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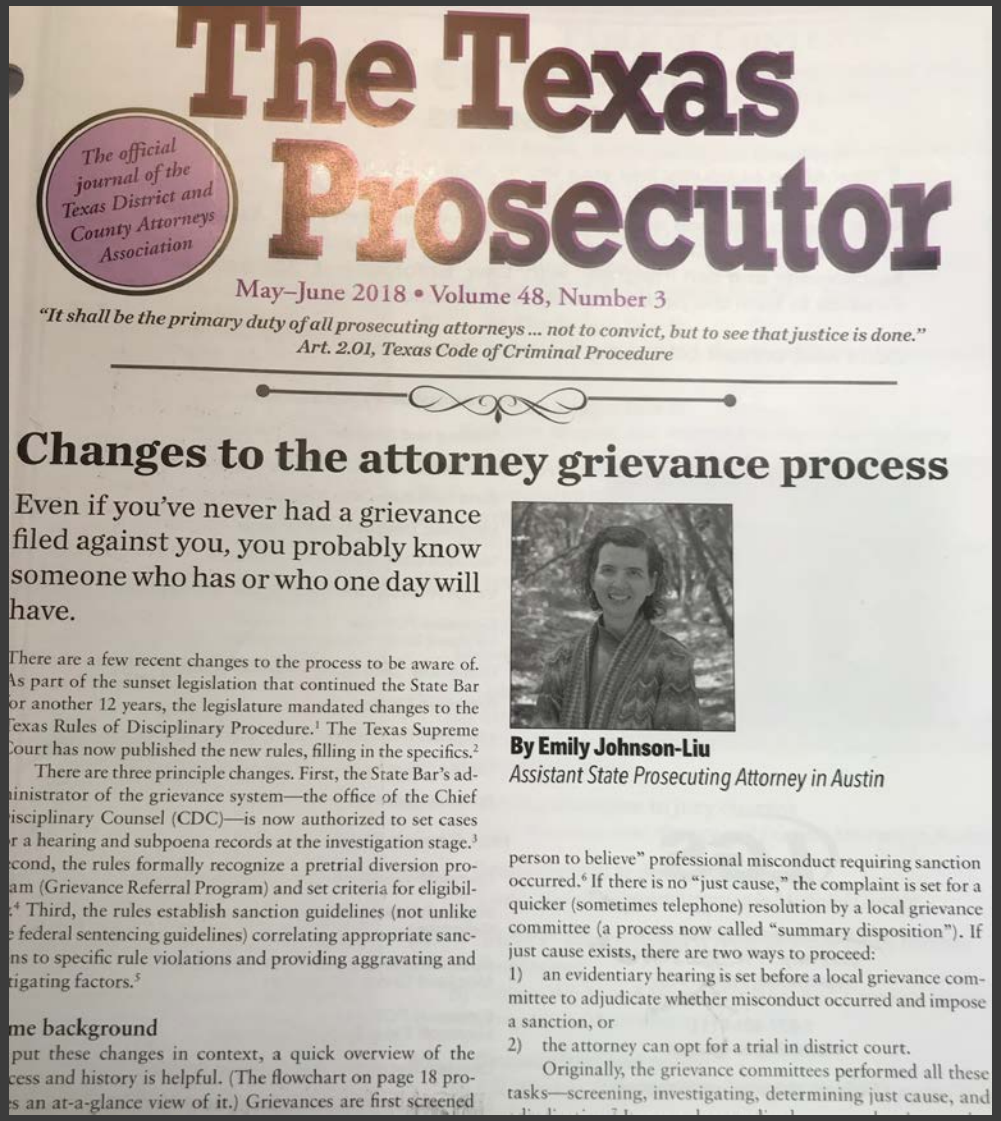
U.S. Supreme Court and Court of Criminal Appeals Update

Emily Johnson-Liu

- State Bar Criminal Pattern Jury Charge Committee
- Texas Court of Criminal Appeals Rules Committee
- TDCAA Publications Committee



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"It shall be the primary duty of all prosecuting attorneys ... not to convict, but to see that justice is done."
Art. 2.01, Texas Code of Criminal Procedure

Changes to the attorney grievance process

Even if you've never had a grievance filed against you, you probably know someone who has or who one day will have.

By Emily Johnson-Liu
Assistant State Prosecuting Attorney in Austin

There are a few recent changes to the process to be aware of. As part of the sunset legislation that continued the State Bar for another 12 years, the legislature mandated changes to the Texas Rules of Disciplinary Procedure.[1] The Texas Supreme Court has now published the new rules, filling in the specifics.[2]

There are three principle changes. First, the State Bar's administrator of the grievance system—the office of the Chief Disciplinary Counsel (CDC)—is now authorized to set cases for a hearing and subpoena records at the investigation stage.[3] Second, the rules formally recognize a pretrial diversion program (Grievance Referral Program) and set criteria for eligibility.[4] Third, the rules establish sanction guidelines (not unlike the federal sentencing guidelines) correlating appropriate sanctions to specific rule violations and providing aggravating and mitigating factors.[5]

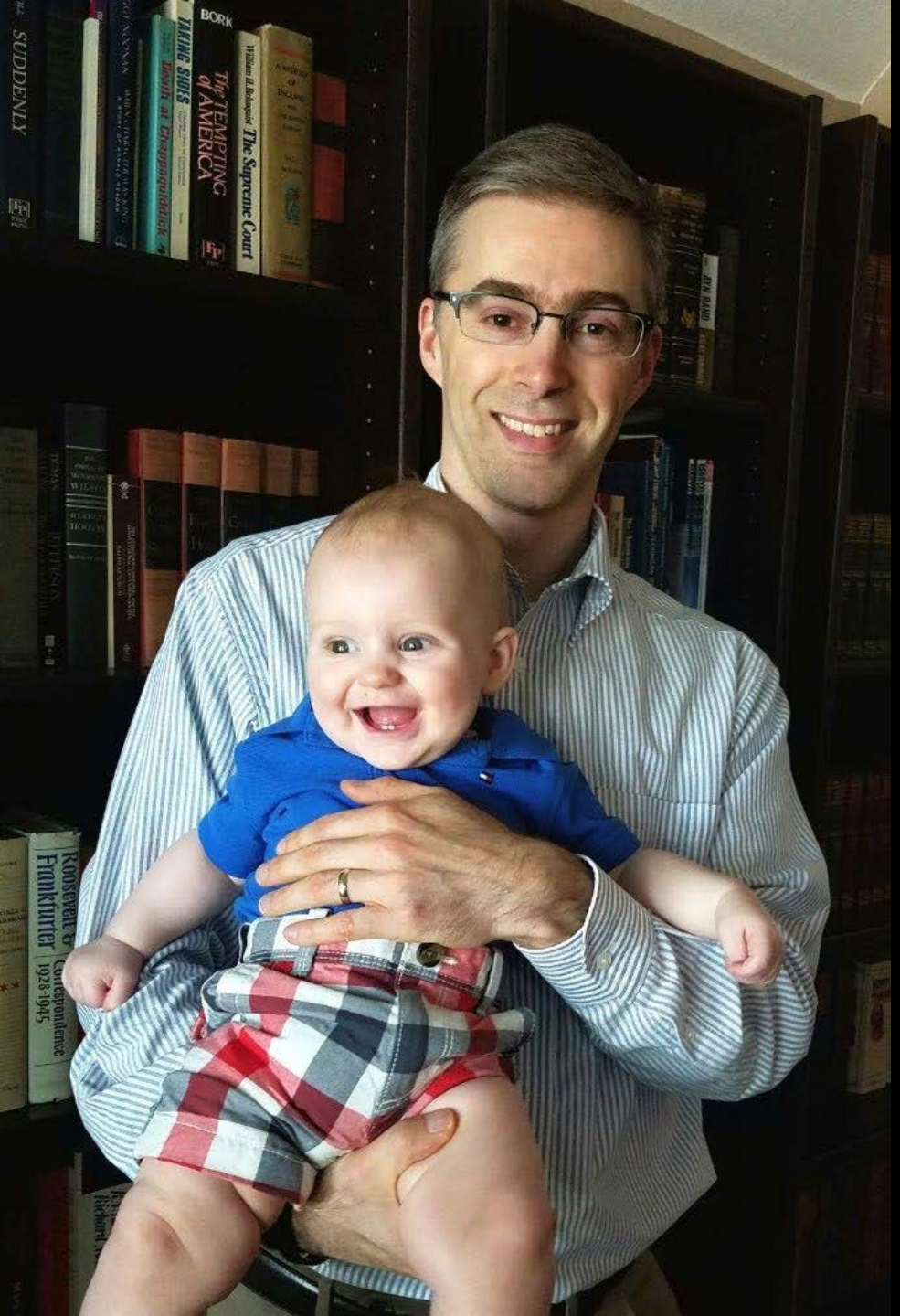
Some background

To put these changes in context, a quick overview of the process and history is helpful. (The flowchart on page 18 provides an at-a-glance view of it.) Grievances are first screened

person to believe" professional misconduct requiring sanction occurred.[6] If there is no "just cause," the complaint is set for a quicker (sometimes telephone) resolution by a local grievance committee (a process now called "summary disposition"). If just cause exists, there are two ways to proceed:

1) an evidentiary hearing is set before a local grievance committee to adjudicate whether misconduct occurred and impose a sanction, or
2) the attorney can opt for a trial in district court.

Originally, the grievance committees performed all these tasks—screening, investigating, determining just cause, and



John Messinger

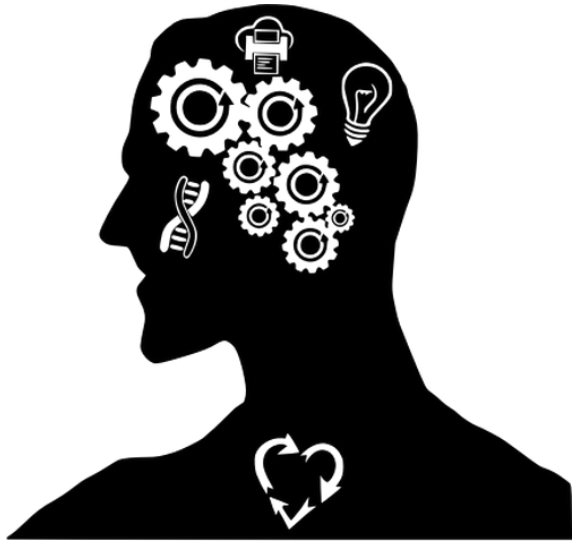
- Advanced Criminal Course Planning Committee
- Developer and Presenter of Traffic Stop Search and Seizure Course for Rural Law Enforcement

Search and Seizure

D.C. v. Wesby, 138 S. Ct. 577

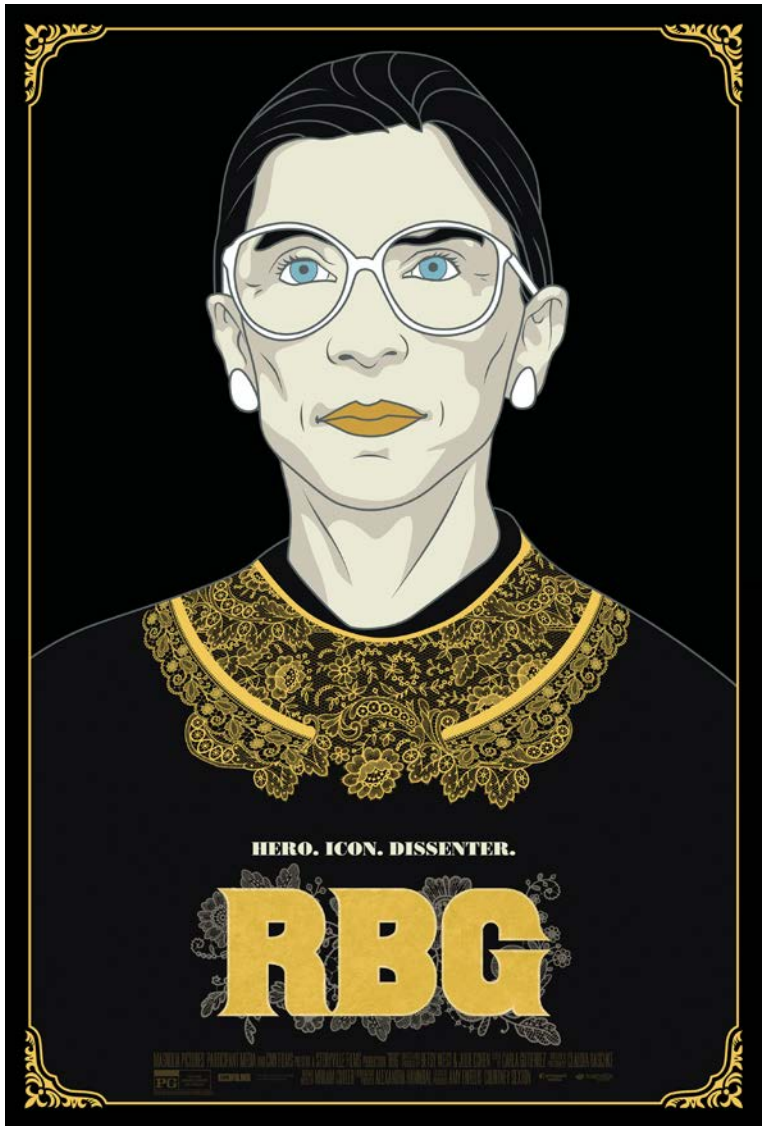
Thomas, Roberts, Kennedy, Breyer, Alito, Kagan, & Gorsuch

"Most homeowners do not live in near-barren houses. And most homeowners do not invite people over to use their living room as a strip club, to have sex in their bedroom, to smoke marijuana inside, and to leave their floors filthy. The officers could thus infer that the partygoers knew their party was not authorized."



