces, and Garcia filed a writ, asserting that his plea was involuntary because he was actually innocent. "The parties agree that Applicant would not have pleaded guilty in exchange for a three-year sentence had he known that the State could only have proved that he possessed a misdemeanor quantity of marijuana. Relief is granted."

9. An "amended" writ is not a "subsequent" writ if it only corrects clerical errors and "provides only further evidentiary and legal support and does not assert additional claims or expand upon a claim raised."

***Ex parte Halprin*, 2013 WL 1150018 (Tex. Crim. App. 2013)(not designated for publication)**

After filing his initial application for a writ of habeas corpus in his death penalty case, Halprin filed what he called an "amended" application. The trial court concluded this was a "subsequent" application, which, if true, would have to be dismissed unless it met certain strict requirements. The court of criminal appeals rejected this finding, holding that the amended writ for the most part merely corrected certain clerical errors, and that "[a]ny additional language provides only further evidentiary and legal support and does not assert additional claims or expand upon a claim raised."

10. A new, expanded common law doctrine of laches replaces the more rigid federal standard.

***Ex Parte Perez*, 398 S.W.3d 206 (Tex. Crim. App. 2013)**

Perez was convicted of murder in 1992 and his conviction was affirmed by the court of appeals later that same year. In 2011, almost 20 years later, Perez filed a writ complaining that he was denied his right to file a petition for discretionary review with the court of criminal appeals because his lawyer had not timely notified him of affirmance by the court of appeals. The state cried laches and urged that Perez be barred from post conviction relief.

Texas has long recognized the doctrine of laches, but has used the federal laches standard, and that standard differs significantly from the Texas common law standard. Specifically, to bar relief under the federal standard, the state was required to make a particularized showing that granting habeas relief would prejudice the state in its ability to respond to the allegations in the habeas petition. In contrast, all the Texas common law standard required was that the state make a showing of prejudice based on a good faith change of position to it detriment because of the delay.

In this case, the court of criminal appeals rejected the federal standard for three reasons: first, the federal habeas standard no longer applies in federal court, having been replaced by a one year statute of limitations; second, several states have recently rejected the federal standard as not current, too narrow, and overly rigid; third, the federal standard has proven to rigid to effectively serve as an equitable standard, creating an impossibly high burden on the state.

> Consistent with the common-law doctrine of laches, going forward, we will (1) no longer require the State to make a "particularized showing of prejudice" so that courts may more broadly consider material prejudice resulting from delay, and (2) expand the definition of prejudice under the existing laches doctrine to permit consideration of anything that places the State in a less favorable position, including prejudice to the State's ability to retry a defendant, so that a court may consider the totality of the circumstances in deciding whether to grant equitable relief.

The court refused to adopt the state's argument that a rebuttable presumption of prejudice applies after five years, it did agree that "the extent of the prejudice the State must show bears an inverse relationship to the length of the applicant's delay." That is, a sliding scale will be used, meaning that the longer the delay, the less prejudice the state will have to show, "particularly when an applicant delays filing for much more than five years after conclusion of direct appeals."

Aside from the changes discussed above, we leave intact the equitable principles that permit a court to reject the State's reliance on laches when the record shows that

> • an applicant's delay was not unreasonable because it was due to a justifiable excuse or excusable neglect;
>
> • the State would not be materially prejudiced as a result of the delay; or
>
> • the applicant is entitled to equitable relief for other compelling reasons, such as new evidence that shows he is actually innocent of the offense or, in some cases, that he is reasonably likely to prevail on the merits.

IMMIGRATION

1. Although the court of criminal appeals could have held that *Padilla* applied retroactively under state habeas law, it chose to follow lockstep with the United States Supreme Court.

***Ex parte De Los Reyes*, 392 S.W.3d 675 (Tex. Crim. App. 2013)**

In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the United States Supreme Court held "that counsel must inform her client whether his plea carries a risk of deportation." *Id*. at 1486. "When the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." *Id*. at 1483.

In *Chaidez v. United States*, 133 S.Ct. 1103, (2013), the Court held that *Padilla* does not apply retroactively. That is, it does not apply to a person whose conviction was final at the time *Padilla* was decided, namely, March 31, 2010.

In this case, De Los Reyes became deportable following his second conviction for

misdemeanor theft, and the second conviction became final in 2004, long before *Padilla* was decided.

> We recognize that we could accord retroactive effect to *Padilla* as a matter of state habeas law. [citation omitted] But we decline to do so. We adhere to the retroactivity analysis in *Chaidez* and its holding that *Padilla* does not apply retroactively.

The court made the same ruling in the following published decisions: *Ex parte Tanklevskaya*, 393 S.W.3d 787 (Tex. Crim. App. 2013); *Aguilar v. State*, 393 S.W.3d 787 (Tex. Crim. App. 2013); *Ex Parte Romero*, 393 S.W.3d 788 (Tex. Crim. App. 2013).

2. *Padilla* is not retroactive.

***Ex parte Enyong*, 397 S.W.3d 208 (Tex. Crim. App. 2013)**

Some time after pleading guilty to assault and violation of a protective order, Enyong filed a writ asserting that his trial counsel had been ineffective under *Padilla v. Kentucky*, 559 U.S. 356 (2010), for failing to advise him of the immigration consequences of his pleas. The trial court denied relief, but the court of appeals reversed. The court of criminal appeals reversed the reversal, in light of the Supreme Court's recent decision in *Chaidez v. United States*, 133 S.Ct. 1103 (2013), which held that *Padilla* is not retroactive, and *Ex parte De Los Reyes*, No. PD–1457–11, __ S.W.3d __ (Tex.Crim.App. March 20, 2013), which adopted the reasoning in *Chaidez* as a matter of state law.

> The Court of Appeals in the instant case did not have the benefit of our opinion in *Ex parte De Los Reyes*. Therefore, we grant the State's petition for discretionary review, vacate the judgment of the Court of Appeals, and remand this case to the Court of Appeals in light of *Ex parte De Los Reyes*.

3. Undocumented person was not entitle to vacate his deferred adjudication for a multitude of reasons.

***Guerrero v. State*, 400 S.W.3d 576 (Tex. Crim. App. 2013)**

Guerrero entered this country illegally when he was 12 years old. As a junior in high school he pleaded guilty, without a lawyer, to possession of under two ounces of marijuana in 1998 and received deferred adjudication probation for 180 days. In 2009 he was stopped for a traffic violation, and when it was discovered that he was undocumented and that he had pleaded guilty to the marijuana case, the federal government initiated deportation proceedings. Two years later he filed a motion to vacate the 1998 case, asserting that he was not represented by counsel, nor was he advised by the judge of the consequences of his plea. At the hearing on this motion, Guerrero's lawyer advised the judge that he was facing deportation because of the plea. The state countered with a signed waiver of counsel. The defense answered that nobody asked Guerrero about his immigration status, and asked whether the court wanted to hear from Mr. Guerrero. the court declined the invitation to hear from Guerrero and granted relief. Later the state filed a motion to reconsider, which was denied, and the state appealed.

The court of appeals affirmed the trial court's order, but the court of criminal appeals granted the state's petition for review and reversed.

Article 11.072 of the code of criminal procedure sets out the procedures that must be followed when one collaterally attacks a proceeding in which the sentence that is challenged was probated, and this is the only way that such proceeding may be attacked. One who attacks his guilty plea bears the burden of defeating the usual presumption that recitals in a written judgment are correct. Absent direct proof of falsity, those recitals are binding. The trial court is the finder of fact in an 11.072 proceeding, and its decision will be treated deferentially. An applicant's live, sworn testimony is a sufficient basis for upholding a trial court's decision to grant relief in such a case. Moreover, appellate courts will uphold a trial court's decision where it is supported by affidavits, depositions, or interrogatories. "But in all habeas cases, sworn pleadings are an inadequate basis upon which to grant relief, and matters alleged in the application that are not admitted by the State are considered denied."

Here Guerrero did not meet his burden of proving, by a preponderance of the evidence, the facts that would entitle him to relief. He did not file a proper habeas application under article 11.072 and counsel's statements were not competent evidence. Even had counsel's statements been competent evidence, they did prove that he was denied counsel.

There is no such thing as a motion to vacate and by filing such a thing, counsel risked having it dismissed. However, since the parties, the trial court, and the court of

appeals all considered the pleading a cognizable writ of habeas corpus, and because it contained facts, if proven, that might have entitled Guerrero to relief, the court of criminal appeals treated the motion as if it were a writ.

That did not help Guerrero much, though. Though treated as cognizable, the document was not sworn, it was not accompanied by any depositions, interrogatories, or affidavits, and Guerrero presented no live witnesses at the hearing. The only evidence was put on by the state in the form of a written waiver of counsel, and this was presumed regular. Thus there was no evidence that Guerrero was denied counsel. Although there is a rule that allows counsel's statements to be taken as evidence when not objected to, that rule only applies to statements that counsel has first-hand knowledge of, and that was not the case here, since habeas counsel had no personal, first-hand knowledge of the the plea proceedings in 1998.

The court of criminal appeals could have remanded the case for further proceedings, but refused to do so here, because even if counsel's statements were accepted as competent evidence, Guerrero would not be entitled to relief. contrary to what the court of appeals held, Guerrero's it was not involuntary simply because it was conditioned on his waiver of counsel. Additionally, ignorance of possible deportation consequences did not render the waiver of counsel or the plea unconstitutional. *Padilla* does not apply retroactively, and this is also true even though Guerrero received deferred adjudication. Nor was he entitled to immigration admonishments before his plea could be recognized as knowing and voluntary. Guerrero was undocumented and was deportable for that reason alone. Even had he gone to trial on the misdemeanor in 1998 and won, he could have been deported. The possibility of removal therefore could not have affected his decision to waive counsel and plead guilty. Finally, the admonishments required by article 26.13 of the code of criminal procedure do not apply in this case because it was a misdemeanor.

> In sum, appellee has not met his burden of defeating the presumption of a regular judgment in the record reflecting a valid waiver of counsel. That this misdemeanor judgment may bar the possibility of "cancellation of removal" is a severe consequence, but that federal immigration removal action is based upon appellee's 1992 illegal entry, not his 1998 misdemeanor plea. Allowing a misdemeanor judgment that is itself not a "conviction" under state law, not a ground for deportation, and not a barrier to admission, to operate in this manner may or may not be bad federal immigration law, but we cannot cut a swath through our state criminal law to avoid its consequences.

IMPROPER PHOTOGRAPHY

Is the Improper Photography statute facially unconstitutional?

***Ex parte Thompson*, 2013 WL 4634608 (Tex. App.–San Antonio 2013, pet. granted)**

The San Antonio Court of Appeals held that the Improper Photography statute is facially unconstitutional. The Texas Court of Criminal Appeals has granted the state's petition to determine the following questions:

1. Did the Court of Appeals error in declaring Penal Code § 21.15(b)(1) [Improper Photography] facially unconstitutional?

2. Did the Court of Appeals error in holding that Penal Code § 21.15(b)(1) [Improper Photography] implicates the protections of the First Amendment?

3. Did the Court of Appeals error in declaring Penal Code § 21.15(b)(1) [Improper Photography] unconstitutional when it held "the application of the statute would potentially penalize some protected speech"?

4. Does Penal Code § 21.15(b)(1) [Improper Photography] reach a substantial amount of constitutionally protected conduct?

5. Did the Court of Appeals error in declaring the whole of Penal Code § 21.15(b)(1) [Improper Photography] facially unconstitutional even though only part of the subsection was implicated by the charges in the indictment?

INDIGENCY

Mandamus relief granted where District Clerk had no authority to order indigent to reimburse county for court-appointed attorneys fees nine years after the judgment was entered.

***In re Daniel*, 396 S.W.3d 545 (Tex. Crim. App. 2013)**

In April, 2002, Daniel was sentenced for forgery, and the judgment reflected court costs in the amount of $295.25. No court-appointed attorneys fees were ordered in that judgment. More than nine years later, the Bexar County District Clerk issued a bill of costs ordering that Daniel pay $7,945.00 for court-appointed attorneys fees, and Daniel filed a writ of habeas corpus asserting that he was indigent at the time of trial and because the trial court never determined that his status had changed, the order that he pay attorneys fees should be deleted.

The court of criminal appeals agreed with the merits of Daniel's argument. A "defendant's financial resources and ability to pay are explicit critical elements in the trial court's determination of the propriety of ordering reimbursement of costs and fees" under TEX. CODE CRIM. PROC. art. 26.05(g). In this case, the bill of cost was not predicated on these "critical elements," and therefore there was no basis for the assessment of attorneys fees.

Habeas, however, was not the proper vehicle for this challenge because it in no way involved the fact or duration of his confinement. Fortunately for Daniel, despite its denomination as a writ of habeas corpus, the court treated it as a petition for mandamus, which required showings of no adequate remedy on appeal, and clear entitlement to the relief he seeks. Daniel succeeded on both prongs. He had no appellate remedy because the bill of costs was entered nine years after the judgment, long after time for filing a notice of appeal. And he was clearly entitled to relief, because there was no order from the trial court that he pay the fees, and because the trial court had not made a finding that this previously indigent defendant had the present wherewithal to pay the fees.

JEOPARDY

1. Double jeopardy prevented defendant's convictions and consecutive life sentences for two charges of attempted capital murder that both depended on proof that a single individual had been murdered; additionally, the court had jurisdiction to consider this claim in a subsequent writ because of actual innocence, specifically, no rational juror could have found defendant guilty of both offenses without violating the federal prohibition against double jeopardy.

***Ex parte Milner*, 394 S.W.3d 502 (Tex. Crim. App. 2013)**

One indictment charged Milner with the murder of Garcia. A second indictment charged him with the attempted capital murder of Britten, alleging that Milner attempted to murder Britten and in the same course and scheme of conduct, that he murdered Garcia (the same Garcia whose murder was the subject of the first indictment). The third indictment charged Milner with the attempted capital murder of Williams, alleging that he attempted to murder Williams and in the same course and scheme of conduct, that he murdered the same Garcia whose murder was alleged in the first and second indictments.

Milner pleaded guilty to all three offenses and received three consecutive life sentences. In this case the court of criminal appeals considered Milner's sixth application for writ of habeas corpus which asserted that his second conviction for attempted capital murder violated the double jeopardy clause. The court agreed.

> [Milner's] two convictions for attempted capital murder resulted from allegations involving the same three victims. The victim, Frankie Garcia, was included as a victim in both of the attempted capital murder convictions for which applicant was convicted. Because each attempted capital murder conviction under Penal Code §§ 19.03(a)(7)(B) and 15.01(b) requires at least two victims not included as victims in other attempted capital murder provisions under those same penal code sections, only one of these attempted capital murder convictions may be upheld. We find that applicant's conviction in [the second attempted capital murder indictment] violates double jeopardy.

Because this was Milner's sixth writ, he also had to prove that the court of criminal appeals had jurisdiction to hear it. The court found that it had jurisdiction because Milner accompanied his constitutional claim – double jeopardy – with a prima facie claim of actual

innocence. "Because he has shown that no rational juror could have found him guilty of both offenses without violating the federal constitutional prohibition against double jeopardy, applicant has made a prima facie case that, but for a violation of the United States Constitution, no rational juror could have found the applicant guilty beyond a reasonable doubt."

2. Multiple punishments for aggravated robbery and aggravated assault of the same person violate the Double Jeopardy Clause.

***Ex Parte Denton*, 399 S.W.3d 540 (Tex. Crim. App. 2013)**

Denton was visited in his home by two people who demanded satisfaction on a drug debt. Instead of paying off, though, Denton and two confederates robbed the two visitors and shot one of them. Two indictments were returned, each one charging Denton with aggravated robbery and aggravated assault of each of the two visitors. Denton was convicted of all four counts, and given concurrent sentences of 25 and 20 years imprisonment. Denton did not object at trial that multiple punishments would violate his right to be free from double jeopardy, but did make that complaint in his writ of habeas corpus.

The court of criminal appeals granted Denton relief, and set aside the two convictions and sentences for aggravated assault, because they resulted in the lower punishments. The "more serious" aggravated robbery convictions and sentences were retained.

The first question was cognizability, in light of Denton's failure to object at trial. The rule for preservation of jeopardy complaints is unique. "Because of the fundamental nature of the double-jeopardy protections, a double-jeopardy claim may be raised for the first time on appeal or on collateral attack if two conditions are met: 1) the undisputed facts show that the double-jeopardy violation is clearly apparent on the face of the record; and 2) when enforcement of the usual rules of procedural default serves no legitimate state interest." Denton met both prongs of the test here. A jeopardy complaint is "clearly apparent on the face of the record" when there is no need to expand the record with additional evidence to support the merits of the claim, and that was true here because the writ record contained all the evidence needed. And although the state has an interest in finality of its convictions, the court could perceive no interest in maintaining the finality of convictions when it is clear on the face of the record that these convictions violate double

jeopardy. "Society's interest, of course, is not simply to convict the guilty. Rather its interest is 'in fair trials designed to end in just judgments.'" The court found that habeas is the proper way to address and remedy a double jeopardy violation.

Having found no procedural default, the court next considered the merits of the jeopardy question. As pled in these indictments, the counts for aggravated robbery and aggravated assault both alleged that Denton threatened the complainants with imminent bodily injury, and that he used or exhibited a deadly weapon. The aggravated robbery indictment further alleged that Denton committed theft. That is, the aggravated assault counts were lesser included offenses of the aggravated robbery counts.

> "If . . . the prosecution, in proving the elements of one charged offense, also necessarily proves another charged offense, then that other offense is a lesser-included offense." *Girdy v. State*, 213 S.W.3d 315, 319 (Tex. Crim. App. 2006). If there is no clear legislative intent to punish the offenses separately, multiple punishments for the criminal act that is the subject of the prosecution is barred. *Id*. No such intent has been shown here. We conclude that applicant has shown that two of his four convictions are in violation of his constitutional double-jeopardy protections that preclude multiple punishments for the same offense.

JOINDER

In the name of harmless error, the trial court may erroneously ignore the statute which gives a defendant a mandatory right to sever indictments and avoid reversal.

***Werner v. State*, 412 S.W.3d 542 (Tex. Crim. App. 2013)**

Werner was charged in two separate indictments with the offense of stalking the same complainant. He moved to sever the two indictments before trial and again at trial, pursuant to § 3.04 of the Texas Penal Code which, except for a few enumerated exceptions, states that "the defendant shall have a right to a severance of the offenses." The trial court denied the motion to sever, Werner was convicted on both indictments and he received sentences of ten years imprisonment, to run concurrently.

The court of appeals reversed. " Section 3.04 is mandatory; it does not give any

discretion to the trial court." It is undisputed that Werner moved to sever his indictments. The reasons the trial court gave for denying – judicial economy, lack of surprise, and lack of undue prejudice – "are not matters relevant to whether appellant is entitled to a severance." The court of appeals went on to hold that the error was harmful and reversible under Rule 44.2(b) of the Rules of Appellate Procedure:

The court of criminal appeals granted the state's petition for discretionary review, and reversed the reversal. Denial of a motion to sever is non-constitutional error and is reviewed under Rule 44.2(b). That is, error is disregarded unless it adversely affects a defendant's substantial rights. Stalking is a unique offense. It requires proof of a pattern of conduct, not just a single act. The earlier stalking would have been admissible to prove intent to place the complainant in fear; that the complainant was actually placed in fear; and, that her fear was reasonable. Without the earlier stalking, the evidence would probably be insufficient to prove the later stalking. Moreover, one factor in considering harm is whether the evidence of guilt was overwhelming and it was here. "Because the State was entitled to offer evidence of appellant's prior acts of harassment relevant to the first stalking offense to prove the elements of the second stalking offense, we conclude that the error was harmless under Tex.R.App. P. 44.2(b)."

JURY

1. A discussion of a rarely-cited rule –Tex. R. App. Proc. 43.3; a reminder about the proper function of an objection – to put the court and opposing counsel on notice – and a clear statement that polling the jury is the correct way to "cure" an untrue or unintended verdict.

***Cook v. State*, 390 S.W.3d 363 (Tex. Crim. App. 2013)**

The jury found Cook guilty of manslaughter and returned its punishment verdict: six years, with a recommendation of probation. When asked by the judge if this verdict was unanimous, the presiding juror said "it is," at which time the judge told the jurors they were free to discuss the case, and discharged them, and they left the courtroom. The judge then imposed the jury's sentence on Cook, gave him 180 days in jail as a condition of probation, and stated that the sentence was to begin immediately. Seven minutes after the jury left the courtroom, for reasons that are not clear, the judge brought the jurors back and told them that she had information that they had questions about the verdict. She then asked them individually if they intended to impose a probated sentence, and when the first four

answered that that was not their intention, she sent them back to continue deliberations. Cook's request for a mistrial was denied. About 30 minutes later the "jury" came back with a new "verdict:" six years imprisonment, with no probation. The judge "re-thanked the jurors and re-released them, and then re-sentenced appellant to six years in prison."

The court of appeals reversed the trial court's judgment on punishment, and then had to determine its remedy. Cook asked the court to reform the judgment and enter the jury's first, probated verdict. The court of appeals declined, noting that Cook did not make this request in the trial court, but instead moved for a mistrial. This was the only relief he sought, and had the trial court granted the mistrial that Cook requested, the remedy would have been to grant a new trial on punishment. And that is just what the court of appeals did. Justice Dauphinot, dissenting, would have reformed the verdict to delete the unlawful sentence and instead to correct the sentence to the one lawfully pronounced in open court before the jury was unlawfully recalled – probation.

The court of criminal appeals granted petitions for discretionary review from both the state and Cook. Neither party tried to defend the trial court's decision to allow re-deliberation; that was clearly erroneous. Cook argued that the remedy chosen by the court of appeals was the wrong one: as Justice Dauphinot had urged in her dissenting opinion, the court should have corrected the unlawful sentence. The state argued that Cook was not entitled to this remedy because he had not requested it from the trial court. the court of criminal appeals found that Cook had the better argument.

As to preservation, the court found that Cook's mistrial motion was both timely and specific. Timely, because Cook was not required to object at the time the judge ordered the released jury back into the courtroom. Her actions were not objectionable until she ordered the jury to re-deliberate. "As soon as that occurred, he moved for a mistrial. Appellant was not required to be clairvoyant and anticipate that the trial judge would improperly send the dispersed jurors off to re-deliberate after sentencing until she actually did so." Specific because the mistrial motion informed the court and the prosecutor of Cook's complaint.

> Everyone understood that defense counsel was saying "Stop this proceeding—whatever it is." Indeed, the very word "mistrial" means "[a] trial that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings." The basis for the motion was obvious from the post-sentencing context. At oral argument the parties agreed that there was no simple, appropriate legal objection. We question whether the trial judge or the

> prosecutor could have cured or ameliorated the problem in any way other than by stopping the unauthorized second sentencing deliberation. "Stop" or "I request a mistrial" is as good an objection as any under these circumstances.

As to the proper remedy, the court relied on TEX. R. APP. PROC. 43.3, a mandatory rule the provides: "When reversing a trial court's judgment, the court must render the judgment that the trial court should have rendered, except when: (a) a remand is necessary for further proceedings; or (b) the interests of justice require a remand for another trial." In this case, "Rule 43.3 required the court of appeals to render the judgment that the trial judge should have rendered: A sentence of six years, probated. 'Once a valid sentence is pronounced by a trial court, generally, it is accorded a measure of finality.'"

