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PRESENTED AT

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Beyond Brief Writing

Breaking the mold of tedious, superficial briefing through strategic choices, charts and pictures, better issue-framing, and more.

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We viewed "Beyond Brief Writing" as an opportunity to delve into topics not typically discussed in other advanced legal writing presentations. Through the examples set out in this paper, we hope you'll find ways to improve and enliven your brief writing. Conferences like these are a chance to step away from the routine of churning out briefs and to reflect. Without such moments to pause and gain perspective, we can trick ourselves into thinking that the grueling hours spent putting a brief together will be directly related, if not matched, by the court's painstaking attention to our work product. Ha! No one has ever said that they wished they could keep reading a legal brief just a little bit longer. Far from it. William Zinsser in his classic nonfiction writing guide, "On Writing Well," chides that "the reader is an impatient bird, perched on the thin edge of distraction or sleep."[1]

There is no reason to think judges are different. After all, they have many more briefs to read after yours. According to the Office of Court Administration, in Fiscal Year 2020, there were 3,450 new writs, 1,043 new petitions for discretionary review (PDRs), and 618 new original proceedings filed in the Court of Criminal Appeals.[2] In the same period, the courts of appeals saw 3,631 new criminal case filings and 5,074 new civil ones.[3] To put that in perspective, that's about 8,500 new cases. If you assume a 12% dismissal rate off the top,[4] that's 7,500 cases getting briefing. If each advocate uses only half her word limit, that comes to 15,000 words of briefing total in the case. At the average reader's rate of 250

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[1] William Zinsser, "The Audience," ON WRITING WELL 24 (30th ed. 2006).

[2] FY20 Annual Statistical Report, Office of Court Administration, 42.

[3] *Id.* at 49.

[4] 12% is a fair estimate. In Fiscal Year 2020, 23% of cases were dismissed, 12% at the opinion stage, suggesting roughly 11% were dismissed at an earlier stage. *Id.* at 50, 52. In the prior year, 24% of cases were dismissed, 9% at the opinion stage, leaving 15% dismissed earlier. FY19 Annual Statistical Report, Office of Court Administration, 17-18.

words a minute, that comes to 1 hour of reading per case, which is 7,500 hours a year or 312 days a year that the courts of appeals spend reading briefs. With this new perspective in mind, let's plunge in to how we can make the most of the precious few minutes that any of our briefs will get.

1. Visual Aids

Visual aids are a valuable tool for appellate courts and practitioners. They are magnetic when placed among the written word. Images, notably, have proven to be a particularly potent way to capture attention and persuade. [5]

> Images are efficient, accessible, and memorable. Multimedia legal argument may assist courts, litigants, and scholars to convey complex scientific, technical, or abstract information. They also engage readers, particularly twenty-first-century readers, to whom legal writing is a vast black-and-white desert.[6]

With some creativity and not-so-new ingenuity, a variety of methods—images, screenshots, charts, and bullet points—can be employed to augment and facilitate your prose.

a. Courts Leading by Example with Visual Aids

Though Westlaw has been slow to adapt to include certain images,[7] that has not stopped the Court of Criminal Appeals (CCA) from pressing forward. In *Milton v.*

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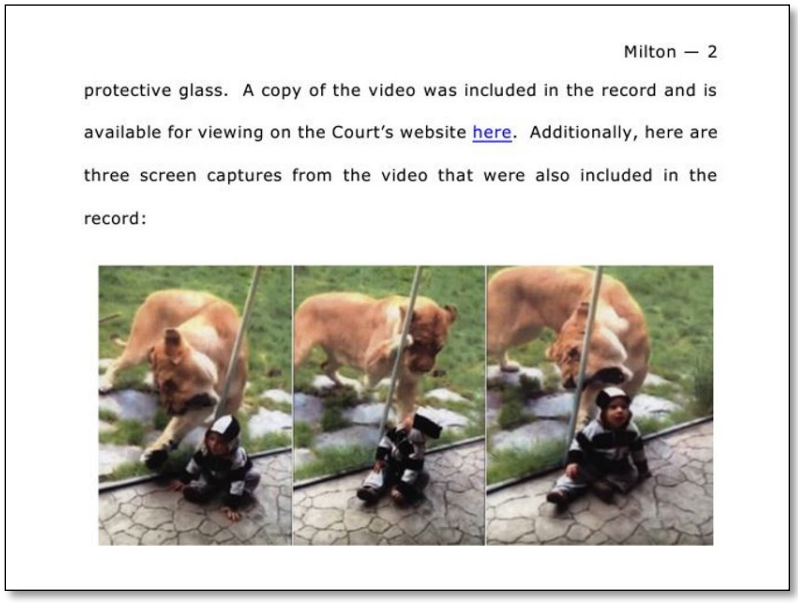
[5] Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1724 (2014) ("[L]awyers and judges are embedding images directly into legal documents, using those images to drive arguments and—through explicit argument and implicit messaging—to compel conclusions."). Porter's article provides a comprehensive history of images in the legal arena.

[6] *Id.* at 1694 (2014).

[7] On Westlaw certain visual material, particularly in pre-2019 sources, is marked with "TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE" within documents. Meanwhile, HeinOnline has adapted to this technology. *Id.* at 1781. The CCA recent use of hyperlinks in opinions have not been reproduced in Westlaw. *See, e.g., Pugh v. State*, No. PD-1053-19, 2022 WL 224275 (Tex. Crim. App. Jan. 26, 2022).

State, PD-0207-18, the Court included screenshots from, and a link on its website to, a video in the record of a zoo lion trying to eat a human baby through the protective glass that was improperly used during the prosecutor's closing argument.



Milton — 2

protective glass. A copy of the video was included in the record and is available for viewing on the Court's website here. Additionally, here are three screen captures from the video that were also included in the record:

Justices on the United States Supreme Court have occasionally used visuals attached to their opinions,[8] but in one recent use,[9] Justice Neil Gorsuch incorporated a photograph from the record in line with the text of his statement to the denial of certiorari. The photo of the curtilage of a home supported his argument that officers on a "knock and talk" strayed from the implied license to go to the front door:

[8] *See* Dellinger, Hampton, "Words are Enough: The Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions," 110 Harvard Law Rev. 1704, Vol. 110, No. 8 (June 1997) (citing, for example, the attachment of the alleged libel in the *New York Times v. Sullivan*, 376 U.S. 254 (1964), and lamenting that photographs, while appearing objective, can "result in a particularly subjective version of the 'facts'").

[9] *Bovat v. Vermont*, 141 S. Ct. 22 (2020) (Gorsuch, J., statement on denial of certiorari).

It's hard to see how the case before us could have been decided without reference to *Jardines*. Suspecting Clyde Bovat of unlawfully hunting a deer at night (Vermont calls it a "deer jacking"), game wardens decided to pay him a visit to—in their words —"investigate further." But the wardens admit that "pretty soon after arriving " they focused on a window in Mr. Bovat's detached garage. Heading there and peering inside, the wardens spotted what they thought could be deer hair on the tailgate of a parked truck.

App. to Pet. for Cert. 53a.

In addition to photographs, courts also use tables and charts to summarize cases,[10] explain complex holdings,[11] and compare offense elements or testimony.[12] While there are numerous and ever-more-recent examples of courts communicating their message visually, still more opportunities exist for practitioners to incorporate visual aids to persuade.

[10] *Hyett v. State*, 58 S.W.3d 826, 836 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (Wittig, J., dissenting).

[11] *Schutz v. State*, 957 S.W.2d 52, 75 (Tex. Crim. App. 1997) (appendix of admissible evidence on credibility of child victim in sex abuse cases).

[12] *Ex parte Beck*, 541 S.W.3d 846, 858 (Tex. Crim. App. 2017).

b. Practitioners Are Using Visual Aids

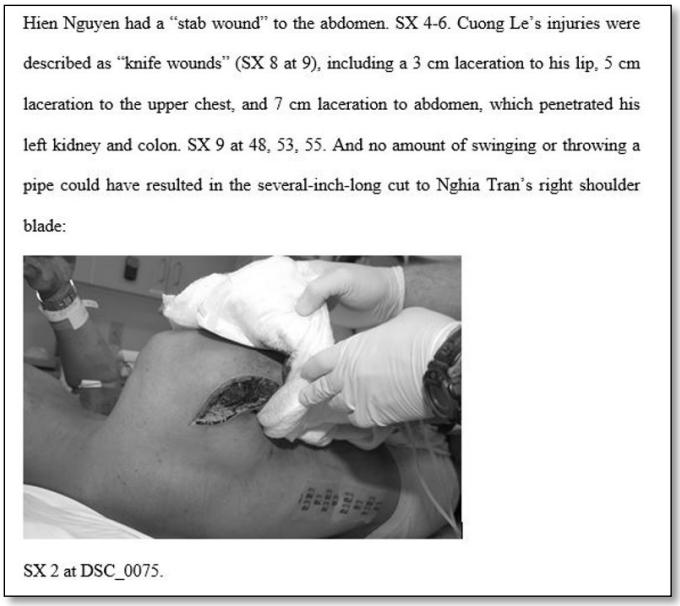
i. Photos and Screenshots in Briefs

Words rarely capture the full import of visual material, as hard as you may try, and images tend to stick with us longer, too.[13] Therefore, you can include a photo or screenshot from a video in a brief to help solidify a point. Pictures and screenshots should enhance or supplement your argument, but they should not substitute for thoughtful advocacy.

In *Monjaras v. State*, PD-0582-21, for example, the Appellant's brief used screenshots from the officers' body cameras to demonstrate when and how, according to Appellant, the consensual encounter transformed into an investigative detention with the officers' proximity and use of hand-gestures and touch. Though the officers' actions were described in writing, the screenshots operate as authority for Appellant's propositions and instantly provide the Court with the necessary context.

[13] Daniel Glaser, "Why pictures trigger buried memories faster than words," The Guardian, Dec. 18, 2016.

Professor Porter observed that images promote the "gestalt perspective": "Rather than parsing an image into its constituent parts, we approach it from a gestalt perspective, taking it all in at once."[14] This can provide a litigant with an opportunity to strike their mark quickly and without excess explanation. The "gestalt perspective" approach was used effectively by the State in *Hoang v. State*, No. 05-08-01303-CR. There, the State included a photo of the victim's injuries to help refute the claim that the Appellant acted in self-defense and defense of a third party.



Hien Nguyen had a "stab wound" to the abdomen. SX 4-6. Cuong Le's injuries were described as "knife wounds" (SX 8 at 9), including a 3 cm laceration to his lip, 5 cm laceration to the upper chest, and 7 cm laceration to abdomen, which penetrated his left kidney and colon. SX 9 at 48, 53, 55. And no amount of swinging or throwing a pipe could have resulted in the several-inch-long cut to Nghia Tran's right shoulder blade:

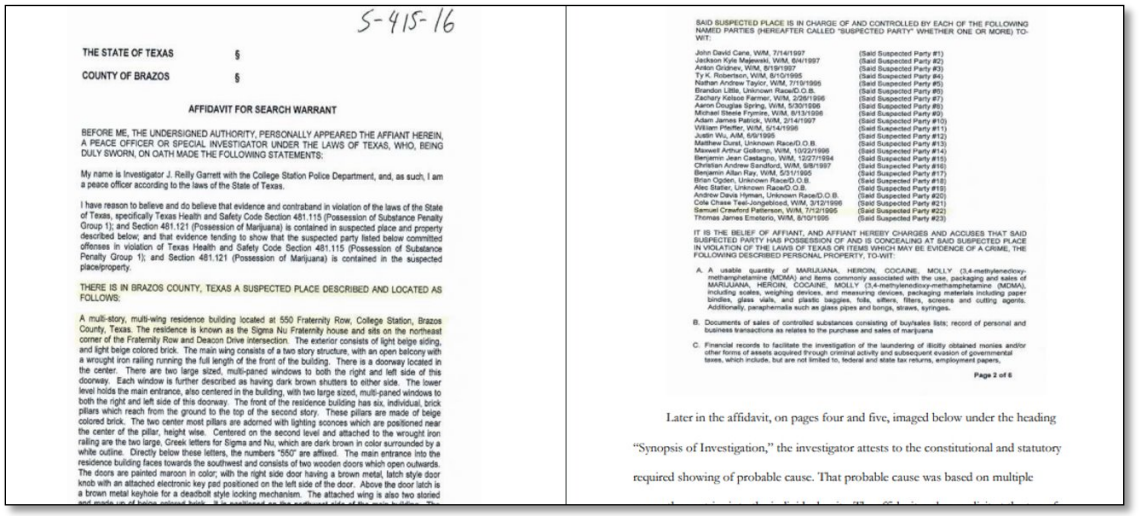
SX 2 at DSC_0075.

When a document, exhibit, jury charge, or charging instrument is at the heart of your case, including it within your brief will often aid the court. First, it obviates the need of the court to cull through the record to find the document at issue. Second, it helps the court understand your argument. Descriptors only go so far; seeing is believing. If, in telling someone else about your case, you would reach for a photo exhibit or pull it up on your computer to explain, consider adding it as an image in your brief.