In the future, the Court may need to consider whether an officer's subjective beliefs should factor into the analysis.

Ginsburg, concurring in judgment in part

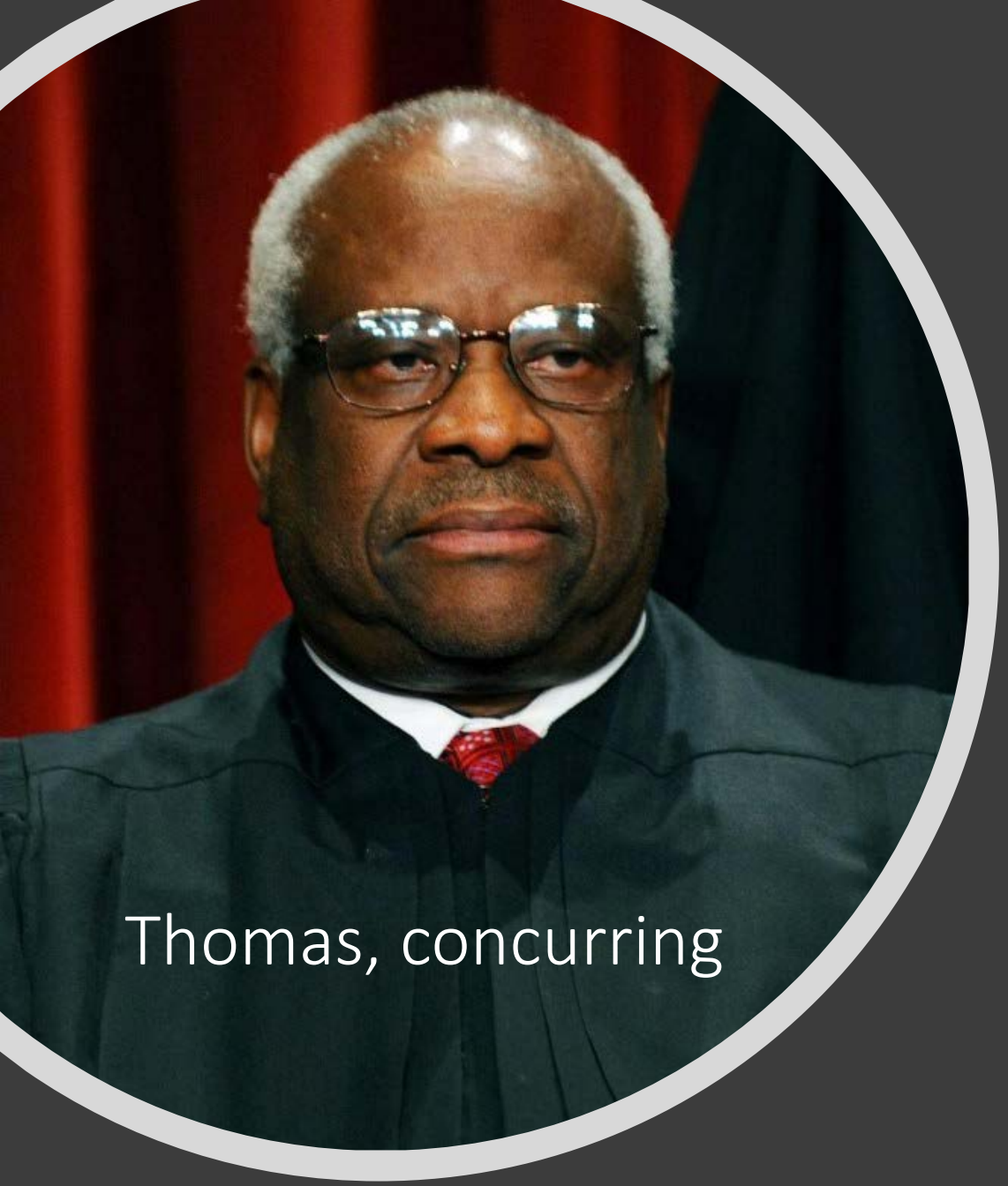


Sotomayor, Roberts, Kennedy, Thomas, Ginsburg, Breyer, Kagan, & Gorsuch

Does the auto exception permit a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a likely stolen motorcycle?

Collins v. VA, No. 16-1027

Auto Exception v. Curtilage



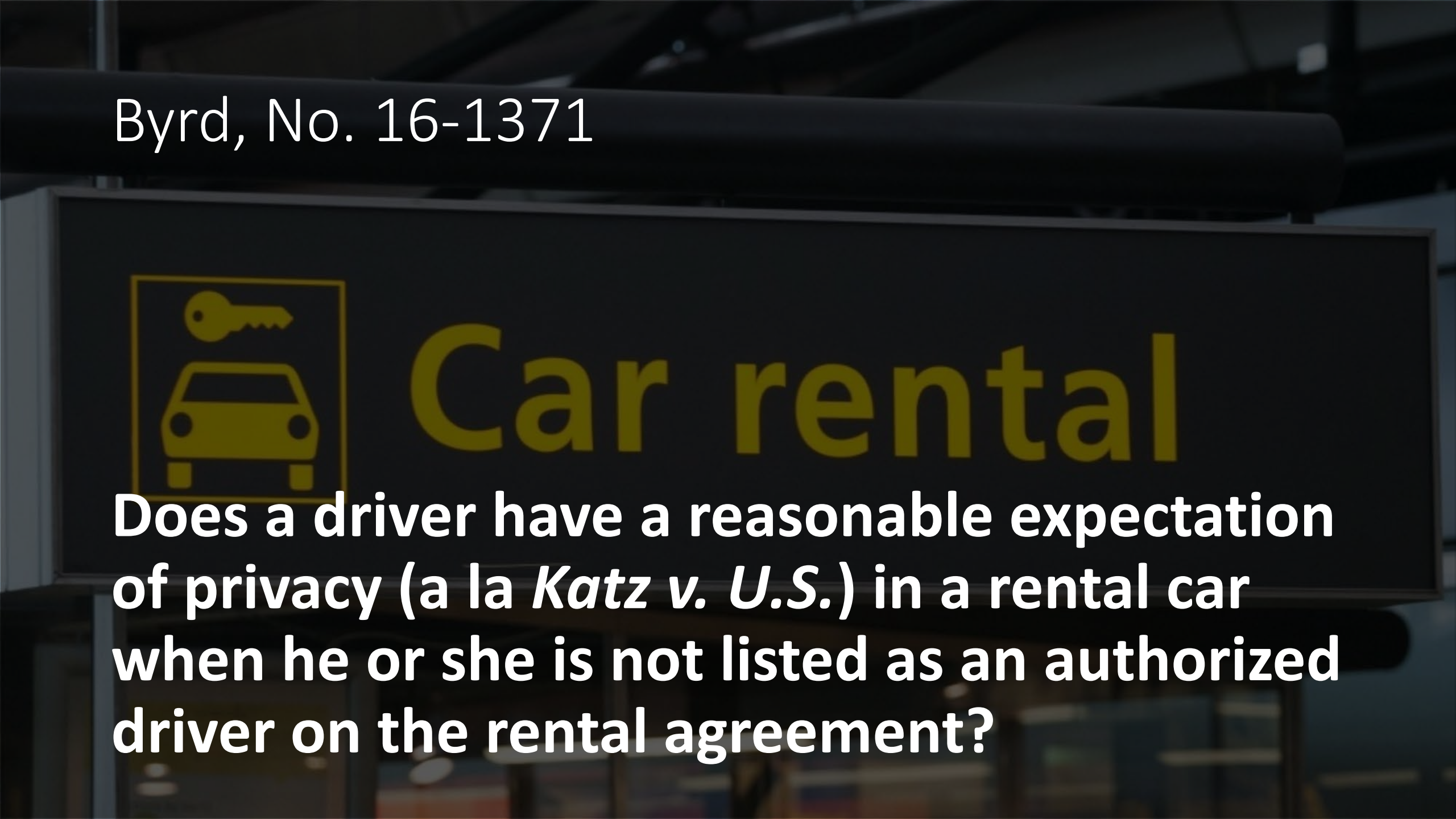
Thomas, concurring

The Court should address whether the states are required to apply the exclusionary rule, which is purely a common law creation.

Alito, dissenting

“An ordinary person of common sense would react to the Court’s decision the way Mr. Bumble famously responded when told about a legal rule that did not comport with the reality of everyday life. If that is the law, he exclaimed, ‘the law is a ass—a idiot.’ C. Dickens, Oliver Twist 277 (1867).”

Byrd, No. 16-1371



Does a driver have a reasonable expectation of privacy (a la *Katz v. U.S.*) in a rental car when he or she is not listed as an authorized driver on the rental agreement?

Kennedy (unanimous)

- Person in current possession has a reasonable expectation of privacy.
- Exclusion of another as driver supports privacy.
- Privacy expectation is different than a risk allocation among private parties.
- Remand to determine whether status of driver is equal to thief or PC supported search.

Search and Seizure in the Court of Criminal Appeals

Cortez, PD-0228-17

Was Cortez lawfully stopped for traveling on the “fog-line?”

Richardson, Hervey, Alcala, Newell, Keel, & Walker

1. Unclear he touched the line.
2. Driving is an "exercise of controlled weaving."
3. Allowing a faster car to pass.
4. Slowing down to turn right onto the exit ramp.

1. Touching is not driving on the improved shoulder.

2. Definitions “shoulder” do not indicate how the shoulder is distinct from the roadway by the markings.

3. Rule of lenity rules.

4. A different interpretation would violate *Lothrop*.

Newell, concurring

1. That it’s unclear Cortez touched the line supports reasonable suspicion.

2. The majority skirts the State’s issue.

3. The fog line is part of the shoulder.

4. The justifications are not before the Court.

Keller, dissenting (Keasler)

HERNANDEZ, PD-1380-16

Improvidently Granted 4/18

1. “Does the improved shoulder of a road include the ‘fog line?’”

2. “Alternatively, because the issue whether the improved shoulder includes the ‘fog line’ is unsettled, is there reasonable suspicion of a violation of driving on the improved shoulder when a driver drives on the ‘fog line’ but does not cross its outer edge?”

3. “Is driving on an improved shoulder ‘necessary’ ‘to avoid a collision’ under TEX. TRANSP. CODE § 545.058(a)(7) simply because the driver is on a two-lane highway at night with a vehicle traveling in the opposite direction?”

Velasquez, PD-0228-16

TEX. CODE CRIM. PROC. art. 28.01 § 1

The court may set a case for a pretrial hearing before the trial on the merits & direct the parties to appear at the time and place stated.

28.01 applies only when there is a pretrial setting, not a hearing pre-trial .

Keasler, Hervey, Alcala, Newell, & Walker

A trial-day suppression issue on a day designated for the trial on the merits is subject to the court's scheduling preferences.

Richardson, dissenting (Keller)

Article 28.01 § 1 requires notice of “time and place,” and the State was notified of the place but not the time.

Impractical for State.

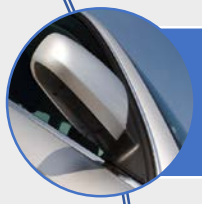
Ramirez-Tamayo
PD-1300-16

Officer Training and Experience
When Innocent Facts = Reasonable Suspicion

Alcala (unanimous)

Officers do not need to detail training and experience as a predicate for establishing their expertise of narcotics detection.