> Commentators have noted that a "question, which has vexed courts for years, is how far can the legal system go in opening verdicts to attack ... before the cure becomes worse than the disease." The cure imposed by the court of appeals in this case—a new punishment trial—is worse than the disease. It is no remedy for the improper "do-over" that occurred in this case to have a second "do-over" by a new jury. The cure for any untrue or unintended verdict is already in place—the right to have the jury polled before it is discharged. Neither party asked to have the jury polled. The trial judge, content to rely on the presiding juror's confirmation that the six-year probated sentence was "the unanimous verdict of the jury," accepted that legal verdict, discharged the jury, and sentenced appellant in open court. We therefore modify the lower court's judgment to reflect the original sentence of six years' imprisonment with probation of the penitentiary time, and we affirm the judgment as modified.

JURY CHARGE

1. If you don't object to jury charge error at trial you will lose on appeal, unless the defendant was egregiously harmed, and "this is a difficult standard to meet."

***Nava v. State*, 2013 WL 6636809 (Tex. Crim. App. 2013)**

The Houston police department created an undercover sting operation to catch television thiefs. Nava, Mendez, and Carrillo showed up at a parking lot and agreed to pay the undercover officers $6,500.00 for the merchandise, but then Carrillo pulled a gun and shot and killed one of the officers who in turn shot and killed Carrillo. Nava and Mendez were charged with felony murder as parties. The charge authorized their convictions if the jury believed they were committing felony theft and that Carrillo and that, in the course of the theft, Carrillo committed an act clearly dangerous to human life that caused the death of the officer, and that Nava and Mendez acted as parties under either § 7.02(a)(2)(that is, acting with intent to promote or assist the offense they solicited, encouraged, directed, aided or attempted to aid the primary actor) or § 7.02(b)(that is, as con-conspirators).

The problem was that the parties charge was "ambiguous." When instructing the jury under § 7.02(a)(2), it authorized conviction if the jury believed that Nava and Mendez promoted or assisted commission of "the offense," and that they solicited, encouraged, directed, aided, or attempted to aid Carrillo to commit "the offense." Nava and Mendez did not object at trial, but they argued on appeal that the instruction was misleading, because it did not specify that "the offense" was murder, rather than felony theft.

The court of criminal appeals agreed that this was error. Because the defense did not object, though, reversal was not required unless the charge error was "egregiously" harmful.

> This is a difficult standard to meet and requires a showing that the defendants were deprived of a fair and impartial trial. The record must disclose "actual rather than theoretical harm," and the error must have affected the very basis of the case, deprived the defendant of a valuable right, or vitally affected a defensive theory. In determining whether egregious harm is shown, we look at the entire jury charge, the state of the evidence (including the contested issues and the weight of probative evidence), the arguments of counsel, and

any other relevant information revealed by the record of the trial as a whole.

"Given the jury charge as a whole, the evidence, and the arguments of the attorneys, we cannot conclude that the record demonstrates egregious harm."

2. The defendant suffered egregious harm when the trial court failed to instruct the jury that it could not consider the statutory presumption of guilt unless the state proved the facts giving rise to that presumption beyond a reasonable doubt.

***Hollander v. State*, 2013 WL 6480167 (Tex. Crim. App. 2013)**

Hollander was indicted for criminal mischief by tampering with a metering device to divert electricity. The trial court instructed the jury, as provided by Texas statute, that it could presume Hollander had engaged in the prohibited conduct if he had received the economic benefit of the service. The trial court did not, however, instruct the jury that before it employed the presumption, the state had to prove the facts giving rise to the presumption beyond a reasonable doubt. The court of appeals agreed that the trial court had erred in not instructing on the state's burden regarding the instruction, but it declined to reverse, holding that Hollander had not objected at trial, and he had not suffered egregious harm. The court of criminal appeals granted Hollander's petition for review and reversed.

> It was never communicated to the jury in any form that it must believe the evidence substantiating the presumption beyond a reasonable doubt before it could convict the appellant. Neither the balance of the jury charge itself nor the conduct of the parties served to correct the deficiency. Moreover, the facts giving rise to the presumption were hotly contested, and we therefore reject both the court of appeals's finding that the great weight of the evidence established the predicate facts and its implicit conclusion that the jury probably would have found those predicate facts to be true to the requisite level of confidence—beyond a reasonable doubt—had it been required to do so. Considering all of these *Almanza* factors, we hold that the error in the jury charge both affected the very basis of the case and deprived the appellant of a valuable right, ultimately depriving him of a fair and impartial trial. The court of appeals erred to conclude otherwise.

3. Reckless and negligent injury to a child were lessers of intentional and knowing

injury to a child in this case and the trial court erred in refusing to submit these lessers to the jury.

***Wortham v. State,* 412 S.W.3d 552 (Tex. Crim. App. 2013)**

Wortham was charged with intentional and knowing injury to a child by shaking and restricting the child's airflow. Wortham told several police officers that he had found the child sleeping in her bed with a plastic bag covering her nose and mouth, and that she was not breathing. He admitted shaking her, but said that he had done that to revive her, before taking her to the emergency room. Several medical witnesses testified at trial that the baby's subdural hematoma would not have been caused by a plastic bag or suffocation, but was consistent with being shaken vigorously. The trial court denied his requests to submit the lesser included offenses of reckless and negligent injury to a child, and the court of appeals affirmed. The court of criminal appeals granted Wortham's petition for discretionary review and reversed.

The test to determine whether a defendant is entitled to a lesser instruction has two parts. First, using the cognate-pleading test, is the offense contained in the requested instruction a lesser included offense of the charged offense. If it is, the court must then determine whether the evidence admitted at trial supports the instruction.

The first is a question of law and does not involve consideration of the evidence. The court must consider the statutory elements of the offense as modified by the particular allegations in the charging instrument, and then compare that with the elements of the requested lesser offense. "Because the indictment alleges all of the elements of the requested lesser-included offenses, reckless and criminally negligent injury to a child by act are lesser-included offenses of intentional and knowing injury to a child by act. Furthermore, Article 37.09(3) states that a lesser-included offense differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission. 'Reckless' and 'criminal negligence' are less culpable mental states than 'intentional' and 'knowing.' Thus, by definition, reckless and criminally negligent injury to a child by act are lesser-included offenses of knowing or intentional injury to a child by act."

The court of appeals answered the second question – whether the evidence supported the lesser – against Wortham, believing that the overwhelming weight of the evidence indicated that the child's injuries were not caused by either the plastic bag or by

Wortham's efforts to revive. But the court erred in considering the weight of the evidence. "If a defendant can point to more than a scintilla of evidence supporting the lesser-included offense instruction—even evidence that is controverted or weak—he is entitled to the instruction. Here, Wortham has presented such evidence. The testimony of [a detective] contained Wortham's assertion that Wortham had shaken C.B. in an attempt to revive her. Wortham's assertion, if true, would negate the "intentional" or "knowing" elements of the charged offense."

4. A witness who could have been charged with the same offense as the defendant is an accomplice witness, and this is true for both direct-parties and for party-conspirators, and in such a case the judge has a sua sponte duty to instruct the jury about accomplices and the defendant does not forfeit this right by not objecting at trial.

***Zamora v. State*, 411 S.W.3d 504 (Tex. Crim. App. 2013)**

Several arguable accomplices testified against Zamora at his capital murder trial, including Rosales. The jury charge authorized conviction on various theories, including that Zamora himself caused the death of the complainant by paying or promising to pay for his killing; that Zamora acted as a "direct-party" by soliciting the killing; and, that Zamora was guilty as a party-conspirator under § 7.02(b) of the penal code. The jury was instructed that one of the witnesses was an accomplice as a matter of law under the direct-party theory and that it should decide whether two others were accomplices as a matter of fact under the direct-party theory. None of the instructions mentioned the accomplice liability under the party-conspirator theory, and no accomplice instruction whatsoever was given concerning Rosales.

Zamora made a general request for an accomplice instruction for Rosales, and submitted a written request to instruct the jury that Rosales was an accomplice as a matter of fact under a direct-party theory. The trial court denied both requests.

Zamora was convicted and he appealed, arguing that he was entitled to an accomplice instruction regarding Rosales both under the direct-party theory and the party-conspirator theory. The court of appeals rejected both complaints and affirmed. According to that court, Zamora was not entitled to an instruction under the direct-party theory because the evidence did not raise it. The court refused to reach his party-conspirator argument, finding that he waived the error by not making this objection in

the trial court.

Zamora's petition for review challenged only the court of appeals's ruling regarding the party-conspirator theory. The court of criminal appeals reversed, and considered and answered two questions. First, was Zamora entitled to an accomplice witness instruction where the witness was arguably an accomplice under the party-conspirator theory? Second, does Almanza apply where the defense fails to request an accomplice witness instruction?

An accomplice is someone who could be prosecuted for the same offense as the defendant, or for a lesser included offense. Most cases discuss whether the alleged accomplice could be prosecuted as a direct-party, but this case makes it clear " that an accomplice-witness instruction is required when the evidence raises the question of whether a witness is an accomplice under a party-conspirator theory."

In Almanza v. State, 686 S.W. 2d 157, 171 (Tex. Crim App. 1984), the court held that two different standards apply to jury charge error, depending on whether the error was objected to in the trial court. Where the appellant did object, jury charge error is reversible if it caused some harm to him, that is, where the error is not harmless. Where the appellant made no objection, the error is reversible only if it caused him egregious harm.

The court has definitively concluded in earlier cases that Almanza's procedural framework applies when the witness is an accomplice as a direct party. Although Almanza does not apply to defensive issues, which can be forfeited if not objected to, the accomplice-witness statute is "the law applicable to the case rather than a defensive issue." This is not an instruction that the defense can forego as a matter of trial strategy. "I[t] is difficult to envision that any competent attorney would reasonably forego an accomplice-witness jury instruction as a matter of strategy based on his theory of the case." Instead, the trial court has a sua sponte duty to instruct on this whether requested by the defense or not.

The narrow question remaining before the court in Zamora was whether any different rule applies when the witness is an accomplice under the party-conspirator theory. "Our review of the underlying principles of Almanza compels us to conclude that all complaints about the trial court's failure to include an accomplice-witness instruction must be analyzed under its procedural framework."

5. The court of appeals erred in not considering that the law of parties was

submitted in the abstract portion of the charge, when it decided that whether defendant was entitled to a lesser included instruction.

***Yzaguirre v. State*, 394 S.W.3d 526 (Tex. Crim. App. 2013)**

Yzaguirre was tried for aggravated robbery with a deadly weapon. There was no question that a robbery had occurred, that Yzaguirre had participated in the robbery, and that one of his confederates had used a deadly weapon. There was at least some evidence, though, that Yzaguirre himself had not used a deadly weapon. The jury was instructed in the abstract on the law of parties, but not in the application paragraph. The trial court denied Yzaguirre's request to submit the lesser included offense of robbery, and he appealed.

The court of appeals reversed. The only question here was whether the jury was authorized to convict Yzaguirre as a party. If so, then there were no facts which would have allowed the jury to find him guilty only of robbery, since it was undisputed that one of his parties had committed aggravated robbery. The court of appeals found that the jury was not authorized to convict Yzaguirre of aggravated robbery as a party in this case because the application paragraph said nothing about the law of parties. Accordingly, the trial court erred when it refused his request for a lesser.

The court of criminal appeals granted the state's petition for discretionary review to consider several questions, including whether a jury charge need contain any reference at all to the law of parties. The court did not need to answer that question (which would have dramatically altered Texas law), instead deciding to reverse the court of appeals's reversal on a narrower basis. Specifically, the court of criminal appeals held that, in deciding whether a defendant is entitled to a lesser instruction, the instruction on the law of parties contained in the abstract portion of the charge should have been considered.

> Because the law of parties was contained in the abstract portion of the jury charge and was supported by sufficient evidence, it was an issue that should be taken into account for the purpose of determining whether to submit a lesser-included offense. And because, as the court of appeals explained, there was no evidence, in light of the law of parties, that appellant committed only the crime of robbery, the trial court was correct to deny the submission of the lesser-included offense.

1. Did the Court of Appeals err by failing to find that Appellant, acting as a principle, "used" the deadly weapons brought to the offense by his codefendants although Appellant may not have had contact or made an overt gesture in connection with the deadly weapons?

2. Did the Court of Appeals err by finding Appellant suffered some harm from the denial of an instruction on the lesser-included robbery offense?

3. Under the Penal Code, is an instruction on the law of parties necessary?

4. If necessary, must the parties instruction be in the application paragraph?

6. It was permissible for the court's charge to authorize conviction by a means unknown to the grand jury where there was evidence to support this submission.

***Moulton v. State,* 395 S.W.3d 804 (Tex. Crim. App. 2013)**

Moulton's indictment alleged in three separate paragraphs that he murdered his wife (1) by manual strangulation, (2) by drowning, or (3) by asphyxiation by means unknown to the grand jury. The medical examiner testifiedthat the cause of death was some sort of asphyxia, drowning, strangulation, or suffocation, but that he could no pick which one because in an asphyxial death, "the findings are very subtle." All three means alleged in the indictment were submitted to the jury disjunctively, and the jury was instructed that it did not have to unanimously agree as to the means, but only that Moulton intentionally or knowingly caused his wife's death. He was convicted and he appealed, and the court of appeals reversed, holding that the court should not have charged the jury on the means unknown theory.

The court of criminal appeals disagreed, and reversed the reversal.

The court distinguished its recent opinion in *Sanchez v. State*, 376 S.W.3d 767 (Tex. Crim. App. 2012), where it had reversed the decision of a trial court to charge on means unknown, because there was no evidence to support such a charge. Rather there was a limited list of known alternatives for the means of death, and, accordingly, the court should

have limited its charge to the two known theories that were supported by the evidence. In the present case, though, because the crime scene did not point to a conclusive list of possibilities, there was unlimited information that may be unknown. Each of the three theories submitted could be supported by the medical examiner's testimony. "[B]ecause manner and means remained unknown at the conclusion of the evidence, the instruction on unknown manner and means was properly submitted to the jury."

7. Although the defense waives charge error when he does not object to the trial court's failure to give an unrequested instruction on a defensive issue such as entrapment, counsel need not object when the court instructs on a defensive issue, but does so incorrectly.

***Vega v. State*, 394 S.W.3d 514 (Tex. Crim. App. 2013)**

Vega was tried for three drug offenses and his defense was that he was entrapped by inducements from the police and from a confidential informant. The trial court instructed the jury that it should find Vega not guilty if it believed or if it had a reasonable doubt that he was induced to do so by a particular police officer – Whitlock. Vega did not object to this instruction in the trial court, and he was convicted. On appeal for the first time Vega complained that the trial court's entrapment instruction was erroneous because it did not also instruct the jury on inducement by the confidential informant. The court of appeals held that Vega failed to preserve this issued because he did not request such an instruction, nor did he object to the instruction given by the trial court.

The court of criminal appeals disagreed with the court of appeals's preservation holding. The trial court has the ultimate responsibility for the accuracy of the jury charge. the trial court has no duty to *sua sponte* instruct on unrequested defensive issues (such as entrapment), because an unrequested defensive issue is not the law applicable to the case. However, if the court does charge on a defensive issue, whether *sua sponte* or as requested by a party, but fails to do so correctly, the court commits charge error, which is subject to review under *Almanza v. State*, 686 S.W. 2d 157 (Tex. Crim. App. 1985). In such a case, objected-to error is reversible if there is some harm; unobjected-to error is reversible only if it resulted in egregious harm.

In the present case, then, the court of appeals erred when it held that Vega failed to preserve error regarding the entrapment instruction given by the court. Furthermore, the instruction was erroneous, because it should have instructed on CI inducements. This

unobjected-to error did not cause egregious harm, though, because an examination of the charge as a whole, the state of the evidence, the argument of counsel, and other relevant evidence, shows that the error here was "obviously harmless."

8. When evidence relied upon to raise a requested lesser included offense establishes a lesser that is greater than the one requested, does this disentitle a defendant to the requested lesser? Does the submission of certain lessers render the failure to submit another lesser harmless error?

***Hudson v. State*, 394 S.W.3d 522 (Tex. Crim. App. 2013)**

Hudson was tried for capital murder, and the jury was also instructed on the lesser included offenses of murder and injury to a child. The trial court refused Hudson's request to submit the lesser included offense of manslaughter, she was convicted of capital murder, and she appealed. The court of appeals reversed the conviction because the trial court did not instruct on manslaughter. The court of criminal appeals granted the state's petition for discretionary review, and reversed the reversal.

According to the court of criminal appeals, its cases "indicate that, when the evidence relied upon to raise the requested lesser-included offense establishes a lesser-included offense that is greater than the one requested, then the defendant is not entitled to his requested submission." In this case, there were "three conceivable intermediate lesser-included offenses" greater than manslaughter, but consistent with a reckless culpable mental state: murder based on intent to cause serious bodily injury; felony murder/kidnapping; and felony murder/injury to a child. The court of appeals erred here because it only considered the evidence with respect to capital murder and manslaughter. A "complete analysis" should have taken into consideration whether the evidence relied on by Hudson would have established one of the intermediate offenses, and whether that would have disentitled her to a manslaughter submission.

The court of appeals also erred in its harm analysis. A proper harm analysis must take into account the lessers that were submitted, and that the jury's rejection of these submitted lessers could render harmless any error regarding the unsubmitted lesser.

9. Trial counsel not objectively unreasonable for failing to request an instruction on mistake of fact where such an instruction might have lessened the state's burden of proof.

***Okonkwo v. State*, 398 S.W.3d 689 (Tex. Crim. App. 2013)**

Okonkwo was tried for the offense of forgery of money. He claimed that he received $60,000.00 from an unknown Nigerian, and, believing it was authentic currency, he tried to obtain money orders with it. In fact, the currency was forged, and a clerk called the police. Okonkwo's sole issue at trial was whether he knew the money was forged. The jury instructions required the state to prove Okonkwo had the intent to defraud and harm, and that he possessed the currency with intent to pass it, and with knowledge that it was forged. After he was convicted, Okonkwo filed a motion for new trial asserting that his trial counsel was ineffective for not requesting an instruction on mistake of fact. The trial court denied the motion, but the court of appeals reversed. The court of criminal appeals reversed the reversal.

Appellate courts must focus on the objective reasonableness of trial counsel's actual conduct in light of the entire record. Counsel's subjective claim, either of "strategy," or of "no strategy," is not dispositive. Here the court of appeals properly employed an objective standard by considering not only trial counsel's affidavit, in which he admitted to having no strategic reason for not requesting a mistake of fact instruction, but also to the facts in the record.

Although the court of appeals used the correct test, it reached the wrong result. "Under the record in this case, we conclude that counsel was not objectively unreasonable by failing to request an instruction on mistake of fact because that theory was inconsistent with a theory that counsel advanced at trial, and it would have misled the jury as to the State's burden of proof."

10. Read the court's jury instructions carefully, and make timely and specific objections or requests; read Judge Meyers's dissent in this case if you like "great theater."

***Gelinas v. State*, 398 S.W.3d 703 (Tex. Crim. App. 2013)**

Gelinas was stopped for DWI because, according to the arresting officer, the light over his license plate was not white. Gelinas argues that, contrary to the officer's testimony, the video showed the light was white, and he introduced a photo, and his wife's

testimony that the light was white. Because of this conflict in the evidence, the trial court instructed the jury under article 38.23(a). Unfortunately, although the abstract portion of the charge instructed the jury generally about reasonable suspicion and traffic stops, and the white-light requirement, the application portion got it *exactly* wrong instructing the jury that if Gelinas failed to comply with the Texas Transportation Code, "then such stopping of the accused would be **illegal** and, if you find the facts so to be, or if you have a reasonable doubt thereof, you will disregard this testimony of Trooper Marquez relative to his stopping the defendant and his conclusions drawn as a result thereof, and you will not consider such evidence for any purpose whatsoever." [emphasis supplied]

> The instruction was clearly erroneous in that it stated the exact opposite of what the law provides. In truth, if the jury found that Gelinas was driving on a public road and failed to comply with the law requiring a white light, the stop would have been legal, not illegal, and thus the jury could have properly considered the testimony and conclusions of Trooper Marquez.

Gelinas made no objection and following his conviction, he complained for the first time on appeal, asserting that the 38.23(a) instruction was erroneous egregiously harmful under *Almanza v. State*, 686 S.W. 2d 157 (Tex. Crim. App. 1984). The court of criminal appeals agreed that the instruction was erroneous, but found that it was not egregiously harmful, and therefore, reversal was not required.

Under *Almanza*, courts evaluate harm by taking into account (1) the entire jury charge; (2) the state of the evidence, including contested issues; (3) arguments of counsel; and (4) any other relevant information contained in the record as a whole." Considering all four factors in this case, the court found the harm less than egregious.

Considering *Almanza's* first factor, the charge was clearly erroneous, since it misstated the law. That the error was in the application portion, however, "is not as significant as we once believed." It was also significant here that the abstract portion of the charge correctly stated the law. "Ultimately, although this factor weighs in favor of a finding of egregious harm, we do not place such great weight on it as the court of appeals was inclined to do."

The second factor - that the issue was a contested one - also weighs in favor of egregious harm, although again, the proper weight is less heavy than assigned by the court of appeals, "given that the presence of an instruction in the first instance means that the

issue was a contested one."

The third factor - arguments of counsel - weighs significantly against egregious harm; "though there were some misstatements of the law during jury arguments, both parties also argued the correct law very clearly to the jury."

As to the fourth factor, the court of criminal appeals noted this: we note the absence in the record of a note from the jury during deliberations expressing confusion as to the contradictory language regarding the 38.23 instruction. This suggests that the jury was not confused by the typographical error in the jury charge or the misstatements during the arguments of counsel. In light of the obviousness of those errors, the common sense of the jurors, the correct portion of the jury charge, and the correct statements of law in both parties' closing arguments, we believe it probable that the jury resolved the issue in accordance with the law. This factor, too, weighs in favor of finding no egregious harm.

So, two factors weighed in Gelinas's favor, and two favored the state, and according to the court's math, tie goes to the state.

Judge Cochran concurred:

> Let's face it. This jury (1) did not read the Article 38.23 jury instructions; (2) did read the instructions, but did not understand what they really said, and therefore ignored them; or (3) did read the instruction, knew that they were wrong, and therefore ignored them. The third option is the least likely; after all, neither the parties nor the trial judge knew that the instructions were wrong at the time that they were written or read. The most likely option is the first, which simply proves the old adage of "garbage in, garbage out." These instructions are 100% legalese. They make no sense. Trial Judges should not be giving instructions like this. This is not a case in which the reviewing court should apply the usual presumption that the jury understood and applied the court's charge in the way it was written. Here, we know that the jury, composed of normal people was unlikely to have understood the jury charge as it was written because not even the lawyers and trial judge, attuned though they may be to legalese, understood what the instructions said.
>
> The trial judge should "chunk" information and give it to the jury in a short, digestible pieces as shown in the Texas Criminal Pattern Jury Charges

volumes published by the Texas State Bar.

Three judges wrote dissents, my favorite being judge Meyer's:

> I have always loved great theater and this case has all the makings of a Tony Award winner. On stage right we have Judge Keasler and the plurality sterilizing Charlie Baird's plurality opinion in *Hutch v. State*, 922 S.W. 2d 166 (Tex. Crim. App. 1996), and in the process basically eliminating the possibility of ever getting relief under the egregious harm standard of *Almanza v. State*, 686 S.W. 2d 157 (Tex. Crim. App. 1985). Entering from stage left, we have Judge Price's impassioned defense of *Almanza*. Lastly, our heroine Judge Cochran saves the day for the plurality by concluding "that the error in this jury charge did not cause appellant egregious harm because the jury instruction was just an indecipherable lump of legal gobbledy-gook that no one (including the lawyers and the judge) either understood or paid attention to." *See* Cochran, J. Concurring opinion at 4-5. But this case is a classic example of the *Almanza* tragedy.
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> * * *
>
> Instead of going to these lengths to disavow Hutch, it would be more equitable to do away with the enigma of *Almanza* and treat all jury charge error under the same "some harm" standard. It seems obvious that the plurality's intent all along was not to reexamine the court of appeals's analysis in this case but to simply eliminate a defendant's ability to ever obtain relief if his attorney failed to object to a defective charge. Therefore, I respectfully dissent.