The same goes for other exhibits. In *Patterson v. State*, PD-0322-21, the issue is whether the search warrant for drugs in a fraternity house was particular enough

[14] Porter, 114 COLUM. L. REV. at 1753.

to authorize the search of the Appellant's bedroom. Appellant's brief includes the affidavit incorporated into the warrant to establish the details (or lack thereof) that, in Appellant's view, prove the warrant was too general. Also, to direct the Court's focus, Appellant went a step further by highlighting the relevant text.



5-415-16

THE STATE OF TEXAS §

COUNTY OF BRAZOS §

AFFIDAVIT FOR SEARCH WARRANT

BEFORE ME, THE UNDERSIGNED AUTHORITY, PERSONALLY APPEARED THE AFFIANT HEREIN, A PEACE OFFICER OR SPECIAL INVESTIGATOR UNDER THE LAWS OF TEXAS, WHO, BEING DULY SWORN, ON OATH MADE THE FOLLOWING STATEMENTS:

My name is Investigator J. Reilly Garrett with the College Station Police Department, and, as such, I am a peace officer according to the laws of the State of Texas.

I have reason to believe and do believe that evidence and contraband in violation of the laws of the State of Texas, specifically Texas Health and Safety Code Section 481.115 (Possession of Substance Penalty Group 1); and Section 481.121 (Possession of Marijuana) is contained in the suspected place and property described below; and that evidence tending to show that the suspected party listed below committed offenses in violation of Texas Health and Safety Code Section 481.115 (Possession of Substance Penalty Group 1); and Section 481.121 (Possession of Marijuana) is contained in the suspected place/property.

THERE IS IN BRAZOS COUNTY, TEXAS A SUSPECTED PLACE DESCRIBED AND LOCATED AS FOLLOWS:

A multi-story, multi-wing residence building located at 550 Fraternity Row, College Station, Brazos County, Texas. The residence is known as the Sigma Nu Fraternity house and sits on the northeast corner of the Fraternity Row and Deacon Drive intersection. The exterior consists of light beige siding, and light beige colored brick. The main wing consists of a two story structure, with an open balcony with a wrought iron railing running the full length of the front of the building. There is a doorway located in the center. There are two large sized, multi-paned windows to both the right and left side of this doorway. Each window is further described as having dark brown shutters to either side. The lower level holds the main entrance, also centered in the building, with two large sized, multi-paned windows to both the right and left side of this doorway. The front of the residence building has six, individual, brick pillars which reach from the ground to the top of the second story. These pillars are made of beige colored brick. The two center most pillars are adorned with lighting sconces which are positioned near the center of the pillar, height wise. Centered on the second level and attached to the wrought iron railing are the two large, Greek letters for Sigma and Nu, which are dark brown in color surrounded by a white outline. Directly below these letters, the numbers "550" are affixed. The main entrance into the residence building faces towards the southwest and consists of two wooden doors which open outwards. The doors are painted maroon in color; with the right side door having a brown metal, latch style door knob with an attached electronic key pad positioned on the left side of the door. Above the door latch is a brown metal keyhole for a deadbolt style locking mechanism. The attached wing is also two storied

SAID SUSPECTED PLACE IS IN CHARGE OF AND CONTROLLED BY EACH OF THE FOLLOWING NAMED PARTIES (HEREAFTER CALLED "SUSPECTED PARTY" WHETHER ONE OR MORE) TO-WIT:

John David Cane, W/M, 7/14/1997 (Said Suspected Party #1)
Jackson Kyle Majewski, W/M, 6/4/1997 (Said Suspected Party #2)
Anton Grishev, W/M, 8/19/1997 (Said Suspected Party #3)
Ty K. Robertson, W/M, 8/10/1995 (Said Suspected Party #4)
Nathan Andrew Taylor, W/M, 7/19/1996 (Said Suspected Party #5)
Brandon Little, Unknown Race/D.O.B. (Said Suspected Party #6)
Zachary Kelsoe Farmer, W/M, 2/26/1996 (Said Suspected Party #7)
Aaron Douglas Spring, W/M, 5/30/1996 (Said Suspected Party #8)
Michael Steele Frymire, W/M, 8/13/1996 (Said Suspected Party #9)
Adam James Patrick, W/M, 2/14/1997 (Said Suspected Party #10)
William Pfeiffer, W/M, 5/14/1996 (Said Suspected Party #11)
Justin Wu, A/M, 6/9/1995 (Said Suspected Party #12)
Matthew Durst, Unknown Race/D.O.B. (Said Suspected Party #13)
Maxwell Arthur Gollomp, W/M, 10/22/1996 (Said Suspected Party #14)
Benjamin Jean Castagno, W/M, 12/27/1994 (Said Suspected Party #15)
Christian Andrew Sandford, W/M, 9/8/1997 (Said Suspected Party #16)
Benjamin Allan Ray, W/M, 5/31/1995 (Said Suspected Party #17)
Brian Ogden, Unknown Race/D.O.B. (Said Suspected Party #18)
Alec Statler, Unknown Race/D.O.B. (Said Suspected Party #19)
Andrew Davis Hyman, Unknown Race/D.O.B. (Said Suspected Party #20)
Cole Chase Teel-Jongebloed, W/M, 3/12/1996 (Said Suspected Party #21)
Samuel Crawford Patterson, W/M, 7/12/1995 (Said Suspected Party #22)
Thomas James Emeterio, W/M, 9/30/1995 (Said Suspected Party #23)

IT IS THE BELIEF OF AFFIANT, AND AFFIANT HEREBY CHARGES AND ACCUSES THAT SAID SUSPECTED PARTY HAS POSSESSION OF AND IS CONCEALING AT SAID SUSPECTED PLACE IN VIOLATION OF THE LAWS OF TEXAS OR ITEMS WHICH MAY BE EVIDENCE OF A CRIME, THE FOLLOWING DESCRIBED PERSONAL PROPERTY, TO-WIT:

A. A usable quantity of MARIJUANA, HEROIN, COCAINE, MOLLY (3,4-methylenedioxy-methamphetamine (MDMA) and items commonly associated with the use, packaging and sales of MARIJUANA, HEROIN, COCAINE, MOLLY (3,4-methylenedioxy-methamphetamine (MDMA), including scales, weighing devices, and measuring devices, packaging materials including paper bindles, glass vials, and plastic baggies, foils, sifters, filters, screens and cutting agents. Additionally, paraphernalia such as glass pipes and bongs, straws, syringes.

B. Documents of sales of controlled substances consisting of buy/sales lists; record of personal and business transactions as relates to the purchase and sales of marijuana

C. Financial records to facilitate the investigation of the laundering of illicitly obtained monies and/or other forms of assets acquired through criminal activity and subsequent evasion of governmental taxes, which include, but are not limited to, federal and state tax returns, employment papers,

Page 2 of 6

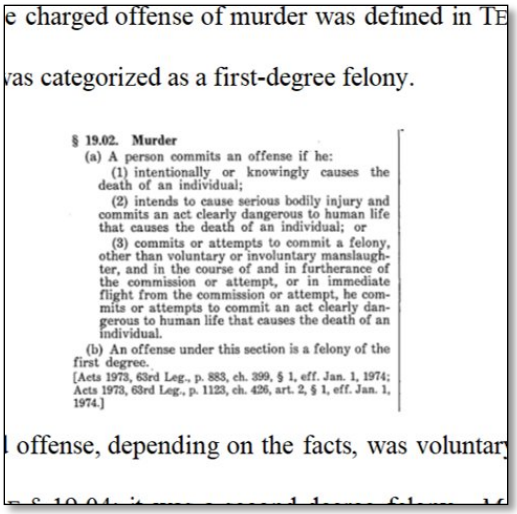
Later in the affidavit, on pages four and five, imaged below under the heading

"Synopsis of Investigation," the investigator attests to the constitutional and statutory

required showing of probable cause. That probable cause was based on multiple

Screenshots showing the historical development of statutes can also be helpful. As we all know, the appellate-practitioner brain seems hardwired to want to see the source for itself. When dealing with nuanced and significant statutory changes, providing screenshots of the text with effective dates, amendments, and emphasized additions and deletions can assist the court. The court can follow the development by evaluating the comparative text side-by-side without pausing to conduct its own research. The same information can be conveyed by retyping an excerpt from the statute, but when you reproduce the image of the statute from the session laws —layout and all—the court knows you have gone to the source and there is added assurance that your reproduction is accurate.

In *Harbin v. State*, PD-0059-20, the State used screenshots of historical murder and sudden-passion statutes to explain how the court of appeals erred to mix and match statutes by applying the "punishment" sudden passion from a 1994 statute to a murder committed in 1991.

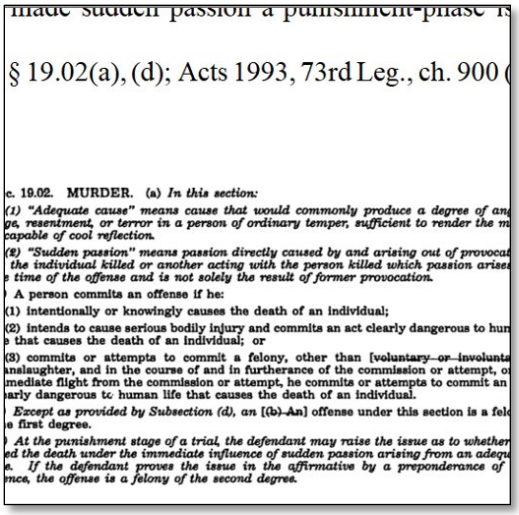


e charged offense of murder was defined in TE

vas categorized as a first-degree felony.

§ 19.02. Murder
(a) A person commits an offense if he:
(1) intentionally or knowingly causes the death of an individual;
(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
(3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.
(b) An offense under this section is a felony of the first degree.
[Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974; Acts 1973, 63rd Leg., p. 1123, ch. 426, art. 2, § 1, eff. Jan. 1, 1974.]

l offense, depending on the facts, was voluntary

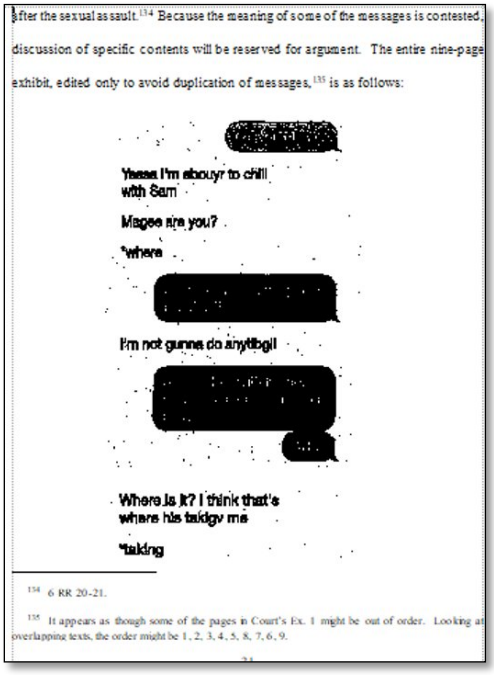


made sudden passion a punishment-phase

§ 19.02(a), (d); Acts 1993, 73rd Leg., ch. 900 (

c. 19.02. MURDER. (a) *In this section:*
(1) "Adequate cause" means cause that would commonly produce a degree of an
ge, resentment, or terror in a person of ordinary temper, sufficient to render the m
capable of cool reflection.
(2) "Sudden passion" means passion directly caused by and arising out of provocat
the individual killed or another acting with the person killed which passion arise
time of the offense and is not solely the result of former provocation.
A person commits an offense if he:
(1) intentionally or knowingly causes the death of an individual;
(2) intends to cause serious bodily injury and commits an act clearly dangerous to hur
that causes the death of an individual; or
(3) commits or attempts to commit a felony, other than [~~voluntary or involunta~~
anslaughter, and in the course of and in furtherance of the commission or attempt, o
mediate flight from the commission or attempt, he commits or attempts to commit an
arly dangerous to human life that causes the death of an individual.
Except as provided by Subsection (d), an [~~(b) An~~] offense under this section is a fel
e first degree.
At the punishment stage of a trial, the defendant may raise the issue as to whether
ed the death under the immediate influence of sudden passion arising from an adequ
e. If the defendant proves the issue in the affirmative by a preponderance of
nce, the offense is a felony of the second degree.

In our everyday lives, we communicate via text and email. When these items have evidentiary value and form the basis for a legal argument, including them as a screenshot avoids any dispute about their completeness and content. The State in *Ukwauchu v. State*, PD-0366-17, displayed text messages to show that they were inadmissible under the rule of optional completeness and referred to the past sexual conduct between the victim and Appellant in violation of TEX. R. EVID. 412.[15]



after the sexual assault.[134] Because the meaning of some of the messages is contested, discussion of specific contents will be reserved for argument. The entire nine-page exhibit, edited only to avoid duplication of messages,[135] is as follows:

Yeaaa I'm abouyr to chill with Sam
Mapee are you?
*where
I'm not gunna do anythigll
Where is it? I think that's where his taldgy me
*taking

[134] 6 RR 20-21.