Rental Car



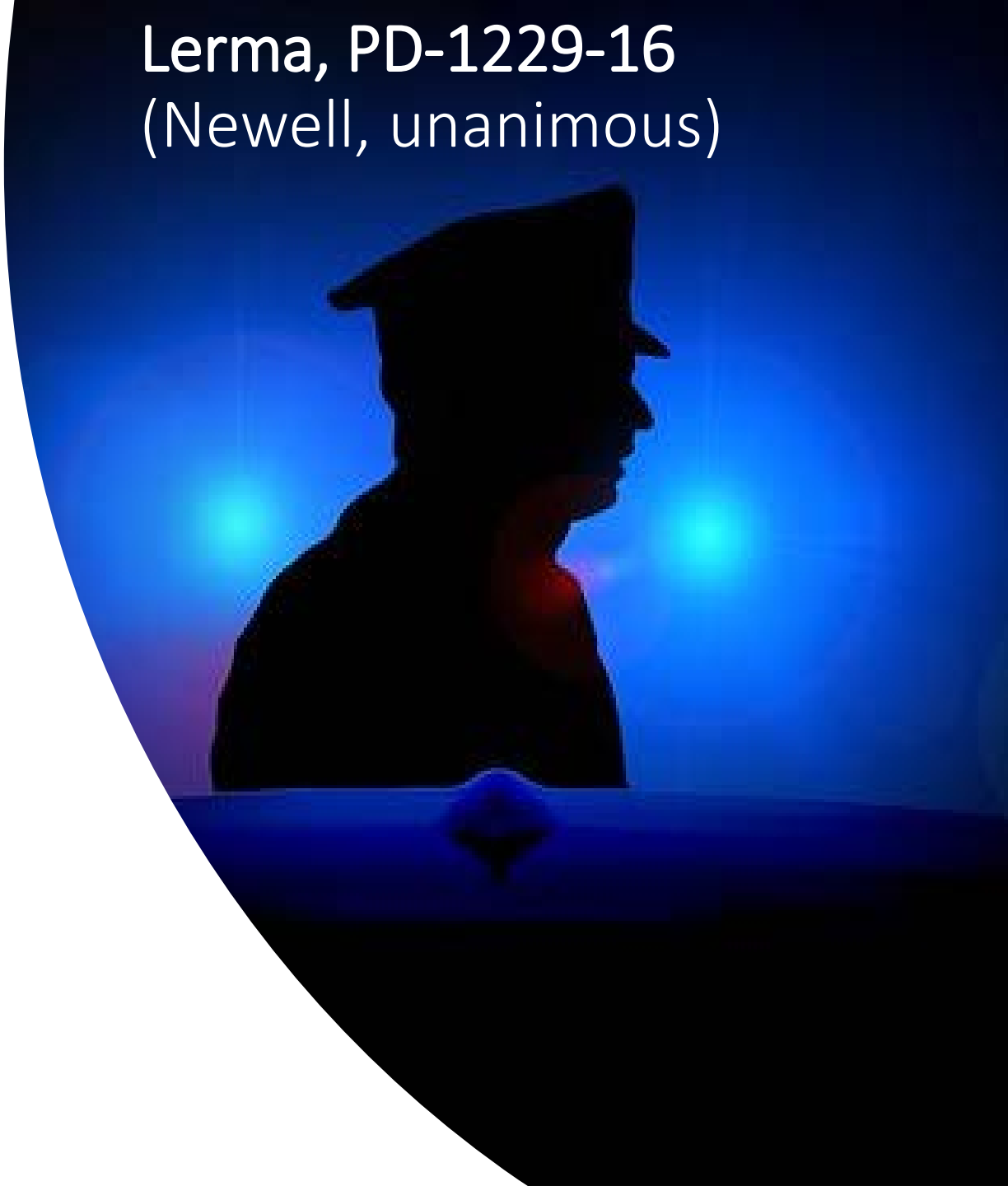
Inoperable Window

Smoking

Cologne

Nervous

Lerma, PD-1229-16
(Newell, unanimous)



Was there reasonable suspicion for the first “pat-down?”

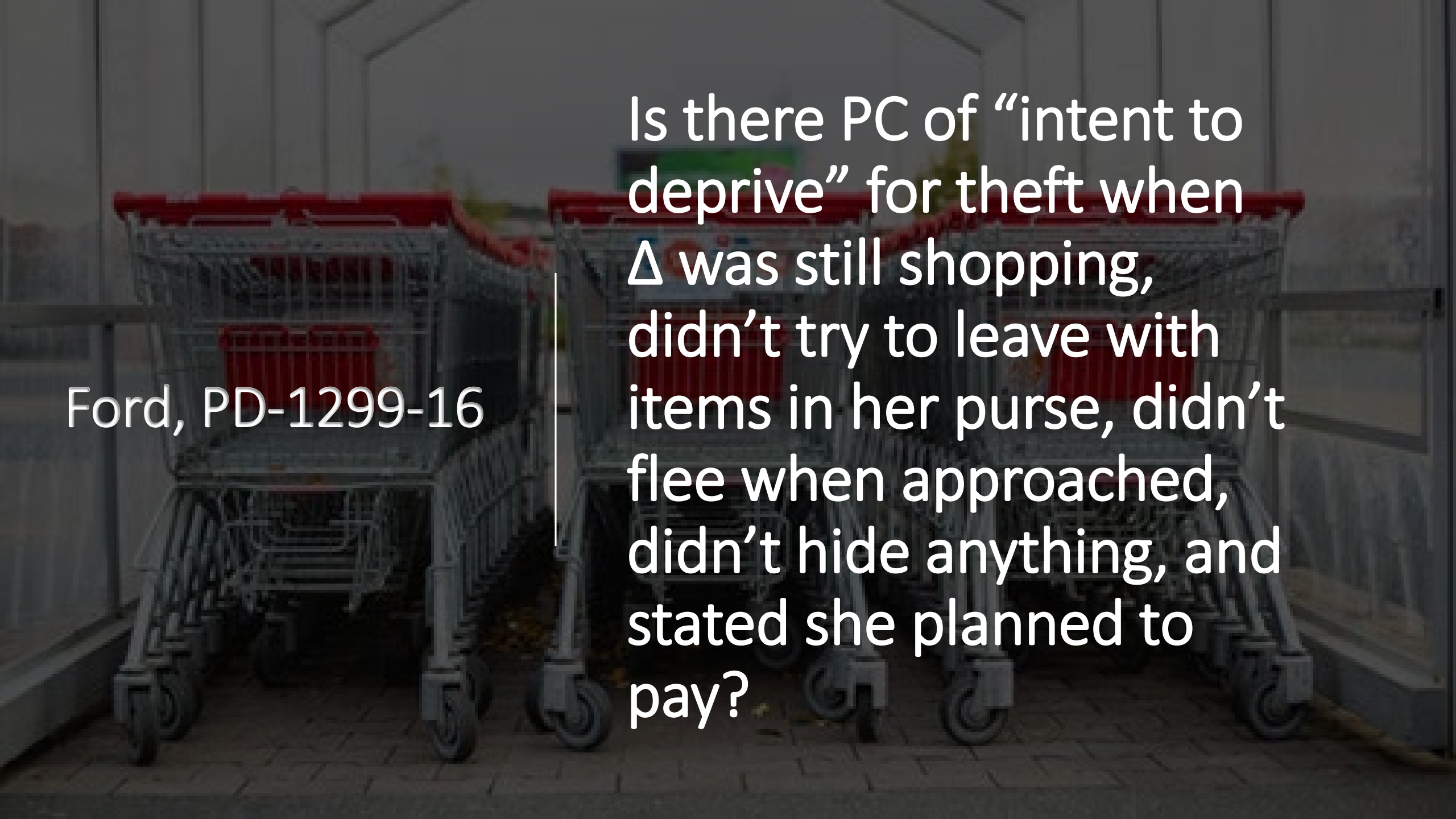
Yes. Officer safety.

- Officer alone & outnumbered
- Δ was moving around & reaching in his pockets
- Δ had pocket knife & could be more weapons

Was the stop unlawfully prolonged?

No. Five minutes between time of stop & discovery of false ID is reasonable.

- Officer interacted with driver, passenger.
- Officer outnumbered.
- Officer determined identity of occupants.
- Officer did not complete tasks associated with stop, like computer warrant check on driver and citation.



Ford, PD-1299-16

Is there PC of “intent to deprive” for theft when Δ was still shopping, didn’t try to leave with items in her purse, didn’t flee when approached, didn’t hide anything, and stated she planned to pay?

Keller, Keasler, Hervey, Richardson, Yeary, & Keel

Employee reported she concealed items in her purse.

Δ admitted she put items in her purse.

Δ covered her purse with her jacket.

Δ had a cart with visible items.

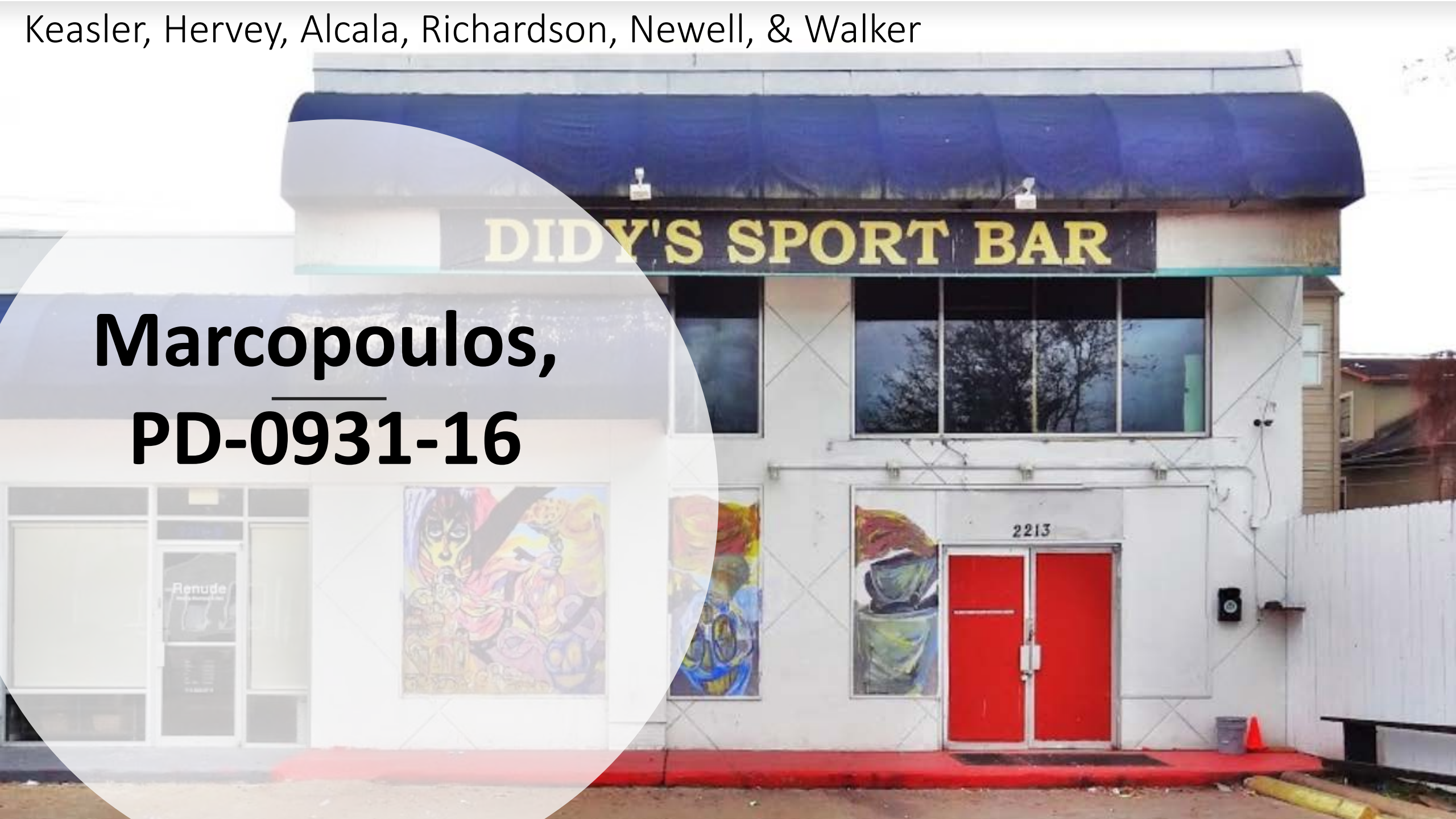
Walker, dissenting (Alcala)

The initial stop was not supported by reasonable suspicion.

An unsworn, unauthenticated police report with hearsay was used at suppression hearing.

Keasler, Hervey, Alcala, Richardson, Newell, & Walker

Marcopoulos, PD-0931-16



Did PC exist to search incident to arrest under the  exception?

1. Yes. Guilt by association. Didy's is a drug den.

2. Yes. Guilt by association. Repeat customer. Just like other drug patrons. Furtive gestures knowing unmarked car was following.