11. Without deciding whether the defendant was entitled to an instruction on sudden passion, the court was able to find that evidence that caused the jury to reject self-defense demonstrated the lack of harm.

***Wooten v. State*, 400 S.W.3d 601 (Tex. Crim. App. 2013)**

The jury rejected Wooten's self-defense claim and found him guilty of murder. At punishment he argued that he was entitled to a charge on sudden passion, but the trial court

refused the instruction. The court of appeals reversed, finding both that the trial court erred in not giving the instruction, and that the error was harmful under *Almanza*'s "some harm standard. The court of criminal appeals granted the state's petition for discretionary review and reversed the reversal.

A bare claim of fear will not support a sudden passion instruction. Rather, fear must rise to the level of passion. The court did not need to decide whether Wooten was sufficiently terrorized here, though, because even if he was, he was not harmed. The court acknowledged earlier cases in which it had suggested that the evidence in a case where the jury rejected a claim of self defense could also demonstrate that the defendant was not harmed by the failure to receive a sudden passion charge. "We think that this is such a case."

> [A] jury that had already discredited the appellant's claim that he reasonably believed deadly force to be immediately necessary would be unlikely to believe that, at the time the appellant first fired, he was actually experiencing a level of fear that caused him to lose control. Moreover, even had the jury believed that the appellant subjectively experienced such a level of fear, it would not likely have found that Johnson's behavior presented a provocation adequate to produce such a degree of fear in a man of ordinary temperament.

JUVENILE

1. The Family Code does not require suppression of a juvenile defendant's statement just because law enforcement officers are present when the magistrate reads the statutory warnings to the juvenile.

***Herring v. State*, 395 S.W.3d 161 (Tex. Crim. App. 2013)**

Herring was 16 when he was arrested for aggravated robbery. He was taken before a magistrate who read him the statutory warnings required by § 51.095(a)(1)(A) of the Texas Family Code. The magistrate testified he was alone with Herring when he read the warnings, but a police officer testified that two police officers were present. Herring moved to suppress his statement, arguing that the presence of the officers rendered the statement inadmissible. The trial court admitted the statement, and the court of appeals affirmed.

The court of criminal appeals affirmed the affirmance. § 51.095(a)(1)(A) does not explicitly require that the magistrate be alone with the juvenile, or that law enforcement officers not be present. Other sections – 51.095((a)(1)(B)(i) and 51.095(a)(1)(D) expressly prohibit the presence of police unless required for safety purposes. Herring asked that the court import the express prohibitions of the latter two statutes into § 51.095(a)(1)(A), but the court declined to do so.

> Because Texas Family Code subsection 51.095(a)(1)(A) does not explicitly prohibit the presence of law-enforcement officers when a magistrate reads the required statutory rights to a juvenile, while other subsections of Section 51.095 expressly forbid the presence of law-enforcement officers during other kinds of proceedings, we hold that, by omitting such a prohibition in Subsection 51.095(a)(1)(A), the legislature expressed its intent that such a prohibition should not apply to the reading of the statutory warnings.

2. A juvenile who receives a determinate sentence for murder or for a 3g offense who is sent to from TYC to TDCJ at 18 and later paroles out of TDCJ is ineligible for release to mandatory supervision.

***Ex parte Valdez*, 401 S.W.3d 651 (Tex. Crim. App. 2013)**

Valdez was adjudicated as a juvenile for committing murder with a deadly weapon, received a determinate sentence of 15 years, and was sent to TYC. On his 18th birthday he was sent to TDCJ to complete his sentence and was later released on parole. Thereafter he pleaded guilty to burglary of a habitation with intent to commit assault, a second degree felony and sentenced to 16 years, and this offense caused his parole to be revoked on the juvenile murder adjudication.

Section 508.149 of the Texas Government Code says that one who was previously convicted of a 3g offense, or of murder, is not eligible for release to mandatory supervision. The question is whether Valdez was convicted of murder, or whether he was "adjudicated as having engaged in delinquent conduct." Section 508.156(f) says that a person released from TYC on parole is considered to have been convicted of the offense for which he was adjudicated. Valdez contends that he was not released from TYC on parole, but was instead transferred to TDCJ, and was released from there, and that therefore his juvenile adjudication did not become a conviction, and that, for this reason he was not ineligible for mandatory supervision. He filed an application for writ of habeas corpus challenging

TDCJ's decision not to release him to mandatory supervision.

The court of criminal appeals denied relief. Valdez's interpretation of the statute would lead to absurd results. It cannot be that the legislature intended that someone released on parole from TYC would be ineligible for mandatory supervision, but that the same person, if transferred to TDCJ and released from there on parole, would be eligible.

> Applicant's transfer from TYC to TDCJ did not alter the fact that, upon his release on parole, he was considered to have been convicted of the offense for which he had been adjudicated. Applicant's juvenile adjudication was a first-degree felony conviction for the purpose of mandatory-supervision eligibility, and TDCJ was correct that Applicant is not eligible for mandatory-supervision review.

MANDAMUS

1. The possibility that a relator will in the future use a trial record as an aid to preparing an 11.07 writ does not divest the court of appeals of jurisdiction to hear a mandamus action that seeks to compel the trial court to rule on a motion to obtain the trial record.

***Padieu v. Court of Appeals of Texas, Fifth District*, 392 S.W.3d 115 (Tex. Crim. App. 2013)**

Padieu filed a Motion For The Use Of The Existing Trial Record On A Loan Basis and when it went unaddressed, he filed an application for writ of mandamus in the court of appeals to compel the trial court to entertain and hear it. The court of appeals dismissed the application for want of jurisdiction. According to that court, Padieu wanted the record to aid in preparation of a habeas corpus application, and only the court of criminal appeals has authority to grant relief in a post-conviction habeas proceeding involving a final felony conviction. Padieu then filed an application for writ of mandamus in the court of criminal appeals

The court of criminal appeals disagreed with the court of appeals and conditionally granted mandamus relief directing the court of appeals to rescind its decision dismissing Padieu's mandamus petition in that court. Although the court of appeals was correct in

treading lightly where a post-conviction habeas action may be pending, in this case, when Padieu filed his mandamus action, he had no habeas petition pending. ", at the time it was filed, relator's mandamus action did not concern a pending habeas corpus application. Although the records he seeks may be intended for preparation of an eventual habeas corpus application, the issue here is simply whether the trial judge has a duty to act upon his pending motion." The court perceived no reason why its exclusive jurisdiction in 11.07 litigation would divest a court of appeals from deciding the merits of a mandamus petition complaining of trial court inaction when the relator had no habeas application pending.

2. Mandamus relief granted in mid-trial preventing trial judge from giving certain instructions to the jury on the law of parties in a capital murder trial.

***In re State ex rel. Weeks*, 391 S.W.3d 117 (Tex. Crim. App. 2013)**

Falk and Martin were indicted for the capital murder of Canfield. Martin was tried first and was convicted. During the charge conference the trial judge announced that he would submit the question of whether Falk was guilty as a party under the "conspiracy" theory (TEX. PENAL CODE §7.02(b), but not under the "intent to promote or assist" theory (§7.02(a)(2), because he believed there was no evidence supporting such submission. Additionally, although he agreed to submit a parties/conspiracy charge, his proposed charge would require the state to prove that Falk should have anticipated the particular manner and means by which his co-conspirator killed Canfield.

The state disagreed with both proposed submissions and filed a petition for writ of mandamus which was denied by the Waco Court of Appeals. As to the judge's first proposal – to not submit the law of parties by intent to promote or assist – the court of appeals deemed that to be a decision based on the judge's assessment of the evidence, not a ministerial act, and therefore, not subject to mandamus review. As to the second proposal – to require the state to prove anticipation of the particular manner and means the co-conspirator used to kill the complainant – the court of appeals ruled that, absent any law on this one way or the other, the issue was not "well-settled," and therefore it was not subject to mandamus review.

The court of criminal appeals disagreed with the Waco court and conditionally granted the writ.

When deciding whether a relator is entitled to mandamus relief against a court of

appeals that has denied mandamus relief against a trial court, the court of criminal appeals conducts a *de novo* review. To be entitled to relief, the relator must show that he has no adequate remedy at law, and that he seeks to compel a ministerial act.

Falk and the judge contend that relator has an adequate remedy at law because the judge agreed by email to reconsider his ruling if the DA would withdraw its mandamus action. The court of criminal appeals rejected this argument, since it would require the state to abandon its chance of mandamus relief without any guarantee that the judge would change his ruling upon reconsideration. This was not an adequate remedy. Falk further contended that relator might have an adequate remedy at law because, the state could raise the issue by a cross-point if Falk were convicted and he appealed. The court of criminal appeals disagreed, though, since whether he would be convicted, and whether he would appeal were speculative. It is not required that the mandamus petition show that thee is no possible remedy; it suffices if the remedy may "be so uncertain, tedious, burdensome, slow, inconvenient, inappropriate, or ineffective as to be deemed inadequate," and that was the case here.

Nor were either of the judge's proposals ministerial acts. "A clear right to relief is shown when the facts and circumstances dictate but one rational decision 'under unequivocal, well-settled (i.e., from extant statutory, constitutional, or case law sources), and clearly controlling legal principles.'" The court clarified older cases that suggested that mandamus would be unavailable in cases of first impression. Mandamus may be appropriate in such cases where "the factual scenario has never been precisely addressed but the principle of law has been clearly established."

Regarding the judge's determination that the promote and assist theory was not raised by the evidence, the court of criminal appeals found that a rational jury could have concluded that Falk aided Martin when he disarmed Canfield, and that the judge erred when it converted a matter-of-law determination based on the existence of some evidence to support an instruction to a factual finding on the reasonableness of the state's theory. "This ruling by the trial judge is contrary to established law that requires the trial court to instruct the jury on the law applicable to the case, including all theories of liability requested by the State for which there is some evidence in the record." The court of appeals erred when it held that it could not resolve a dispute about the state of the evidence on mandamus. It was not the trial judge's job to determine whether the state was correct that Falk was guilty as a party. "Rather, the trial judge's task is simply to determine whether the evidence raises the issue. It is up to the jury to resolve conflicts in the evidence."

Relief was also granted regarding the judge's proposed submission on the conspiracy theory under § 7.02(b). "Although no case specifically holds that the State need not prove that the defendant should have anticipated the particular method by which a murder was committed to show liability under § 7.02(b) in a capital-murder case, the combined weight of our precedents clearly establishes that proposition."

Judge Price, joined by Judge Womack, dissented:

> Mandamus is an extraordinary remedy. To intercede in an ongoing capital murder trial and order the trial court to give a particular jury instruction that we believe is raised by the evidence, and modify another jury instruction because we think the trial judge has misconstrued the law, is extraordinary indeed. Shall we interrupt the next capital trial because we think the trial judge has made a legal mistake in admitting certain evidence, or in failing to admit it? Or in granting a continuance, or failing to grant it? In allowing a capital murder defendant to represent himself, or failing to allow it? Or a hundred other scenarios that routinely present themselves in the course of a capital ligation (or any other criminal trial)? Where will it end?

MOTION FOR NEW TRIAL

The trial court erred when it granted defendant's motion for new trial, where the only basis of that order was raised, not in the motion itself, but in a memorandum of law which was filed more than 30 days after sentencing.

***State v. Zalman*, 400 S.W.3d 590 (Tex. Crim. App. 2013)**

Within 30 days after his conviction for DWI, Zalman timely filed a motion for new trial asserting that a new trial was warranted, in the interest of justice, because the evidence was contrary to the law and evidence. Later, after the expiration of the 30 days allowed to file the motion, Zalman filed a memorandum asserting that a new trial was warranted, in the interest of justice, because the trial judge erred in ruling on certain pretrial motions. The state strenuously objected that the memorandum of law was in fact an untimely amendment to the motion for new trial because the motion had said nothing about pretrial issues. The trial court overruled the state's objections and granted a new trial, and the state appealed.

The court of appeals affirmed, and the state filed a petition for discretionary review. The court of criminal appeals reversed.

A motion for new trial must be filed within 30 days after sentencing, and the trial court may not grant a new trial on its own motion. The motion may be amended within the initial 30 days as long as it has not yet been ruled on by the court, but no amendment may be made outside the 30 days, even with leave of court, over the state's objection.

A motion for new trial may be granted "in the interest of justice," but "justice means in accordance with the law. A judge may not grant a new trial on mere sympathy, an inarticulate hunch, or simply because he believes the defendant received a raw deal or is innocent. "

Zalman's stated reason in his motion for new trial – that the verdict was contrary to the law and evidence – was a legal valid reason. This phrase, however, has been interpreted to mean that the evidence was legally insufficient to support the verdict. It does not mean that there were legal errors committed, such as what Zalman here raised in his memorandum of law, namely that the trial court erred in overruling his motion to suppress. Here, although Zalman raised a valid legal claim in his motion, the evidence he pointed to at the hearing did not relate to insufficiency, but rather to suppression.

> It was error for the trial court to grant the appellee's motion for new trial over the State's objection when the appellee argued only unpled (or untimely pled) grounds at the hearing. Likewise, it was error for the Court of Appeals to sustain the trial court's order.

PAROLE

For purposes of determining credit for time served, a parolee is arrested, not when the blue warrant is formally executed, but instead when it causes his confinement, or, in this case, when it made him ineligible for bail.

***Ex parte White*, 400 S.W.3d 92 (Tex. Crim. App. 2013)**

White was paroled on a burglary conviction in May, 2005, and on July 20, 2006 the parole board issued a revocation warrant ("blue warrant") for his arrest, but the warrant was not formally executed until December 1, 2006. Before formal execution, though, White was arrested on an unrelated charged and jailed in Gregg County. On September 3, 2006 the unexecuted blue warrant was lodged against him as a "hold without bond" detainer, and this hold prevented his release on bond on the unrelated charge. TDCJ initially applied credit from December 1, and White filed a writ, claiming he was entitled to credit from September 3. The trial court and the state agreed with White, and TDCJ eventually gave him the credit he asked for. Even so, the court of criminal appeals set the writ for submission to determine the proper amount of credit due.

The court of criminal appeals granted relief. Section 508.253 of the Texas Government Code provides that a parolee is entitled to credit from the date of his "arrest" on the revocation warrant, but "arrest" is not defined.

> [W]e conclude that, for purposes of section 508.253, an "arrest" occurs when the blue warrant causes the defendant's confinement. Thus, applicant's "arrest" occurred when the blue warrant made him ineligible for bail on the new offense, which would have otherwise been bailable.

PARTIES

A co-conspirator in the business of selling moderate amounts of methamphetamine should have anticipated that his colleague would assault a police officer trying to bust their drug deal.

***Anderson v. State*, 2013 WL 6182427 (Tex. Crim. App. 2013)**

Anderson and Sherber had sold drugs to various people throughout the state, including on six prior occasions to Harmon, who was acting as a paid informant of the DPS. On the occasion in question, the intended delivery was for two ounces of methamphetamine, and when they showed Harmon the drugs, he signaled DPS, and they attempted an arrest. Sherber drove off and crashed into several vehicles, including one driven by an officer. Anderson was convicted for delivery and for aggravated assault on a peace officer, and was sentenced to 40 years and life imprisonment, respectively. He appealed, asserting that the evidence was insufficient to prove his guilt as a party. The court of appeals disagreed and affirmed, and the court of criminal appeals affirmed as well.

To convict one as a party to a secondary offense under § 7.02(b) of the penal code, the state must prove that the second felony was committed in furtherance of the unlawful purpose and was one that the co-conspirator should have anticipated as a result of carrying out the conspiracy. It is not necessary to prove actual anticipation, only that the crime was one that should have been anticipated. Because § 7.02(b) is a variation of the common law "Pinkerton Rule" that is often employed in federal court, the court of criminal appeals looked to federal case law. Federal courts frequently find a link between large-scale drug operations and weapons and violence. Conversely, the links are less often found when the drug operations are small.

> Considering the totality of the circumstances in this case, we conclude that Appellant and Sherber were acting together in a criminal business to sell moderate amounts of methamphetamine and that, given the volume of drugs involved, Sherber's assault of the officer in this case was one that should have been anticipated as a result of the carrying out of the conspiracy.

Specifically, the amount of drugs in this transaction (two ounces of methamphetamine, the fact that there were more than eight and a half ounces in the vehicle, that Anderson had sold to Harmon on six prior occasions, and that he had $3,500.00 in his possession when arrested suggested more than a small drug operation. Additionally, Sherber and Anderson had frequently worked together in the past, and because of the number of repeat transactions, and the distances traveled to complete the sale, and the amount of drugs and money, Anderson "should have anticipated that he and Sherber might become the target of a thief or a police investigation, and that violence might be used either to protect the drugs or to escape."

ROBBERY

A defendant can be guilty of aggravated robbery by threatening the complainant with a deadly weapon even though the complainant never saw the weapon.

***Boston v. State*, 410 S.W.3d 321 (Tex. Crim. App. 2013)**

Boston went to a store with his brother, who pulled a gun and robbed the 83 year old proprietor. A store video showed the brother holding the gun and pointing it at the proprietor while Boston grabbed the money, but the proprietor testified at trial that she never saw the gun. Boston was convicted of aggravated robbery as a party, and he appealed, arguing, among other things, that the evidence was legally insufficient to prove that he used and exhibited a deadly weapon because the threat was not perceived by the complainant. The court of appeals disagreed and affirmed the conviction. "It is the use or exhibition of a deadly weapon—not its perception by the victim—that is the aggravating element of aggravated robbery with a deadly weapon."

The court of criminal appeals granted Boston's petition for discretionary review and affirmed, holding that the court of appeals erred "because a rational jury could have inferred that the victim was threatened, that the victim perceived the threat, and that the victim was placed in fear as a result of the perceived threat." Specifically, when the proprietor opened the cash register, Boston reached over the counter and took all the money out of the register. Although she testified that she didn't see the weapon, brandishing a firearm is not the only way to threaten or place a person in fear.

SEARCH AND SEIZURE

1. The totality of circumstances here shows this encounter was a detention.

***Johnson v. State*, 2013 WL 6480290 (Tex. Crim. App. 2013)**

Whether an encounter between police and citizen is a consensual encounter or a detention is a question of law and therefore subject to de novo review on appeal. In this case the court of criminal appeals held that the court of appeals erred when it found the encounter to be consensual.

We point out that the officer's shining of a "pretty darn bright" high-beam

spotlight onto a person sitting in a parked vehicle, parking the police car in such a way as to at least partially block the person's vehicle such that the person would have had to "maneuver" around the police car to drive away, using a "loud authoritative voice" in speaking with the person, asking "what's going on," and demanding identification manifests a detention, that is, an interaction that a reasonable person would not feel free to terminate. While none of these circumstances individually would necessarily lead to an inescapable conclusion that the person was detained, under the totality of these circumstances, we conclude that appellant was indeed detained—perhaps when the officer shined a bright light on him in his car, but certainly when the officer blocked appellant's car such that appellant would have had to "maneuver" his car from its parking place if he wished to terminate the interaction—thus implicating Fourth Amendment protections. On this record, the trial court could not reasonably have concluded that a reasonable person in appellant's shoes would have felt free to disregard the officer's approach, show of authority, and commands or felt free to terminate the interaction.

2. Affidavit stated probable cause even though it involved an unknown third party.

***Moreno v. State*, 2013 WL 6479898 (Tex. Crim. App. 2013)**

The court of appeals and the court of criminal appeals disagreed that the affidavit to search Moreno's home was insufficient. The police initially received information from another police agency that Moreno was selling drugs from his home. To corroborate this tip, they used a reliable confidential informant to conduct a controlled purchase from Moreno. The CI was searched and had no drugs. The police watched the CI make contact with an unknowing participant who was seen going to Moreno's apartment, entering and exiting it, then driving straight to another location where the cocaine was delivered to the CI.

It was reasonable for the magistrate to infer that the unknowing participant obtained the crack cocaine from Appellant's residence. Indeed, as the Supreme Court noted in *Gates*, probable cause "does not deal with hard certainties, but with probabilities." It is based on "common-sense conclusions about human behavior" formulated by "practical people." Although it is possible that the third party obtained the cocaine from some other source as

Appellant contends, Appellant presents no persuasive argument as to why the magistrate's inference that the third party bought the crack cocaine from Appellant was unreasonable. Additionally, unlike a confidential informant, the unknowing participant in this case appeared to be unaware of his participation in the police-conducted controlled purchase and, therefore, had no apparent motive to engage in subterfuge to mislead the police. Further, Appellant presents us with no facts to indicate that the unknowing participant had such a motive.

Even if the credibility or reliability of the unknowing participant were essential to the probable-cause determination in this case, the unknowing participant's statements may be deemed reliable because they were made by the participant as "one of the actors in the crime in the nature of admission against interest."

3. Judge Alcala believes that the case should be abated to the trial court for additional findings of fact and conclusions of law concerning the motion to suppress.

***Delafuente v. State*, 2013 WL 6182437 (Tex. Crim. App. 2013)(Alcala, J., dissenting)**

This case requires this Court to once again decide what to do when the losing party on a motion to suppress has requested explicit findings of fact and conclusions of law, but the findings made by the trial court are wholly inadequate. The majority opinion decides that a remand for supplemental findings is unnecessary, but I disagree. I conclude that the trial court, in essence, made only one fact finding and that it is an inadequate basis upon which to determine whether the officer had reasonable suspicion to detain the sedan occupied by Joseph Delafuente, appellant. I would sustain the second ground presented in the State's petition for discretionary review and reverse and remand the case to the court of appeals with instructions to abate to the trial court for additional findings. I, therefore, respectfully dissent.

4. Beware of "dispositive" motions to suppress.

***Bland v. State*, 2013 WL 5925719 (Tex. Crim. App. 2013)**

Bland was charged with possessing cocaine, and he filed a motion to suppress and a motion to disclose the identity of the informant. The parties agreed that the motion to suppress would be "dispositive," that is, if the motion was denied, the defendant would plead guilty, and if it was granted, the state would dismiss. At the suppression hearing the defense brought up the motion to disclose, and the prosecutor objected, noting that the motion to suppress would be dispositive, and that accordingly, the disclosure of the informant would be irrelevant to guilt or innocence. The trial court denied both motions, Bland appealed, and the court of appeals affirmed.

The court of criminal appeals granted Bland's petition for review, but, in a 5-4 decision, affirmed:

> The only issue before us is whether the court of appeals erred in rejecting appellant's claim that the trial court should have granted his motion to disclose on the basis that the confidential informant's testimony was necessary to a fair determination of guilt. If the motion to suppress was dispositive of the case, then it would not matter whether the confidential informant might have been able to provide testimony at the guilt phase of trial. The lead prosecutor explained that the "dispositive" nature of the motion to suppress was part of the plea agreement, and the second prosecutor explained exactly what was meant by "dispositive." Statements by counsel about the current court proceedings that are not contradicted by the opposing side are evidence of what occurred, at least when the opposing side is in a position to and has an incentive to contradict the statement if it is not true. Not only were the prosecutors' explanations uncontradicted, but defense counsel expressed agreement with what was said. Under these circumstances, we conclude that the parties contemplated that the dispositive nature of the motion to suppress was a term of the plea agreement. Despite appellant's protestations to the contrary, the explanation of "dispositive" and its role as a part of the plea agreement appears to be clear from the record.