[135] It appears as though some of the pages in Court's Ex. 1 might be out of order. Looking at overlapping texts, the order might be 1, 2, 3, 4, 5, 8, 7, 6, 9.

[15] The messages were later reproduced in a concurring opinion after the case was unsealed. *Ukwauchu v. State*, PD-0366-17 (Yeary, J., concurring).

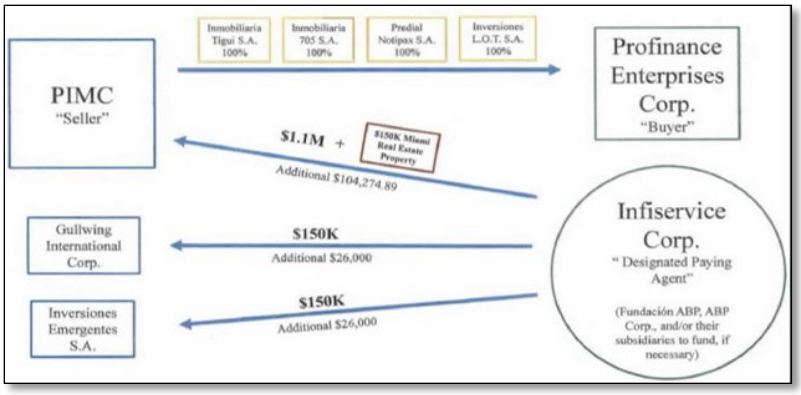
ii. Charts in Briefs

Tables and charts can be especially useful in condensing information into a comprehensible and memorable form. You can save the court the trouble of parsing out a lengthy indictment by including a chart of charges, particularly where the differences between the paragraphs or counts are minor but matter. In this example, the parties disputed what elements the jury had to be unanimous about in a single count indictment with multiple paragraphs:

Para-graph	Kind of Sexual Assault	Means of penetrating vagina	Aggravating Factor
1	penetrate vagina	penis	causing s.b.i.[7]
2	penetrate vagina	unknown object	causing s.b.i.
3	penetrate vagina	fingers	causing s.b.i.
4	penetrate vagina	penis	place in fear of s.b.i.
5	penetrate vagina	unknown object	place in fear of s.b.i.
6	penetrate vagina	fingers	place in fear of s.b.i.
7	penetrate vagina	unknown object	deadly weapon
8	penetrate vagina	penis	deadly weapon
9	penetrate vagina	fingers	deadly weapon
10	penetrate mouth	---	causing s.b.i.
11	penetrate mouth	---	place in fear of s.b.i.
12	penetrate mouth	---	deadly weapon
13	D's mouth to V's vagina	---	causing s.b.i.
14	D's mouth to V's vagina	---	place in fear of s.b.i.
15	D's mouth to V's vagina	---	deadly weapon

If you have something to compare or contrast—such as elements of two statutes or testimony of two witnesses or one witness on two occasions—a two-column chart can very quickly convey this information. A chart can make your point far better than any assertion you could make in words for remarkably similar or different comparisons.

A series of complex financial transactions can similarly be made understandable by creating a diagram to show payments and companies' relationships. If a party used an exhibit to illustrate this information at trial, it will frequently also aid the court of appeals. Including it in your brief saves the court the time and trouble of searching for it.



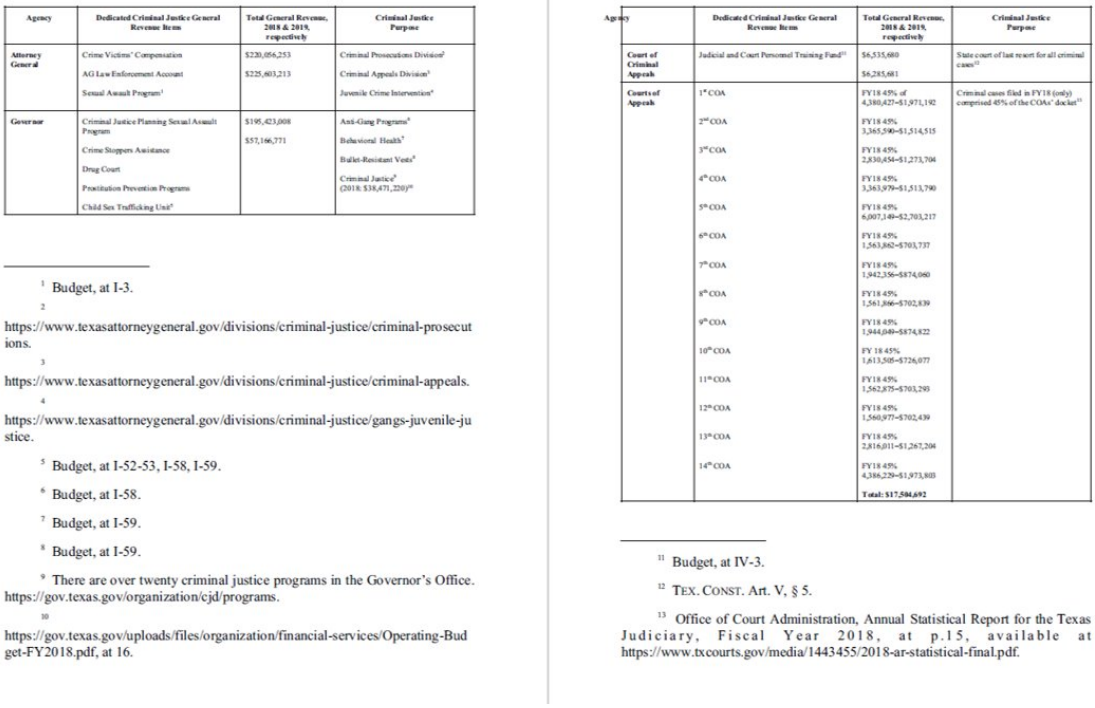
Advocates have long used vertical timelines in speedy-trial claims to list the events that occur in a case, but you can go one step further by setting out various periods of delay next to the number of days as in this example from another state. You could add color to designate which party the period should be weighed against and even shades of color to indicate strength.

Delay Time Frame	Reason for Delay	Number of Days (245 total)
Jan. 22 – Mar. 20[6]	Motion to dismiss for lack of subject-matter jurisdiction	59
Mar. 21 – Aug. 4	COVID-19 & prohibition on new jury trials	137
Aug. 5 – Sept. 14	Rule 20 evaluations	41
Sept. 15 – Sept 22	Insufficient jury pool	8

A similar setup can be helpful for other time calculations, like the tolling (and resuming) of limitations periods, or numerical information like IQ-test results in an intellectual-disability claim.[16]

[16] The CCA did just that fairly recently in *Petetan v. State*, 622 S.W.3d 321, 338 (Tex. Crim. App. 2021).

Charts can also be included as an appendix. When your case involves a large amount of data that needs to be distilled for the court, an appendix chart will help present that information without cluttering your brief. In *Dulin v. State*, PD-0856-19, the State created a chart from the State of Texas budget to show that criminal justice expenses far exceeded the amount of court costs assessed. Instead of just citing Texas' entire biennium budget, which comprises thousands of pages, the State laid out specific amounts dedicated to criminal justice.



Agency	Dedicated Criminal Justice General Revenue Item	Total General Revenue, 2018 & 2019, respectively	Criminal Justice Purpose
Attorney General	Crime Victims' Compensation AG Law Enforcement Account Sexual Assault Program[1]	$220,056,253 $225,603,213	Criminal Prosecutions Division[2] Criminal Appeals Division[3] Juvenile Crime Intervention[4]
Governor	Criminal Justice Planning Sexual Assault Program Crime Stoppers Assistance Drug Court Prostitution Prevention Programs Child Sex Trafficking Unit[5]	$195,423,008 $57,166,771	Anti-Gang Programs[6] Behavioral Health[7] Bullet-Resistant Vests[8] Criminal Justice[9] (2018: $38,471,220)[10]

[1] Budget, at I-3.

[2] https://www.texasattorneygeneral.gov/divisions/criminal-justice/criminal-prosecutions.

[3] https://www.texasattorneygeneral.gov/divisions/criminal-justice/criminal-appeals.

[4] https://www.texasattorneygeneral.gov/divisions/criminal-justice/gangs-juvenile-justice.

[5] Budget, at I-52-53, I-58, I-59.

[6] Budget, at I-58.

[7] Budget, at I-59.

[8] Budget, at I-59.

[9] There are over twenty criminal justice programs in the Governor's Office. https://gov.texas.gov/organization/cjd/programs.

[10] https://gov.texas.gov/uploads/files/organization/financial-services/Operating-Budget-FY2018.pdf, at 16.

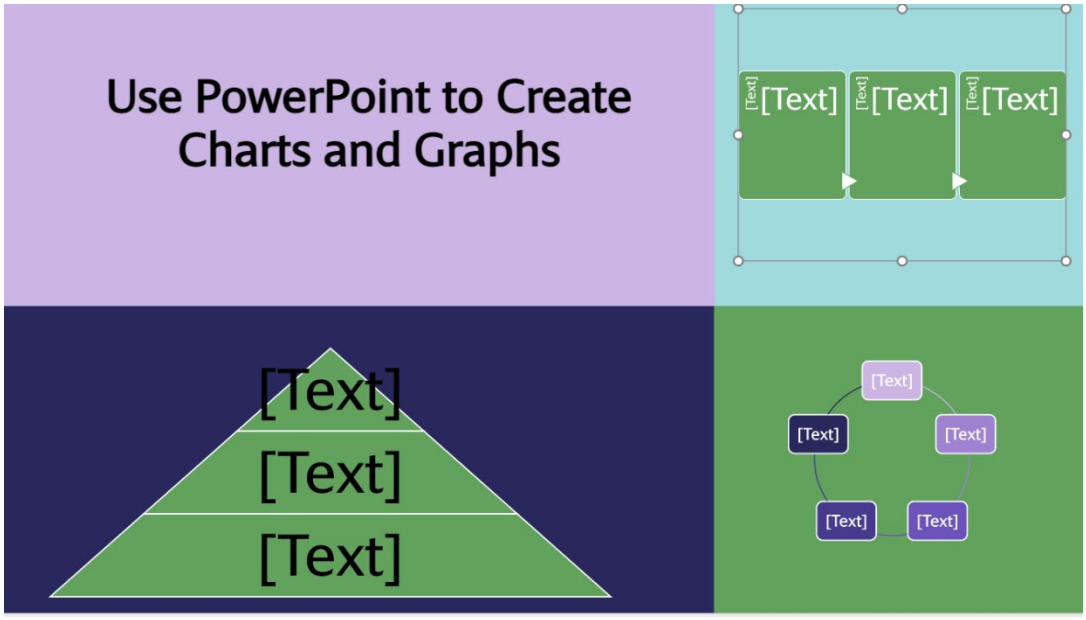
Agency	Dedicated Criminal Justice General Revenue Item	Total General Revenue, 2018 & 2019, respectively	Criminal Justice Purpose
Court of Criminal Appeals	Judicial and Court Personnel Training Fund[11]	$6,535,680 $6,285,681	State court of last resort for all criminal cases[12]
Courts of Appeals	1st COA 2nd COA 3rd COA 4th COA 5th COA 6th COA 7th COA 8th COA 9th COA 10th COA 11th COA 12th COA 13th COA 14th COA	FY18 45% of 4,380,427=$1,971,192 FY18 45% 3,365,590=$1,514,515 FY18 45% 2,830,454=$1,273,704 FY18 45% 3,363,979=$1,513,790 FY18 45% 6,007,149=$2,703,217 FY18 45% 1,563,862=$703,737 FY18 45% 1,942,356=$874,060 FY18 45% 1,561,866=$702,839 FY18 45% 1,944,049=$874,822 FY 18 45% 1,613,505=$726,077 FY18 45% 1,562,875=$703,293 FY18 45% 1,560,977=$702,439 FY18 45% 2,816,011=$1,267,204 FY18 45% 4,386,229=$1,973,803 Total: $17,504,692	Criminal cases filed in FY18 (only) comprised 45% of the COAs' docket[13]

[11] Budget, at IV-3.

[12] TEX. CONST. Art. V, § 5.

[13] Office of Court Administration, Annual Statistical Report for the Texas Judiciary, Fiscal Year 2018, at p.15, available at https://www.txcourts.gov/media/1443455/2018-ar-statistical-final.pdf.

PowerPoint and other applications can be used to create aesthetically pleasing charts and graphs that can be inserted into your document using the snipping tool or by taking a screenshot. So, just because you are working in a word processing program doesn't mean that you are relegated to its tools for creating charts and graphs. Indeed, creating a chart or graph in Word or WordPerfect can be difficult to format or leave little room for creativity. PowerPoint's "smart art" feature offers several options for charts and graphs that allow data to be easily inserted into an already existing format. And they include color to boot. PowerPoint also allows you to format your own chart or graph to suit your needs.