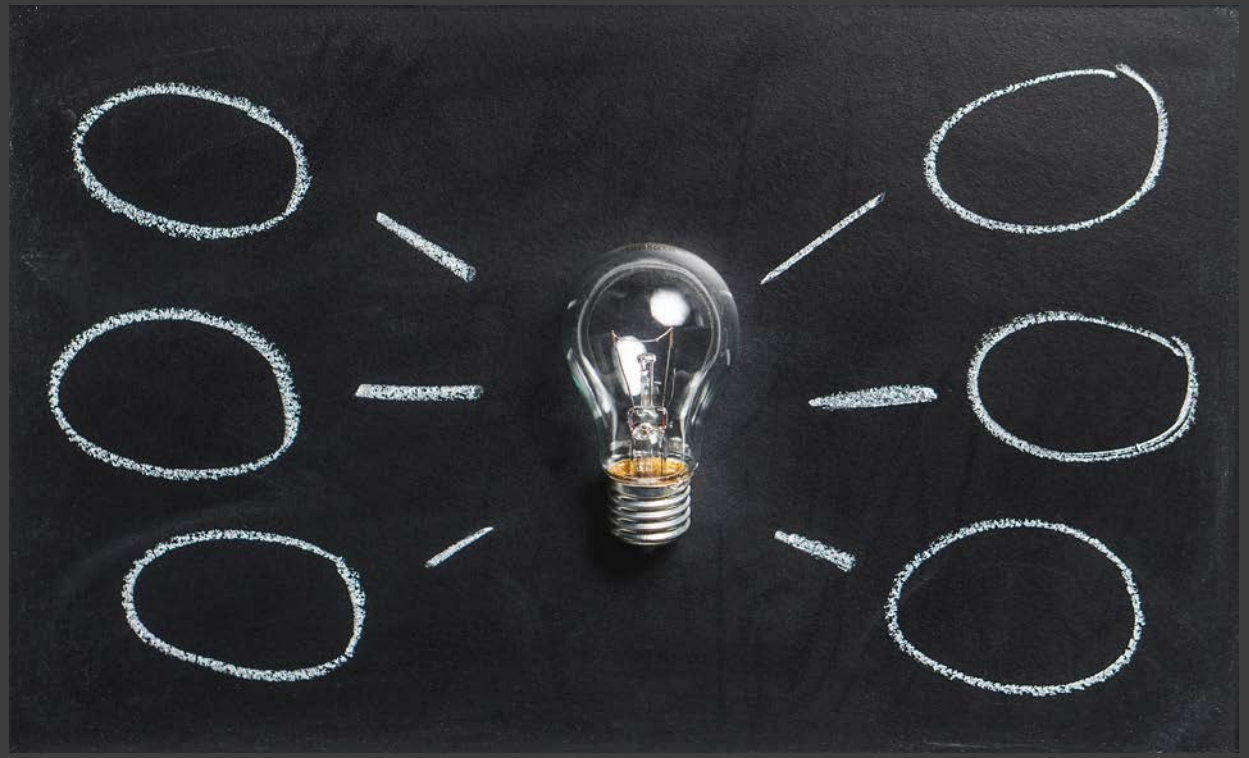
3. No. Insufficient by a smidge. Δ not connected to "hotbed" of activity. Brief presence useless. Furtive gestures are inconsequential absent a drug connection.

Sanchez, PD-1037-16
Keller (unanimous)

Was the search of the Δ's Jeep lawful when the Δ was arrested on outstanding traffic warrants and drugs were found on his person during a search incident-to-arrest?

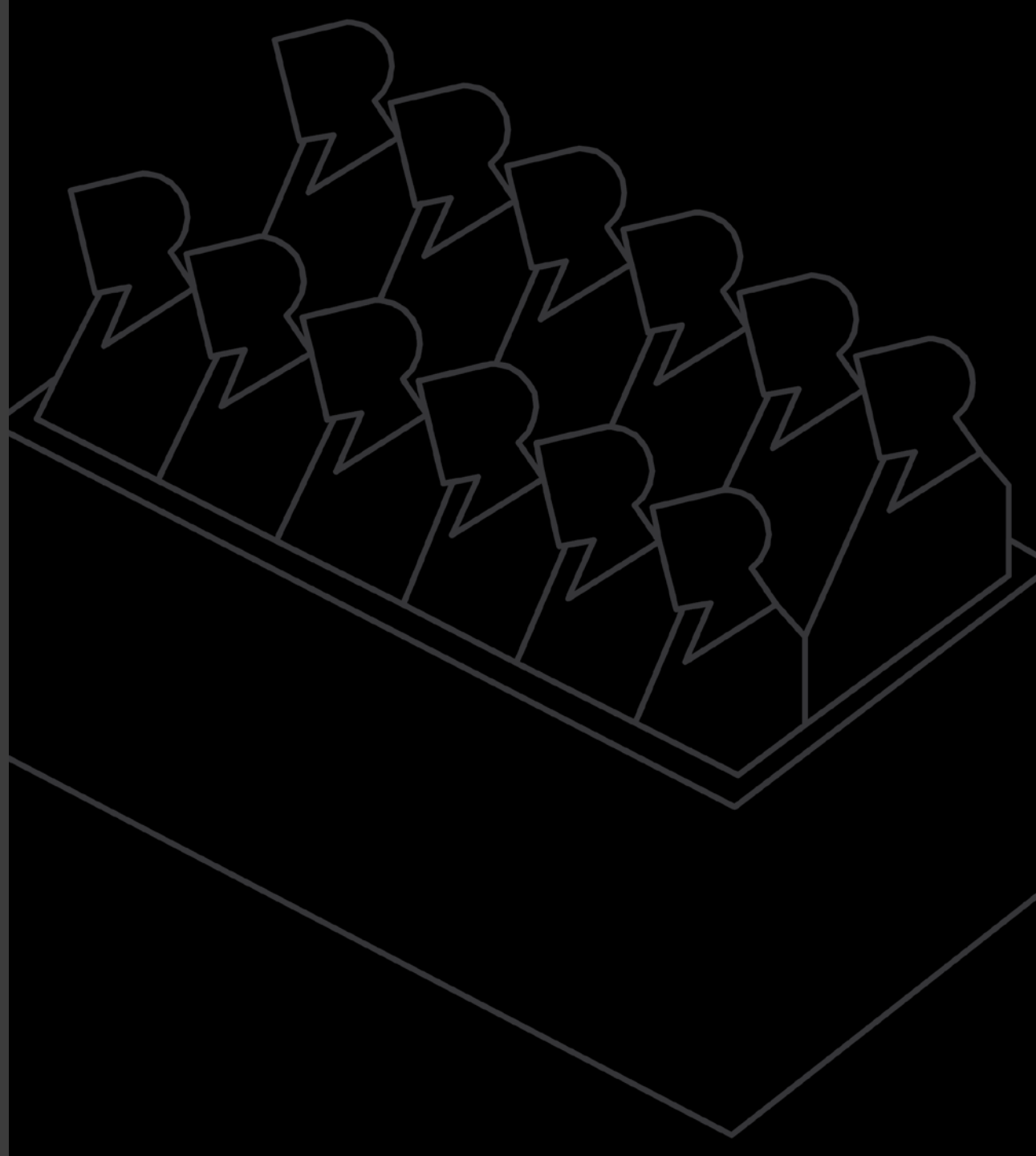
1. No. There was no reason to believe that there would be evidence of the traffic violations found in the jeep.

2. Yes. As long as there was PC to arrest for the newly discovered offense and the search occurs close in time to the formal arrest.



- Be suspicious of a renter named “Peaches”
- Know and respect curtilage
- Consider how you appear when driving a rental car
- The status of the fog-line will remain a mystery
- Shoplifters don’t have to pass the checkout

Jury Charge Issues



Burnett, PD-0576-16

Hervey, Keasler, Alcala, Richardson, Newell, & Walker

The evidence was insufficient to infer what kind of drug hydrocodone is, what intoxicating effects it causes, and if the Δ showed symptoms of its intoxicating effect.

It is error to include the entire definition of "intoxicated" in every charge, regardless of the evidence.

"by not having the normal use of his mental and physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, or a combination of two or more of those substances, and any other substance in his body . . . ."

Richardson, concurring

Δ moved to suppress

Δ objected to admission and officer’s ID of pills

Dissents

Keller (Yeary, Keel)

- Δ agreed with officer's ID as hydrocodone
- Hydrocodone's effects are common knowledge
- Testimony about its effects

Yeary

- Extra –definitional terms are superfluous
- Evidence sufficient to prove hydrocodone; effect is common knowledge

Gamino, PD-0227-16

TEX. PENAL CODE § 9.04 "a threat to cause death or serious bodily injury by the production of a weapon . . . As long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary does not constitute deadly force."

Δ, charged with aggravated assault with a deadly weapon, was not disqualified from having a non-deadly force self-defense instruction.

9.04 non-deadly force is encompassed in law of self-defense, so only a general self-defense request is required.

Richardson, Keller, Alcala, Yeary, Keel, & Walker

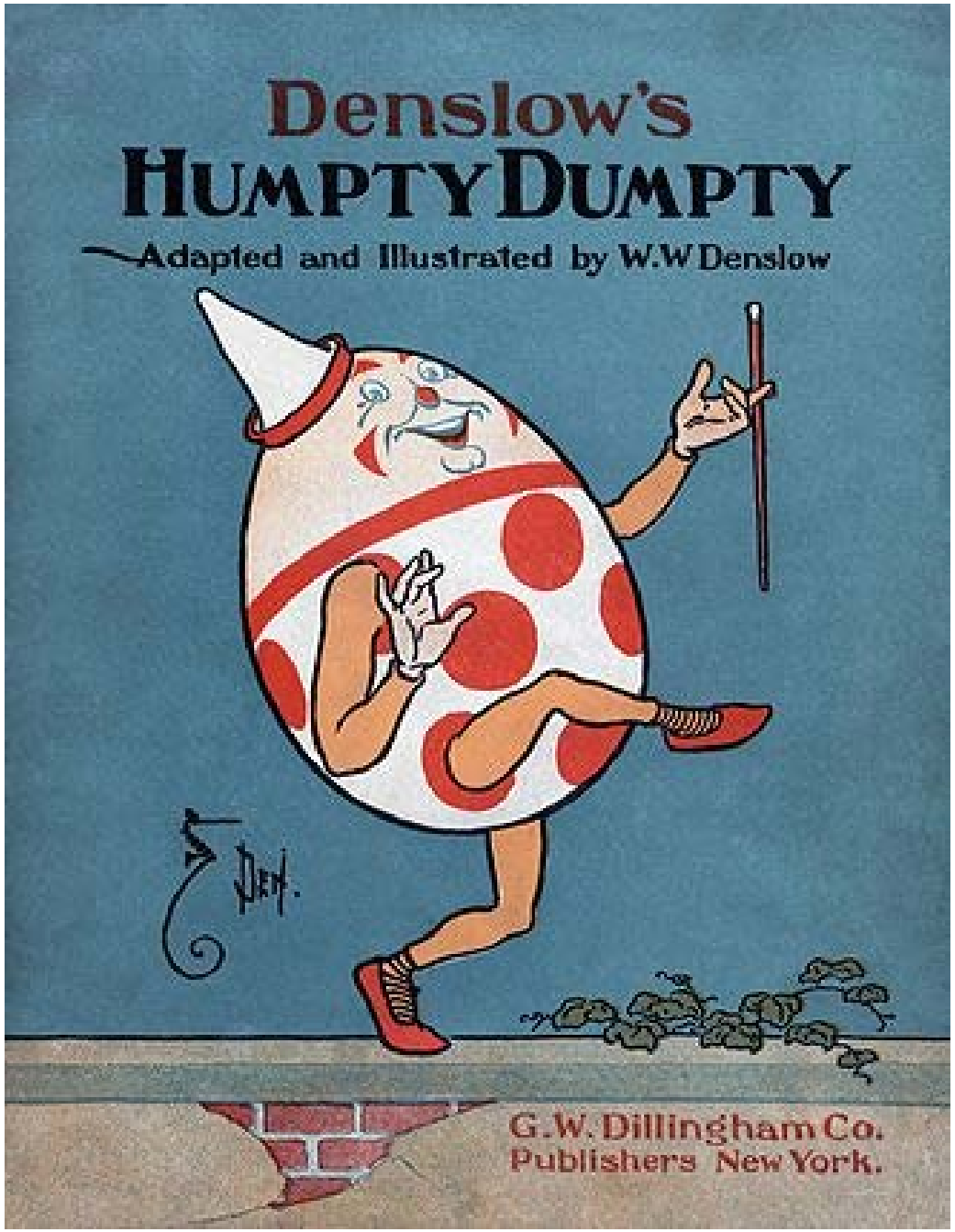
Keasler, dissenting (Hervey)

- Confession and avoidance requires an admission to all the elements; Δ did not admit he threatened the victim.

- Majority errs to infer from Δ's statement—"I grabbed my weapon, I threw my left hand, I said, Stop, leave us alone, get away from us"—that he threatened the victim in any way.

Confession and Avoidance

Rodriguez, PD-0439-16

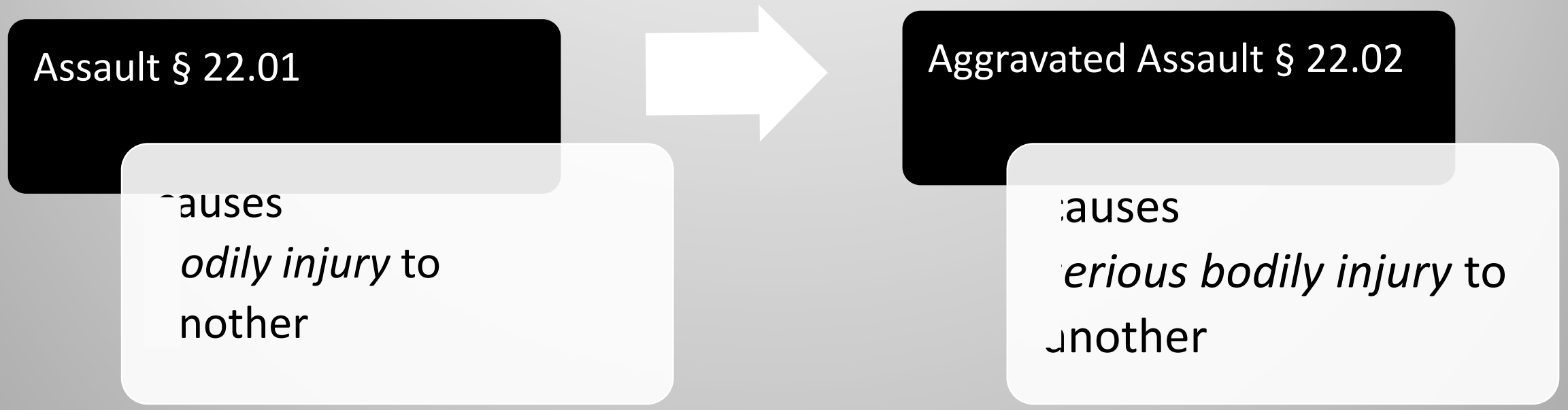


Transferred Intent

A person is . . . criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that: (1) a different offense was committed . . . .