5. Where the defense did not argue in the trial court that the breath test results were inadmissible because they were unreliable, this was not a "theory applicable to the case," and the appellate courts could not uphold the trial court's suppression order on this basis.

***State v. Esparza*, 413 S.W.3d 81 (Tex. Crim. App. 2013)**

Esparza was arrested for DWI and filed a motion to suppress complaining that his arrest was illegal and that the circumstances under which his breath was tested rendered the results obtained illegal. A hearing was held and the trial court found that the arrest was legal, but granted the motion nonetheless, because the state failed to present any evidence regarding the breath test results.

The state appealed and the court of appeals reversed, holding that Esparza failed to establish any illegalities in the way the breath test was conducted. The court rejected Esparza's argument, made for the first time on appeal, that there was another theory that could have justified the trial court's suppression order, namely that the state had failed to establish the scientific reliability of the test as required by Rule 702. The court pointed out that Esparza had never used the words "reliability" or "accuracy," and that he had not cited to Rule 702 in the trial court.

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

The so-called *Calloway* Rule, established in *Calloway v. State*, 743 S.W. 2d 645 (1988), says that the party who prevails in the trial court need not have explicitly raised an alternative theory in the trial court to justify the appellate rejection of appellant's claim. The court of appeals, however, eschewed the *Calloway* Rule, finding that Rule 702 did not constitute a "theory of law applicable to the case," and the court of criminal appeals agreed. The proponent of scientific evidence is not typically called on to establish its reliability unless and until the opponent makes a 702 objection. In this case there was nothing that occurred that would have alerted the prosecutor that Rule 702 reliability was at play at the pretrial hearing.

> Accordingly, we hold that, because the State—appellant though it may have been in this case-was never confronted with the necessity of meeting its burden to establish the scientific reliability of its breath-test results at the hearing on the appellee's pretrial motion to suppress, and for that reason the record was undeveloped with respect to admissibility as a function of scientific reliability, inadmissibility of that evidence under Rule 702 was not a "theory of law applicable to the case" that is available to justify the trial court's otherwise erroneous ruling on the appellee's motion to suppress."

6. Remanded in light of *Florida v. Jardines*.

***Rivas v. State*, 411 S.W.3d 920 (Tex. Crim. App. 2013)**

This case was remanded to the court of appeals for reconsideration in light of *Florida v. Jardines*, 133 S.Ct. 1409 (2013), in which the Supreme Court held that using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home constituted a "search" under the Fourth Amendment. *Jardines* was decided 12 days after the court of appeals's decision here.

7. Taking photographs of people at a public pool was not "unusual, suspicious, or criminal," and provided no reasonable suspicion for a traffic stop of the photographer.

***Arguellez v. State*, 409 S.W.3d 657 (Tex. Crim. App. 2013)**

The police were notified that an unknown male in a suspicious vehicle was taking pictures of people in their bathing suits at a public swimming pool. They stopped the car and obtained consent from the driver, Arguellez, to look through the photos on a digital camera found in the car. The cameras contained many photos of women and young girls in bathing suits, and after receiving *Miranda* warnings, Arguellez admitted to taking the photos. He was indicted and filed a motion to suppress, asserting that the police had no cause to stop him. The trial court denied the motion and he pleaded no contest and appealed to the court of appeals.

The court of appeals affirmed the convictions and the court of criminal appeals granted Arguellez's petition for discretionary review in which he asked this question: "Is 'crime afoot' when a person takes pictures at a public pool permitting a police officer to conduct an investigative detention?" The court concluded "that crime was not afoot" and reversed the convictions.

When the police conduct a warrantless seizure, the state bears the burden of showing reasonable suspicion to believe an individual was violating the law, and this must be founded on specific, articulable facts. Reasonable suspicion was lacking here.

> The totality of circumstances, including the cumulative information known to the cooperating officers at the time of the stop, was that an unknown male in a described vehicle was taking photographs at a public pool. Photographs are routinely taken of people in public places, including at public beaches, where bathing suits are also commonly worn, and at concerts, festivals, and sporting events. Taking photographs of people at such public

venues is not unusual, suspicious, or criminal.

8. A person's refusal to cooperate, accompanied by his "extreme nervousness and a game warden's hunch he was up to no good," did not combine to establish reasonable suspicion to seize and frisk.

***Wade v. State*, 2013 WL 4820299 (Tex. Crim. App. 2013)**

Wade was parked at a public boat ramp on Lake Waco at lunchtime with his motor running, and two game wardens stopped to make sure he was okay. They thought the truck was out of place and suspicious because they did not see a boat or fishing equipment. Wade told them he was eating lunch, but they thought that was a lie because they didn't see any food wrappers or a cooler. Wade said he lived nearby, but his license showed his address as 15 miles away, so, again, the game wardens thought he was lying. They also thought Wade was lying when he said he was looking at buying a house near the boat ramp. And they thought he was "overly nervous." The game wardens were concerned for their safety and, in light of Wade's nervousness, they asked him if he had any weapons. Wade asked them why they were doing this to him, and they regarded his answer as "quite a strange response" for someone just eating lunch. When he refused to give consent to search his truck, the game wardens ordered him out and told him they were going to conduct a pat down for their safety. They frisked him and when they asked Wade if there was anything they should know about, he said there was a pipe in the truck. A search of the truck turned up a pipe and a small amount of methamphetamine.

The trial court denied Wade's motion to suppress and the court of appeals affirmed, finding three "objective" facts that created a reasonable suspicion of criminal activity: First, Wade changed his story for being at the boat ramp; second, Wade was very nervous; third, Wade gave strange responses when asked if he had any weapons.

The court of criminal appeals granted Wade's petition for discretionary review and reversed. "The Supreme Court has consistently held that a person's refusal to cooperate with a police request during a consensual encounter cannot, by itself, provide the basis for a detention or Terry frisk. Because appellant's refusal to cooperate was accompanied only by his extreme nervousness and a game warden's hunch he was up to no good, the warden's stop-and-frisk of appellant violated the Fourth Amendment."

What began here as a consensual encounter escalated into a detention when the game wardens ordered Wade out of his truck. Wade argued here that his refusal to answer certain questions did not give the game wardens reasonable suspicion to order him out of his truck and frisk him, and the court agreed that the "action of standing on his rights [did not] serve as the tipping point in the reasonable-suspicion calculus."

Nervousness does not establish reasonable suspicion, but nervous or evasive behavior can be a relevant factor. It is not particularly probative, though, because citizens are often nervous when stopped by the police, and the more accusatory the questions become, the more nervous they get.

Nor did Wade's story-changing amount to reasonable suspicion. His stories – that he was eating lunch, that he lived nearby, and that he was looking at property to buy – were not even odd, much less suggestive as a pretext for criminal activity. That the responses seemed odd to the officer is not the question. "What matters are the objective facts that indicate criminal activity, not the officer's characterization of them." An officer must do more than label behavior as suspicious to make it so. Rather, the government must be able to articulate why a particular behavior is suspicious, or logically demonstrate that the behavior is indicative of something more sinister than it appears at first glance. The court of criminal appeals disregarded the "changing stories" as having had any probative value in the reasonable suspicion analysis.

Nor were Wade's so-called "strange responses" sufficient to constitute reasonable suspicion. Although a refusal to cooperate might be a relevant factor to consider, "it cannot be the prominent factor as it was here."

> Neither nervousness nor a refusal to cooperate with an officer during a consensual encounter are sufficient by themselves to constitute reasonable suspicion. Nor were they sufficient in combination with appellant's statements about his reasons for coming to the boat launch to provide the basis for the detention and frisk. Appellant's statement about the pipe in his truck was derived from the warden's illegal detention and was "fruit of the poisonous tree," and therefore that statement could not provide probable cause for searching appellant's truck.

9. "Is a cell phone really a pair of trousers."

***State v. Granville*, 373 S.W.3d 218 (Tex. App.–Amarillo 2012, pet. granted)**

Granville was arrested for causing a disturbance at his school, at which time his cell phone was taken from him and was put in the property room. An officer who was not involved in the arrest was told that Granville had taken a picture of a student urinating in a urinal at the school the day before, and, without a warrant the officer went to the property room, turned on Granville's phone, and scrolled through it for the picture in question. Granville was charged with improper photography, and he filed a motion to suppress, which was granted by the trial court.

The court of appeals affirmed the order of suppression. The "crux" here was this: "May an officer conduct a warrantless search of the contents or stored data in a cell phone when its owner was required to relinquish possession of the phone as part of the booking or jailing process?"

First, the court recognized that the police may not seize evidence just because they have probable cause to do so. Without a warrant, a search is presumptively unreasonable. The state's argument that this search was justified by probable cause, "without more, is wrong." Second, it is not true that this search was permissible because the phone was jail property to which Granville had no expectation of privacy. Although prisoners have no expectation of privacy in their cells, arrestees retain some expectation of privacy in belongings or personal effects taken from them after arrest. "Instead of having none, their expectations of privacy are "diminished."

The court next addressed the extent to which an arrestee has an expectation of privacy in the electronically stored data in his cell phone that was taken from him upon arrest. A stranger can learn much about the "owner, his thought processes, family affairs, friends, religious and political beliefs, and financial matters by simply perusing through" his phone. It cannot be reasonably doubted that such matters are intrinsically private. Security measures, such as passwords and encrypted programs, have been developed to prevent disclosure. Given this, it cannot be doubted that people like Granville have a general and reasonable expectation of privacy in the data contained in or accessible by their cell phones. And, although being jailed diminishes, it does not necessarily vitiate, expectations of privacy.

> As we cautioned early on, we deal not with a warrantless search incident to arrest or one undertaken due to exigent circumstances. Nor do we deal with property found in a jail cell. Rather, we consider a warrantless search, by a stranger to an arrest, of a cell phone taken as part of an inventory-conducted incident to jailing for evidence of a crime distinct from that underlying the owner's arrest. Nothing in those circumstances or the others mentioned herein nullify Granville's reasonable expectation of privacy in the phone searched. Nothing in them allowed the officer to act without a warrant. While assaults upon the Fourth Amendment and article I, § 9 of the United States and Texas Constitutions regularly occur, the one rebuffed by the trial court here is sustained. A cell phone is not a pair of pants.

10. Although our legislature has not expressly authorized search warrants to be sworn out over the telephone, and not in the physical presence of the magistrate, neither has it prohibited such practice, and until the legislature addresses the question, the courts will decide legality on a case-by-case basis;

the circumstances of the telephonic warrant application in this case sufficed "to satisfy the solemnizing function of the oath requirement under Article 18.01(b)."

***Clay v. State,* 391 S.W.3d 94 (Tex. Crim. App. 2013)**

The officer who arrested Clay for DWI filled out an affidavit in support of search warrant for her blood, and then telephoned a local county court-at-law judge and "swore to and signed" the affidavit in that conversation. The officer then faxed his affidavit to the judge, who signed and dated the jurat, as well as a warrant authorizing the seizure of Clay's blood, and then faxed the warrant back to the officer, who took the blood sample. The officer and the judge recognized each other's voices, but it was undisputed that the officer did not appear and sign the affidavit in person before the judge. The trial court denied Clay's motion to suppress the blood, and she appealed, asserting that the seizure was illegal because the affidavit in support of the search warrant had not been signed in the physical presence of the judge who issued the warrant. The court of appeals disagreed and affirmed the conviction.

The court of criminal appeals also affirmed. This is a case of first impression. Article 18.01(b) of the code of criminal procedure does not specifically address the issue here, and the court made it clear that it could not expand on what the legislature has written, even for the sake of keeping pace with technological advances. That said, the court deemed it proper to permit the practice under the circumstances proven in this case.

> We see no compelling reason to construe the "sworn affidavit" contemplated by Article 18.01(b) necessarily to require that the oath always be administered in the corporal presence of the magistrate, so long as sufficient care is taken in the individual case to preserve the same or an equivalent solemnizing function to that which corporal presence accomplishes. Only the Legislature is free to amend or supplement Article 18.01(b) to specifically and comprehensively regulate the process of obtaining search warrants by telephonic or other electronic means, as so many other states have now done. Until that time, the question of whether the circumstances of an individual telephonic warrant application will suffice to satisfy the solemnizing function of the oath requirement under Article 18.01(b) will have to be resolved on a case-by-case basis.

11. Judge Cochran strongly recommends that the one who loses a motion to suppress should always request findings of fact.

***Aguirre v. State,* 402 S.W.3d 664 (Tex. Crim. App. 2013)(Cochran, J.,**

concurring in the refusal of petition for review)

The police received information that Aguirre was selling marijuana out of his home, and approximately 20 officers swarmed the area and began surveillance. They saw a man leave Aguirre's garage with a white bag and when they stopped him they found marijuana in the bag. He told them he bought it from Aguirre, and so at least six of the narcotics officers, rather than seek a warrant, went to his home, wearing guns and jackets emblazoned with the word, "Agents," to conduct a "knock and talk," in hopes of obtaining consent to search. According to the officers, Aguirre did consent, voluntarily, of course, and this led to the discovery of several hundred pounds of marijuana. Aguirre and his young son testified that they believed that, from the coercive circumstances, they believed they had no choice but to allow the officers to consent. Aguirre argued that this was not a true "knock and talk" scenario, but instead a huge show of force. The prosecutor argued that the trial court could find from the totality of circumstances that Aguirre voluntarily consented, and that Aguirre's motion to suppress should be denied. The trial court denied the motion without comment.

Aguirre lost in the court of appeals and the court of criminal appeals denied his petition for discretionary review. Judge Cochran concurred but clearly did so reluctantly, and she focused on Aguirre's failure to request findings of fact. She said, "'For want of a nail the shoe was lost.' For want of a factual finding, the appeal was lost." Later in the opinion she noted that even though the testimony was conflicting, counsel failed to request findings, and that this "failure sealed appellant's fate on appeal." Absent specific findings, the appellate court's hands are tied: "Factual findings can only help the losing party on appeal." Judge Cochran then "reluctantly" agreed with the court's decision to refuse Aguirre's petition, but not before this statement:

> I have a difficult time hypothesizing sufficient facts from the testimony in this case-even crediting every word of the State's two witnesses and discounting every word uttered by appellant and his son-that would support a finding that this was just a "knock and talk" citizen-police encounter. I find it even more puzzling that the trial judge could have found, by clear and convincing evidence, that appellant voluntarily consented to the search of his home, based upon Officer Moreno's testimony. Had I been in appellant's position, I would not have felt free to ignore the demands (or requests) of this cadre of narcotics officers. I think it unlikely that any normal reasonable person in appellant's position would feel free to ignore these police officers under the circumstances to which Officer Moreno testified. To me, this is a real stretch by both the trial judge and the court of appeals. I cannot imagine that those judges would have felt free to ignore these officers and their demands/requests had they suddenly arrived at their homes. On the other

hand, it is within the realm of possibility (though just barely) that the trial judge could have found, based on Officer Moreno's testimony, that appellant voluntarily consented to the search even though he had been detained by the officers. Such a factual finding might pass the "red face test" if phrased very carefully. Unfortunately for appellant, with no explicit factual findings it is almost impossible for him to overcome the extremely deferential standard of review that we use for the trial judge's implicit factual findings.

12. Reasonably suspicious enough, where the officer was justified in suspecting that the defendant was involved in criminal activity and in detaining her to investigate further.

***State v. Kerwick*, 393 S.W.3d 270 (Tex. Crim. App. 2013)**

Shortly after midnight, someone called the police to report several people fighting in front of a bar. When officer Bradford arrived he saw several people standing outside. Bradford spoke to someone who was the owner of a damaged vehicle which was at the location, and this person, who identified him or herself to Officer Bradford, pointed at a vehicle parked on the roadway directly across the street from the bar and stated, "There they are right there. There they are, there they are." Bradford approached Kerwick's vehicle, it began to move, and he ordered Kerwick to stop. After observing the usual symptoms, Bradford arrested Kerwick for DWI. The trial court granted her motion to suppress, finding that Bradford did not possess specific, articulable facts establishing reasonable suspicion that some activity out of the ordinary was occurring or had occurred, and that Kerwick had a connection with criminal activity.

The state appealed and the court of appeals affirmed, holding that "the record before us simply contains no facts to enable either the trial court or this court to objectively evaluate either Officer Bradford's belief that the person who said, "There they are right there. There they are, there they are," was the person who called the police or his belief that [Kerwick] was 'involved in an offense . . . .'"

The court of criminal appeals reversed. Although each fact known to the officer in isolation may not have established reasonable suspicion, in totality they did. Damage to the vehicle and a report that several people were fighting is indicative of unusual activity and was an indication that a crime had occurred. And there was evidence that Kerwick or her companions were connected to the criminal activity. Further, Kerwick's attempt to drive away, though not conclusive, is certainly suggestive of wrongdoing.

Officer Bradford's investigatory stop was reasonable in 30 order to determine Kerwick's and her passenger's identities and "maintain the status quo

> momentarily to obtain more information" concerning the possible criminal activity. When police receive a call about an offense and, on arrival at the scene, someone shouts "There they are," it would be unreasonable for an officer not to investigate further. Amounting to more than a mere hunch, the specific, articulable facts, and the rational inferences flowing from those facts, warranted Officer Bradford's investigative detention of Kerwick.

In so concluding, the court of criminal appeals made several statements that, although of no use to Kerwick in her case, may be important for other practitioners in future cases to know about.

First, "the court of appeals properly disregarded portions of the trial judge's findings of fact number four and eleven which respectively found that Officer Bradford 'believed' that the person with whom he spoke was the one who called the police and that the occupants of the vehicle were involved in either an assault, criminal mischief, or both. Officer Bradford's subjective beliefs are not relevant to the determination of reasonable suspicion."

Second, the court of criminal appeals was critical of the court of appeals for highlighting perceived deficiencies in the record and the questions left unanswered by the record and the trial court's findings. "By focusing on what the record and the findings did not contain, the court ventured beyond its role in ensuring that the trial judge's findings were supported by the record. Instead, the court's review of the record, as well as its ultimate conclusion concerning its adequacy, centered on what it believed the record and the trial judge's findings should have contained. Based on our review of the record, we hold that the findings of fact that the trial judge entered are supported by the record."

Third, that the trial court's findings "essentially mirrored" the officer's testimony, indicated to the court of criminal appeals that the trial court found the officer credible. Even though, of course, the trial court granted the defendant's motion to suppress.

13. The federal independent source doctrine is not inconsistent with Article 38.23.

Wehrenberg v. State, 2013 WL 6479977 (Tex. Crim. App. 2013)

The police had been conducting surveillance of a residence for about 30 days when a confidential informant notified them that opeople within were "fixing to" cook

methamphetamine. A few hours later the police entered the residence without a warrant, cuffed several people, including Wehrenberg, and performed a protective sweep of the premises. While they "secured" the residence, other officers obtained a search warrant, which, when served, yielded drugs and manufacturing equipment. Wehrenberg argued that the initial warrantless entry was illegal and that so was his detention and removal, and that such illegality tainted the subsequently obtained search warrant.

The trial court denied in part Wehrenberg's motion to suppress, and the Fort Worth Court of Appeals reversed, holding that the police had probable cause to enter a residence without a warrant, but that the entry was nonetheless illegal because there were no exigent circumstances. The court of appeals rejected the state's argument that the evidence was lawfully seized under the "independent source rule," holding that that judicially created exception to the exclusionary rule was in direct contradiction to the legislatively-created state exclusionary rule found in article 38.23.

The court of criminal appeals granted the state's petition for discretionary review to answer the following question: "Is the independent source doctrine consistent with Article 38.23?" The court reversed the court of appeals.

> We agree with the State that the independent source doctrine poses no conflict with Article 38.23 of the Texas Code of Criminal Procedure, the statutory exclusionary rule in Texas that requires suppression of evidence "obtained" in violation of the law. [citations omitted] Because the independent source doctrine does not circumvent or avoid the statutory exclusionary rule's requirement that evidence obtained in violation of the law be suppressed, we conclude that the court of appeals erred by rejecting that doctrine as a basis for upholding the trial court's suppression ruling. We reverse and remand.

14. The warrant was particular enough even though it incorrectly stated the address of the property to be searched and the color of the roof.

***Bonds v. State*, 403 S.W.3d 867 (Tex. Crim. App. 2013)**

Bonds moved to suppress evidence seized from a home pursuant to a search warrant, and the motion was overruled by the trial court. That court agreed that the warrant's

description was partially inaccurate in describing the color of the roof and the address of the property to be searched, but upheld the search anyway, concluding that the affidavit established probable cause because the property searched had the correct number of windows, and because the affiant's personal knowledge permitted him to identify the correct location to be searched pursuant to the warrant in question. The court of criminal appeals agreed.

15. No reasonable suspicion for stop for driving in the left lane without passing.

***Abney v. State*, 394 S.W.3d 542 (Tex. Crim. App. 2013)**

Kilgore, a Kaufman County deputy sheriff followed Abney for approximately one mile in the left lane, and pulled him over when he turned left at a cross-over to make a u-turn. The deputy testified that Abney had been traveling in the left lane and had not passed anyone, and that there was no one in the right hand lane. The violation, according to the officer, was traveling in left lane without passing, and the officer testified that there had been a sign approximately 15 to 20 miles back on the highway that warned that such action was illegal ("left lane for passing only"). The deputy found marijuana in Abney's car and arrested him, and he filed a motion to suppress complaining that there was no reasonable suspicion for the stop. The trial court denied the motion and the court of appeals affirmed. The court of criminal appeals reversed.

The traffic code indicates that it is an offense to travel in the left lane without passing when there is a sign that identifies this activity as a violation. "Without such a sign present within a reasonable distance of the traffic stop, there is no offense."

> Here, the record does indicate that Kilgore did not know at what point Appellant entered the highway. He explained that he followed Appellant for a one-mile stretch that did not contain a "left lane for passing only" sign and that he pulled Appellant over as he was turning left onto a crossover, assuming Appellant had passed a sign located fifteen to twenty miles behind him. There is no evidence to support an assumption that Appellant had driven past the sign, and other evidence introduced indicated that the sign Kilgore relied upon was actually located twenty-seven miles away from the stop. The facts support that Appellant was driving in the left lane to make a left turn, which would be an appropriate action to take as it is clearly illegal to make a left turn from the right lane. If the facts in this case were sufficient for a stop, then anyone driving in the left lane without passing other vehicles is subject to a traffic stop if there is a "left lane for passing only" sign located anywhere on the highway, even if there is no evidence that the driver has passed such a sign. The purpose of regulatory signs is to provide drivers with notice of

traffic laws or regulations. According to the Texas Manual on Uniform Traffic Control Devices, these signs are required to be installed at or near where the regulations apply. However, although it provides guidelines for the spacing and placement of speed limit signs, there are no specific guidelines for the spacing of the "left lane for passing only" signs. Therefore, it is necessary to determine, based on the statute, whether such a sign is applicable based on the facts of each case. In this case, the evidence indicated only that, in Kilgore's opinion, Appellant may have passed a "left lane for passing only" sign located at least fifteen miles away. Other testimony indicated that the sign was twenty-seven miles from where the traffic stop was conducted. Neither one of these scenarios places the sign at or near where the alleged violation took place. As we explained in *Robinson v. State*, an officer's mistake about the legal significance of facts, even if made in good faith, cannot provide probable cause or reasonable suspicion. Given the vagueness of the statute, a "left lane for passing only" sign located at least fifteen miles away is not close enough to be applicable. We conclude that Kilgore's testimony did not support the trial court's finding of reasonable suspicion.