Finally, like charts, bullet points can visually and substantively emphasize or separate information. This tactic was effective in *Cook v. State*, PD-0850-21, to highlight testimony that opened the door to rebuttal evidence.

- Chance and Felicia are "lying." 3 RR 148.
- Felicia is a liar and manipulator who coached and manipulated Chance to lie. 3 RR 150-51.
- Gladys got the truth from Chance when he denied the allegations. 3 RR 160-61.
- Chance would not tell the truth to the judge and jury and would say what Felicia coached him to say in court. 3 RR 160-61.

iii. Hyperlinks

Hyperlinks offer a powerful referencing tool that far surpasses its paper-and-ink analog. With a click or tap, you can take the reader to an outside website or different section of your brief. Judges are consumers of online content, too, and many may appreciate electronic briefs that incorporate the conveniences they use every day for online navigation. That said, the practitioner should also be

aware of the evolving rules in this area. Criminal E-filing Rule 2.2(4)[17] requires compliance with the Technology Standards set by the Judicial Committee on Information Technology. This includes the rule that e-filed documents "may not contain any . . . feature restrictions including password protection." Rule 3.1D. This language likely forbids hyperlinks to Westlaw and Lexis documents and even the State Bar's legal research platform "Fastcase" since they all require some kind of log-in or password for access. But it should not prohibit links to the txcourts.gov opinions. Just be aware that the page numbers do not align with the Southwestern Reporter and default links take the reader to the beginning of what could be a lengthy document.

Also, use your best judgment when it comes to hyperlinks. Don't use them just because you can, or because your legal research software adds them to your brief with the click of a button. Numerous bright blue links on the page are distracting and are of no value when used to refer repeatedly to the same case on the same page. You can alleviate some of the distractions by changing the text color to black and underlining the text to signal a link.

It's better to be judicious about sending your reader somewhere other than your brief. Instead of hyperlinking every case you cite, consider using hyperlinks only for difficult-to-find sources, such as legislative history, or other trustworthy websites like government cites or online dictionaries.

A Note on Appendices

The Rules of Appellate Procedure do not require an appendix in criminal cases. Tex. R. App. P. 38.1(k). But the documents required for civil cases (the judgment, jury charge, findings of fact, text of statute, or rule on which the argument is based) can frequently be helpful to include in criminal briefs where they are relevant to the issues raised. Even if you are including part of a jury charge or statute within the text of your brief, consider adding the entire document in an appendix. Bookmark the appendix to show up on the navigation panel of the PDF of your brief.

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[17] "Statewide Rules Governing Electronic Filing in Criminal Cases," Final Order Adopting Amendments, Misc. Docket No. 17-005 (Tex. Crim. App. Apr. 24, 2017).

You might also give thought to hyperlinking to the appendix within the body or footnote of your brief.

> *Tip*: Holding "Alt" and the left arrow together in a PDF document will take you back to the last place you viewed within the PDF, similar to the "Back" button on a web browser, which can be handy for returning to the text after viewing an appendix.

Practitioners may one day incorporate other web-browser effects into their briefs. Links that open a small window or side panel alongside the text (to bring up a photo or map exhibit, for example) or roll-over/hover annotations (for dictionary definitions or footnotes, as in Westlaw) could immediately bring additional material to a judge's attention at their option—all while maintaining their place in the brief.[18]

c. Warnings about Visual Aids

i. The E-filing Rule

Briefs cannot include embedded video or audio materials. Rule 2.2 of the Statewide Rules Governing Electronic Filing in Criminal Cases governs the format for electronically filed documents.[19] Subsection (4) requires litigants to "comply with the Technology Standards set by the Judicial Committee on Information Technology and approved by the Supreme Court and the Court of Criminal Appeals." In turn, Rule 3.1.D. of the Technology Standards, applicable to digital media documents, states that "[a]n e-flied document may not contain . . . embedded multi-media video, audio, or programming."[20]

ii. Ethical Concerns

Litigants should remember that visual materials must be used in accordance with the Rules of Professional Conduct and the Rules of Appellate Procedure.

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[18] Porter, 114 Colum. L. Rev. at 1750.

[19] Texas Supreme Court Misc. Docket No. 17-9039 and CCA Misc. Docket No. 17-005, eff. May 1, 2017.

[20] Technology Standards, Judicial Committee on Information Technology, Version 7.0, eff. Nov. 2021.

- Cropping, size alterations, and omitting text from visual materials should be done with Texas Rule of Professional Conduct 3.03(a) in mind. Rule 3.03(a) provides that a lawyer shall not knowingly make a false statement of material law or fact to the court.
- Visual materials should not be used to subvert the document length provided in Texas Rule of Appellate Procedure 9.4(i).
- Privacy-protected information under Texas Rule of Appellate Procedure 9.10 should not be disclosed using visual material.
- Obscene, offensive, or pornographic material should also be omitted from visual materials.

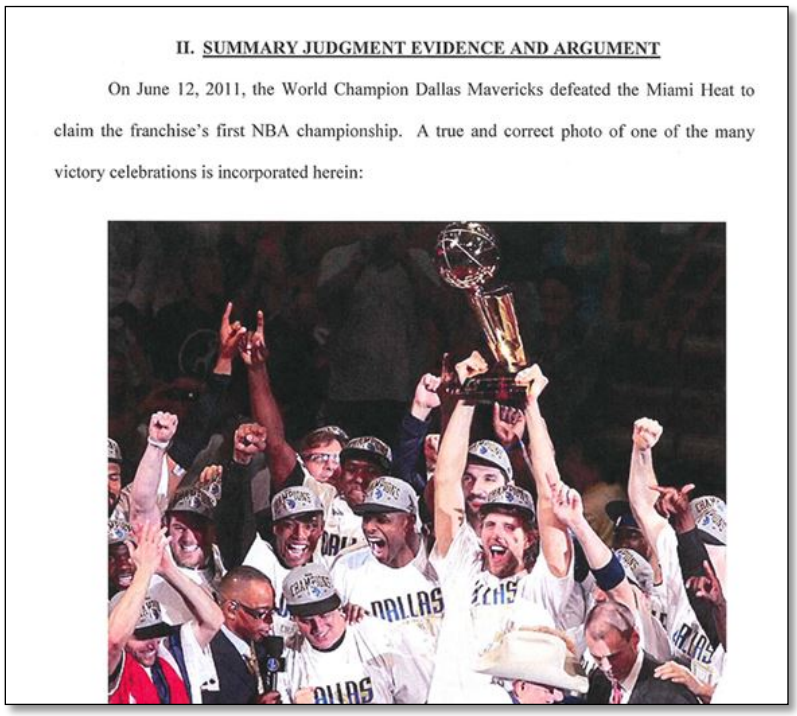
iii. Thinking Critically about Visuals

For all the reasons that visuals are powerful, persuasive tools in briefs, they also have the potential to mislead:[21]

> Sidebars, infographics, rollover states, and embedded video in briefs could draw the eye and the mind away from the nuanced and substantiated legal arguments that have characterized legal writing until now. Where an image will do, perhaps readers will have less incentive to pore over detailed text. There is a real risk that visual advocacy will create more gloss but less substance in legal discourse.[22]

In one memorable example, Maverick's owner Mark Cuban incorporated a photograph in a summary judgment motion to argue that he had not financially mismanaged the team. The photograph essentially communicated that championship-winning teams can't be financially mismanaged—a dubious argument had it actually been articulated in words—but that was persuasive when conveyed implicitly through image:

[21] Porter, 114 Colum. L. Rev. at 1755-56.
[22] *Id.* at 1774.



II. SUMMARY JUDGMENT EVIDENCE AND ARGUMENT

On June 12, 2011, the World Champion Dallas Mavericks defeated the Miami Heat to claim the franchise's first NBA championship. A true and correct photo of one of the many victory celebrations is incorporated herein:

As Porter argues, lawyers and judges are trained in the analysis of legal text, not images, and we often naively think such images "obviously" or "indisputably" represent "truth."[23] Certainly some facts can be conclusively determined by a photo or video, but our use of visuals to persuade often communicates in ways beyond traditional legal argument and reason, and judges and opposing counsel should be wary of that. Gruesome autopsy photos in a brief about legal sufficiency would be one rather obvious emotional ploy. But even when the admissibility of the autopsy photos is the issue in the case (as with a Rule 403 objection), dropping them into the brief removed from the context and lead-up in which they were offered at trial and viewed by the jurors has the potential to skew things.

Textual descriptions that accompany images can affect how we perceive and interpret them.[24] And this likely goes beyond mere captions. The brief itself provides context and manages expectations for these images. In one example Porter cites, the plaintiff in a copyright violation case positioned two images side-by-side, one of his own work and the other, the claimed copyright violator's. This comparison had the effect of highlighting the similarities and downplaying their

[23] *Id.* at 1756.

[24] *Id.* (explaining this effect, called "verbal overshadowing").

differences and may have helped form initial impressions of the evidence that would be difficult for the responding party to shake.

Briefing and legal advocacy in general often entail managing expectations and influencing perception. The difference is that we are often not as skeptical or critical of those influences when it comes to images because, as stated above, "seeing is believing."

But as with many other aspects of appellate practice, advocates can frequently find persuasive ways to respond by digging deeper. In one case, the State used its brief to counter the appellate judge's natural inclination to view the evidence as the trial court had. The issue in the case, a State's appeal, was reasonable suspicion for failure to yield right of way "so closely as to be an immediate hazard to the operator's movement in or across the intersection." The officer testified that the defendant nearly caused an accident when he merged in front of another driver already on the roadway, causing the bystander driver to slow down very quickly. The officer's dashcam, which recorded the two vehicles, was introduced at the suppression hearing. The trial court relied on the video to rule in the defendant's favor, explaining that it showed there was no immediate hazard and that the other driver had just "tapped" his brakes. Anticipating that appellate judges might have the same reaction to the video from watching it a single time, the State's brief deliberately undercut any expectations that video of a near-miss accident would have the drama of a Hollywood movie. It incorporated a frame from the video supporting the officer's testimony:

SX 1 at 21:43:22 (arrow added to indicate location of SUV).

Officer Vargas, who had seen the maneuver first-hand, pulled

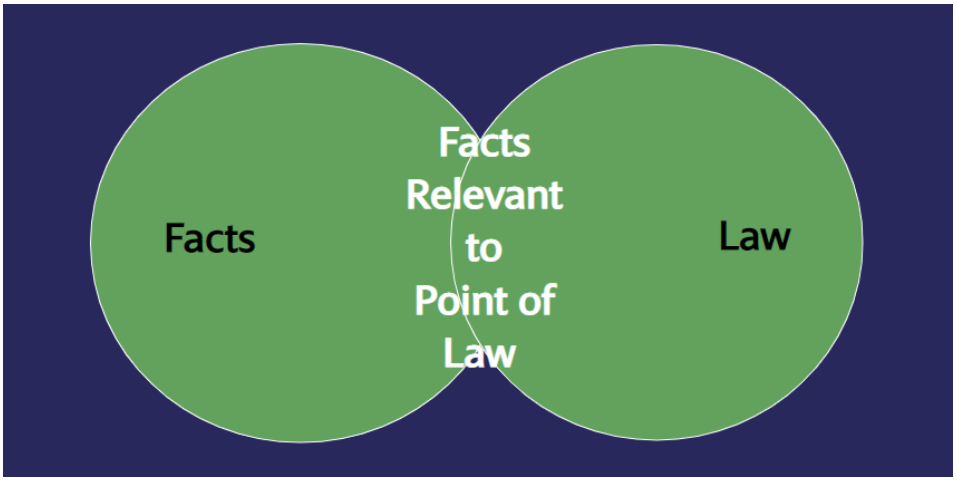
Whether we realize it or not, there are always interpretive choices being made when we view and use evidence. Why not do it deliberately. By analyzing the visual record to the same extent we would analyze the statute's language, appellate practitioners can contribute to a more convincing and lasting persuasive view of the evidence and invite appellate judges to do the same in deciding the cases before them.

2. Making Strategic Choices

a. Statement of Facts

i. Begin with the Facts

Attorneys often attempt to write a brief in the order it will be written. That can make the job a lot more complex than necessary. The best place to start is with the facts. But the key is to tailor the facts to the legal issue. This means identifying the operative facts.



With your broad-sense legal issue in mind, drafting the operative facts first ensures that you know the exact situation you are dealing with. This avoids wasting time analyzing a topic that doesn't really exist because:

- you didn't pay close enough attention to a determinative detail when initially reading the record;
- you relied on the opposing party's rendition of the facts that were wrong;

- you relied on a faulty memory (your own or that of the trial attorney) of what occurred at trial; or
- you took a court's incorrect rendition of the facts at face value.