Mistake of Fact

It is a defense . . . that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required . . . .



Keasler (unanimous)

1. Does the State have the burden to prove culpable mental state for serious bodily injury under § 22.02?

No. Legislature dispensed with mental state.

2. Was Δ entitled to a mistake of fact instruction?

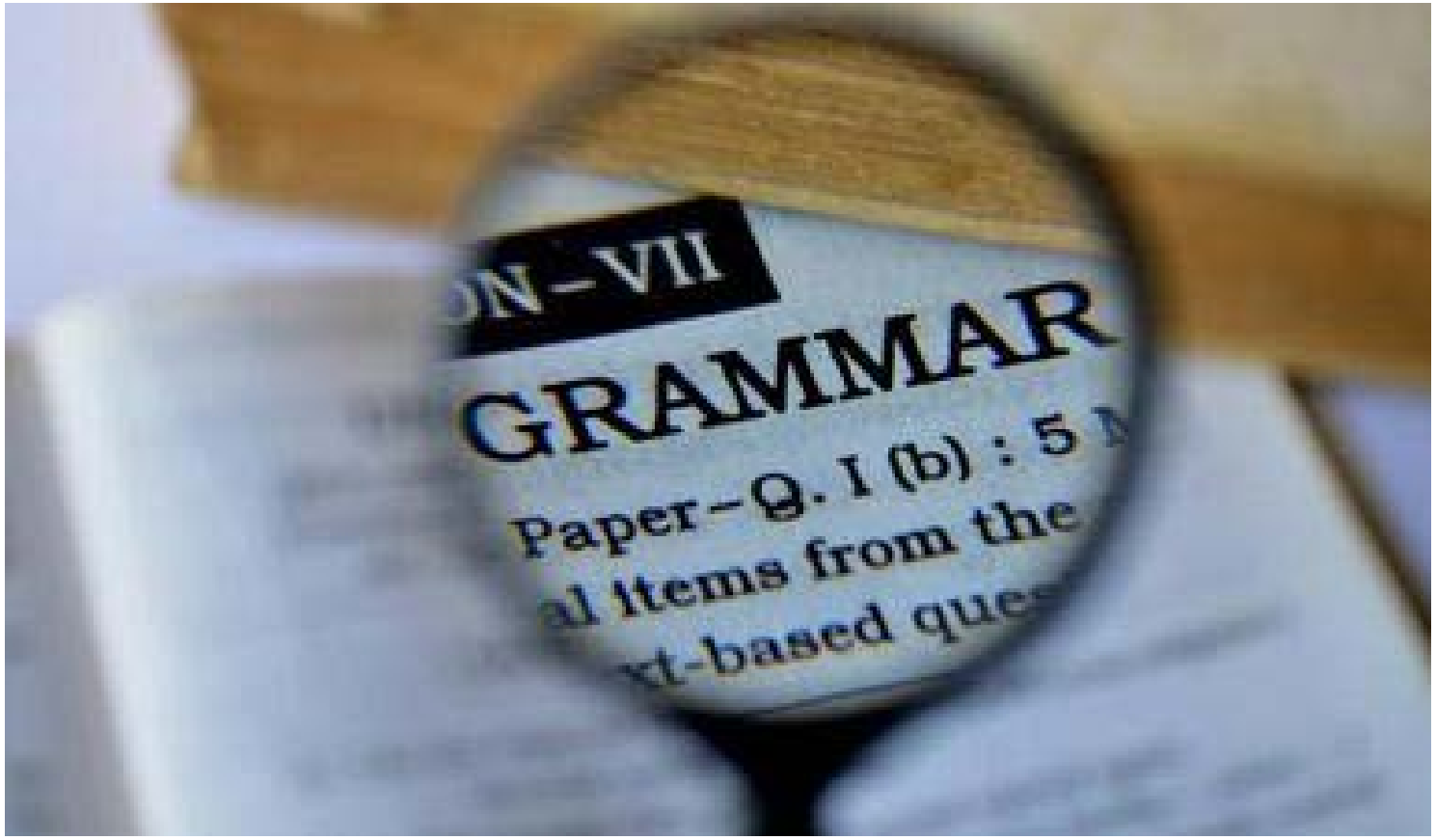
No. Because he was not entitled to a transferred intent instruction. No mental state to supplant in 22.02.

O’Brien, PD-0061

Organized Criminal Activity

Money Laundering

Theft



Newell, Keller, Hervey, Richardson, & Keel

According to the 8th grade grammar test, Organized Criminal Activity is a "circumstances-surrounding-conduct" offense.

Unanimity is not required.

Alcala, concurring

KISS

- The plain language is like the felony murder statute, which provides different manners and means.
- As long as they are the same offense level, no unanimity is required.

Under the majority's view, once a person is convicted of Organized Criminal Activity with a specific combo, it would violate jeopardy to convict him of another offense, even if the underlying offenses are different.

Yeary, dissenting (Walker)

Combination is not the gravamen; intent to establish a combination is enough.

Walker, dissenting (Yeary)

The offense of Organized Criminal Activity is an enhancement for the predicate offense; it just raises the degree based on intent instead of the punishment range.

The listed crimes are too generic to satisfy due process.

Deadly conduct is a lesser included offense of aggravated assault by threat when it used or exhibited a deadly weapon.

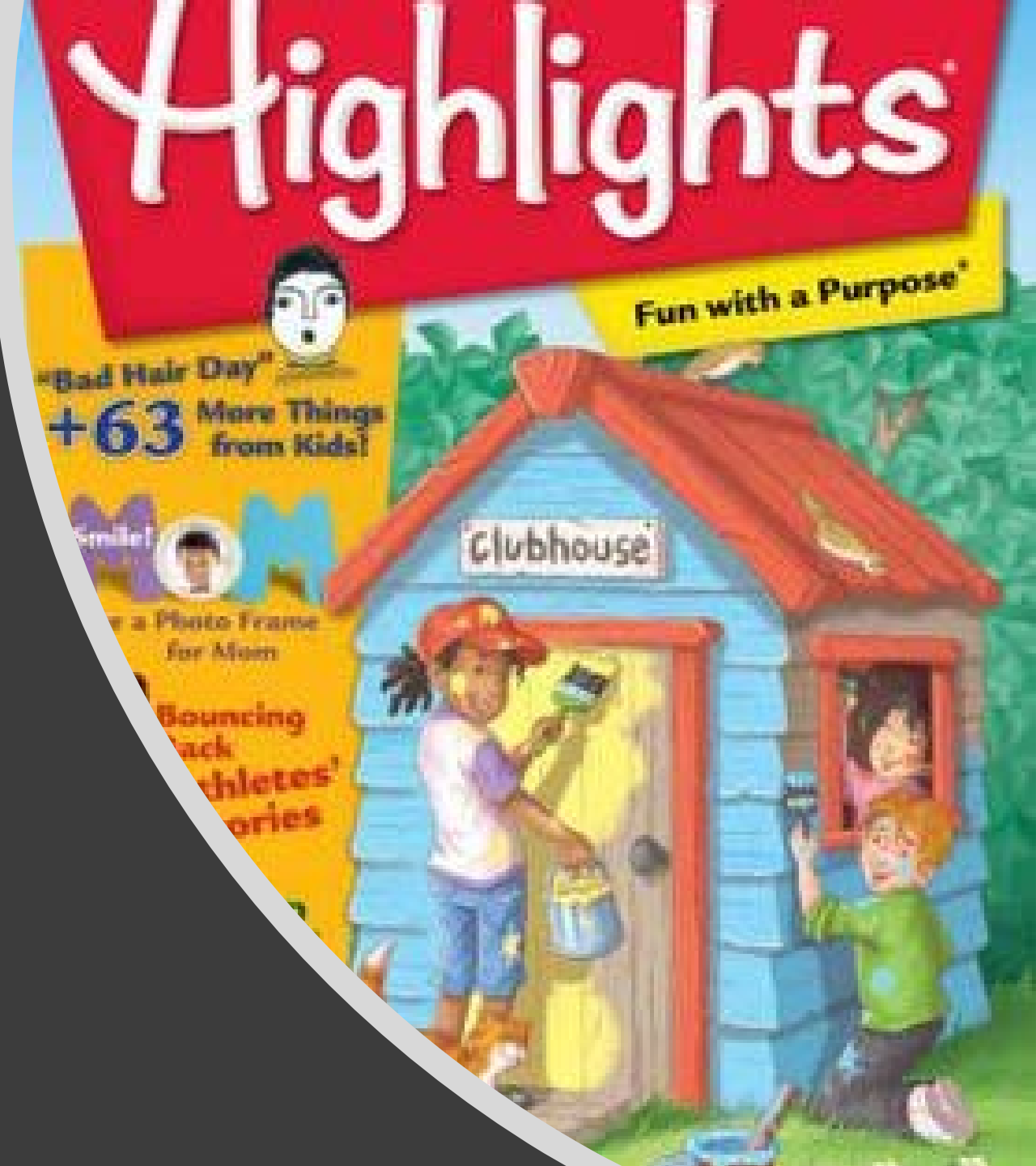
Safian, PD-0323-25-16

Alcala (unanimous)

Owings, PD-1184-16

Is the failure to make the State elect among various sex offenses subject to a constitutional harm analysis?

- Make sure the evidence supports the types intoxicants in the definition
- Don’t forget about confession and avoidance for defenses
- It pays to be liberal with requests on defensive issues
- If there’s no mens *rea*, intent cannot be transferred



Enhancements

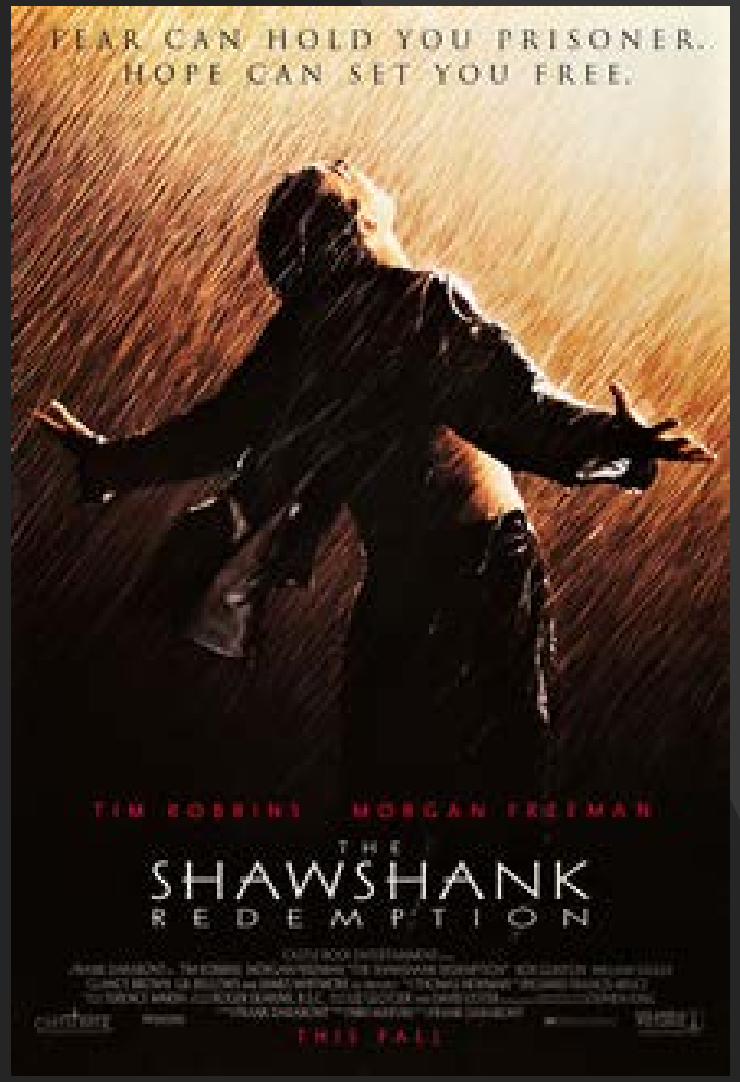
Keller, Hervey, Alcala, Newell, Keel, & Walker

Oliva, PD-0398-17

Is a DWI enhancement from a Class B to a Class A a guilt-phase enhancement or punishment enhancement?