16. Although the videotape provided indisputable evidence that the defendant committed a traffic violation, it did not provide indisputable evidence that the arresting officer saw the violation, and the trial court's factual finding that he did not must be upheld.

***State v. Duran*, 396 S.W.3d 563 (Tex. Crim. App. 2013)**

Duran turned left in front of a police officer who was speeding to domestic violence call, which caused the officer to abandon the domestic violence call and go after Duran. The video shows that two seconds after one of Duran's tires crossed over the center stripe, the officer put on his overheads and made a traffic stop. Duran was charged with DWI and he filed a motion to suppress, arguing no reasonable suspicion for the stop. The officer testified that he stopped Duran because he turned in front of him, and because his car crossed the center stop. The state conceded that the left turn was not a traffic violation, but maintained that the line-crossing violation was, and that it was captured on video. The trial court granted Duran's motion to suppress and made findings of fact which included the finding that the police officer "most probably did not even see the center stripe violation because he did not mention it in his report."

The state appealed, arguing that the videotape clearly showed that Duran's car crossed the center stripe, and that this gave the officer reasonable suspicion, and the court of appeals agreed and reversed the order of suppression, holding that the videotape provided an objective justification for the stop.

The court of appeals reversed the reversal. The sole question in this case was a simple one, factually: Did the officer see Duran cross the center stripe? The trial court decides this, not the appellate courts, which must view the trial court's findings in the light most favorable to the trial court's ultimate findings. Here there was indisputable evidence that Duran crossed the center stripe, but there was not indisputable evidence that the officer saw him do it. "And that is what matters." Because the record supports the totality of the trial court's findings, that court's ruling will be upheld.

17. Defendant had standing to complain of warrantless seizure of dogs from home which he did not own or reside at; plain view doctrine did not authorize warrantless seizure of dogs from curtilage; community caretaking function argument was waived when it was not asserted below.

***State v. Betts*, 397 S.W.3d 198 (Tex. Crim. App. 2013)**

An animal control officer responded to a location for a dog fight and he entered property when he heard a puppy yelping. He then saw a number of dogs he described as chained and malnourished, he saw that there was no food, and that their water was dirty. He called the police who after making similar observations, entered the property and seized 13 dogs, claiming a reasonable suspicion to believe that the dogs were in immediate danger. Betts was indicted for animal cruelty, and he filed a motion to suppress complaining that the dogs had been seized illegally. The trial court granted the motion to suppress, the court of appeals affirmed, as did the court of criminal appeals.

A defendant who challenges a search must show standing, that is, that he had a reasonable expectation of privacy in the place searched. In making this determination, the courts must consider whether from the totality of circumstances:

> (1) whether the accused had a property or possessory interest in the place invaded; (2) whether he was legitimately in the place invaded; (3) whether he had complete dominion or control and the right to exclude others; (4) whether, before the intrusion, he took normal precautions customarily taken by those seeking privacy; (5) whether he put the place to some private use; and (6) whether his claim of privacy is consistent with historical notions of privacy.

This is a non-exhaustive list, and no one factor controls. In the present case, the record supported the trial court's determination that Betts had standing, even though he did not own or live on the property. His aunt did, though, and he had her permission to keep his dogs there, and he entered the property daily to feed the dogs. The property was fenced on all four sides and the dogs were kept approximately 70 yards from the road, behind the

house, in a central part of the back yard. Housing and sheltering dogs is certainly a common private use for one's backyard. Nor did Betts forfeit his right to privacy because the backyard was exposed to public view.

Nor was this search justified by the plain view doctrine. Although the record supported the conclusion that the officers could see the dogs from the street, that did not authorize them to enter private property and seize the dogs without a warrant.

Finally, because the state did not argue the community caretaking function in the trial court or on appeal, it cannot do so now. "'"[I]n cases in which the State is the party appealing, the basic principle of appellate jurisprudence that points not argued at trial are deemed to be waived applies equally to the State and the defense.' [citations omitted] Because the community caretaking function was not a theory argued by the State at trial or to the court of appeals, the State cannot here rely on that theory to prove that the trial court's ruling should be reversed by this Court."

18. Officer illegally entered defendant's residence without a warrant where there was no showing of the imminent destruction of marijuana within.

***Turrubiate v. State*, 399 S.W.3d 147 (Tex. Crim. App. 2013)**

After a CPS worker reported to the Sheriff's Office that Turrubiate's home smelled like marijuana, a deputy knocked on the door, and when Turrubiate cracked the door, the deputy noticed the same smell. Based on the smell, the deputy determined that immediate entry was necessary to prevent the marijuana from being destroyed, and to preserve it for prosecution, and he also thought that if he left for a warrant, the marijuana would be available for destruction. So the deputy forcibly entered the home, pointed his taser at Turrubiate, cuffed him and placed him on the floor. He discovered marijuana in the house and Turrubiate was charged accordingly. The trial court denied his motion to suppress and he appealed. The court of appeals reversed, and the court of criminal appeals affirmed the reversal.

A warrantless entry into a residence is presumptively, and the state bears the burden of showing both probable cause and that exigent circumstances made a warrant impracticable. In this case, the only indicia of exigency were the odor of marijuana and that the occupant knew that a policeman was at his door. This alone is not enough to show the imminent destruction of marijuana. Turrubiate voluntarily answered the door both times the deputy knocked and did not engage in any behavior, such as making a furtive movement, suggesting an intent to destroy evidence.

Alternatively, the state complained here that the court of appeals had failed to

consider whether a reasonable officer could have believed that the presence of marijuana in the home was endangering the safety of a six month old child. The court of criminal appeals agreed that this might have been a basis to uphold the trial court's finding of exigent circumstances, and remanded the case to the court of appeals to determine whether the state made this argument at trial, or, if not, whether the court of appeals may nonetheless address it.

19. Although a lawyer performs deficiently when he waives the right to challenge illegally seized evidence by stating "no objection" when the evidence is offered before the jury, there is no prejudice if the defendant lacks standing to challenge the seizure. And, a temporary guest of a registered hotel guest lacks standing to complain about a search of the hotel room if there is no evidence he had any property or possessory interest in the room, any personal belongings in the room, or that he intended to stay overnight.

***Ex Parte Moore*, 395 S.W.3d 152 (Tex. Crim. App. 2013)**

Moore was arrested in a motel room in Lubbock and was later indicted and tried for possessing cocaine base found in the room. His lawyer filed a motion to suppress the evidence found in the motel room, and it was denied. When the state offered the evidence in front of the jury, the defense stated, "no objection." The evidence was admitted, Moore was convicted and sentenced to 99 years imprisonment, and his appeal was affirmed after the court of appeals found that he waived any error surrounding the seizure of the cocaine when he responded, "no objection" at trial. Moore then filed a writ of habeas corpus asserting that he was denied the effective assistance of counsel when his trial lawyer waived the suppression issue. The trial lawyer filed an affidavit admitting that he had had no trial strategy for stating "no objection."

The trial court found that counsel performed deficiently, but recommended that relief be denied for want of a showing of prejudice because, among other things, Moore failed to establish standing in the motel room. In other words, even if trial counsel's deficient performance waived Moore's right to complain about the seizure, it did not matter, since Moore lacked standing to complain about the seizure.

The court of criminal appeals agreed and denied relief. A registered hotel guest has an expectation of privacy in the hotel room, and an overnight guest of a registered guest also has a reasonable expectation of privacy in the room. Whether a "temporary" guest may expect privacy depends on the totality of circumstances.

> Turning to the case at hand, when viewed in the light most favorable to the trial court's ruling, the record of the hearing on the motion to suppress

established only that Applicant was in the motel room at the time the search warrant was executed. The evidence does not show that Applicant's subjective expectation of privacy was one that society was prepared to recognize as objectively reasonable under the circumstances. This conclusion is grounded on the totality of the circumstances established by the evidence. There was no evidence that Applicant was the registered guest of the room or that he had any property or possessory interest in the room. Nor was there evidence that he had any personal belongings in the room or that he intended to stay overnight.

Because Applicant did not have a reasonable expectation of privacy in the motel room, he cannot complain of an alleged violation of his Fourth Amendment rights resulting from the search at issue, and the trial court did not abuse its discretion in denying Applicant's motion to suppress. Therefore, Applicant has failed to demonstrate harm resulting from trial counsel's deficient performance because he has not shown that he would likely have been successful on appeal had the issue been properly preserved.

20. Since defendant gave pet-sitter apparent consent to view his computer she did not violate the law when she did so and found child pornography on it.

***Baird v. State,* 398 S.W.3d 220 (Tex. Crim. App. 2013)**

Baird hired Killian to pet sit his dog while he was on vacation, and took her on a tour of his house advising her what he wanted her to do. After Baird left, Killian went into his master bedroom and got on his computer, ostensibly to download music. She discovered child pornography and reported it to the police. Baird filed a motion to suppress claiming that he had not given her access to the bedroom and computer, and that therefore she obtained the evidence illegally, in violation of article 38.23(a) of the code of criminal procedure. The trial court disagreed and denied Baird's motion to suppress, and the court of appeals and the court of criminal appeals affirmed.

Clearly Baird did not give Killian express consent to view his computer. Did he give her "apparent consent?"

"[T]he evidence supports a finding that the appellant gave Killian his apparent consent. The appellant invited Killian to help herself to "anything" and "everything," and this invitation was not limited to the refrigerator and pantry, but was repeated during the course of the tour of the house, which included his master bedroom. Whatever he may have intended, the appellant told Killian only that he required her to keep the bedroom door closed in

order to keep the dog out. He did not expressly banish her from the bedroom, nor did he forbid her to use his computer. He showed her how to operate the television and stereo. He did not power the computer down or password-protect it, and he admitted that he allowed his roommate to use it regularly. Given this convergence of facts, the trial court was justified in concluding that Killian had the appellant's apparent consent—that is to say, it is clear and manifest to the understanding that she had his assent in fact—to enter his bedroom and use his computer.

21. *Georgia v. Randolph* does not apply to vehicular searches; consent by the driver of a vehicle authorizes the search, even though the passenger expressly refuses to consent.

***State v. Copeland,* 399 S.W.3d 159 (Tex. Crim. App. 2013)**

The police stopped an SUV and the driver consented to a search of it. Copeland, the passenger, claimed she owned the vehicle, and refused to consent. Copeland and the driver told the officer they were common law married. The driver continued to consent, and Copeland continued to refuse. The search turned up a couple of pills, which Copeland moved to suppress, arguing that the search of the SUV was unlawful as to her because she refused to consent. The trial court agreed and suppressed the evidence, and the court of appeals affirmed, relying on *Georgia v. Randolph,* 547 U.S. 103 (2006), in which the Supreme Court had held illegal a seizure from a residence where one of the occupants had consented, but the other had expressly refused to consent.

> Is a vehicle a mobile "castle" so that passengers are treated the same as tenants who may disallow police to search a residence after a fellow tenant has consented to the search? Concluding that it is not, we decline to extend the holding in *Georgia v. Randolph*, 547 U.S. 103, 123, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), from residences to vehicles. Because the trial court applied *Randolph* to vehicles, the court of appeals erred by upholding the suppression ruling on that basis.

SELF DEFENSE

1. Defendant is not entitled to an instruction on the "Castle Doctrine" where there was no evidence that the killing occurred on or after the effective date of this law.

***Krajcovic v. State,* 393 S.W.3d 282 (Tex. Crim. App. 2013)**

On September 6, 1997, the police were called to Krajcovic's residence for a shooting, and, upon arrival, they smelled "odor of death." Inside they found a body decomposing. The medical examiner could not determine the precise time of death, but could only say that it was more than 36 hours before the body was discovered. The "Castle Doctrine" provides, among other things, that a person has no duty to retreat inside his own home, and requires that the jury be instructed accordingly. The trial judge here instead instructed the jury that a person is justified in using deadly force against another "if a reasonable person in defendant's situation would not have retreated." Krajcovic's objection that the instruction given did not properly submit his right not to retreat was overruled, he was convicted, and he appealed.

The court of appeals reversed, holding that the Castle Doctrine" applied, and that the trial court improperly instructed the jury. The court of criminal appeals reversed the reversal.

The "Castle Doctrine" became effective for all offenses committed on or after September 1, 2007. Here, though, there was no evidence that the killing occurred on or after the effective date of the statute. Testimony from a witness that he may have seen the victim in October is not affirmative evidence that the killing occurred in September, where here, the body was found in September. Testimony by another witness that he did not know or remember when he last saw the victim is not affirmative evidence that the killing happened in September.

> The evidence raised at trial governs what is included in the charge, and here there is no affirmative evidence to support a rational inference that the murder was committed on or after September 1st. Because there was no evidence to support the defense, the trial court did not err in failing to give the instruction.

2. An "impenetrable forest of legal 'argle-bargle' that attempted to instruct the jury on the law of self-defense" but which in fact erroneously and harmfully instructed on provocation.

***Reeves v. State*, 2013 WL 5221142 (Tex. Crim. App. 2013)**

Reeves was tried for murder and the trial court instructed the jury on self defense. Over Reeves's objection, the court also instructed the jury on provocation, namely that if the jury found that Reeves had provoked the difficulty he would not be entitled to rely on self defense. The jury convicted Reeves and he appealed. The court of appeals reversed his conviction, finding both that the trial court had erred in submitting provocation, and that this instruction had caused Reeves some harm. The court of criminal appeals granted the

state's petition for discretionary review, but unanimously affirmed the reversal.

The state conceded and the court of appeals found that there was no evidence that Reeves had provoked the difficulty here. Since Reeves's lawyer timely objected, the only question was whether he suffered actual harm, and the court answered by examining the four factors from *Almanza v. State*, 686 S.W. 2d 157 (Tex. Crim. App. 1985). "This analysis requires a reviewing court to consider: (1) the jury charge as a whole, (2) the arguments of counsel, (3) the entirety of the evidence, and (4) other relevant factors present in the record." Using this test, especially the first, second, and fourth prongs, the court found that Reeves suffered actual harm from the erroneous charge.

The jury charge as a whole. Judge Cochran noted that the beginning of the jury charge, where the law of murder was submitted, was "the way instructions should be—clear, concise, and to the point." Then came "a six-page impenetrable forest of legal 'argle-bargle' that attempted to instruct the jury on the law of self-defense." Sounding like an English teacher, the judge went on to point out a "run over sentence," "paragraphs containing 80–plus words with multiple sub-sections that span the better part of a page" and a "self-defense application paragraph [that] is a single sentence that contains 204 words." After discussing two lengthy application paragraphs, she concludes, "Neither is comprehensible." The state argued that Reeves was not harmed because provocation was already before the jury in the main instruction on self defense. The court rejected this argument finding that there was no way to presume that the jury understood this portion of the charge because it was so poorly written. In contrast, the portion of the charge that addressed provocation directly, and the portion that Reeves objected to at trial and on appeal, was "slightly" more comprehensible than the "impenetrable forest of legal argle-bargle." The presence of the provocation charge implied that there was some evidence of provocation, when in fact there was not. Additionally, the location of the provocation instruction – after the charge on self defense – made it more likely that the jury's attention was drawn to it, and magnified the harm. Finally, when contrasted to the six impenetrable pages of self defense instruction, the abstract instruction on provocation "was clear as a bell."

The arguments of counsel. Unfortunately for the state, its claim of harmlessness was belied by its summation at trial, where "the prosecutor explicitly pointed to that easily understood abstract portion of the provocation instruction." Although a charge might be harmless in certain cases where it had absolutely no applicability to the facts of the case, "but here the prosecutor referred the jurors directly to the improper instruction and asked that they 'pay close attention to it.' Not only did she refer to the concept in the abstract, she read a portion of the erroneous charge to the jury. This emphasized the improper instruction and brought it to the front of the jurors' minds."

The entirety of the evidence. In this case the evidence was conflicting. Reeves testifed that he acted in self defense, but other state's witnesses testified consistent with the murder conviction. It is not the appellate court's job to "weigh in on this fact-specific determination . . . . We do, however, agree with the court of appeals that 'the evidence of guilt was not so overwhelming that the erroneous provocation instruction was harmless .'"

Other Relevant Evidence Contained In The Record. It is relevant here that the erroneous charge and the prosecutor's argument undermined Reeves's sole defense. "Thus any erroneous instruction that limited his self-defense theory was likely harmful." Although an erroneous provocation instruction will not necessarily be harmful when self-defense is the sole defensive theory, that factor goes on the 'some harm' side of the scale rather than the 'no harm' side."

SENTENCING

1. The evidence was sufficient to prove that appellant had twice previously been convicted of felonies, even though the indictment erroneously reversed the chronological order of those convictions.

***Roberson v. State*, 2013 WL 6081202 (Tex. Crim. App. 2013)**

Roberson was charged as an habitual. Specifically, the indictment alleged that, prior to the instant felony allegation, she had been previously finally convicted of a felony in 1989, and before that, she had been finally convicted in 1991. After she was convicted, and before the sentencing phase commenced, Roberson objected that the second alleged enhancement offense alleged that it had occurred before the first, when, in fact, it occurred afterwards. The trial court overruled the objection, and the state switched the order of the enhancement allegations when it read them to the jury, before Roberson entered her plea. The jury heard evidence and found both enhancements true, and sentenced her to 30 years imprisonment. The court of appeals affirmed, and the court of criminal appeals affirmed the affirmance.

First, the court of criminal appeals rejected Roberson's complaint that the court of appeals had erroneously relied on an unpublished decision. TRAP Rule 47.7(a) provides that unpublished decisions have no precedential authority, but may be cited as long as they contain the notation, "not designated for publication." The court of appeals's citation here contained that notation, and that court's "discussion of [the unpublished decision] appears to have been more comparative and illustrative rather than viewing [the case] as precedential authority."

The court also rejected the merits of Roberson's complaint. The evidence in this

case shows that Roberson was in fact previously convicted of the two offenses that were alleged in the indictment, and therefore the evidence was sufficient to support the enhanced sentence. "While the indictment's enhancement paragraphs were erroneously listed in reverse chronological order on the face of the indictment, when the prosecutor read the enhancement allegations at the punishment proceeding, they were read in the proper order of commission and finality and conformed to the required sequence of prior convictions." Sufficiency is different than notice. Roberson does not complain that she lacked notice.

2. The trial court erred in ordering the defendant to reimburse the county for his court-appointed attorney's fees where the court did not find a material change in his financial status after he was declared indigent, but the defendant forfeited the claim when he did not raise it on direct appeal from the order that imposed the reimbursement.

***Wiley v. State,* 410 S.W.3d 313 (Tex. Crim. App. 2013)**

The trial court found that Wiley was indigent and appointed a lawyer to represent him. He pled guilty and got probation, and later his probation was revoked. He appealed from the revocation and argued, among other things, that the evidence was insufficient to support the trial court's order that he reimburse the county for his court-appointed trial attorney. The state conceded that the evidence was insufficient. The court of appeals held that Wiley had waived his right to complain because he had not objected to assessment of attorney's fees at the time they were initially assessed. The court of criminal appeals affirmed, but for a somewhat different reason.

Once a defendant is declared indigent, the trial court may order him to pay for legal services, but only if it finds he has he funds to do so. "A defendant who has previously been found indigent is presumed to remain indigent unless there is a 'material change' in his financial status, and in the absence of any indication in the record that his financial status has in fact changed, the evidence will not support an imposition of attorney fees. Here, because the trial court failed to find there was a material change, the evidence is insufficient to support the court's order to pay attorney's fees.

The court went on, however, to find that Wiley procedurally defaulted this claim, not because he failed to object when the assessment was made, but because he failed to bring it as a claim in a direct appeal from the order that originally imposed probation.

3. The court of appeals erred because it addressed the merits of the defendant's claim on appeal – that the state had the burden in revocation proceedings to prove the defendant's ability to pay court-assessed fees – before it determined that defendant preserved this issue for appellate review.

***Gipson v. State*, 383 S.W.3d 152 (Tex. Crim. App. 2012)**

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.

Gipson raised two issues on appeal, and the court of appeals reversed, based only on the first issue Gipson presented. Accordingly, the court ruled that the trial court abused its discretion by revoking probation based solely on Gipson's plea of true, when there was no evidence of willful refusal to pay.

The court of criminal appeals granted the state's petition for discretionary review and reversed the reversal. The court agreed with the state's argument that an appellate court may not reverse based on the merits of a claim without first determining whether the claim was preserved for appeal. "Because the court of appeals found the evidence insufficient to support revocation without addressing the State's procedural argument, we remand the case to that court."

In light of the court of criminal appeals's ruling, we do not know the answer to the burning question: "Does a plea of true to failure to pay "fees" as required under conditions of community supervision waive or forfeit a claim that the defendant was unable to make those payments?" Although the court did not answer that question, it raised and discussed several other interesting points of law that it thought might be helpful to the court of appeals on remand.

Gipson's second issue – the one not reached by the court of appeals – was that the trial court erred under *Bearden*when it failed to inquire about Gipson's reasons for not paying. Although it remanded this case for the intermediate court to consider procedural default, the court of criminal appeals did deem it necessary to discuss the *Bearden* issue, because it might impact the procedural issue on remand. That discussion made two interesting points.

First, contrary to the court of appeals's ruling, *Bearden v. Georgia*, 461 U.S. 660 (1983), did not put an evidentiary burden on the state to prove that the probationer had an ability to pay. Instead, *Bearden* imposes a "judicial directive" that requires the trial court to inquire into the probationer's ability to pay, and then, to consider alternatives to imprisonment if he is unable to pay. "*Bearden* does not categorically prohibit incarceration of indigent defendants as the court of appeals suggests; rather, it permits incarceration when 'alternative measures are not adequate to meet the State's interests in punishment and

deterrence.’”

Second, what the court referred to as the “ability-to-pay” statute, Tex. Code Crim. Proc. art. 42.12 § 21(c), expressly applies to fees for court-appointed counsel, community supervision, and court costs, and clearly requires the state to prove that those fees were not paid and that the defendant had the ability to pay them, before probation can be revoked for non-payment. In this case, the trial court revoked Gipson not only because he failed to pay the enumerated fees, but also because he did not pay his fine and fees for Crime Stoppers and pre-sentence investigation. The court of appeals determined that the state also had the burden of proving that Gipson had the ability to pay these non-enumerated fees, and any other unpaid amounts as well. The court of criminal appeals also remanded this case and ordered the court of appeals to decide “whether the ability-to-pay statute applies to appellant's unpaid amounts that are not explicitly listed in the statute.”

Third, apart from the federal constitution and the ability-to-pay statute, Texas common law has sometimes in the past required the state to prove that the probationer had an ability to pay all unpaid amounts before his probation could be revoked for non-payment. “Applicable common law has varied over the past fifty years.” This case is also remanded for the court of appeals to consider whether and how the common law applies to non-enumerated amounts.

> If the ability-to-pay statute does not pertain to revocation for fines and fees for Crime Stoppers and pre-sentence investigation, then the court of appeals must (1) consider whether the common-law requirement has been statutorily superseded or whether it would still apply to those payments and (2) decide how that determination would impact the question of whether appellant's sufficiency claim is procedurally barred. Because the requirements under the ability-to-pay statute may differ from those under common law, resolution of the State's procedural arguments may depend upon which applies. For example, the ability-to-pay statute dictates what the State must show at a “hearing” at which only failure to pay is alleged. Tex.Code Crim. Proc. art. 42.12 § 21(c). The court of appeals did not discuss whether appellant's plea of true and stipulation to the allegation would constitute a “hearing” so as to trigger the evidentiary requirements of the ability-to-pay statute. By contrast, under common law, the analysis appears to have turned on whether evidence of a defendant's ability to pay was introduced rather than on whether a “hearing” was held.