Imagine the scenario of writing a thoughtful and thorough analysis on a pretrial motion to suppress issue only to realize later that some of the facts relied upon by the trial court or the opposing party were admitted after the trial court made its ruling (and there was no re-litigation of the issue). Because the post-suppression-ruling facts cannot be considered in analyzing the issue, you might need to start over or eliminate the issue entirely.[25] Knowing the facts in play should be the first step in your brief building block.

This approach has the beneficial secondary effect of narrowing your legal research. If you know that your case contains facts X, Y, and Z, you can eliminate caselaw with non-analogous facts A, B, and C during your in-depth research phase. And in the process, you may realize the significance of a fact initially dismissed or undervalued.

Remember that you can revisit your fact section when you hit a point in argument that makes something more (or less) important than you first realized.

ii. Myth Busting About Facts

Like urban myths, there are certain misconceptions held by many appellate practitioners regarding the fact section in brief. It's time to bust those myths.

First, you don't need to include all the facts in your case, so don't provide a bench-brief-like summary of the record. Your fact section is not supposed to replace or substitute the appellate court's own record review. As mentioned, the art of crafting a fact section involves providing a narrative tailored to your legal claim.

Next, you can reference facts in your argument section that were not previously mentioned in your fact section. It's okay for your fact section to be more general and then build on it later with details in your analysis. For instance, you can

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[25] *See e.g., Rangel v. State*, 250 S.W.3d 96, 97-98 (Tex. Crim. App. 2008) (dismissing the State's and Appellant's petitions for discretionary review as improvidently granted because none of the evidence required to analyze the ruling was presented to the trial court until after its ruling).

generically list offenses constituting sexual abuse and then later describe them in detail as needed to support a sufficiency or harm claim. Or you can summarize testimony in the fact section and later replicate the exact testimony when it's material to a point of error.

Third, you don't need an elaborate fact section when your issue is purely procedural. Again, tailor the facts needed to the issue before the court. When a procedural issue is involved, the facts are the transactions that set up the procedural question. A good example of this is the State's Brief in *Huggins v. State*, PD-0590-21, which deals with a belated request to invoke the right to counsel after it was previously waived.

iii. Fact Considerations

When drafting a fact section, continue to ask yourself if a fact is relevant to your issue. Some practitioners have a habit of being overly detailed. This happens when names and dates are used with no real bearing. When a court sees names and dates, this implicitly suggests that those things will be important to the case. Recall "Chekhov's Gun" rule: "If in the first act you have hung a pistol on the wall, then in the following one it should be fired. Otherwise don't put it there." If details carry no import to the legal issue, don't include them because they establish an unnecessary and unfulfilled expectation for the reader.

Do your best to eliminate redundant facts. As stated before, it's permissible to set out a general factual background and later address the particulars when needed to support your legal argument. It can show a lack of thoughtfulness when practitioners simply repeat (or even copy and paste) the above-mentioned facts. Though it can be difficult to plan to eliminate redundancies in the initial writing process, it can certainly be achieved in the editing process by thinking about how to introduce facts more generally when greater detail follows.

Lastly, remember that Texas Rule of Appellate Procedure 38.1(g) requires a party to set out the pertinent facts "without argument" in the fact section. One reason for this is so that opposing counsel and the court can sort out the claims and arguments actually being raised on appeal from what may only be sideline, gratuitous complaints about what occurred in the trial court. Good advocates, obviously, would eliminate any such gratuitous remarks anyway. Another reason is so that the appellate court and the parties are dealing with the right facts—*i.e.*,

those relevant under the applicable standard of review. A recitation of the facts in the light most favorable to the defense is appropriate when the issue is denial of a defensive instruction, not sufficiency review. The no-argument rule should force advocates to confront and accept the controlling facts rather than wasting time and effort commenting on what they think is unfair about how those facts were arrived at. As a result, the briefing can advance beyond arguments over irrelevancies to a more productive debate about why, despite certain facts against the party, it should still prevail.[26]

But while the statement of facts should be written without argument, there is still room for advocacy in how those facts are presented. "You advance that objective by your terminology, by your selection and juxtaposition of the facts, and by the degree of prominence you give to each . . . . You will amplify the facts that suggest your desired outcome by placing them prominently in the narrative."[27] Criminal cases provide great material for the kind of long-arc storytelling that is compelling and persuasive—whether it is about the offense or the investigation. And doing the initial work of weeding out irrelevancies and accounting for the standard of review will free you to use the creative process of narration to highlight facts that aid your cause instead of distracting from it.

iv. Where to Brief Facts

Determining where to brief facts can be a demanding organizational exercise. It usually depends on the type and number of issues you are dealing with. When there are numerous issues with specific facts, it may be better to brief the facts by the issue in the argument section. In that case, a more global explanation of the facts can be given in the formal fact section.

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[26] *See, e.g., Carter v. State*, No. 06-18-00124-CR, 2019 WL 1996533, at *2 (Tex. App.—Texarkana May 7, 2019, no pet.) (ruling on the merits but "not disagree[ing]" with the State's assessment that the defense brief violated Rule 38.1(g) by presenting only the facts from the losing side and being argumentative); *see also State ex rel. Kilian v. City of W. Linn*, 112 Or. App. 549, 554 (1992) (noting that a lengthy witness-by-witness recitation of the testimony favorable to the party "rarely creates a useful impression of the facts").

[27] Antonin Scalia and Bryan Garner, MAKING YOUR CASE: The Art of Persuading Judges, at 94 (2008).

If you have a sufficiency or defensive-entitlement issue, the fact section can give a comprehensive overview of the facts, with the analysis immediately following at the start of the argument section. If you are the responding party and address issues in a different order in which they were first presented, tell the court you have altered the order in the reply.

Overall, remain flexible in your approach. Just because you started using one method to present your facts doesn't mean you have to stick with it. Remember that your finished product is what matters. When the flow just isn't working, change things up by reorganizing. Before starting any reorganization, it may be helpful to save your new draft under a different name so you can always go back to your original material if needed.

b. Statutory Construction

Statutory construction issues can be vexing. Over and over, courts say that the plain text controls, subject to narrow exceptions of ambiguity or absurdity. Even if you think that the text is unambiguous, provide an extratextual analysis because it's hard to predict where a court will fall. You don't want to be in the position of not having weighed in and then having the case decided against you. Further, extratextual sources can be used as additional support for a plain-text analysis or call attention to a potential adverse argument that should be addressed.

In going beyond the plain text, several resources are available to help with your research:

- Texas Legislature Online
- Texas State Library and Archives Commission
- Texas State Law Library
- Texas Legislative Reference Library

Never lose sight of the fact that statutory construction issues will frequently affect other cases. It's essential to ask:

- Are other statutes worded similarly and thus will be impacted?
- How does the scheme of other codes impact your case or vice-versa?
- If your argument prevails, will the rule be tenable when applied in future cases?

- How would your construction be applied with other subsections in a statute?

As discussed below, you need to think in terms of systems and consequences.

c. Sufficiency

Because courts are busy, they are anxious to grasp your argument quickly and move on. This is especially true of sufficiency claims, which could encompass challenges to an element's interpretation or proof as to any or all the elements. Narrow the argument (or response) at the top of your issue with a concise statement of why you should win before getting into the details, setting out all the statutory elements, or inserting a cut-and-paste standard of review paragraph. If you use a cut-and-paste standard, tailor it to what is needed to resolve this sufficiency challenge. Courts frequently reuse the same standard of review paragraph(s) in opinions. Hence, it is easy for practitioners to follow suit, repeating the same or similar language in their briefs because they believe this is what courts want to hear. This only encourages skimming or wholesale skipping of sections of your brief. Make what you say count. The standard of review for sufficiency is probably one of the best known of any. So limit your iteration to only the salient parts, said a single time. For the same reason, trim any quotes from other cases to a phrase or two. Because sufficiency claims are unique to your set of facts, long quotations from other sufficiency cases are seldom helpful.

A common mistake practitioners make in sufficiency arguments is treating a recitation of the facts as argument. It's not. Particularly if you have already set out the facts in a separate section of your brief or a subpoint in the issue, use the argument section to *explain* their significance. The narrative you have created will, of course, arc in support of your position. Still, unless the court happens to already agree with that position, you will have to articulate the connections and rational inferences to persuade.

i. Be Strategic About What You Argue

Be strategic about what you argue. If you are the appellant, skip surface-level claims that can be quickly answered by regurgitating that the jury determines the weight and credibility of the evidence (*i.e.*, the child was not credible; the child could not have been molested when others were in the home). Consider instead

whether the statutory language is susceptible to a different interpretation, requiring more than the State ever dreamed, and so it wasn't even trying to prove it. The defense argument in *Nicholson v. State*, PD-0963-19, is a prime example. There, the defendant was convicted of evading in a vehicle, which criminalizes intentionally fleeing from a person the defendant knows is a peace officer "attempting lawfully to arrest or detain him." TEX. PENAL CODE § 38.04(a). Earlier caselaw had held that the knowledge requirement encompassed the attempted detention, but not its lawfulness. But the statute had since been amended to place the word "lawfully" right in the middle of the phrase a defendant had to "know" about. At trial, the State told the jury, consistent with the caselaw, that "the defendant doesn't have to know that the officer *lawfully* tried to arrest him." It made no concerted effort to prove that fact because it hadn't interpreted the statute that way. In this context, the defendant's plain-language interpretation on appeal opened up a new avenue of argument, one with a lot of potential for success despite an unfavorable standard of review. *See Nicholson v. State*, 594 S.W.3d 480 (Tex. App.—Waco 2019, pet. granted).

ii. Be Strategic About How You Argue

Numerous sufficiency challenges assert that the evidence of guilt relied solely on speculation and include block quotations from *Hooper v. State*, 214 S.W.3d 19 (Tex. Crim. App. 2007). This doesn't make it so. To be successful, whether you are arguing sufficiency for the defense or no rational evidence to raise a lesser for the State, you need to show the court why the opposing position is irrational. This is a difficult standard to meet. Aim for something violating the laws of physics, contravening human experience, or being just plain fanciful. One particularly good example of this on both sides is *Melgar v. State*, No. PD-0243-20, currently pending in the Court of Criminal Appeals. There, the State's theory is that the defendant killed her husband at home and then staged being trapped in a closet. The defense theory is that she, too, was a bona fide victim in the home-invasion. The parties each highlight different aspects of the case to support their claim. The defense relies on physical evidence undercutting the State's version (like marks from bindings up the defendant's arms inconsistent with self-imposed bondage) and the tenuousness of the State's trial theory that she wedged a chair under the closet doorknob while inside the closet. The State responds with the fact that the jury could disbelieve any of the testimony about the state of the evidence when

she was discovered, even from the State's own witnesses. Both advocates go beyond the surface-level briefing too common in sufficiency claims.

d. Strategies for the Argument Section Generally

Regardless of the particular issue you are arguing, a few general strategies apply. First, be selective about the cases you brief. Briefing the twelve most cited cases on your issue may be fine for pre-writing but no argument should consist of an unconnected parade of case-summary paragraphs all beginning with the phrase "In such and such case …." The argument section is the time to focus in on the one or two cases that really control, just as you narrow your discussion of the relevant facts in your statement of facts. If a case helps your argument but its holding is not really debatable, use only one case—and only cite it. As Scalia and Garner put it, "Anything more is just showing off to an unappreciative audience."[28] Save the brief explanation of facts and analysis for the cases essential to your argument.

Second, remember that not every case can or should be harmonized. As you search for a legal proposition underlying the cases, you are likely to find cases that are wrongly decided, particularly if a legal proposition has never been articulated. Outlier cases can distract you from the guiding principle. Don't throw out what could be a better rule just because there's one or two cases that don't fit—especially if they are unpublished or from a different court of appeals. Also consider a long game in the Court of Criminal Appeals. Sometimes if you ignore what the courts of appeals are doing—even if only temporarily—you can more easily identify a rule fitting most of the cases. Be sure to acknowledge that the court of appeals cannot overrule a Court of Criminal Appeals case (and it will be naturally hesitant to overrule one of its own), but sometimes that's the way toward re-aligning the law with the statute, making a court-made rule stick closer to its purpose, or any number of things that advance the law.