TEX. CODE CRIM. PROC. art. 36.01

"[w]hen prior convictions are alleged for purposes of enhancement only and are not jurisdictional" then the reading of the allegations involving those convictions must be delayed until punishment.



How to Determine Type of Enhancement

Guilt

- Jurisdictional
- "A person commits an offense"

  e.g., HEALTH & SAFETY CODE § 821.079(d); PARKS AND WILD. CODE §§ 67.005(b), 68.021(b)
- PENAL CODE § 38.04 a felony of the third degree if: "(A) the actor uses a vehicle while . . . in flight and . . . . has been previously convicted under this section;"
- Aggravating part of the circumstance

  See also offenses in FN 57
- Titled "aggravated"

Punishment

- "if it is shown on the trial of"

  e.g., offenses in FN 60 (priors) *and* offenses in FN 61 (circumstances)
- Under art. 36.01 enhancement and not jurisdictional
- Prior conviction
- Punishable or punished
- Separated from "elements"
- Titled "Enhanced"

If a fact-issue (other than a prior conviction) implicates the constitutional right to a jury trial, then there must be an *affirmative* waiver of the constitutional right to a jury trial at punishment.

Problem

Δ has jury at guilt & did not elect to have jury at punishment. Default art. 37.07 § 2(b) is trial court. No express waiver.

Apprendi v. N.J.

Keasler, dissenting (Yeary)

Calton v. State said an enhancement does not change the degree of the offense. Nothing can be enhanced without first having a conviction. Therefore, anything that changes the degree is an element.

Ex parte Pue, WR-85,447-01

Richardson, Hervey, Alcala, Newell, Keel, & Walker

Is the “finality” of an out-of-state prior conviction under the habitual statute determined by:

1. The law of the originating state.
2. It depends; either the originating state or Texas.
3. Texas’ enhancement law.

Keller, concurring (Keasler)

- Either way, the conviction was not final.
- We need to determine "illegal sentence" cognizability; but IAC here, regardless.

Yeary, dissenting

The Court should decide when "illegal sentence" claims are subject to forfeiture if not objected to or raised on direct appeal; older case law supports forfeiture.

Ex parte Clay, WR-87,768-01 (felon in possession of firearm)

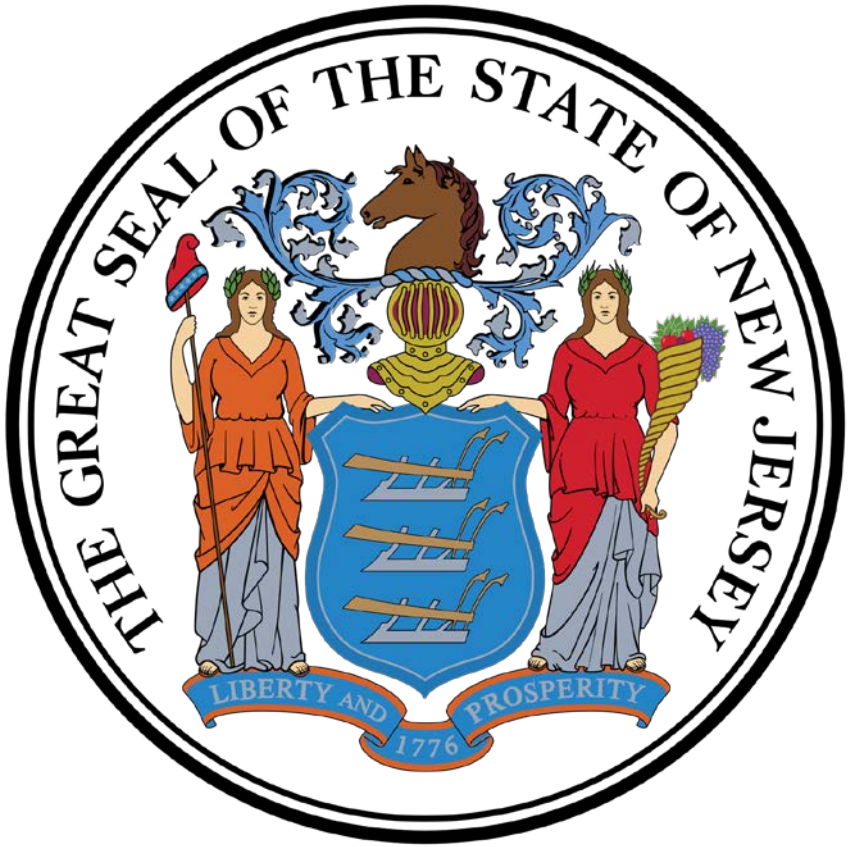
Keel, concurring (Hervey & Newell)

- A trial objection was made.
- Dissent inconsistent; no justification to distinguish between sentence outside of range and improperly enhanced.

Lee,PD-0880-16

Keel, Keller, Hervey, Alcala, Richardson, Yeary, Newell, & Walker

An out-of-state sexual assault conviction cannot be used to support a conviction for continuous sexual abuse.



- Consider any non-prior conviction enhancement very carefully and the need for an express waiver at punishment

- What happens outside of Texas stays outside of Texas for continuous offenses

Separation of Powers

Penright,PD-1671-15

Salinas' striking down of the "comprehensive rehabilitation" and "abused children's counseling" fees is retroactive to cases pending on direct appeal when *Salinas* was decided.

Otherwise, it applies prospectively.

Vandyke, PD-0283-16

Clemency Power

Repeal Criminal Liability for Failure to Comply with Sex-Offender Treatment

Newell, Keller, Hervey, Alcala, Richardson, & Walker

When a Legislative amendment invalidates a *conviction*, the Governor's Clemency power has not been usurped.

Reprieve	Commutation	Pardon
Delays Execution of Judgment	Lessens Punishment	Exempts From Punishment & Legal Disability

Yeary, dissenting (Keasler)

- Older cases establish that a Pardon is a remission of guilt; offender is innocent.
- Pardon allowed after deferred; so “punishment "reliance is wrong.
- In *Jones*, CCA inexplicably rejected *Scrivnor* and Bishop’s Treatise.
- “Pardon for Innocence,” the Executive “Fail-Safe”

Statutory Construction

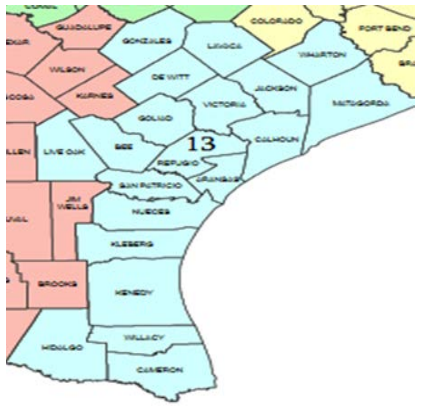
Bolles, PD-0791-16
Richardson (unanimous)

Culture

Art

material visually depicts a child under 18 at the time the image was made who is engaging in lewd exhibition of the genitals . . . .

Re-creation does not reset the date the image of that same child was made.



material visually depicts a child under 18 at the time the image was made who is engaging in lewd exhibition of the genitals . . .

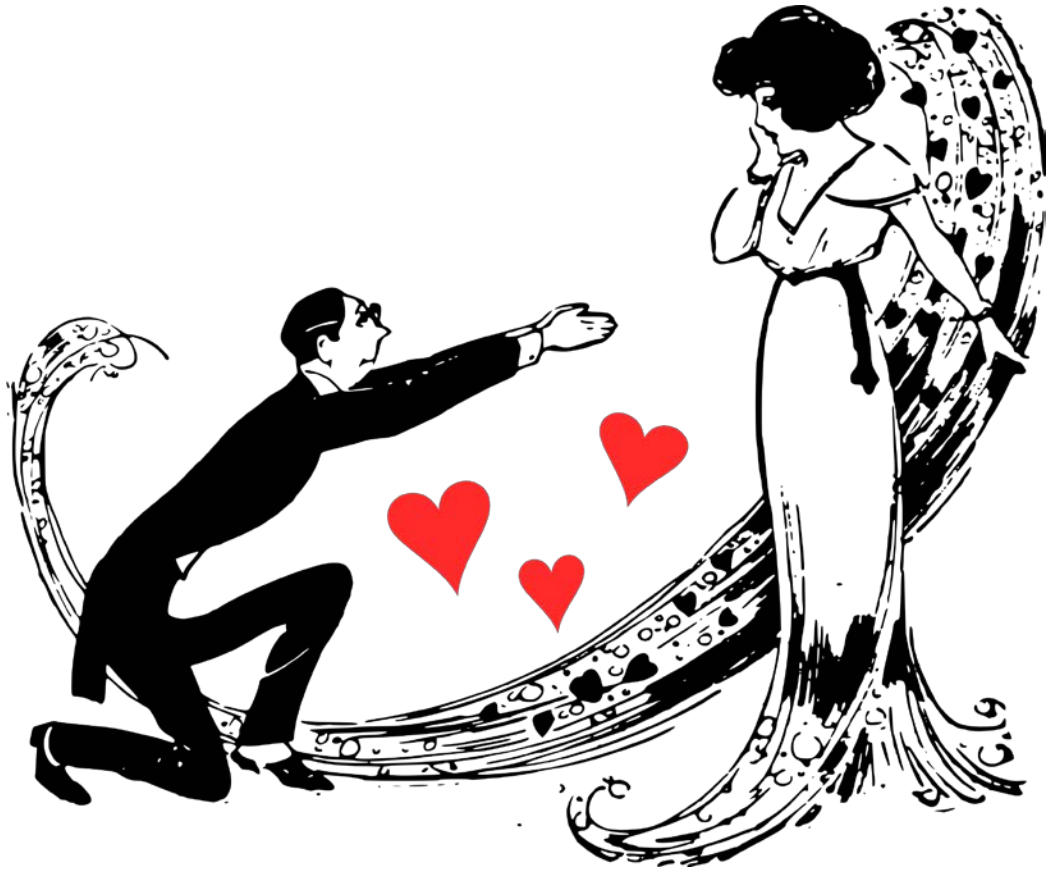
Child pornography can result from an original image that is not pornographic.

Zoomed-in photo of Rosie's genitals is lewd.

When You're Utterly Clueless

U.S. v. Dost **Factors**

1. Is the focal point on the genitalia or pubic area?
2. Is the setting sexually suggestive?
3. Is the pose unnatural or inappropriate attire, based on the age?
4. Is the child fully or partially clothed?
5. Is it suggestive of sexual coyness or willingness to engage in sexual activity?
6. Is it intended or designed to elicit a sexual response?



TEX. PENAL CODE § 25.07(a)(2)(A)

A person commits an offense if, in violation of a protective order, the person intentionally or knowingly communicates with a protected individual or household member in a threatening or harassing manner.

Wagner,
PD-0659-15

Not Overbroad

Does Not Implicate Protected Speech

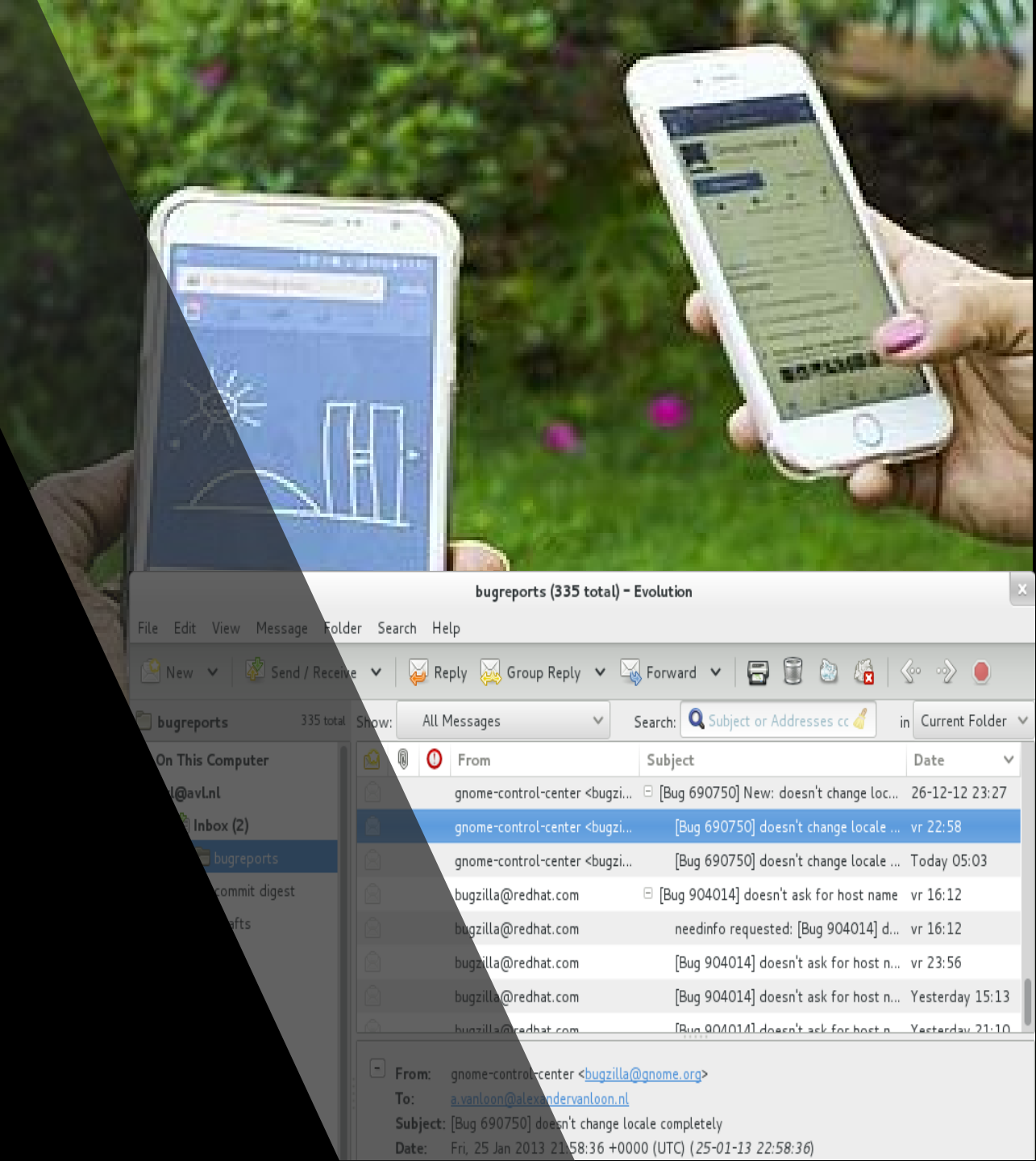
1. Narrow Scope
2. Culpable Mental State
3. Harassing Manner