4. Trial court unconstitutionally revoked probation where discharge from sex offender treatment was the product of probationer’s invocation of his Fifth Amendment privilege.

***Dansby v. State*, 398 S.W.3d 233 (Tex. Crim. App. 2013)**

Dansby was put on deferred adjudication for aggravated sexual assault of a child, and signed conditions of probation in which he agreed to participate and abide by all rules of sex offender treatment, and to submit to and pass polygraphs. Dansby answered a number of questions about sexual activity before he was placed on probation, but when the polygraph examiner asked him, "Do you have any other victims?" he declined to answer because his lawyer had told him to. Shortly thereafter he was discharged from the "treatment" program, and a motion to enter adjudication was filed by the state, and granted by the trial court, which sentenced him to 18 years imprisonment. Specifically, the trial court found that Dansby violated condition 30, which required him to submit and pass polygraphs upon request, and condition 36, which required him to participate in and abide by all conditions of the prescribed sex offender treatment program.

Dansby argued that he was revoked as a penalty for invoking his Fifth Amendment privilege. The court of appeals disagreed and affirmed, finding that the trial court could have reasonably believed that Dansby violated condition 36 for reasons other than invoking his Fifth Amendment privilege.

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

The Fifth Amendment's privilege against self-incrimination protects probationers. Although the state may insist on incriminating answers as needed to sensibly administer a probation system, it must recognize that those answers may not be used in a criminal proceeding. Dansby was not offered use immunity, though. In this case the court of appeals avoided the constitutional question by finding that Dansby was revoked, not for taking the Fifth, but instead for being discharged from sex offender treatment.

> But this principle cannot operate to excuse the court of appeals from addressing the appellant's asserted Fifth Amendment issue if the one ground for revocation that it found to be supported by the evidence is equally infected with constitutional infirmity as the ground for revocation for which it abjured reliance. The question presently before us boils down to simply this: Was the appellant's discharge from the sex offender treatment program a product of his invocation of a Fifth Amendment privilege? We hold that the court of appeals erred to conclude that it was not.

* * *

[I]n our view, neither the fact that there were other relevant factors contributing to Young's ultimate decision to discharge the appellant, nor the fact that appellant's reticence in group therapy sessions may not have been wholly attributable to a reasonable fear of incriminating himself, necessarily establishes that his discharge from the sex offender treatment program occurred independently of his invocation of the Fifth Amendment privilege. When an appellate record admits of so strong an inference as this one does that the probationer's unwillingness to incriminate himself was the *deciding* factor in discharging him from the sex offender treatment program, we cannot permit the court of appeals to avoid addressing the constitutional issue.

5. It is *possible* (though just barely so) to commit criminally negligent homicide without using or exhibiting a deadly weapon.

***Chambless v. State*, 411 S.W.3d 498 (Tex. Crim. App. 2013)**

Chambless was convicted of criminally negligent homicide by the use of a firearm. Statutorily, criminally negligent homicide is a state jail felony, but because the jury found that Chambless used a deadly weapon, the jury was instructed that the range of punishment was as a third degree felony. Chambless argued that, according to case law from the court of criminal appeals, a verdict of homicide necessarily is a finding that a deadly weapon was used, because something must have been used that was capable of causing, and did cause, death. If that is so, Chambless said, then this automatic punishment enhancement nullifies the statutory definition of negligent homicide as a state jail felony. Chambless made this objection at trial, but it was overruled. The jury sentenced him to eight years imprisonment.

The court of appeals affirmed, but did agree that this issue "is not a simple one." The court rejected the premise of Chabmless's argument, believing it untrue that criminally negligent homicide can never be committed without using or exhibiting a deadly weapon. "Accordingly, the two statutory provisions at issue here "can be harmonized."

The court of criminal appeals granted Chambless's petition for discretionary review, but affirmed, finding that the court of appeals correctly held that not all criminally negligent homicides include the use of a deadly weapon." The court acknowledged previous in which it had written tha "a verdict of homicide necessarily is a finding that a deadly weapon was used . . ." but found no problem distinguishing that case from Chambless's. Moreover, it is not true that every homicide case will necessarily involve the use or exhibition of a deadly weapon. It is possible to commit criminally negligent homicide by omission, and in such a case, the defendant might face a non-enhanced state-jail felony punishment range. And even if Chambless's premise was valid, "it would be merely academic in this case because Chambless's use of a firearm was uncontested and clearly satisfied § 12.35(c)(1)."

6. The evidence was legally insufficient to prove that the defendant violated a condition of his deferred adjudication probation by having prohibited contact with his wife.

***Hacker v. State*, 389 S.W.3d 860 (Tex. Crim. App. 2013)**

Hacker was on deferred for assaulting his wife, and among other things he was under a no-contact order which prohibited him from contacting his wife in person, by

phone, in writing, via the internet, or through third persons, except as permitted by the court. Phone calls were permitted for the purpose of child custody issues.

The trial court found that Hacker violated the no-contact order, and sentenced him to prison for four years. The court of appeals affirmed. The court of criminal appeals held that the evidence was legally insufficient and reversed.

> Appellate courts are not permitted to use a "divide and conquer" strategy for evaluating sufficiency of the evidence. Rather, a reviewing court must consider the combined and cumulative force of all the evidence. But the State cannot prevail under the combined and cumulative force of all of the evidence in the present case because the State failed to introduce evidence that any prohibited conduct had occurred. What the State had here was just linking-type evidence. Appellant had motive and opportunity for prohibited contact because he expressed buyer's remorse about pleading guilty and his wife did not want the "no contact" order. Appellant lied about collateral issues regarding when the child-care arrangement began and how much property of his remained at the residence. Appellant violated the protective order, which might show motive, intent, or even character. The State also had other circumstantial evidence that was perhaps suspicious but did not establish the fact of prohibited contact: the crossed-out address, appellant's admission to being present at his wife's house when she was not there, and appellant's admission to frequent telephone conversations with his wife about child-custody matters.
>
> None of this evidence established that prohibited contact occurred. Without that, all of this evidence was mere "suspicion linked to other suspicion." We hold that the evidence was legally insufficient to meet the State's allegation in its motion to revoke, and therefore, the trial court abused its discretion in revoking appellant's probation. We further hold that the court of appeals erred in upholding the trial court's judgment in doing so.

7. Is an objection required to preserve a complaint that it is cruel and unusual punishment to sentence a 17 year old to life without parole?

***Garza v. State*, 2012 WL 5236048 (Tex. App.-San Antonio 2012, pet. granted)(not designated for publication)**

In *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the Supreme Court held that it was cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution to impose a sentence of life without possibility of parole on one who was

under 18 at the time he committed his offense. The San Antonio Court of Appeals recognized *Miller's* holding, but held in this case that it "need not determine whether Garza's sentence violates the mandates set forth in *Miller* because he has not preserved this issue for our review."

> Here, at the sentencing phase of the trial, the trial court specifically asked Garza's counsel if there was any legal reason he should not be sentenced. Counsel plainly stated, "[n]o reason in the law, Your Honor." The trial court then proceeded to sentence Garza to the statutorily mandated sentence of life without parole. *See* Tex. Penal Code Ann. § 12.31(a)(2) (West 2011) (stating that when State does not seek death penalty for offense of capital murder, sentence to be imposed is life without parole). Thereafter, Garza did not object to the sentence imposed, and although he filed a motion for new trial, he did not contend his sentence violated the Eighth Amendment or constituted cruel and unusual punishment. Accordingly, we hold Garza has failed to preserve the issue for our review.

The court of criminal appeals granted Garza's petition for discretionary review to determine this issue: "The Court of Appeals erred in holding that the sentence imposed by the trial court did not violate the Eighth Amendment's prohibition against cruel and unusual punishment because the Appellant failed to lodge an objection to the sentence hence waiving his claim that the life sentence imposed violated the Eighth Amendment's prohibition against cruel and unusual punishment."

8. The requirement of a timely objection assumes that the defendant had the opportunity to object.

***Burt v. State,* 396 S.W.3d 574 (Tex. Crim. App. 2013)**

Burt was convicted of theft and sentenced on January 15, 2009, and the judge orally pronounced sentence and stated: ""The sooner we can get that restitution matter taken care of, the better." On the same day he filed a motion for new trial, and it was overruled, also that day. The next day the trial court filed its written judgment ordering restitution in the amount of $591,785. On appeal Burt complained about the restitution, but the court of appeals affirmed, holding that he had waived his right to complain by not timely objecting.

The court of criminal appeals reversed. The requirement of a timely objection assumes that the defendant had the opportunity to object.

> Appellant could not have objected during the oral pronouncement because at that point, he could not have known that the sentence in the written judgment

would be different from the orally pronounced sentence, or that there might be error in the amount of restitution. Similarly, when appellant filed his motion for new trial on January 15, 2009, the written judgment had not yet issued, so appellant could not have known to include the restitution issues in the motion. The trial court ruled on the motion for new trial that same day, thus preventing appellant from amending the motion to include the restitution issues.

The court remanded the case to the court of appeals to consider the merits of Burt's complaint, namely whether the restitution order was illegal because it ordered payment to people not named in the indictment.

9. Does the "judicial clemency" provision of article 42.12 § 20(a), which purports to release the defendant from "penalties and disabilities" once probation is terminated, permit the state to impeach the defendant with the prior conviction, and bar the defendant from applying for probation from a future jury?

***Yazdchi v. State*, 2012 WL 5381211 (Tex. App.-Houston [1 Dist.] 2012, pet. granted)(not designated for publication)**

Yazdchi was convicted of a felony in 2000 and put on community supervision. In 2003 he filed a motion to terminate his community supervision and he was discharged, allowed to withdraw his plea, the indictment was dismissed, and the judgment of conviction was set aside, pursuant to article 42.12, § 20(a) of the Texas Code of Criminal Procedure. Later he was indicted for theft and falsely holding himself out as a lawyer, and before that trial commenced he filed an application for community supervision. In that application, he acknowledged his prior conviction but represented that it had been set aside, and that therefore he was eligible for community supervision if the jury convicted him in his new cases. The trial court disagreed and determined that he was not eligible to apply for probation. The court also ruled that it would allow the state to impeach Yazdchi with this prior if he testified (so he did not). Yazdchi was convicted and sentenced to 10 years imprisonment on both cases.

The court of appeals affirmed his conviction. Although § 20(a) provides that the conviction is wiped away, the indictment is dismissed, and the defendant is free to walk away from the courtroom released from all penalties and disabilities, this "judicial clemency" is not absolute. This provision also provides that proof of the prior wiped-away conviction shall be made known to the judge should the defendant again be convicted of any criminal offense. The court of appeals examined the statute, its own precedent and cases from other courts and held that one whose conviction has been set aside under § 20 is

not entitled to apply for community supervision if convicted subsequently. The court also held that Yazdchi did not preserve in the trial court his complaint on appeal that the trial court erred by ruling that the prior wiped-away conviction could be used for impeachment if he testified.

The court of criminal appeals granted Yazdchi's petition for discretionary review to determine the following questions: "Whether the Court of Appeals correctly interpreted Tex. Code Crim. Proc. Art. 42.12 § 20 to allow Appellant to be impeached with the [sic] his prior completed probation and prohibit him from filing a sworn motion for probation and allow a jury to consider his eligibility for probation when Appellant's prior plea was withdrawn, the indictment dismissed, and Appellant relieved of all penalties and disabilities."

10. Defendant was an indigent at trial and was presumed to remain indigent, absent proof that his financial circumstances had materially changed; accordingly, the trial court's finding that he be required to reimburse his court appointed trial attorney was not supported by the evidence.

***Cates v. State*, 2013 WL 3196932 (Tex. Crim. App. 2013)**

Cates was convicted of unauthorized use of a vehicle, sentenced to prison, and order to pay $1,039.75 in court-appointed attorneys fees as part of the court costs. He appealed, arguing that since the trial court had found him indigent and since there is no factual basis in the record to support a determination that he can pay the fees, the evidence was insufficient to support the trial court's order. The court of appeals disagreed and affirmed, finding that the record supported a finding that Cates could pay at least a portion of the costs through his inmate trust account. Accordingly, the court modified the judgment to limit his liability to withholdings from his inmate trust account while incarcerated.

The court of criminal appeals reversed.

Article 26.05(g) of the code of criminal procedure allows the trial court to order a defendant to re-pay costs of court-appointed counsel that the court finds he is able to pay. The court of criminal appeals has held that the defendant's financial resources and his ability to pay are critical elements in the trial court's determination that reimbursement is required. Also, when a defendant has been determined to be indigent, he is presumed to stay indigent for the remainder of the proceedings unless a material change of circumstances occurs.

> Here, Appellant had been determined by the trial court to be indigent and there was never a finding by the court that he was able to re-pay any amount

of the costs of court-appointed legal counsel. Thus, there was no factual basis in the record to support a determination that Appellant could pay the fees.

Code of Criminal Procedure Article 26.05(g) requires a present determination of financial resources and does not allow speculation about possible future resources. The court of appeals's reasoning that there may, in the future, be funds in Appellant's inmate trust account and that such funds could be used during his incarceration to re-pay expenses of his court-appointed counsel, was flawed.

The parties are correct that the proper remedy is to reform the court of appeals's judgment by deleting the $1,039.75 in court-appointed attorney's fees from the order assessing court costs.

SEXUAL OFFENSES

1. The failure to give a medical care defense was harmless in this case.

***Cornet v. State*, 2013 WL 5925772 (Tex. Crim. App. 2013)**

Previously the court of criminal appeals held that the trial court erred by refusing to submit Cornet's medical care defense to the jury, and it remanded the case to the court of appeals for a harm determination. The court of appeals found the error harmless, and the court of criminal appeals once again granted Cornet's petition for review. The court affirmed the court of appeals's holding that the error was harmless.

The medical care defense is one of confession and avoidance and the general rule is that the erroneous denial of instructions on such defenses is harmful because it deprives the defendant of his sole avenue of acquittal. Harm analyses, however, are always record-based, and require examination of the totality of circumstances, and when this sort of analysis is done here, it is clear that Cornet was not harmed.

The jury convicted Cornet of two counts occurring during the same transaction – digital penetration of the child's sexual organ, and contact between mouth and anus. The medical care defense applied only to the digital penetration. That the jury convicted Cornet of mouth-anus contact was crucial to the court's harm analysis.

By convicting appellant of orally contacting the complainant's anus, an offense to which the medical-care defense is inapplicable, the jury clearly determined that it did not believe appellant's testimony that he was examining the child for her medical care and that he did not penetrate her sexual organ

> or orally contact her anus. Because the totality of the record reveals the jury's implicit rejection of the medical-care defense, we hold that the absence of that instruction was harmless.

2. Where defendant admitted penetration, but where there was some evidence raising the medical care defense, trial counsel was ineffective in not requesting that this defense be submitted to the jury.

***Villa v. State*, 2013 WL 5925764 (Tex. Crim. App. 2013)**

When Villa was first accused of aggravated sexual assault he denied having had any contact at all with the child. Later he allegedly admitted contact, but said he had put his middle finger in her vagina while applying diaper rash medication. At his trial he testified and repeatedly denied that he had ever admitted putting his finger inside the child, but said that he had touched her while putting the medication on. Counsel did not request an instruction on the defense of medical care, Villa was convicted and he appealed. The court of appeals reversed, holding that trial counsel was ineffective for not requesting the defensive instruction.

The court of criminal appeals granted the state's petition, but affirmed the reversal, holding both that Villa had raised the defense, and that trial counsel was ineffective.

The medical care defense is one of confession and avoidance. That is, one who seeks such an instruction must admit to the act and to the requisite mental state. The record in this case, in essence, shows a disagreement over the degree of penetration. Penetration does not require penetration of the vagina, but only of the "female sexual organ."

> A reasonable juror could certainly find that Appellant's statement was an admission of contact with the complainant's labia minora and . . . was a "penetration" of her sexual organ. Alternatively, a reasonable juror could find Appellant's statement that he had, in fact, "touched the genitals of this little girl" was also an admission of penetrating her sexual organ. The court of appeals was correct when it held that the jury should be allowed to choose which evidence is believable. Appellant admitted to all elements of the offense in his trial testimony and presented evidence at trial that properly raised the medical-care defense. Appellant was therefore entitled, under the doctrine of confession and avoidance, to an instruction on the medical-care defense.

The court also agreed with the lower court that counsel was ineffective. Although a single error will not typically amount to ineffective counsel, the error counsel committed

here did. There was "no imaginable strategic motivation" for counsel's lapse. Counsel elicited testimony from his client amounting to an admission of guilt. His opening statement, the evidence presented, and his summation all revolved around the medical care defense, and, as noted, the defense was raised by the evidence.

> Because the evidence raised the sole defense of medical care, and because Appellant's counsel failed to request a jury instruction on the issue, our confidence in the outcome of this trial is undermined, and both prongs of the *Strickland* test have been satisfied. Appellant, therefore, received ineffective assistance of counsel.

3. Section 33.021(b) of the Texas Penal Code which purports to criminalize communicating with minors in sexually explicit ways is unconstitutionally overbroad because it prohibits a wide array protected speech and is not narrowly drawn to protect children from sexual abuse.

***Ex parte Lo*, 2013 WL 5807802 (Tex. Crim. App. 2013)**

Lo was charged with communicating by text message in a sexually explicit manner with a person whom he believed to be a minor with an intent to arouse or gratify his sexual desire, a third degree felony under § 33.021(b)(1) of the Texas Penal Code. He filed a pretrial application for writ of habeas corpus challenging the facial validity of the statute, and the trial court denied relief. The court of appeals affirmed, but the court of criminal appeals granted his petition for discretionary review and reversed, finding the sexually-explicit provision of the statute "overbroad because it prohibits a wide array of constitutionally protected speech and is not narrowly drawn to achieve only the legitimate objective of protecting children from sexual abuse." The court did not address whether the statute was also unconstitutionally vague or whether it violated the Dormant Commerce Clause.

The usual rule is that statutes are presumed constitutional, and the party attacking the statute bears the burden of showing it is unconstitutional. When a penal statute restricts speech based on content, though, it is presumptively invalid, and the government bears the burden of rebutting that presumption. Furthermore, the courts must apply the "most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." The court of appeals erred here by presuming this content-based regulation of speech was valid, and by not employing the strict scrutiny test.

To meet the strict scrutiny test, a statute regulating speech content must be necessary to serve a compelling state interest and must be narrowly drawn. The problem here was that the 33.021(b) was not narrowly drawn. To illustrate, the court compared this

section to with 33.021(c), which regulates, not speech, but conduct, namely the actual solicitation of a minor to meet for sex. This statute, which focuses on conduct, is not at issue in this case, but similar statutes have been routinely upheld, across the nation and in at least one Texas Court of Appeals. In contrast, 33.021(b) is "a separate, very different [statute] that prohibits and punishes speech based on its content." For example, (b) bars not only explicit descriptions of sexual acts, but also electronic communications or distributions of materials relating to sexual conduct. Such a broad description would encompass not only things like child pornography, but also many modern movies, television shows, and books. Although the state has a compelling interest in protecting children from sexual predators, section 33.021(b) is not narrowly drawn to achieve that narrow goal.

> In sum, everything that Section 33.021(b) prohibits and punishes is speech and is either already prohibited by other statutes (such as obscenity, distributing harmful material to minors, solicitation of a minor, or child pornography) or is constitutionally protected.

4. *Fleming* is back: Will we now find out whether either the Federal or Texas Constitutions require proof of a culpable mental state in statutory rape cases?

***Fleming v. State*, 376 S.W.3d 854 (Tex. App.-Fort Worth 2012, pet. granted)**

Fleming pleaded guilty to aggravated sexual assault of a child under 14 and was given probation and required to register as a sex offender. On appeal he asserted that the statute violated Due Process and Due Course of Law because it failed to require a culpable mental state relating to the victim's age, and it failed to recognize an affirmative defense based on his reasonable belief that the child was 17 or older. When the case first went up on appeal, the Fort Worth Court of Appeals affirmed the conviction, holding, among other things, that Fleming failed to preserve his state constitutional argument. 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."

On the second go-around, the court of appeals again affirmed the conviction, denying relief on both state and federal constitutional grounds.

The court of appeals started by rejecting Fleming's argument that the state due course of law provision provides any more protection than does Federal Due Process. According to that court the Texas Supreme Court, and the majority of the Texas intermediate courts that have addressed the matter "have repeatedly held that the due course of law provision provides the same protections as the federal Due Process Clause." Nor did that court see any cause for treating Fleming's substantive due process claims any differently than his procedural due process claims. "We therefore will address Fleming's arguments regarding due course of law or due process under federal law, regardless of whether his claims are substantive or procedural in nature."

After this start, things continued to go poorly for Fleming in the court of appeals. There is no fundamental right that a state must include either a *mens rea* component or a mistake of fact defense in statutory rape cases. Therefore, the statute need only serve a legitimate interest to be constitutional, and the court of appeals concluded that it did. Where there is no fundamental right at issue, the matter is appropriately left to the discretion of the legislature. That being so, the court would only substitute its judgment for the legislature's if it found that its classification to be arbitrary and capricious, and here the court made no such finding.

Once again, the court of criminal appeals granted Fleming's petition for discretionary review, to consider the following issues:

1. Whether Section 22.021 of the Texas Penal Code is unconstitutional, under the Due Process Clause of the Fourteenth Amendment, due to its failure to require the State to prove that Defendant had a culpable mental state ("mens rea") relating to the alleged victim's age when engaging in the conduct alleged?

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

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

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

5. Does Fleming have a chance after all?

Celis v. State, 2013 WL 2373114 (Tex. Crim. App. 2013)

> In deciding the petition for discretionary review filed by Mauricio Celis, appellant, we address three jury-charge complaints. First, we determine that the offense of falsely holding oneself out as a lawyer, as it applies here, does not require an instruction as to a culpable mental state beyond the intent expressly prescribed by the plain language in that statute. *See* TEX. PENAL CODE §38.122. Second, we conclude that appellant was not entitled to an instruction on a mistake-of-fact defense because his requested instruction did not negate the culpability required for the offense. *See* TEX. PENAL CODE § 8.02(a). Third, we hold that the court of appeals properly determined that the trial court's instruction on the definition of "foreign legal consultant" was not an improper comment on the weight of the evidence. *See* TEX. CODE CRIM. PROC. Art. 36.14. We affirm.

Celis argued that the trial court erred when it refused to instruct the jury by adding "the word 'intentionally' before the phrase 'did then and there' so as to require the jury to find that he intended every element of the offense." The court of criminal appeals disagreed, holding that the only culpable mental state required by the state prohibiting one from falsely holding himself out as a lawyer concerns whether the defendant intended to obtain an economic benefit for himself by holding out as a lawyer, and the charge properly instructed in this regard.

As to the court's second point - entitlement to mistake of fact - the majority held that "[t]he instruction on mistake of fact . . . applies only with respect to elements that require proof of a culpable mental state." Accordingly, since the culpable mental state in this case went only to intent to obtain an economic benefit, there was no requirement that the court instruct the jury on mistake of fact as to whether Celis reasonably believed he was licensed to practice law in Mexico. Judge Cochran concurred on this point. She believed the majority was mistaken, that the mistake of law defense could apply to any element of the offense, even those that don't require proof of a culpable mental state. In response, the majority noted that such a position "would alter practically every offense in the Texas Penal Code in a way that has not been recognized in Texas for over 30 years." The majority then made this observation: "Perhaps there may be an instance in which a statute is unconstitutional as applied to a defendant because a jury is not permitted to consider his mistaken, reasonable belief about a matter, but that situation is not before us here: appellant has not challenged the constitutionality of this statute, and, as Judge Cochran agrees, these facts do not support his appellate claim pertaining to mistake of fact."