Finally, for questions of first impression, aim to build a framework of what has occurred in the law before this case so that the next step you want the Court to take follows inevitably from this presentation. This is easier said than done. But we frequently employ it through narrative in the statement of facts. Adapting that idea in your argument section can push your briefing well beyond the basic. For

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[28] Scalia and Garner, MAKING YOUR CASE, at 126.

examples of this build-up style in judicial opinions, *see Watkins v. State*, 619 S.W.3d 265, 274-78 (Tex. Crim. App. 2021), and in a brief, *see* the State's short amicus brief in *Rodriguez v. State*, PD-1130-19.

e. Keep it to the Record

On direct appeal, you are bound by the trial record. This means, in Judge Cochran's infamous words, "swell stuff" is prohibited.[29] The prohibited "swell stuff" includes:

- Scientific evidence not subject to judicial notice.[30]
- Facts or materials not in the appellate record.
- Reports from the Forensic Science Commission.[31]

As with every rule, there are exceptions. Sometimes extra-record information is inextricably tied to a legal issue. In those rare instances, it may be necessary to consult outside resources. This has been done repeatedly in court-cost cases to demonstrate whether costs are appropriately dedicated to a criminal justice purpose.[32] Outside sources can also fill occasional gaps in the court's knowledge

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[29] *Hernandez v. State*, 116 S.W.3d 26, 30 (Tex. Crim. App. 2003) ("The State Prosecuting Attorney presents a plethora of cites to scientific articles and learned treatises, as well as to some cases from other jurisdictions concerning this general area of scientific endeavor. This is swell stuff. The trial court should have been given this material, and appellant should have been allowed an opportunity to cross-examine any witnesses who sponsored it.").

[30] *See* Goldstein & Keasler, *Bad Science, Bad Law: Judging Science on Appeal in Texas Criminal Cases and Related Ethical Issues*, Texas Bar Journal, 568-573 (July 2011) (discussing the prohibition on appellate courts against conducting independent scientific research).

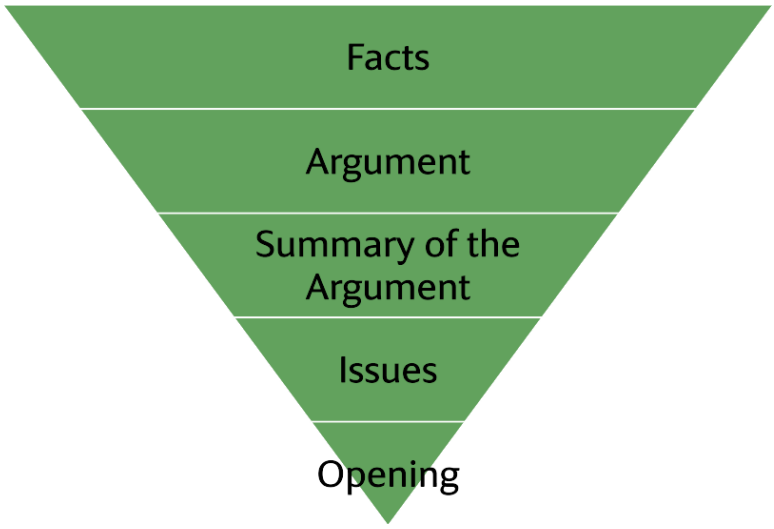
[31] TEX. CODE CRIM. PROC. art. 38.01 § 11.

[32] *Salinas v. State*, 523 S.W.3d 103, 108 n.19 (Tex. Crim. App. 2017) (discussing the use of costs on rehabilitation services at the Texas Health and Human Services Commission); State's Brief in *Dulin v. State*, PD-0856/57-19 (using the State's budget to demonstrate that striking the time-payment fee violates separation of powers).

base, like how ubiquitous cell-phone use is,[33] or what certain law enforcement abbreviations mean.[34]

f. Reducing Your Points for More Efficient Briefing

The order in which you proceed with the parts of your brief has already been touched on above. But more explanation is warranted. Starting your brief writing with the order in which it will be read can create unnecessary work. To bring more efficiency to the writing process, try using the following framework:



The strategy here is to begin with the facts for the reasons stated above. The next step is to compose your argument section. This entails fully fleshing out your legal argument and its organization. This is the bulk of the hard work; during this process, you solidify the legal issues and operative facts.

Now think about how the argument section provides the foundation for your argument summary. Once the argument section is complete, you can easily

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[33] *State v. Granville*, 423 S.W.3d 399, 408 n.26 (Tex. Crim. App. 2014)

[34] *See, e.g.*, *Martinez v. State*, 449 S.W.3d 193, 203 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (citing Homeland Security website for the definition of "ICE detainer").

transition to the summary of the argument section. This is, after all, a synopsis of everything you just methodically and painstakingly analyzed.

With the hard work completed, move on to crafting your issues. Think of your issues as the smallest constituent part of the summary of the argument and argument. At this point, you shouldn't have any questions about the legal principles and operative facts that need to be included. You can focus on how to write the issue, not what to write. Based on experience, when a practitioner prematurely drafts the issues—say before writing the main parts of the brief—it can negatively affect the writing and research process. First, your perspective may be hampered because you are too tied to the issue you've cast. Second, it may ultimately create more work because it is highly likely that you'll need to redraft your issue as your ideas and focus coalesce. So, it may be beneficial to suppress the instinct to start your brief by drafting your issues or continually edit them as you proceed with the analysis. Admittedly, this framework may not work best for you, and if that's the case, *see* Section 3.iii. below.

Finally, complete your process with an opening statement (or executive summary) at the beginning of your brief. This helps the reader quickly grasp what the case is about. Note that most courts do this at the beginning of their opinions because of this. Follow their lead. A statement should include the legal principles, operative facts, and the form of relief that you want. This is a more condensed version of the summary of the argument. Former CCA Judge Keasler was known to have a 75-word limit for opening statements in his opinions. Though this rule may be impossible to follow in all cases, it's a good guidepost and can force you to weed out unnecessary phrases and words. And in doing this for every case, you will learn to become a more concise writer (and hopefully more efficient).

g. Use Headings Persuasively

Headings are not only helpful to break up ideas, but they can also be a means to persuade. And although their persuasive impact seems minimal when they appear in the body of your lengthy argument section, think about their use in a table of contents. When all that is presented are your headings, seen together, they can offer a roadmap of your analysis in a persuasive format. Consider the following example:

The table of contents is often an afterthought (if that), but if you strategize with persuasive headings, you can harness this brief-content requirement into an advocacy tool.

It can also provide a final chance to check the organization of your argument.

3. Framing the Issue

a. Overview

The playwright Anton Chekhov famously said, "The task of a writer is not to solve the problem but to correctly pose the question." This is doubly true of the appellate practitioner. As explored in more depth later, properly framing the issue can provide the Court a roadmap for ruling in your favor. A vital piece of that frame is the issue statement. There are several models for crafting good issue statements—Bryan Garner's Deep Issue[35] and the "Under-Does-When" model[36] are two. But whatever method you choose, a good issue statement includes:

- the controlling legal principles (when it needs to), and
- only the operative facts.

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[35] Bryan Garner, THE WINNING BRIEF 53-97 (2d ed. 2003).

[36] Clay Greenberg & Matthew Weingast, "Persuasive Issue Statements," The Writing Center at Georgetown University Law Center 2 (2015) (describing a single-sentence-issue formula with the following structure: "Under [controlling law], does [legal question] when [legally significant facts.]").

It needs to convey what the case is poised to decide, which can take some effort to distill.

Early drafts can be meandering, often because the writer hasn't determined what are the controlling principles and facts are or how best to phrase them, as in this example:

> The court of appeals misapplied the standard for reviewing relevance determinations where its analysis for determining whether the trial court abused its discretion in excluding relevant evidence looked to whether, based on the trial court's personal evaluation of competing or available inferences, it is reasonable to reject the State's proffered inferences, when the proper standard looks to whether an appellate court can state with confidence that by no reasonable perception of common experience could it be determined that the proffered inference is one that is reasonably available from the evidence.

This issue statement is overloaded. It asks too much of the reader to hold these details and concepts in mind and follow the train of thought. Here's a more succinct revision:

> In affirming the trial court's decision to exclude evidence as irrelevant, did the lower court wrongly disregard the State's relevance theory because the trial court did not believe it, even though a rational factfinder could have?

In making it more concise, the revision necessarily omits some ideas present in the original, but this is necessary for writing an issue statement. To be understood, you have to make some choices. To make it persuasive, you have to make the right ones.

b. Draft the Issue with the Twitter Limit in Mind

Anyone who scrolls Twitter knows that you are limited to expressing an idea with 280 characters. This can be very difficult when it comes to encapsulating legal issues. But the character allowance provides a helpful guideline for composing issues because it forces you to pare down an issue by identifying what is essential. The following are rewritten issue examples taken from the SPA's Twitter feed (@OSPATX) notifying practitioners what PDRs the CCA has granted:

"Whether the Fourteenth Court of Appeals improperly acted as a 'thirteenth juror' by re-evaluating the weight and credibility of the evidence showing that the complainant's gunshot wounds constituted serious bodily injury?"

Has a woman sustained "serious bodily injury" when she is shot through her breast and her thigh?

"The Court of Appeals erred when it determined that the interaction between the Appellant and Officers Sallee and Starks was at all times a consensual encounter. Although the encounter may have initially been consensual, the encounter quickly escalated into an investigative detention that was not supported by reasonable suspicion when the Appellant yielded to the officers' show of authority before the first search."

Did the officers' statements, made while flanking Monjaras, about not emptying his pockets and how to place his hands, coupled with physical gestures and touch by police, result in an investigative detention?

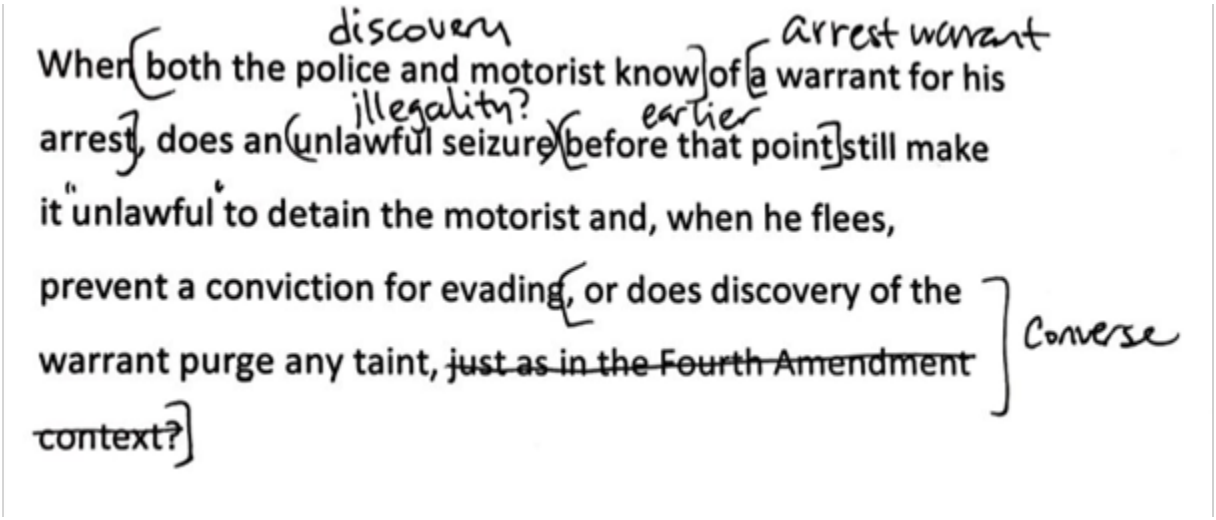
c. Revising the Issue Statement as You Go

Although, as stated earlier, it is likely more efficient to wait toward the end of the writing process to draft your issue statement(s), that may not work for you. If you revise as you go, be sure your process helps you identify what details matter and when you can be more general. Here's what that process might look like:

First draft (from *Day v. State*, PD-0682-21):

> When both the police and motorist know of a warrant for his arrest, does an unlawful seizure before that point still make it unlawful to detain the motorist and, when he flees, prevent a conviction for evading, or does the discovery of the warrant purge any taint, just as in the Fourth Amendment context?

Markup:



Some reductions are obvious—"arrest warrant" instead of "warrant for his arrest"; "earlier" instead of "before that point." Other things, like "in the Fourth Amendment context," are implicit (just by mentioning purging taint) and can be eliminated. Also, I tend to say things in two different ways, first one way and then it's opposite, in case one way "speaks" to the reader better. Application paragraphs of jury charges do this with the "converse" instruction (*i.e.*, "If you do not so find, you will acquit the defendant."). But it's unnecessary bulk in an issue statement and, worse, can confuse the reader expecting each clause to convey something new (not just say the same thing differently).

Other things are more fundamentally flawed and appear in this drafting stage because I haven't worked out their importance. For example, my facts involve an unlawful seizure, but does that matter? It's an evading case. Won't any prior illegality do? The initial draft begins with the fact that the police and motorist both know of the existence of a warrant. On revision, this is unimportant but, more than that, steals a prime position from what I want the court most to focus on: Eureka, there's a warrant!