> "persistently disturb, bother continually, or pester another person"

Alcala, Keasler, Hervey, Richardson, Yeary, Newell, Keel, & Walker

Not Vague As Applied

A Person of Ordinary Intelligence Would Know What is Prohibited



Keller, dissenting

Frequency and Emotional Intensity

“substantial emotional distress”

- Test to identify child porn

- Statutes with “threatening & harassing” are generally upheld

Habeas Corpus

Ex parte Navarro, WR-82,264

Moon's sufficiency standard for juvenile transfer orders does not meet the subsequent writ exceptions.

Not a new legal basis because recognized by the 1966 S. Ct. decision *Kent v. United States*

Does not establish "actual innocence" by a preponderance of the evidence

Ex parte St. Aubin, WR-49,980

Does multiple punishment jeopardy satisfy the successive writ gateway innocence exception?

No. Non-cognizability rules; the Hon. Mother Superior's decisions this millennium have been dedicated to further restricting habeas review.

Yes. Judge Matlock's well-reasoned opinion in *Ex parte Milner* says so.

No. The State has a right to obtain two verdicts and the violation occurs after the guilt phase.

Dissent (Newell, Alcala, Richardson, & Walker)

- Should accept State's waiver of procedural default.
- Should not treat as punishment error when violation occurred upon conviction.

Ex parte Thuesen, WR-81,584-01 (reh'g improv granted)

recuse

transitive verb | re·cuse | \ri-ˈkyüz\

Legal Definition of RECUSE

recused recusing

1 : to challenge or object to (as a judge) as having prejudice or a conflict of interest

2 : to disqualify (as oneself or another judge or official) for a proceeding by a judicial act because of prejudice or conflict of interest

- an order *recusing* the district attorney from any proceeding may be appealed by the district attorney or the Attorney General — *California Penal Code*

Once a trial judge recuses, the judge cannot restore judicial authority.

Not a significant amount of non-fact-specific habeas cases

CCA always looking for an opportunity to address cognizability

Error Preservation

Keasler, Hervey, Alcala, Richardson, Newell, & Walker

Proenza, PD-1100-15

1. A complaint about a comment on the weight of the evidence is at least a tier-two right, waivable only, and thus is not forfeitable.

2. Jettisoned harm-based "fundamental error" preservation doctrine. *Marin* controls.

Newell, concurring: Stop “fetishizing” *Marin*; it explains how to treat rights and prohibitions but does not help categorize them.

Keller, dissenting (Yeary, Keel): This is a statute, not constitutional right, and its mandatory status is ambiguous. The rationale for a timely objection is served here because any error can be cured.

Hernandez, PD-1389-16
Keel (unanimous)

Even an incurably improper jury argument is subject to forfeiture.

- *Marin* is not so helpful when categorizing rights and prohibitions

- Remember what is not in evidence

Appealability

Shortt, PD-0597-15

Yeary, Alcala, Richardson, Newell, & Walker

TEX. CODE CRIM. PROC. art. 42.12 §23(b)

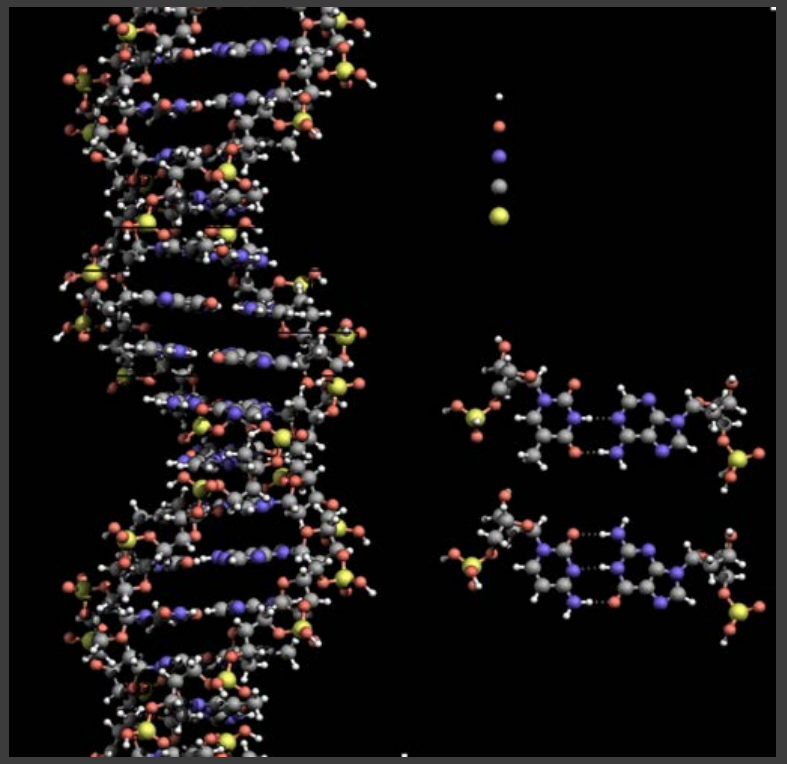
"The right of the defendant to appeal for a review of the conviction and punishment . . . shall be accorded the defendant at the time he is placed on community supervision."

A Δ can appeal from an order granting shock community supervision.

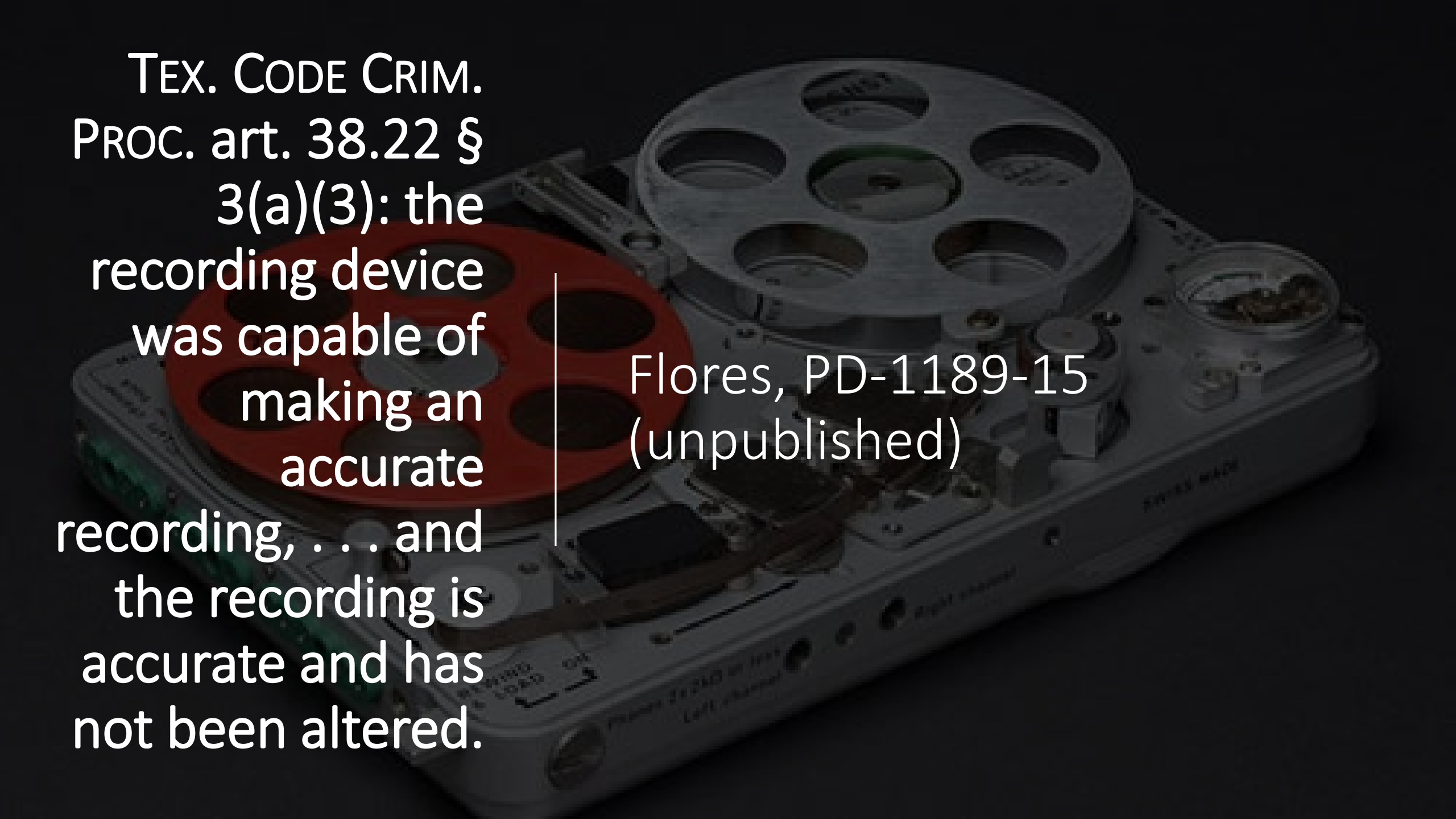
Section 23(b) only allows an appeal after:

1. Conviction & Punishment
2. Revocation Proceedings

Keller, dissenting (Keasler, Hervey, & Keel)



Evidence



TEX. CODE CRIM. PROC. art. 38.22 § 3(a)(3): the recording device was capable of making an accurate recording, . . . and the recording is accurate and has not been altered.

Flores, PD-1189-15 (unpublished)

The admission of a recording with lost or unrecorded minutes violated 38.22 § 3(a)(3).

Plurality

Walker, Hervey, Alcala, & Richardson

Improvident Grant

The issue presented was not preserved in the trial court and was not addressed by the COA, even though it was raised on appeal.

Yeary, dissenting (Keller, Keasler, & Keel)

Can “jail house” informant testimony be used to corroborate accomplice-witness testimony?

Mata, PD-0890-17, pet. ref’d

Hervey, concurring to refusal to grant
(Richardson, Newell, & Walker)

Ineffective Assistance of Counsel

Counsel, cannot over a client's objection, admit guilt, even if it's the best strategy to avoid the death penalty.

Ginsburg, Roberts, Kennedy, Breyer, Sotomayor, & Kagan

McCoy v. LA, No. 16-8255

RIGHTS OF THE DEFENDANT

- to plead guilty
- waive jury trial
- testify
- forgo appeal
- maintain innocence in death penalty case

deprivation of right to self-presentation

deprivation of right to counsel

deprivation of counsel of choice

right to a public trial

biased judge

denial of opportunity to present summation

exclusion of grand jurors based on race

erroneous reasonable doubt

denial of right to contest guilt in capital case

Alito, dissenting (Thomas & Gorsuch)

intent (constitutional)
v.
admit guilt but contest intent (unconstitutional)

1. Apply to elements?
2. Must elements be contested?
3. Concession of guilt on lesser?

Miller, PD-0891-15
on reg'h

Standard for prejudice when counsel affected a client's decision to waive a jury:

Is there a reasonable probability that the deficient performance caused a waiver of a proceeding?

Keel, Hervey, Richardson, Yeary, Newell, & Walker

Dissents

Keller: just had the wrong type of trial; not structural.

Alcala (Keller, Keasler): windfall from unwarranted expansion of right; under *Strickland* probable outcome with jury would have been near actual outcome.