Finally, as to the third issue - whether the trial court impermissibly commented on the weight of the evidence by defining the statutorily undefined term "foreign legal consultant" - the court acknowledged that it is generally impermissible to define an undefined term in the charge, sometimes this is permissible, and that it was permissible here. "We hold that the charge properly instructed the jury as to the 'foreign legal consultant' criteria within the definition of 'in good standing.' In fact, because appellant claimed at trial that he believed he was licensed in Mexico and not that he believed he was licenced in Texas, this was the only way in which the jury could have found that he was 'in good standing' under the statute."

6. The sexual assault statute which permits enhancement where the defendant is prohibited from marrying his victim is not facially unconstitutional because there is at least one valid application, namely the punishment of bigamists who sexually assault their purported spouses. "Arguments pertaining to an as-applied challenge or the sufficiency of the evidence must be reserved for another day."

***State v. Rosseau*, 396 S.W.3d 550 (Tex. Crim. App. 2013)**

Sexual assault is ordinarily a second degree felony, but it is a first degree felony "if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under Section 25.01." TEX. PENAL CODE § 22.011(f). Rosseau was so charged, and he filed a motion to quash, asserting, among other things, that this statute punished people for being married and therefore violated the equal protection and due process provisions of the federal and state constitutions. Judge Herr granted the motion to quash "all enhancements," and the state appealed.

The San Antonio Court of Appeals reversed, and the court of criminal appeals affirmed the reversal.

First, the court of criminal appeals held that the state had the right to appeal the pretrial order, and the appellate court had jurisdiction over the appeal, even though it the portion of the indictment dismissed was a punishment enhancement allegation and not an element of the offense.

Second, the court of criminal appeals disagreed with the state, and held that Rosseau had properly made a facial challenge to the indictment. A motion to quash need not contain "magic language." The motion in this case, although it could have been more clear, "adequately apprised the trial court of his argument that the bigamy provision is facially unconstitutional in all its applications."

Finally, the court held that Rosseau failed to meet his burden "to rebut the presumption of constitutionality because he did not prove that the statute operated unconstitutionally in all its applications and could never be constitutionally applied to any defendant under any set of facts or circumstances." The statute has at least one valid application, namely to punish bigamists who sexually assault their purported spouses. "Arguments pertaining to an as-applied challenge or the sufficiency of the evidence must be reserved for another day."

7. Under the facts in this case, a conviction for indecency by contact did not subsume a conviction for indecency by exposure.

***Loving v. State*, 401 S.W.3d 642 (Tex. Crim. App. 2013)**

Loving exposed his genitals and began masturbating in front of two sisters, eight and nine years old. The girls left the room for a while, and when they came back, Loving was still masturbating. He touched the younger girl, then he stopped masturbating, and he touched the older girl's breast and asked her to touch his penis, but she "punched" it instead. Loving was convicted of three counts of indecency by contact and sentenced to seven years imprisonment. He was convicted of two counts of indecency by exposure and sentenced to 10 years probation.

The court of appeals affirmed Loving's convictions for touching an exposing himself to the younger girl, and for exposing himself to the older girl and for touching her breast and for causing her to touch his penis, but it vacated the conviction for exposing himself to the older girl, finding that "under the facts presented, the exposure offense involving the older girl was subsumed by the contact offense in which the older girl punched appellant's exposed penis and that conviction for both offenses violated the prohibition of double jeopardy."

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

Indecency by contact and indecency by exposure are two separate offenses. From reading other cases, the court drew two conclusions. First, the gravamen of indecency, whether by contact or exposure, is the nature of the prohibited conduct. Second, because the commission of each prohibited act determines how many convictions may be had for a particular course of conduct, Loving's conduct violated the indecency statute two separate times. "We conclude that Appellant's exposure conviction was not barred by double-jeopardy principles because the Legislature intended to allow separate punishments under these circumstances."

8. The court of criminal appeals unstacked sentences that were improperly stacked because one involved a sexual assault complainant who was 17 years old.

***Sullivan v. State*, 387 S.W.3d 649 (Tex. Crim. App. 2013)**

Sullivan was convicted in a single trial for committing four different sexual assaults against three different complainants, and the jury sentenced him to 18 years on each conviction. One of the complainants, AS, was 17 at the time of the offense, and the other two were under 17. Two of the convictions involved AS, and the trial court ordered these two sentences to run concurrently with each other. The court ordered the two sentences involving AS to be served consecutively with the remaining two sentences involving the other two complainants, the end result being that Sullivan was required to serve three consecutive 18-year sentences, or 54 years.

Everyone agreed that the sentence was illegal. The applicable statute authorized the court to stack jointly-tried sentences where the victims are under 17, but not where the victims were 17 or older. Accordingly, the court of criminal appeals reformed the trial court's judgment to reflect that the improperly stacked sentence was not stacked, and that the two properly stacked sentences were stacked on each other, resulting in a total of 36 years imprisonment.

9. There is a three-pronged test to determine whether a foreign conviction is substantially similar to a Texas sexual offense so as to require a mandatory life sentence, and the North Carolina offense, "Indecent Liberties," failed to meet any of those prongs.

***Anderson v. State*, 394 S.W.3d 531 (Tex. Crim. App. 2013)**

Anderson was convicted of sexual assault, and the trial court sentenced him to a mandatory life sentence after finding that he had previously been convicted of the North Carolina offense of "Indecent Liberties." Anderson appealed, asserting, among other things, that the mandatory life sentence was not authorized because "Indecent Liberties" was not "substantially similar" to any Texas offense. The court of appeals disagreed and affirmed.

The court of criminal appeals reversed, concluding that the two offenses were not substantially similar. The court noted that the Texas "two strikes policy" imposes a harsh penalty – mandatory life imprisonment – and that therefore the "determination must be made with sensitivity," and the courts must be careful to ensure substantial similarity. Although the offenses need not be identical, the proper test is three-pronged, and all three factors weigh against a finding of similarity in this case:

> First, the North Carolina offense is much broader than the Texas offense, criminalizing a significant amount of conduct that is lawful in Texas. Second, the elements of the two offenses are not "substantially similar with respect to the individual or public interests protected." The North Carolina offense is more concerned with preventing children from being exposed to any form of "lewd" conduct and with punishing the "immoral, improper, or indecent" minds of adults than with proscribing specific sexual acts against children, which is the focus of the Texas statute. Third, the class, degree, and range of punishment for "Indecent Liberties" is much less than for the Texas offense of "Indecency with a Child." Moreover, the North Carolina offenses most analogous to the Texas offense—"Sexual Offense with a Child," and "Indecent Exposure"—specifically exclude the offense for which appellant was previously convicted.

10. An outcry statement of a child-complainant requires testimony from a live witness; a videotape of the outcry is not admissible.

***Bays v. State*, 396 S.W.3d 580 (Tex. Crim. App. 2013)**

Anne was six when she said her grandfather sexually assaulted her. A CPS worker interviewed Anne and a 30 minute videotape of this interview was played to the trial court as an outcry statement under article 38.072. The court of appeals reversed the conviction and the court of criminal appeals affirmed the reversal.

> [W]e determine that Article 38.072 of the Texas Code of Criminal Procedure, the outcry statute, is a hearsay exception statutorily limited to live testimony of the outcry witness. [citation omitted] The child-complainant's own videotaped statement does not meet the requirements for being admitted under that statute.

11. "Well damn girl, how long you stay 15." An example of "winning against all odds:" A unanimous court of criminal appeals, in a decision authored by Presiding Judge Keller, reverses a conviction for criminal solicitation of a minor in spite of the just-quoted text message, and it finds a rare interpretation of the "on or about" rule that is helpful to the defense.

***Sanchez v. State*, 400 S.W.3d 595 (Tex. Crim. App. 2013)**

Sanchez was tried for soliciting sex from "Molly," a girl who was under 17 "on or about January 24, 2006. When Sanchez first began communicating with Molly on the internet in April 2004, she told him she was 15. At that time, he was less than three years

older than her. They continued to communicate over the next two years, and she continued to claim to be 15. Eventually, on January 24, 2006, Molly agreed to let Sanchez come to her house for sex. When she reminded him that she was 15, Sanchez replied, "Well damn girl, how long you stay 15?" He then went to the location they had agreed upon, with condoms in his pocket, and he was arrested. As the court noted, it was then that "her secret for agelessness was revealed when he learned that she was actually Bruce Marshall, an undercover police detective."

The defense asked that the court submit to the jury the affirmative defense that he was within three years of the complainant's age but the trial court refused, and the court of appeals affirmed, holding that that defense did not apply to the offense of online solicitation. In the alternative, the court of appeals held that the affirmative defense in question requires a certain age difference between the complainant and the defendant, and since there was no victim in this case, the defense was not applicable.

The court of criminal appeals reversed.

> The questions in this case are: does the affirmative defense in § 22.011(e) of the Penal Code apply to the criminal-solicitation-of-a-minor statute, and, if so, did the evidence at trial justify an instruction on that affirmative defense? We hold that the affirmative defense in § 22.011(e) does apply to the criminal-solicitation-of-a-minor statute and that the jury should have been so instructed. We reverse the judgment of the court of appeals and remand the case for it to consider whether appellant was harmed by the omission of the instruction.

The first question was whether the within-three-years affirmative defense that is found in our sexual assault statute (§ 22.011(c) of the penal code) applies to criminal solicitation of a minor, criminalized in § 15.031. The court of appeals said the defense was inapplicable because it was not referred to in § 15.031, but the court of criminal appeals disagreed. The plain language of § 15.031 incorporates the entirety of § 22.011 ("A person commits an offense if, with intent that an offense under Section . . . 22.011 . . . be committed . . . ."), including, of course that statute's within-three-years affirmative defense. Also, § 15.031(b) looks to the facts as the defendant "believes them to be." That is, "if the circumstances surrounding the defendant's conduct were such that he believed the minor's age to be within three years of his own, then he would not have committed an offense at all, provided he raised and proved the within-three-years affirmative defense."

The court of criminal appeals also disagreed with the court of appeals's alternative holding – that the victim in this case was not really a victim since "Molly" was fictitious character "without age." In fact, "Molly" was just a pseudonym for the detective, who was

a real person, and § 15.031(b) criminalizes solicitations of both minors, and persons the defendant "believes" to be minors. As the court noted, the lower court's holding was "somewhat contradictory. If it is correct that 'Molly's' age cannot be calculated because she is a fictitious character, then she also cannot be underage for the purpose of the offense of solicitation of a minor itself." If there was no victim, then there was no culpable conduct.

There was an additional question that required resolution. Just because the court of appeals mistakenly read § 15.031 as to the availability of the affirmative defense did not mean that Sanchez had raised the defense her. When he was caught on January 24, 2006, Sanchez was 20 years old, and "Molly," the ageless victim still claimed to be 15, which was well-outside the three years allowed by law. Alternatively, if the 20 year old claimed that he really thought Molly was 17, then there would be no crime at all, because she was no longer a minor, and since there was no crime, the evidence would not support an affirmative defense. Under either scenario, according to the state, Sanchez loses.

> But that reasoning ignores that appellant was not just charged with criminal conduct that might have occurred on January 24, 2006. He was, instead, charged with conduct that might have occurred " on or about " January 24, 2006. "It is well settled that the 'on or about' language of an indictment allows the State to prove a date other than the one alleged in the indictment as long as the date is anterior to the presentment of the indictment and within the statutory limitation period." What that means in the instant case is that the State could have obtained a conviction for any solicitations by appellant to "Molly" that occurred on or before the date in the indictment up to the statute-of-limitations cutoff date. Even using the shortest possible statute of limitations period—three years—no conduct the State attempted to prove occurred outside that time frame. At trial, the State introduced the chat-room transcripts into evidence. The jury charge also included the "on or about" language. As a result, the jury could very well have concluded that appellant was guilty of criminal solicitation of a minor based solely on his conduct in April 2004, not on conduct from a later date. If that was the case, then "Molly" would be under seventeen and appellant would have been within three years of her age. Thus, there would have been some evidence to raise the affirmative defense in § 22.011(e). Therefore, the court of appeals erred when it ruled that appellant was not entitled to that defensive instruction.

SHACKLING

The trial court erred in shackling the defendant where there was no reason for it, but the error was non-constitutional, since there was no reasonable probability that the jury was aware, and this non-constitutional error was harmless.

***Bell v. State*, 2013 WL 5221060 (Tex. Crim. App. 2013)**

The trial court shackled Bell at his trial for controlled substances but made no particularized findings that articulated why he did so, nor does the record make clear that there were any reasons for shackling. The court allowed Bell's lawyers to pile up briefcases to hide the shackles from the jury, and a bailiff testified that he was unable to see any shackles when he took various positions in the jury box.

The court of appeals held that the trial court erred, but affirmed because harm was not shown. The court of criminal appeals affirmed, although it did not agree with the way the court of appeals decided harmlessness.

The trial judge's statement – that everyone in custody needs restraint – is only a generalized concern and is an insufficient basis for shackling. At worst it shows a propensity to shackle and is "a distasteful practice '[reminiscent] of an era when the accused was brought from prison to the courtroom in chains, unkempt and wearing (at best) prison attire, following which he was exposed to a jury in the worst possible light.'"

It was clearly error for the judge to shackle Bell. The only question was harm.

> Whether this error is of constitutional dimension in that it deprived Bell of his presumption of innocence turns on an additional inquiry: whether the record shows a reasonable probability that the jury was aware of the defendant's shackles. After reviewing the record, we cannot conclude that there was a reasonable probability the jury perceived Bell's restraints. In fact, the bailiff's observations support the conclusion that the jury could not see Bell's restraints. It is also apparent that the judge took precautionary measures to shield Bell's shackles from view by placing briefcases in front of counsel's table. Of course this does not speak to whether the jury could hear the rattling of the restraint's chain. But in light of this record, to conclude that it is reasonably probable that the jury heard the rattling of the chain would be purely speculative. If the rattling of the chain was in fact audible, it is reasonable to expect that Bell would have brought these facts to the trial judge's attention, thereby making a record of the rattling, and perhaps, provide an opportunity to reurge his objection.

SPEEDY TRIAL

1. A speedy trial complaint may not successfully be raised for the first time on appeal.

***Henson v. State*, 407 S.W.3d 764 (Tex. Crim. App. 2013)**

Henson's case was reset 25 times over a three year period before he finally had a trial and was convicted. Henson agreed to all the resets, never objected, and never filed a speedy trial motion. The first time he raised the issue was in the court of appeals, which affirmed the conviction.

The court of appeals granted discretionary review. "The question before us is whether a defendant must first preserve error for appellate review through a timely objection in the trial court before he is entitled to such an analysis."

> In this case, the appellant made no effort to demand a speedy trial. He claims that announcing ready was such a demand. However, this is not a demand for a speedy trial; instead, it merely asserts that he could go to trial at that moment should the State push for it. A speedy-trial demand should be, at the very least, unambiguous. Finally, the appellant's other actions are inconsistent with a demand for a speedy trial. He did not file a speedy-trial motion, did not request a hearing on the delays, and explicitly agreed to each and every reset. The appellant signed each agreed reset. These are not the actions of someone seeking to preserve and protect his right to a speedy trial.

2. When the state takes a really long time to arrest a defendant (here, six years after indictment), and when it has no good reason for the delay, is the defendant entitled to a speedy trial dismissal if the state fails to extenuate and "persuasively" rebut the presumption that the delay prejudiced the defendant?

***Gonzales v. State*, 2013 WL 765575 (Tex. Crim. App. 2013)(not designated for publication)**

Gonzales was indicted in 2004 for injury to a child and indecency with a child in 2002, but was not arrested until April, 2010. In May, 2010, San Antonio lawyer Sean Keane-Dawes filed a motion to dismiss asserting that Gonzales's right to a speedy trial had been denied. To meet his burden of showing that he had been prejudiced, evidence was produced that Gonzales's memory had faded, that he did not recognize the name of the complainant, that he did not remember anything about the event, and that he would not able to aid in his own defense. His mother testified that she "vaguely" remembered the incident and that her husband would most likely be unable to testify because he had a heart attack that affected his memory. The trial court overruled the motion, finding that Gonzales had neither shown that he had demanded a speedy trial, nor that he had been prejudiced.

The court of appeals affirmed. The court agreed that the first two factors weighed in

Gonzales's favor, and also found, contrary to the trial court, that the third factor favored Gonzales. Although the court found that three of the four factors under *Barker v. Wingo* weighed in Gonzales's favor, it still ruled against him because he failed to show prejudice. Specifically, according to the court, Gonzales had not shown that "lapses in memory" were in some way "significant to the outcome" of the case.

Although the court of appeals briefly referenced *Doggett v. United States*, 505 U.S. 647 (1992), three times, it seems to have ignored this very important language from that case:

> When the Government's negligence thus causes delay six times as long as that generally sufficient to trigger judicial review . . . and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, [citation omitted] nor persuasively rebutted, the defendant is entitled to relief.

The court of criminal appeals granted Gonzales's petition for discretionary review, reversed the court of appeals, and remanded the case to that court. Quoting from *Doggett*, the court recognized that the six year delay between indictment and arrest "'presumptively compromise[d] the reliability of a trial in ways that neither party can prove or, for that matter, identify.' Accordingly, the Court of Appeals should have reviewed the record not for proof of prejudice but rather the rebuttal or extenuation of prejudice." Because the court of appeals improperly shifted the burden to the defense, the court remanded the case to the intermediate court "to conduct the *Barker* balancing test under the correct standard for determining prejudice."

SUFFICIENCY

1. Clarifying that the *corpus delicti* rule applies only to cases in which the defendant has confessed.

***Carrizales v. State*, 2013 WL 6480241 (Tex. Crim. App. 2013)**

Carrizales was convicted of criminal mischief for throwing metal roofing screws in the road and causing passing vehicles to get flat tires. On appeal he claimed that the evidence was insufficient to prove the *corpus delicti* of the offense, specifically that the screws ended up in the tires by anyone's intentional or knowing acts, much less his own. The court of appeals affirmed the conviction, and the court of criminal appeals affirmed the affirmance, clarifying that the common law, judicially created doctrine of *corpus delicti* "exists, in the post *Jackson v. Virginia* era, only in confession cases."

The court traced *corpus delicti* back at least to the 17th century in *Perry's case* in which three people confessed to murder and were executed, only to have the alleged victim turn up alive a few years later. After that the courts disallowed murder convictions unless a dead body was found. The purpose of the rule is to insure that people are not convicted of a crime that never occurred based solely on their false confessions. Since *Jackson v. Virginia*, 443 U.S. 307 (1979), there has been only one constitutional test for legal sufficiency of the evidence. In this case the court recognized that "application of the corpus-delicti rule as it applies to convictions based on extrajudicial confessions has survived the *Jackson v. Virginia* due-process sufficiency review in Texas." This did not help Carrizales, though, because his case did not involve a confession.

2. The court of appeals properly reversed the defendant's conviction for manslaughter and did not err in not reforming the judgment to negligent homicide where there was no evidence concerning the standard of care an ordinary person should be held to, or that showed the defendant should have been aware of the risk to her step-daughter.

***Britain v. State*, 412 S.W.3d 518 (Tex. Crim. App. 2013)**

Britain was the stepmother and Brasse was the father of eight-year-old Sarah who died of complications from appendicitis on February 8, 2005. The day before, Sarah reported to her school nurse that she had a stomach ache, and after sending her back to class twice, the nurse called the parents, and Britain picked her up and took her home from school. Sarah began vomiting that evening and vomited at least three more times. The next day, Brasse left for work very early, and Sarah stayed home from school with Britain, continued to vomit, and drank fluids but did not eat. About 5 pm her brother took her water and covered her with a blanket, and about 6 pm, Britain discovered her dead.
Britain was convicted of reckless injury to a child and manslaughter, and Brasse was convicted of manslaughter. On appeal, SACDLA member Susan Schoon represented Britain; San Marcos lawyer Chevo Pastrano represented Brasse.

The court of appeals reversed the convictions of both Britain and Brasse. Both crimes required proof of recklessness, and this required the state to prove the defendants possessed a subjective and actual awareness of a substantial and unjustifiable risk. "'[M]ere lack of foresight, stupidity, irresponsibility, thoughtlessness, ordinary carelessness, however serious the consequences may happen to be,' does not rise to the level of criminal recklessness." although this was a tragic incident, there was no evidence that Britain knew there was a substantial risk that Sarah would die from these symptoms that are common to many childhood ailments and persisted for less than 24 hours.

The state filed a petition for discretionary review saying that the court of appeals

erred erred by not reforming the verdict to the lesser included offense of criminally negligent homicide. The court of criminal appeals granted the state's petition, but affirmed the court of appeals.

Although the court of appeals *may* reform a judgment to a lesser included offense, it is not required to, and the court did not err in refusing to do so under the facts presented here. Five medical professional testified in this case and gave conflicting testimony but the standard of care that a medical professional would have exercised is not the same as a layperson like Britain would have exercised.

> There was no evidence concerning the standard of care an ordinary person should be held to or that showed the appellant should have been aware of the risk to Sarah. Given this lack of evidence and the conflicting testimony of the medical experts concerning the ease with which such a serious risk was identified, we cannot say that the State proved beyond a reasonable doubt that the appellant acted with negligence. The Court of Appeals did not err in rendering a judgment of acquittal, and we affirm that decision.

3. Contractors beware, and get your money up front: Theft of services by deception requires proof that deception before the services are rendered.

***Daugherty v. State*, 387 S.W.3d 654 (Tex. Crim. App. 2013)**

Daugherty signed a contract with a general contractor for him to build out office space, and paid him a small portion on the contract up front, agreeing to pay the balance upon completion of the work. When the contractor completed the work, Daugherty gave him a check for the balance, but by then, the money in her account was insufficient to cover the check, and eventually the contractor took his complaint to the district attorney, who indicted Daugherty for theft of services by deception. She was convicted, but the court of appeals reversed the conviction and remanded for entry of a judgment of acquittal. The court of criminal appeals granted the state's petition for discretionary review, but then affirmed the reversal.

To prove theft of services by deception, the state must prove that the defendant secured the services by deception, that is, that the service provider – here the general contractor – relied upon Daugherty's prior act of deception when he performed his services, and that at that time she had no intent to pay him. Proof that the check was issued after the services were rendered will not support a conviction for theft of services. The deception must be such as is likely to affect the judgment of the service provider, and once he has completed his contractual performance, his judgment as to what he has already done cannot be retrospectively affected by the purported deception of issuing a worthless check.

> Why is this timing important? Criminal liability depends upon a person's culpable mental state at the time the person performs some criminal act and is the convergence of a bad act and a guilty mind. Theft of service by deception requires that the defendant intend to defraud the service provider before that person provides the service, and the defendant must commit some act of deception—lying about her bank account, giving the service provider a bad check, promising to pay a leasing contract when the defendant has no intent to do so, etc.—that is likely to affect the judgment of the service provider. And the service provider must have actually relied upon that deceptive act in providing the service.
>
> In sum, the deception must occur before the service is rendered, and that deceptive act must induce the other person to provide the service. The other person must rely upon the defendant's deceptive act in providing the service.

Daugherty breached her contract with the contractor and she still owes him money. "But this routine civil breach of contract case does not give rise to a criminal conviction for theft of services."

4. More reason to lament the demise of factual sufficiency review, especially from defendants who have motive, opportunity, girlfriends, and aggressive dogs that don't act aggressively.

***Temple v. State*, 390 S.W.3d 341 (Tex. Crim. App. 2013)**

Temple was convicted of murdering his wife, and among the 80 points of error raised was at least one complaining that the evidence was legally insufficient. The court of appeals affirmed the conviction, and after granting Temple's petition for discretionary review, the court of criminal appeals also affirmed.