After further drafting and working out what's important through writing (and sometimes more research), you can weed out the unimportant detail and manage to talk about something concrete too. While there's always room for improvement and further revision, I finally settled on this:

> Will discovery of an arrest warrant necessarily render an attempted seizure on the warrant "lawful" (despite an earlier illegality) for purposes of evading arrest?

d. The Deep Issue

Bryan Garner argues that practitioners should package their issue statement with what the judge needs to understand the case and decide it in the writer's favor, all in 90 seconds.[37] He advocates that practitioners do this through a syllogism in the following format:

> *Major Premise*—Principle of Law
>
> *Minor Premise*—Facts of the Case
>
> Question (essentially the conclusion that follows)

He provides the following criminal-case example:

> A criminal defendant has the right to be present whenever prospective jurors are questioned on voir dire. During voir dire in this murder case, a prospective juror was questioned by the judge at the bench. Williams was present and positioned so that he could hear the conversation. He asked to approach the bench while the prospective juror was questioned, but his request was denied. Did that denial violate Williams's right to be present?[38]

In our experience, however, in criminal cases, particularly in the CCA, the Court is often familiar with the controlling principle of law so that it doesn't have to be overtly stated. To take one recognizable case, *Derichsweiler v. State*, 348 S.W.3d 906 (Tex. Crim. App. 2011), one could imagine the following syllogism:

> *Major*—An officer must have reasonable suspicion that crime is afoot to stop a motorist.
>
> *Minor*—Defendant was only acting weird in a drive-thru lane.
>
> *Question*—Was there reasonable suspicion?

[37] Garner, THE WINNING BRIEF at 55.
[38] *Id.* at 78.

Although the Court focused on whether there had to be reasonable suspicion of a *particular* crime (ultimately holding there did not), this concept could easily be incorporated into a single-sentence issue. The major premise of what is generally required for reasonable suspicion could be skipped since it is already widely known.

This will not always be the case, though. When your court is not familiar with the controlling law (for little-used statutes or highly specialized areas of law, for example), Garner's model could aid the court. Here's one such recent example in the CCA:

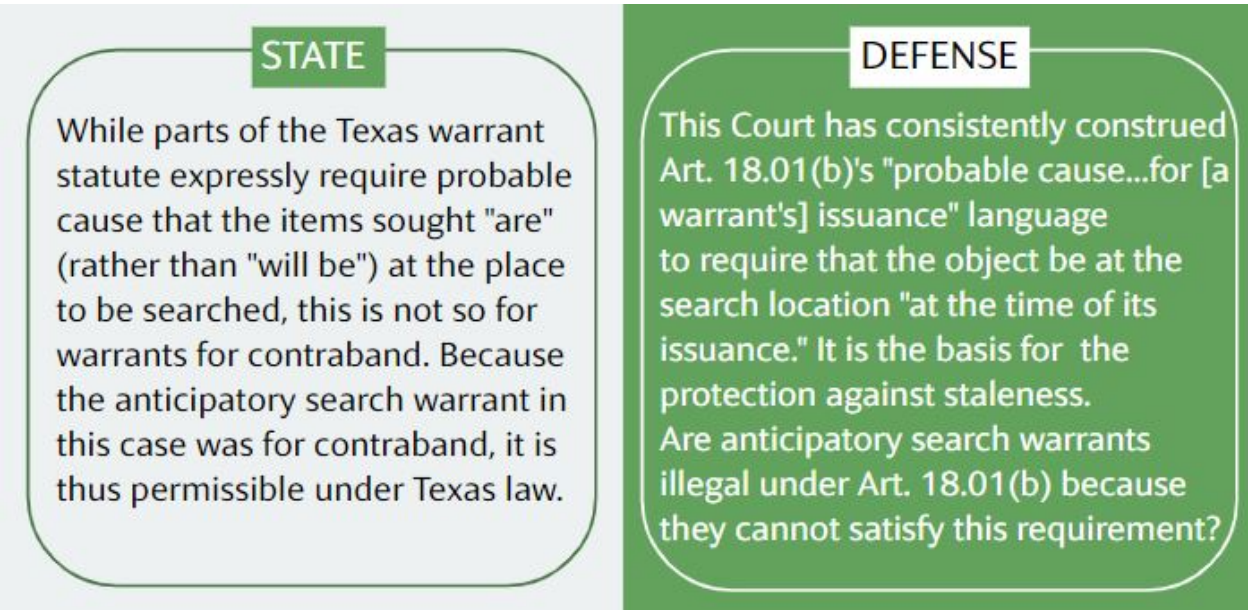
> (from *Brown v. State*, PD-0034-20)
>
> Article 46B.0095 of the Texas Code of Criminal Procedure allows for commitment of an incompetent defendant for the "maximum term provided by law for the offense for which the defendant was to be tried." The maximum term of confinement for a juvenile adjudicated for a first-degree felony offense is forty years if the State obtains grand jury approval for a determinate-sentence. What, then, is "the maximum term provided by law" for determining the length of mental-health commitment for a juvenile who is accused of a crime severe enough to be determinate-sentence eligible but is found unfit to proceed before a grand jury could make a determinate-sentence finding?

Another potentially persuasive use of Garner's model is in arguing against an expansion of a legal doctrine, as in this example by law professor and Supreme Court advocate Jeffrey Fisher in *Hemphill v. New York*, No. 20-637:

> A litigant's argumentation or introduction of evidence at trial is often deemed to "open the door" to the admission of responsive evidence that would otherwise be barred by the rules of evidence.
>
> The question presented is: Whether, or under what circumstances, a criminal defendant who opens the door to responsive evidence also forfeits his right to exclude evidence otherwise barred by the Confrontation Clause.

Note that even here, Fisher provides a single-statement issue for the court, a practice that we support.

At the other extreme are issue statements that never collect in one digestible form what the advocate sees as the controlling law and facts in the case. This is a missed opportunity for advocacy at best, and, at worst, can be a sign of a total lack of framing of the issue. In one case before the CCA, the defense identified a question that has been an unresolved issue in Texas for some time: Are anticipatory search warrants prohibited under Texas law. *Parker v. State*, PD-0388-21. While this is clearly the "issue" in the case in one sense, it does not provide the framework for why the defense should win. It doesn't identify what law should control or when. The Court may find this in the brief, of course, but when the brief writer sets everything out in one short section by building that frame around the issue, she can be much more persuasive and save the Court time, too. Likewise, the State, in response, can frame the issue in a way that favors its position. One might imagine the parties framing the issue in *Parker* as follows:



While putting this information in your issue statement is likely unwieldy for many criminal cases, we still recommend that it appear in condensed form (like an

executive summary) somewhere in your brief—either in an initial opening paragraph or at the top of each issue.

4. Breaking the Mold: Things to Help You Grow

a. Mistakes

Mistakes are universal, and making them is expected. The saying goes, "It's not a matter of if but when." How you handle mistakes makes a difference to your professional growth and credibility.

Let Go of a Bad Argument

A common mistake is to hold on to a flawed argument or strategy. Don't trap yourself in plan-continuation bias where you fail to stop, think of alternatives, and course correct. When something's not working in your favor, learn to let it go, even when you've spent hours or days researching and writing. Set aside your inclination to stay the course or keep material just because of all the time and effort you spent on it. Know that you've benefitted from learning something new, and hope that maybe (just maybe) one day this material will be helpful in another case.

Fess Up and Correct Mistakes

We're all familiar with that gut-sinking feeling when you realize that you've made a material mistake in a document already filed in court. With angst swimming in your mind, you then ponder your options. But there's only one right option: fess up and correct it when possible. It can be difficult to do, but you owe the court candor. TEX. R. PROF. RESPONSIBILITY 3.03(a). And things would be far worse if it went uncorrected and was seized upon by opposing counsel or the court in an opinion. In the end, your credibility is at issue in your current case and future cases.

Learn from Your Analytical Mistakes

You can learn from your analytical mistakes by comparing your argument and the argument that the court ultimately adopted, even when you're the prevailing party. Don't just be satisfied that you won; seriously consider the analysis that you may have missed.

And if your analytical mistake becomes apparent upon reading opposing counsel's brief, dig in and remedy it with a response.

Be Understanding of Others' Mistakes

When you confront another person's mistake, assume it is just that without inferring any malintent. Remember that it's when, not if, and think about how you'd like to be treated had it been your "when" moment. You can respectfully point out a mistake in a neutral manner without engaging in any personal attacks or taking it personally. How you treat others affects your credibility with the court and other practitioners. Have no doubt that unprofessional behavior does not go unnoticed by judges and their staff and will be recalled every time you appear in a future case . . . you just may not be aware of it.

b. Hypotheses and Rabbit Trails

Encourage professional growth by accepting that there's more to discover and consider beyond your initial impressions. Always be curious in developing an argument by taking the rabbit trails you will inevitably find while testing your hypothesis. Press on and exhaust the possibilities through to a resolution. If you've decided to discount an angle, ask yourself if it's something that should be pointed out to the court and opposing counsel. Frequently, another open and curious mind will land on the same question, so it could help explain why you've ruled out a particular rabbit trail and potentially save the court from having to rehash it unnecessarily.

c. Criticism Improves Your Skills and Work-Product

Legal writing and analysis are personal, so it's hard to place yourself in the position to be critiqued intentionally. However, it's necessary to grow and improve. And isn't it much better to get it from a trusted colleague rather than opposing counsel or the court? Seek out a colleague with more experience who is willing to take the time to help sharpen your skills. Finding the right fit for your style may take some trial and error, but an experienced practitioner's critical feedback will be invaluable in the short and long term.

If you are a solo practitioner or the only appellate practitioner in an office, you may need to look outside your office for help. Word of mouth among our small

group of criminal appellate practitioners is probably the best way to identify a person, and don't forget about those who have recently retired but would like to stay somewhat active in the field. If you work among other appellate attorneys, you can try to create reciprocal relationships that can support all of you.

We've all benefitted from knowledgeable mentors along the way, so get past your fear that others will think it's an imposition to help more junior attorneys. Those with experience are often happy to have a chance to pay it forward. And, at the very least, you've broadened your network by interacting with someone with whom you will likely cross paths in the future.

d. Invent Words or Phrases

One trick to help enliven your briefs is to replace repetitive, wordy phrases with a single-word concept. For example, if you find yourself repeatedly typing phrases like "whether the defendant was entitled to an instruction on self-defense and defense of others," create a shorthand for the concept. When I joined the State Prosecuting Attorney's Office, I noticed Stacey Soule and John Messinger doing this—and it's really an advance. They use the word "entitlement," and even as a reader encounters this shorthand for the first time, in context, it is clear what it refers to.

Don't be afraid to coin a phrase for a doctrine if there isn't already one in use or if a traditional name has been criticized. *See* State's Brief, *Cook v. State*, No. PD-0850-21 (suggesting "remedial cumulative evidence doctrine" to replace wide-ranging "curative admissibility"). Names like the "*Barker* factors" started with someone seizing on a convenient shorthand and others catching on.[39] There's no reason why you can't be the one to name the next doctrine or test.

e. Freedom from Citations

The appellate practitioner is trained to have a citation to back up every proposition. But that isn't always possible, and it's our job to shepherd the formation and advancement of the law. Move past feeling uncomfortable, and

[39] "How a Word Gets Into the Dictionary," Merriam-Webster ("A word gets into a dictionary when it is used by many people who all agree that it means the same thing.").

don't unduly restrict yourself from making an argument just because you don't have a case on point. In some instances, particularly when urging something new, your argument will rely on common sense. Just say it. The caveat is that it's important to show the logic underpinning your work. Take the reader through your thought process step-by-step.

Occasionally, an issue has no precedent and truly is one of first impression. This is a wonderful opportunity to exert your ability to make a logical argument that can be applied in future cases. A recent example of this is *McCurley v. State*, No. 02-21-00122-CR. McCurley involves the use of novel genealogical DNA evidence generated by a lab not accredited by the Texas Forensic Commission. The crux is how accreditation impacts the admissibility of a novel type of DNA evidence that is so new no accreditation is available and temporary accreditation is not required. This case being the first of its kind exemplifies pure lawyering at its best.

In *Ortiz v. State*, PD-1061-19, the State presented a novel twist on occlusion assault that challenged well-established law:

SUMMARY OF THE ARGUMENT

The courts of appeals that have held that assault by occlusion includes a lesser, non-occlusion assault all give the same reason: simple assault is established by proof of less than all the facts required to establish assault by occlusion.[34] This assumes that every enhanced assault is merely a generic assault with extra elements tacked on. This case shows why that is wrong.

The facial question in this case is whether any other injury caused to an alleged victim is a lesser-included offense of assault by occlusion. The real question presented is whether the State or defense can make the trial about a different injury than that charged. As a matter of both charging discretion and variance law, the parties are bound by statutory allegations that specify the injury in an assault case.

And, in doing so in *Ortiz*, the State fleshed out its thought process:

The indictment did not allege an injury other than occlusion. The State chose statutory language that defines the gravamen and unit of prosecution because it defines the injury in an assault case. It does not matter that assault is not a classic "Chinese menu" offense like theft[80] or even that there are no other specific injuries listed in the statute. Under *Johnson*, the allegation is material. It cannot be avoided by either party.

The injury is also factually distinct as a matter of prosecutorial discretion. Impeded breath or circulation is distinct even from other injuries to the neck or throat. It is farther removed from any injury to the knee, arms, head, or anywhere else the victim and appellant agree he caused injury. As *Johnson* explains, each injury gives rise to a different assault, at least in a case like this in which each injury is accompanied by a separate act.