Miller overruled *Burch*, issued in November 2017

1. eligible for probation
2. not a valid trial strategy
3. election based on erroneous advice
4. result of the proceeding would have been different

Burch, PD-1137-16

Hervey, Keller, Keasler, Alcala, Newell

Keel, concurring (Richardson, Yeary, & Walker)

When the record is silent as to defense counsel's reasons for calling witnesses, the presumption of reasonable strategy has not been rebutted.

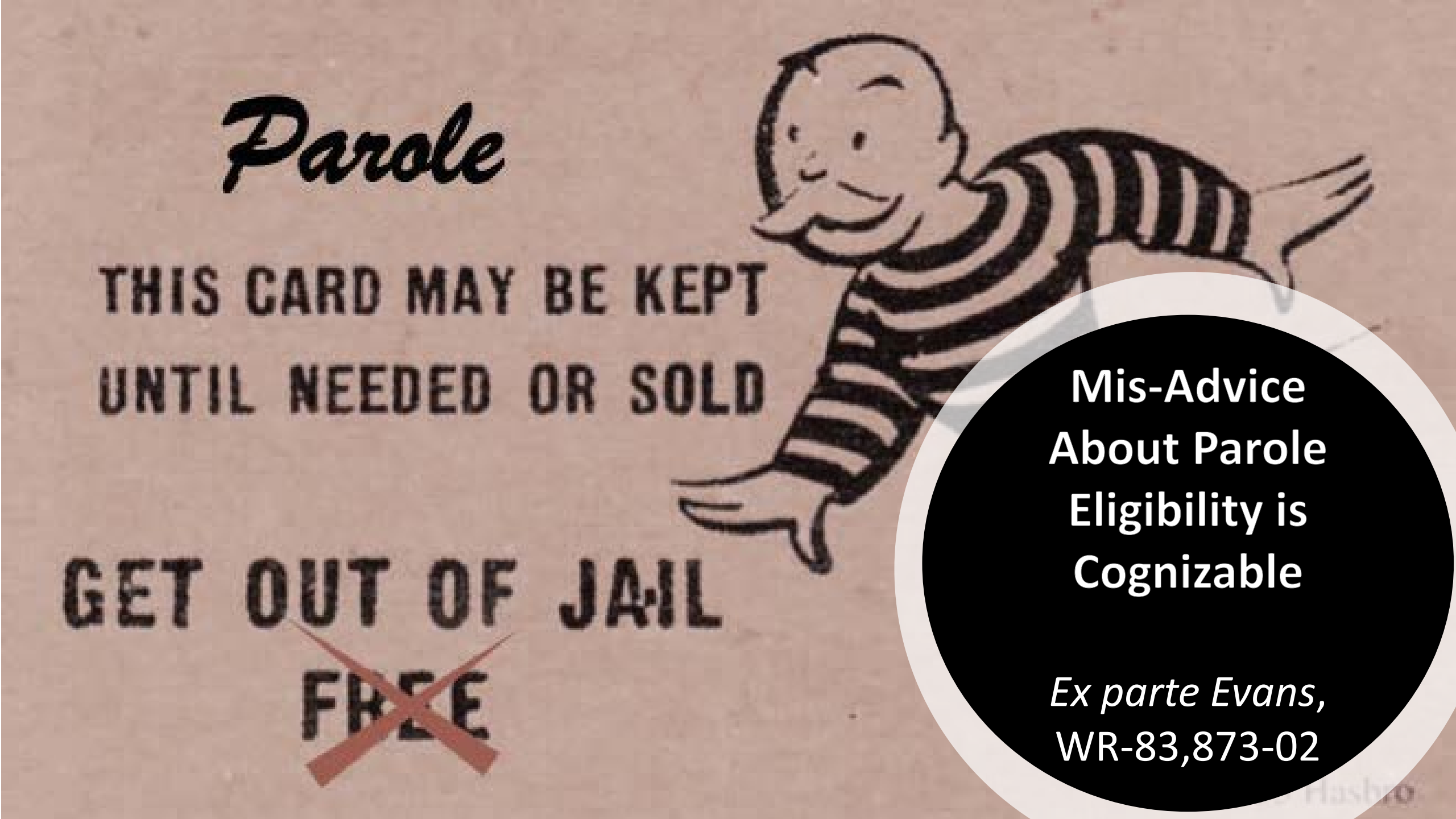
Prine, PD-1180-16

Ex parte Garcia, PD-0804-17

Hervey, unanimous

Pre-*Padilla* No Deportation Advice Claims are Not Cognizable

Affirmative Mis-Advice Deportation Claims are Cognizable



Mis-Advice About Parole Eligibility is Cognizable

Ex parte Evans, WR-83,873-02

Standard for prejudice should be considered

Keep an eye out for defense attorney errors

Constitutionality

Breyer Roberts, Ginsburg, Sotomayor, Kagan, & Gorsuch

Class v. U.S., 138 S. Ct. 798

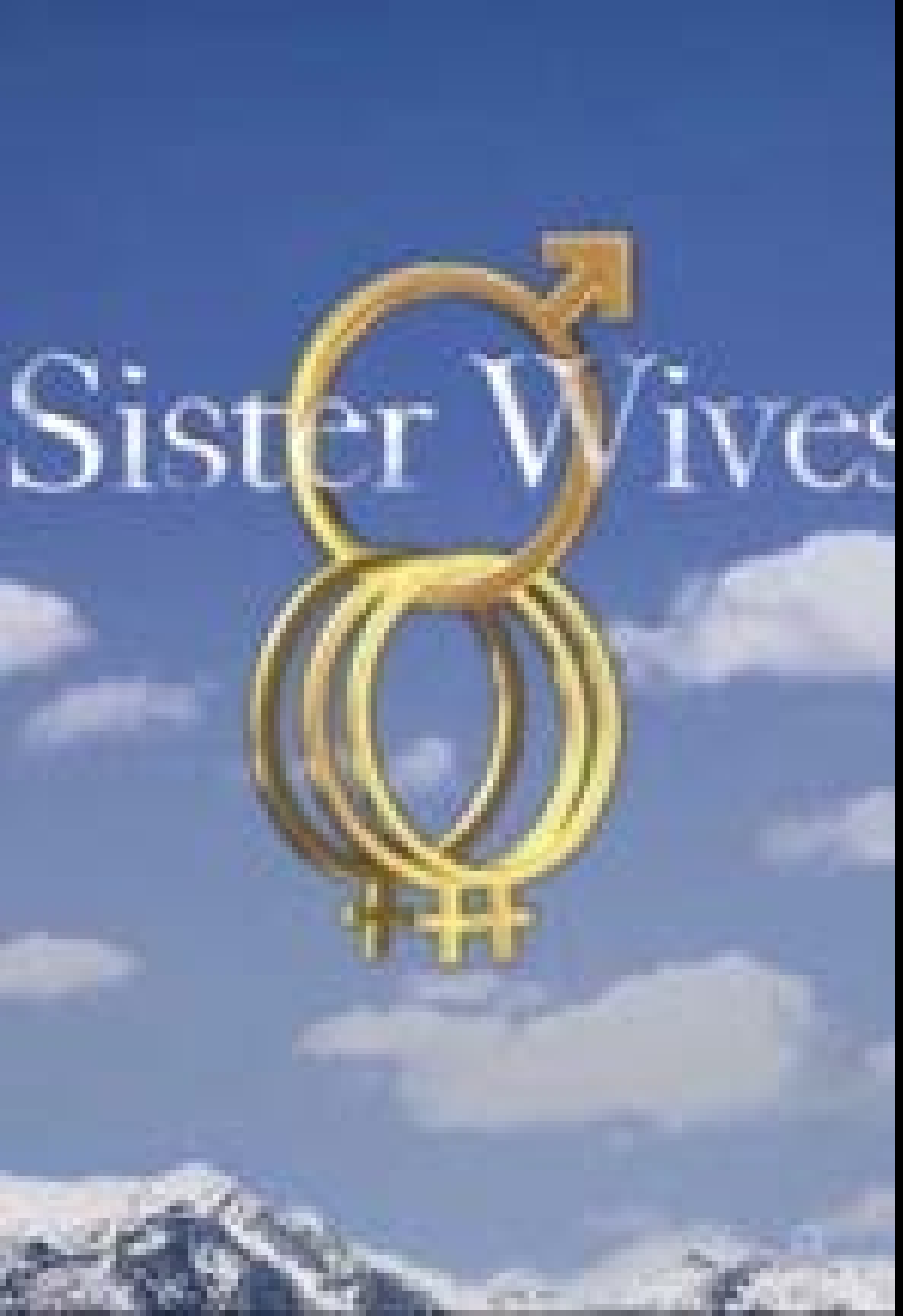
A guilty plea does not waive the right to challenge the constitutionality of a statute on appeal.

Not a challenge to underlying conduct; goes to power to prosecute.

Class does not affect Texas' wavier of right to appeal

Karenev v. State, 281 S.W.3d 428 (Tex. Crim. App. 2009): facial challenge to the constitutionality of a statute is a forfeitable right (*Marin*) and therefore cannot be raised for the first time on direct appeal.

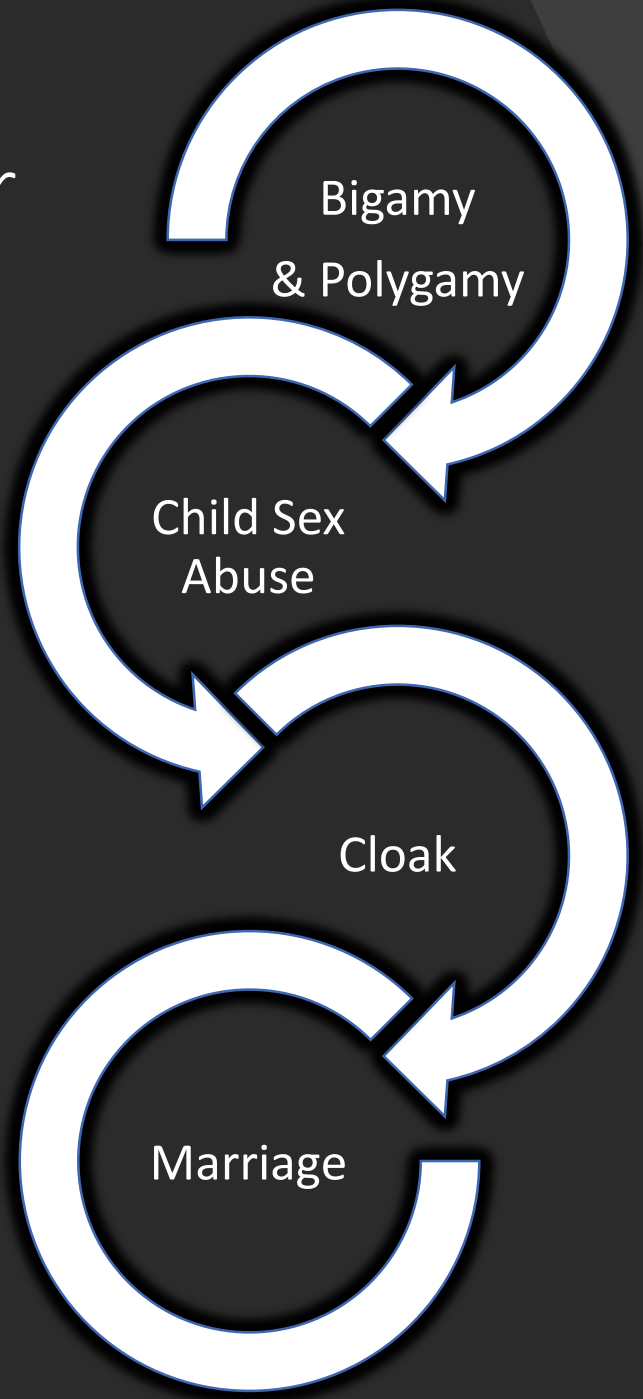
Ex parte Beck, 541 S.W.3d 846 (Tex. Crim. App. 2017): novel facial challenge cannot be raised for the first time on habeas.



Estes,
PD-0429-16

Does the prohibited from marrying, “bigamy” “polygamy” enhancement (aggravator), TEX. PENAL CODE § 22.011(f), for child-sexual assault violate Equal Protection?

Keasler, Keller, Yeary, Keel, & Walker



Newell, concurring & dissenting (Hervey, Richardson)

- Whether the Legislature had a rational basis; not any.
- Conjuring justifications is an improper application of *FCC v. Beach Communications*. **Distinction between married and unmarried is rational .**
- Enhancement could be justified in all offenses.

- Implication of fundamental right or suspect class is key.
  - COA's rational basis holding is a *de facto* strict scrutiny ruling.
- Survives strict scrutiny because marriage has always been limited to 2 people; regulation.

TEX. PENAL CODE §21.16(b):
(b) A person commits an offense if:
(1) without the effective consent of the depicted person, the person intentionally discloses visual material depicting another
person with the person's intimate parts exposed or engaged in
sexual conduct;
(2) the visual material was obtained by the person or created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private;
(3) the disclosure of the visual material causes harm to the depicted person; and
(4) the disclosure of the visual material reveals the identity of the
depicted person in any manner, including through:
(A) any accompanying or subsequent information or material related to the visual material; or
(B) information or material provided by a third party in response to the disclosure of the visual material.