After the recent case of *Brooks v. State*, 323 S.W. 3d 893 (Tex. Crim. App. 2010) it is simple enough to state the law, and the *Temple* court, in this 8-0 decision, did so, reiterating that there is "only one standard 'to evaluate whether the evidence is sufficient to support a criminal conviction beyond a reasonable doubt: legal sufficiency. . . .' Accordingly, when reviewing the sufficiency of the evidence, we consider all of the evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, a jury was rationally justified in finding guilt beyond a reasonable doubt."

Although the sufficiency standard is easy to recite, it is, or at least it should be, difficult to apply, and that is certainly true when the case, like this one, was vigorously

tried, and the evidence was entirely circumstantial. It would not serve much purpose to discuss the facts of this case in detail, but suffice it to say that Temple lost on appeal because he had the motive and opportunity to kill his wife, and because there was too much guilt to be inferred from many pieces of evidence including: too many girlfriends, deception, a staged burglary, a dog that did not attack, and a history of gun usage. The bottom line is, if you can't convince your jury of reasonable doubt, you will be unlikely to convince an appellate court that the evidence was legally insufficient, and this is all the more true now that *Brooks* did away with factual sufficiency review. Or did it?

Many who read *Brooks* thought that it forever ended the debate about whether the courts of appeals have the jurisdiction to conduct factual sufficiency reviews. For what its worth, there are at least a few who still believe there is room to argue that the intermediate appellate courts have jurisdiction to review factual sufficiency. Justices Seymore and McCally make some powerful, spirited arguments to that effect, concurring and dissenting in *Temple v. State*, 342 S.W. 3d 572 (Tex. App.–Houston [14th Dist.] 2010), *aff'd*, 390 S.W.3d 341 (Tex. Crim. App. 2013).

5. How to challenge on appeal the legal and the factual sufficiency of evidence when a jury rejects an affirmative defense in the aftermath of *Brooks*.

Matlock v. State, 392 S.W.3d 662 (Tex. Crim. App. 2013)

Matlock was charged with criminal nonsupport, and the only question at his trial was whether he had the ability to pay, which, by statute, is an affirmative defense. The jury convicted Matlock on all 16 counts alleged in the indictment, and he appealed. The court of appeals affirmed the convictions on 15 counts, but reversed and remanded and ordered acquittal on the first count, finding that Matlock had been incarcerated in the county jail for 11 months preceding the date that particular payment was due, and that there no evidence that he had any money himself, or that he had any source from which he could have borrowed that money.

The court of criminal appeals granted the state's petition for discretionary review "to determine whether the legal and factual sufficiency standards that govern Texas civil proceedings still apply to the rejection of an affirmative defense after this Court's decision in *Brooks v. State* [323 S.W.3d 893 (Tex. Crim. App. 2010)]." The court determined that they do, but held that this case should be remanded to the court of appeals because that court "mistakenly conflated those two distinct standards in this criminal nonsupport case." In the process, the court looked at several cases, including *Brooks*, *Meraz v. State*, 785 S.W. 2d 146 (Tex. Crim. App. 1990), *Jackson v. Virginia*, 443 U.S. 307 (1979), and two cases from the Texas Supreme Court – *Sterner v. Marathon Oil Co.*, 767 S.W. 2d 686 (Tex. 1989), and *City of Keller v. Wilson*, 168 S. W. 3d 802 (Tex. 2005).

From the *Sterner* and *Wilson* cases, the court came up with this test for determining the *legal* sufficiency of the evidence to support a jury's rejection of an affirmative defense in a criminal case:

> In reviewing the legal sufficiency of the evidence to support an adverse finding on the affirmative defense of an inability to pay in a nonsupport prosecution, we first look for evidence ("more than a mere scintilla") that supports the jury's implied finding that the defendant could pay child support, and we disregard all evidence of the defendant's inability to pay unless a reasonable factfinder could not disregard that evidence. If no evidence supports the jury's finding that the defendant could pay child support, then we search the record to see if the defendant had established, as a matter of law, that he did not have the ability to pay his child support. If the record reveals evidence supporting the defendant's position that he did not have the ability to pay, but that evidence was subject to a credibility assessment and was evidence that a reasonable jury was entitled to disbelieve, we will not consider that evidence in our matter-of-law assessment.

A defendant who is appealing from a jury's adverse finding on his affirmative defense is entitled to an acquittal on appeal only if the evidence conclusively establishes his affirmative defense under this two step test.

Such a defendant can also raise a *factual* sufficiency challenge to the adverse finding on his affirmative defense, although if successful on this challenge, he is not entitled to acquittal, but merely a remand for a new trial. This is the test for *factual* sufficiency:

> In the factual-sufficiency review of a rejected affirmative defense, an appellate court views the entirety of the evidence in a neutral light, but it may not usurp the function of the jury by substituting its judgment in place of the jury's assessment of the weight and credibility of the witnesses' testimony. Therefore, an appellate court may sustain a defendant's factual-sufficiency claim only if, after setting out the relevant evidence and explaining precisely how the contrary evidence greatly outweighs the evidence supporting the verdict, the court clearly states why the verdict is so much against the great weight of the evidence as to be manifestly unjust, conscience-shocking, or clearly biased.

As noted, the problem in this case was that the court of appeals seemed to confuse the two sufficiency standards, legal and factual. That is, it appeared to find that the evidence was *factually* insufficient, and yet it ordered an acquittal rather than a new trial. "We therefore reverse the judgment of the court of appeals and remand the case to that

court for further proceedings consistent with this opinion."

6. "Human scent discrimination" by dogs, while it may raise a 'strong suspicion," is insufficient to establish guilt beyond a reasonable doubt; nor was the remainder of the state's "evidence," which seemed more speculative than inferential, enough in this case, to prove either capital murder or conspiracy.

***Winfrey v. State*, 393 S.W.3d 763 (Tex. Crim. App. 2013)**

Burr worked at a high school once attended by Winfrey, and after he was found dead in his home, Winfrey, her father, and her brother were charged with capital murder and conspiracy. "No physical evidence connected appellant or her family to the scene, nor were she or any member of her family connected to the property assumed to be missing from Burr's home. The only evidence that purported to directly connect appellant to the crime scene was a "scent lineup" conducted by Keith Pikett." Specifically, according to Pikett, two dogs "alerted" to Winfrey's scent being on Burr's clothes, which indicated Winfrey had been in contact with those clothes. Pikett also testified that different dogs alert differently. One will turn 90 degrees; another will turn sideways and bark; and a third will turn and jump on him. Ultimately, Pikett decides what constitutes an alert.

Besides that so-called direct evidence, there was just a bit of circumstantial evidence. a former boyfriend claimed that Winfrey had shaved herself just after receiving notice that she had been ordered to provide a pubic hair sample, that she had tried to get a former husband to alibi her, and that she had once commented that getting into Burr's home was "an easy lick." And a former teacher at Winfrey's school, who was then employed by the DA as a Crime Victim Assistant Coordinator, testified that she had overheard Winfrey telling Burr that she knew he had money hidden in his home and asking him when he was going to take her out and spend some of it. Another teacher overheard Winfrey say somebody should "beat the shit out of" Burr, although she later apologized saying that she didn't like Burr's cats. And there was other evidence that Winfrey would sometimes visit Burr in his home and that they asked him to go to church with them but he declined. And there was evidence that her father had made statements to another inmate while they were both incarcerated.

Winfrey was convicted of both capital murder and conspiracy and sentenced to life imprisonment. Her brother was tried separately and acquitted of both conspiracy and capital murder. Her father was convicted of murder but the court of criminal appeals previously found the evidence against him to be legally insufficient. Winfrey appealed and the court of appeals disregarded the dog scent "evidence," but nonetheless affirmed her conviction, holding that the other evidence was legally and factually sufficient to prove her guilt.

The court of criminal appeals granted Winfrey's petition for discretionary review, reversed the court of appeals, and ordered the entry of acquittals on both her convictions.

The court referred to Winfrey's father's case, in which it had previously held that dog scent "evidence" is "merely supportive" and that when used alone or as primary evidence "are legally insufficient to support a conviction." Although this might have raised a strong suspicion about the guilt of the Winfrey family, it was insufficient to prove guilt beyond a reasonable doubt. As in the father's case, then, the court looked at the remainder of the so-called evidence, and found that it too was legally insufficient.

> Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient to establish guilt. While juries are permitted to draw multiple reasonable inferences as long as each inference is supported by the evidence presented at trial, "juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions." "[A]n inference is a conclusion reached by considering other facts and deducing a logical consequence from them," while "[s]peculation is mere theorizing or guessing about the possible meaning of facts and evidence presented." "A conclusion reached by speculation ... is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt." [citations omitted]

The state's evidence that Winfrey was guilty of capital murder seemed more speculative than inferential. Nor was there sufficient evidence to prove her guilt of conspiracy.

As to conspiracy, Winfrey argued that § 15.02(c)(2) of the penal code prevented her conviction because both of her alleged conspirators had been acquitted. She also argued that there was no evidence that she had agreed with her father and brother to kill Burr. "We find that we do not need to address the proper interpretation of the statute in this case because the record does not contain evidence on which a reasonable jury could find that appellant agreed with one or both of the alleged co-conspirators that one or more of them would engage in conduct that would constitute the alleged capital murder or that one or more of them performed an overt act in pursuance of such an agreement."

> Regardless of whether the acquittal of appellant's brother of conspiracy, combined with her father's acquittal of the murder and the state's election not to indict him for conspiracy, constituted a defense to the prosecution for the criminal conspiracy, the evidence in the record is insufficient to sustain the agreement element of the conspiracy statute. Appellant is thus entitled to the requested relief regarding her criminal-conspiracy conviction.

7. Any variance between the allegations in the indictment, which alleged that death was caused by shaking combined with impact, and the proof at trial, which arguably did not prove shaking, was immaterial.

***Ramos v. State*, 407 S.W.3d 265 (Tex. Crim. App. 2013)**

The three-count indictment alleged that Ramos committed capital murder by shaking Danielle; by shaking and causing Danielle's head to strike an object; and by shaking and striking Danielle's head with an object. The medical examiner testified that some type of trauma to Danielle's head caused her brain to bleed and swell. He believed it more likely that her head was in motion when it struck an object, and in his opinion the injuries were consistent with shaking, coupled with an impact. This was the only evidence that shaking contributed to Danielle's death. Ramos testified that he became frustrated with the child's crying and tossed her into her bassinet, not intending injury. The jury convicted Ramos of the lesser included offense of manslaughter and he appealed.

The court of appeals found the evidence legally sufficient to prove that Ramos recklessly caused Danielle's death. According to that court, a hypothetically correct jury charge for manslaughter would ask whether Ramos recklessly caused Danielle's death and would not submit the manner and means alleged in the indictment.

Ramos filed a petition for discretionary review asserting that a hypothetically correct jury charge for manslaughter would have included the manner and means of the reckless killing, as required by article 21.15 of the code of criminal procedure, and that, when measured against such a charge, the evidence concerning shaking would be legally insufficient. The court of criminal appeals granted Ramos's petition, but affirmed the court of appeals.

There are two types of variance. The first is a statutory variance, that is, where the statute provides alternate methods of committing an offense, and the indictment pleads only one of those methods, but the state proves the other, unalleged method. The other type of variance is non-statutory, such as where the indictment pleads something that is merely descriptive of the offense. The variance here, which concerned the manner and means of the killing, was of the non-statutory sort.

Article 21.15 is a notice requirement that requires the state to more specifically plead crimes involving recklessness and negligence. It does not apply in this case because the indictment did not allege manslaughter or recklessness. Moreover, manslaughter is a "result of conduct" offense, where the gravamen or focus is on the death of the individual. The purported variance in this case was non-statutory, involving the method by which the defendant killed the child, or allegations that are descriptive of the elements of the offense.

Any variance between proof and matters unnecessarily pled in the indictment is an immaterial variance for purposes of legal sufficiency. The court then looked at three lines of cases and came to the following conclusion:

> Because (1) the gravamen of manslaughter is the death of the victim, and the evidence shows beyond a reasonable doubt that Appellant caused the death of the victim, (2) notice was adequately provided to Appellant, and there is no risk of double jeopardy, and (3) the cumulative force of the evidence supports the jury's verdict that, beyond a reasonable doubt, the Appellant caused the death of the victim, the variance in pleading and proof is immaterial.

8. Habeas relief denied where there was some evidence to support the trial court's order stacking a sentence for possession of a controlled substance in a drug free zone, and where the court had no jurisdiction to consider assessment of attorneys fees.

***Ex Parte Knight,* 401 S.W.3d 60 (Tex. Crim. App. 2013)**

Knight was indicted for two separate offenses as a habitual offender. The first alleged that she was a felon in possession of a weapon; the second that she possessed a controlled substance in a drug-free zone and that she used or exhibited a deadly weapon in the course of that offense. She was convicted of both offenses, and the trial court stacked the sentences. Knight later filed an application for writ of habeas corpus complaining that there was no evidence to support the stacking order or the imposition of attorney's fees in the bill of costs. The court of criminal appeals denied relief.

As to the stacking order, the court noted that a claim that evidence is insufficient is not cognizable in a writ. A habeas court can only consider "no evidence" claims. Habeas relief must be denied if there is "any" evidence to support the judgment, and here there was.

> Based on the entire record, some evidence shows that the jury increased applicant's punishment due to the drug-free-zone violation because it found the allegation true, the trial court included that affirmative finding in its judgment, and the jury sentenced applicant at the higher punishment range. Although applicant may have arguments as to why the evidence does not show that the jury actually increased her sentence due to the drug-free-zone finding, those arguments have little weight in a habeas proceeding, which is limited to a review for some evidence rather than for sufficient evidence. We hold that some evidence shows that the punishment for the drug-possession offense was increased due to the jury's drug-free-zone affirmative finding. We, therefore, deny relief as to this claim.

As to the attorney's fees, "because a challenge to a reimbursement order "in no way implicates the fact or duration of [an applicant's] confinement pursuant to his conviction and, therefore, it is not the proper subject of a statutorily governed post-conviction application for writ of habeas corpus." [citation omitted] This ground, therefore, must be dismissed."

Although in a recent case the court construed the applicant's habeas writ as a writ of mandamus, it declined to do so here "because the court of appeals has concurrent jurisdiction over a petition for a writ of mandamus directed against a district-court judge.

VOIR DIRE

1. How brain-dead would a prosecutor have to be to lose under Batson?

***Blackman v. State*, 2013 WL 6480037 (Tex. Crim. App. 2013)**

The trial court overruled the defense's objection that the prosecutor challenged Fortune, a black juror, in violation of *Batson*, and the court of appeals reversed, finding error under *Snyder v. Louisiana*, 552 U.S. 472 (2008). The court of criminal appeals granted the state's petition for review and reversed the reversal.

The court of criminal appeals found several faults with the way the court of appeals analyzed the *Batson* claim, including that that court identified the wrong reasons relied on by the prosecutors in the trial court. The court also held that the court of appeals "erred to conclude that Snyder governs the facts of this case."

The court of criminal appeals quoted a portion of the state's brief on direct appeal which properly identified the reasons the trial prosecutor struck venireperson Fortune:

> The prosecutor explained that he struck Fortune because he did not have the same "vibe" that she did when attempting to make eye contact. He also indicated that he was troubled by the manner in which Fortune addressed a defendant in her prior jury service as "the accused." Her tone indicated to him that the defendant had been wrongfully accused. Additionally, the prosecutor felt that appellant's trial counsel was obtaining eye contact from Fortune in a manner that he was not.

These factors, in the court of criminal appeals's view, were good enough, and were race neutral.

The appellant offered nothing on the record to discredit the sincerity of these

> prosecutorial perceptions, and the trial court was entitled to credit the prosecutor's assertion that he struck similarly positioned non-African-Americans as an indication that his strike against Fortune was not racially motivated. We hold that the trial court did not clearly err to find that the prosecutor's explanations were genuine and to conclude, accordingly, that the appellant failed to meet his burden to establish by a preponderance of the evidence that the State indulged in purposeful discrimination by striking Fortune from the petit jury on the basis of her race.

2. Judge Meyers dissents to a refusal to grant PDR, believing that "[t]he judge allowing the prosecutor to voir dire the jury regarding lesser-included offenses at this point in the trial is a significant situation that warrants our consideration."

***Slater v. State*, 408 S.W.3d 876 (Tex. Crim. App. 2013)**

The prosecutor told the jury during voir dire that the jury could not consider a lesser offense unless it found the defendant not guilty of the greater offense. The trial court overruled the defense's objection, and the court of appeals affirmed the conviction. The court of criminal appeals refused Slater's petition for discretionary review, and Judge Meyer's dissented, believing that this "is a significant situation that warrants our consideration:

> First, the prosecutor's statements during voir dire were a misstatement of the law. Second, the prosecutor should not be commenting about the jury charge during voir dire when he could not possibly know what the charge is going to include until both sides have presented their cases and the parties have held a jury-charge conference with the trial judge. The evidence raised at trial may not have even revealed the possibility of any lesser-included offenses being included in the jury instructions. Third, the prosecutor's statements may have forced the defense to voir dire the jury on issues that may not be relevant to the case or to make statements about the case that he did not want to reveal at that particular time. In order to respond to the voir dire statements by the prosecutor, the defense could have had to reveal privileged or prejudicial information. Finally, the court of appeals did not adequately consider the issue of the prosecutor's statements during voir dire, instead focusing on the language that was later included in the jury charge.

3. The trial judge did not commit fundamental error when he told the jury during voir dire that, if he were charged with a crime, "I would probably want to get up and tell my side. It's just my nature. I would want to probably say my point

of view on the thing or my version of the facts, but that's just me."

***Unkart v. State*, 400 S.W.3d 94 (Tex. Crim. App. 2013)**

This is the way the trial court explained the hallowed Fifth Amendment's protection during jury selection:

> This is an area of the law that I find that people have opinions about, and there's nothing wrong with that. It's a great country that we live in. But my opinion about that doesn't jive with everyone else's opinion, and I want to go into that to discuss with you how important your frame of mind, your willingness to accept this instruction that I'm about to give you because, you know, *I think—praise God, I haven't been charged with a crime. But if I were, then I think I would probably want to get up and tell my side. It's just my nature. I would want to probably say my point of view on the thing or my version of the facts, but that's just me.*
>
> *And you may have the same opinion that Judge Ray has, or not*; and it's okay, subject to one condition, that is, that no matter what your opinion on the matter is, that you can follow the instruction as follows. If the defendant decides not to testify, you cannot refer or allude to that fact during your deliberations. In other words, if you're on the jury, you can't go back in the jury room and say, "Hey, she didn't even testify. What's up with that?" You can't even refer to that fact, and you cannot consider that decision to remain silent as a circumstance against the defendant for any reason whatsoever (emphasis in opinion).

Defense counsel – perhaps because he was stunned that a trial judge would say such a thing – made no immediate objection, but waited until the next day to make a motion for mistrial, in which he cited to the Fifth Amendment and article 38.05 of the Texas Code of Criminal Procedure. The motion for mistrial was overruled. Unkart did not testify and he was convicted.

The court of appeals reversed, finding that the judge's remarks vitiated Unkart's presumption of innocence and constituted fundamental error of constitutional dimension. The error, therefore, was not waived even though unaccompanied by a contemporaneous objection. *See Blue v. State*, 41 S.W.3d 129, 131–33 (Tex.Crim.App.2000). Finally, this constitutional error was reversible under Rule 44.2(a), since the court could not say beyond a reasonable doubt that it did not contribute to the conviction.

The court of criminal appeals granted the state's petition for discretionary review

and reversed the reversal.

The court began by "clarify[ing] the status of *Blue*." Labeling *Blue* a plurality decision in which "it is not possible to ascertain a majority holding or the narrowest ground or rule that commands a majority of the court," the court found that "it has no precedential value." The court did observe that the different opinions in *Blue* "may nevertheless be considered for any persuasive value they might have, in the same way as any other opinion that does not command a majority of this Court, such as a concurring opinion." And whatever persuasive value *Blue* might have, it did not help Unkart, since circumstances in the cases "differ significantly in several respects."

> What happened in the present case is a far cry from what happened in *Blue*. Analyzing the trial judge's instructions as a whole makes it clear that he was engaged in a well-intentioned effort to protect appellant's rights. Most of the trial judge's instructions were, functionally, an instruction to disregard the comment about which appellant complains. And if there were any residual harm, it would have been cured by a timely instruction to disregard the specific comments that appellant found objectionable. Appellant was, therefore, not entitled to a mistrial on the basis of the trial judge's comments in voir dire, and he forfeited a lesser remedy by failing to request an instruction to disregard.

4. Does the trial court commit constitutional or non-constitutional error when it prevents counsel from asking prospective jurors to compare and contrast the different standards of proof in Texas?

***Easley v. State*, 2012 WL 4040798 (Tex. App.-Waco 2012, pet. granted)(not designated for publication)**

When Easley's lawyer tried during voir dire to discuss the standard of proof in a civil trial, to show that it differs from the beyond-a-reasonable-doubt standard that applies in criminal cases, the trial judge shut him down, noting: "I don't allow you to get into a stairstep thing of probable cause and reason to believe and that sort of stuff.... We're talking about the standard of proof that applies here but nothing else." Easley was convicted and he appealed, complaining, among other things, that the trial court impermissibly limited the scope of his voir dire. The court of appeals held that this was non-constitutional error and that therefore, under Rule 44.2(b), the error is reversible only if it affected a substantial right. According to that court, it did not, and the conviction was affirmed.

The court of criminal appeals granted Easley's petition for discretionary review to determine the following issues:

1. The Tenth Court of Appeals erred in deciding that limitations on voir dire were nonconstitutional and erred in applying Rule 44.2(b).

2. Assuming Rule 44.2(b) is proper for harm analysis, the Tenth Court of Appeals erred in determining that the voir dire limits did not affect a substantial right.

WEAPONS

The exhibition of deadly weapon during the commission of an offense is not "exhibition" unless it somehow facilitates the offense.

***Plummer v. State*, 410 S.W.3d 855 (Tex. Crim. App. 2013)**

The police were called to a wellness clinic where they encountered Plummer, a convicted felon, who was apparently working as a security guard. They became suspicious of Plummer for a variety of reasons, including that the Glock he was wearing was a smaller version than the one usually issued to police officers, that he was nervous, and that it seemed unusual that a wellness clinic would need an off-duty police officer for security. Plummer was wearing a t-shirt labeled "Police," underneath which was body armor, and his undersized-Glock was holstered on his gun belt. Plummer was convicted of unlawful possession of a handgun by a convicted felon, and unlawful possession of body armor by a felon. The trial court made an affirmative finding of a deadly weapon on the body armor case.

The court of appeals affirmed the conviction and sentence, holding, among other things, that there was sufficient evidence to support the affirmative finding. The court of criminal appeals granted Plummer's petition for discretionary review to decide this question: "Whether a felon working as a security guard exhibited a firearm that remained in its holster while he wore a bullet-proof vest under his t-shirt?" The court reversed the court of appeals and the trial court, finding that "this case raises an important case of first impression:

> To support a deadly-weapon finding, must the "exhibition" of a deadly weapon facilitate, in some manner, the associated felony offense? Or is it sufficient that the exhibition of the deadly weapon occurs simultaneously with the felony but is unrelated to its commission?
>
> We conclude that there must be some facilitation purpose between the weapon and the associated offense to support a deadly-weapon finding. Because there was no evidence that appellant's possession of a mini-Glock pistol facilitated his commission of the offense of possession of body armor, we delete the deadly

weapon finding from the judgment.