Because the State specified an injury, appellant was not entitled to a "lesser" instruction on a different one. This rule, which applies when the defendant admits to an offense that could be included within the plain language of the charge, applies with more force when a defendant knowingly asks for an instruction on a different bodily injury than alleged in an assault case. What appellant wanted was a "lesser" offense only in the sense that he would face a lesser punishment.

Be careful not to displace research, however. When you can, find an analogous proposition to draw upon. The most common practice is to use a *Cf.* cite to an authority with an obviously related principle.

> The neighbors' success in containing and extinguishing some of the vegetation fire does not erase the real danger they faced. *Cf. Brown v. State*, 605 S.W.2d 572, 575 (Tex. Crim. App. 1980) (when assessing sufficiency of the evidence supporting serious bodily injury, "[t]he relevant issue was the disfiguring and impairing quality of the bodily injury as it was inflicted, not after the effects had been ameliorated or exacerbated by other actions such as medical treatment.'"), *reaffirmed in Blea v. State*, 483 S.W.3d 29, 33-35 (Tex. Crim. App. 2016). Sims testified that fire is a

> Evidence of Appellee's BAC would have walked away with Appellee. *Cf. Bailey v. U.S.*, 568 U.S. 186, 198 (2013) ("Allowing officers to secure the scene by detaining those present also prevents the search from being impeded by occupants leaving with the evidence being sought or the means to find it."). His person, and

But sometimes it's necessary to apply a more advanced rule to uncharted territory. Take, for example, the rule that inchoate offenses in Title 4 of the Penal Code cannot be exported to non-Penal Code offenses and the converse consequence that non-Penal Code offenses cannot be imported into Titles 4 through 11. *State v. Colyandro*, 233 S.W.3d 870, 876, 884 (Tex. Crim. App. 2007). In *Chase v. State*, PD-1768-13, the State argued for an extension of that rule to non-Penal Code defenses to preclude the import of extra-Penal Code defenses to Penal Code offenses. Though the State lost this case,[40] it demonstrates how larger system-based legal principles can be used to further an analogous but novel point.

f. Think in Terms of Systems and Consequences

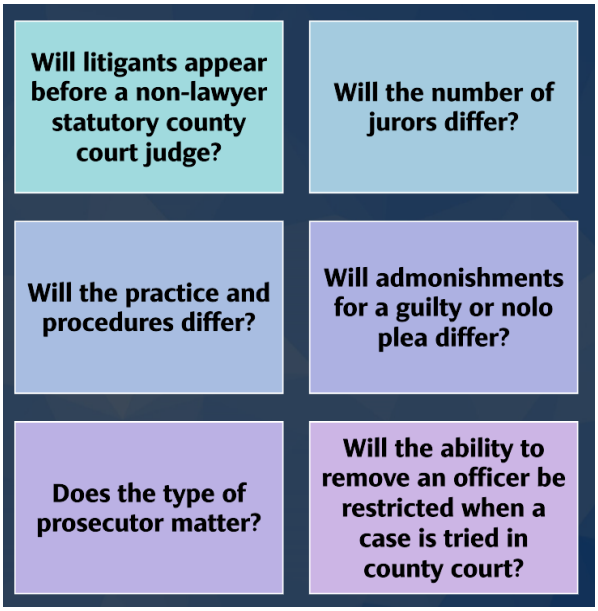
Recognize that your arguments will likely impact other areas of the law and vice versa. You should always ask yourself what other areas of law will be affected or

[40] *Chase v. State*, 448 S.W.3d 6, 13-15 (Tex. Crim. App. 2014) ("We reject the State's contention that § 1.03(b) bars the application of a non-Penal-Code defense to a Penal Code offense.").

what areas of law need to be considered in making your argument. Playing out issues to see how they fit within the legal system and their consequences generally require a broad understanding of Texas criminal law that comes with many years of experience. But even as a new attorney, you need to be aware of related issues you inevitably don't know and do your best to identify them. Be patient and humble and expect that it will take time and effort to develop these skills. Again, seek out a trusted colleague and ask for help when you need it.

Systems

For example, consider the following issue from *Roland v. State*, PD-0035-21: Do county courts have jurisdiction concurrent with district courts over official misconduct cases? This issue raised several ancillary questions related to a change in jurisdiction, should the Court find concurrent jurisdiction, that needed to be addressed for the Court in deciding the issue:



Consequences

Likewise, you may need to explain to the court how your argument will apply to a statutory scheme beyond your case. In *Prichard v. State*, PD-0712-16, the State proposed that the Court construe cruelty to non-livestock animal offenses to authorize a deadly weapon finding. The State's argument, if accepted, would have impacted future cases beyond the statutory subsection charged. Therefore, in graph format, the State laid out when a deadly weapon finding would apply to the various statutory subsections:

A person commits an offense if the person intentionally, knowingly, or recklessly:			
Subsection	**Prohibition**	**Starting Offense Level**	**42.092(c) Max Offense Level**
(b)(1)	*tortures an animal* or in a cruel manner kills or causes serious bodily injury to an animal;	State Jail Felony	Felony 3
(b)(2)	without the owner's effective consent, kills, *administers poison* to, or causes serious bodily injury to an animal;	State Jail Felony	Felony 3
(b)(3)	*fails unreasonably to provide necessary food, water, care, or shelter for an animal in the person's custody*;	Class A	State Jail Felony
(b)(4)	*abandons unreasonably an animal in the person's custody*;	Class A	State Jail Felony
(b)(5)	*transports or confines an animal in a cruel manner*;	Class A	State Jail Felony
(b)(6)	*without the owner's effective consent, causes bodily injury to an animal*;	Class A	State Jail Felony
(b)(7)	*causes one animal to fight with another animal, if either animal is not a dog*;	State Jail Felony	Felony 3
(b)(8)	*uses a live animal as a lure in dog race training or in dog coursing on a racetrack*; or	State Jail Felony	Felony 3
(b)(9)	*seriously overworks an animal.*	Class A	State Jail Felony

Systems and consequences can intersect. In *Bowen v. State*, the CCA broke new ground and authorized reformation to the base offense when the evidence supporting the aggravating element was insufficient. 374 S.W.3d 427 (Tex. Crim. App. 2012). That led to *Thornton v. State*, where the CCA reformed to the lesser offense of attempt. 425 S.W.3d 289 (Tex. Crim. App. 2014). *Bowen* and *Thornton* paved the way for *Walker v. State*, which applied reformation to a lesser when there was a conviction for a legally non-existent greater offense. 594 S.W.3d 330 (Tex. Crim. App. 2020). Along the way, other legal issues have spawned from *Bowen*'s reformation rule. Now there is a new area in which practitioners must consider what constitutes a lesser,[41] material variances,[42] whether an

[41] *See, e.g.*, *Lang v. State*, PD-1124-19 (Is theft a lesser of organized retail theft?).
[42] *See, e.g., Hernandez v. State*, 556 S.W.3d 308 (Tex. Crim. App. 2017) (reform to assault from aggravated assault.).

enhancement is a guilt or punishment issue,[43] and double jeopardy and unit of prosecution.[44]

Bad Facts Can Make Bad Law: A Consideration for Prosecutors

Another area where consequences are important to predict is in a case that presents some type of extraordinary bad fact. This typically happens in a State's case in which the State wants to win because the facts surrounding the crime were egregious or the conviction is questionable in hindsight or may raise serious ethical concerns.[45] In the former, the State may feel compelled to present an argument that would harm the State's long-term interests if applied in the future. In the latter situation, the State may want to confess error without realizing the case's status as future precedent. Prosecutors must think of how the rule of law they ask for will be applied in the court of appeals district or statewide. Undoubtedly, prosecutors are duty-bound to see that justice is done, TEX. CODE CRIM. PROC. art. 2.01, but if, in the long run, a position could potentially harm the State (on a macro scale due to Texas' decentralized prosecution model), a prosecutor should consider how to confine it without overtly betraying the rule of law.

g. Overcoming Bad Precedent

It's not unusual for a party's position to be controlled by negative precedent. Though the court of appeals may be bound by precedent, that doesn't mean it has to be the end of the matter. All is not lost. Set your case up for review by the CCA by providing the lower court with the argument you would want them to adopt if they could. This gives the lower court an opportunity to urge the CCA to grant review to revisit an issue and overrule precedent.[46] Additionally, it can garner a

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[43] *See, e.g., Do v. State*, PD-0556-20: (asking whether the 15. DWI enhancement is a guilt or punishment issue but the opinion left it unresolved).

[44] *See, e.g., Ortiz v. State*, S.W.3d 804 (Tex. Crim. App. 2021) (simple assault is not a lesser of occlusion assault).

[45] Because defense attorneys are duty-bound to their client's interests, they don't typically confront these types of dilemmas.

[46] *See, e.g., Colyandro*, 233 S.W.3d at 873 ("But the court did suggest that we revisit *Baker*, stating that "*Baker* appears to be based on questionable reasoning and is arguably in conflict with the history of the criminal conspiracy offense in Texas as well as the growing legislative trend to propagate felony offenses

concurring or dissenting opinion by a justice that does the same. Having a lower-court or a lower-court justice on your side when petitioning for review can help get your case granted and case law overturned.

h. Legal It Up

Thinking of new approaches to issues isn't always straightforward. You will need to push yourself beyond reflexively accepting the status quo. There are a few avenues you can take to help formulate a viable legal question:

- Consider whether the standard of review is appropriate.[47]
- Consider who should bear the burden of production or persuasion.[48]
- Revisit a proposition's point of origin to determine whether it has been improperly applied or expanded beyond its original justification.[49]

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throughout the various statutory codes."); *Watkins v. State*, 554 S.W.3d 819, 821 (Tex. App.—Waco 2018), *rev'd and remanded*, 619 S.W.3d 265 (Tex. Crim. App. 2021) ("applying well-established precedent from the Court of Criminal Appeals, by which this Court is bound, we are constrained to hold that the definition or standard we must use to determine whether the objectionable evidence was material is the same after the passage of the Michael Morton Act as it was before passage, regardless of what the Legislature may have thought or intended to accomplish.").

[47] *See, e.g., Matlock v. State*, 392 S.W.3d 662, 667 (Tex. Crim. App. 2013) ("The State petitioned this Court, arguing that the court of appeals erred by applying a factual-sufficiency standard of review in deciding whether the evidence was legally sufficient to satisfy appellant's burden to prove his affirmative defense.").

[48] *See, e.g.*, State's Brief *White v. State*, PD-0442-17 ("Whether the proponent of evidence at trial has the burden of showing statutory compliance in response to an objection under Article 38.23 (the Texas exclusionary rule.").

[49] *See, e.g, Ash v. State*, 533 S.W.3d 878, 883 (Tex. Crim. App. 2017) ("The State argues that we have alternately stated that a witness is an accomplice as a matter of law if he could have been charged with the same offense as the defendant, a lesser-included of that offense, or when the evidence clearly shows that the witness could have been so charged. We agree, and we take this opportunity to clarify any confusion.").

- Ask whether the principle has been undermined by more recent law.[50]

Considering these points implores you to question the law and its current application.

5. Breaking the Mold: Things to Remember

It's important to challenge your assumptions and question everything, even if it's to guide you back to basic matters. Too frequently, appellate practitioners get bogged down in a merits issue or distracted by a trending topic. There are a few issues that are always worth vetting:

- Preservation. Don't forget that some issues require specificity to preserve for appellate review, especially those that can be raised as pretrial suppression issues.
- Category of Right at Issue. It may seem like all the rights and prohibitions have been neatly categorized as systemic, waivable, or forfeitable under *Marin v. State*. 851 S.W.2d 275 (Tex. Crim. App. 1993). But far from it.
- Estoppel. Even when preservation does not apply, estoppel may still be a bar to review. *Prystash v. State*, 3 S.W.3d 52 (Tex. Crim. App. 1999).

6. Oral Argument

There are two points about oral argument that are worth pointing out after viewing years of CCA arguments. First, don't split argument with another attorney. While issues can be cabined, a court's discussion will not be separated. Judges and Justices want to talk about a problem on their time and their prompting. Splitting argument prevents this. Relatedly, be able to pivot among topics; don't rebuff a question because, in your mind, you haven't switched to that topic yet. Argument is for the court, and you are there to assist it and not be a roadblock to helpful discourse.

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[50] *See, e.g., Miller v. State*, 457 S.W.3d 919, 927 (Tex. Crim. App. 2015) (adopting closely related crimes exception to the corpus delicti rule); *Shumway v. State*, _SW.3d_, PD-0108/09-20, 2022 WL 301737, at *8-9 (Tex. Crim. App. 2022) (adopting incapable of outcry exception to the corpus delicti rule).

7. Conclusion

Have faith in yourself. It's easy to undermine your worth by comparing yourself to other successful practitioners or those who held a position before you. But you need to trust your voice and instincts and be open to learning and boosting your appellate advocacy.