# Criminal Case Highlights

## from the US SCt and Court of Criminal Appeals (CCA)

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**produced for**

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**By Emily Johnson-Liu, State Prosecuting Attorney's Office**

**& Britt Lindsey, Taylor County District Attorney's Office**

# 1. Fourth Amendment

## 1.1 Investigative Detention

- *Monjaras v. State,* 664 S.W.3d 921 (Tex. Crim. App. 2022) (5[Walker] -4 dissenting without opinion)[1]

**Officers' close proximity to suspect, instructions to show his hands, and placing hands on his back transformed encounter into a detention.**

Two officers asked Monjaras for consent to search while standing within arm's length of him during a consensual encounter. Monjaras began to empty his pockets. As the body-cam recording showed, Officer Sallee said, "Hold on, hold on, hold on. May I search you?" and put his hand on Monjaras's arm. Monjaras, however, continued to empty his pockets. Sallee clarified it was a question and put his hand around Monjaras's elbow. Monjaras kept removing items from his pocket, saying, "But I know... you said you wanted to search me." Sallee put his hand on Monjaras's lower back, saying, "No, no, no, you're not understanding what I'm saying." With Sallee's hand still on Monjaras's back, Officer Stark moved very close to Monjaras with his hands out and palms down, saying "manos, manos," and gesturing for Monjaras to copy him. More insistently, Sallee repeated, "May I search you? May I go into your pockets and

[1] The numbers in the vote breakdown indicate how many judges (including the author) joined each opinion. The first number represents the number of judges in the majority, the "+" precedes the number joining a concurrence, the "-" precedes the number joining a dissent, and the "±" indicates a concurring and dissenting opinion. The authoring judge of each is noted in brackets. Thus "(5 [McClure] -4 [Keel] ±1 [Yeary])" indicates 5 judges joined Judge McClure's majority opinion, 4 judges joined Judge Keel's dissent, and Judge Yeary filed an opinion concurring and dissenting. Judges who concur or dissent without opinion are noted thereafter.

search you?" Monjaras paused and responded, "Yeah." The officers ultimately discovered bullets and a gun in a backpack and his waistband and arrested Monjaras.

Monjaras filed a motion to suppress alleging he'd been subjected to an investigative detention without reasonable suspicion. At the suppression hearing, the officers testified that Monjaras had been free to leave, asserting their interaction with Monjaras preceding the search was consensual. The trial court denied Monjaras's motion to suppress but did not enter findings.

Monjaras challenged the ruling on appeal. The court of appeals (COA) panel was divided on the question, but the majority sided with the State that the encounter was consensual. Monjaras filed PDR.

In a 5-judge majority decision, the CCA agreed with the dissenting COA judge that what began as a consensual encounter (when only one officer spoke to Monjaras in a public place, asked for identification, and posed basic questions) escalated into an investigative detention. It held that the COA majority (1) failed to consider the interaction in its entirety by focusing primarily on Sallee's initial contact and (2) considered the officers' subjective intent rather than viewing the circumstances from the perspective of an objectively reasonable person. "[W]hen Officer Starks moved closer to [Monjaras] with his hands extended and said, 'manos, manos,' while Officer Sallee had his hand on [Monjaras's] body, a reasonable person in [Monjaras's] shoes would no longer feel free to disregard the officers' requests." They conveyed that Monjaras had to stop what he was doing and keep his hands where they could see him, which a reasonable person would take as an order requiring compliance. And it was only after this that he acquiesced to the search. The officers' subjective intent that they were trying to help him understand what they were attempting to do is not determinative; nor is the fact that it was mid-day, the officers' tone was mundane, and neither officer pulled out his weapon. The physical touching provided context to the officers' statements and transformed what might have been only a request in another context into an order.

Four judges dissented without opinion.

## 1.2 Probable Cause

- *State v. Espinosa,* 666 S.W.3d 659 (Tex. Crim. App. 2023) (9-0[Hervey])

  **Defendant found smelling of alcohol and asleep in running car in bumper-to-bumper school pick-up line constituted probable cause for DWI.**

Two cousins driving by a pick-up line at an elementary school noticed that the driver of the car fifth in line had her head hanging at an odd angle and became concerned she was having a medical emergency. The two pulled over and attempted to open the door to the car, but the doors were locked and windows up, although the car was running and in park. The cousins began pounding on the windows and another driver in line called 911. The driver, Espinosa, eventually awoke and opened her door; one of the cousins, Ashley later testified that Espinosa

"smelled like a bar." Espinosa was initially unresponsive, then spoke after a few minutes but was difficult to understand. She got out of the car and asked Ashley to drive her home. According to Ashley, Espinosa "couldn't walk a straight line." A Houston police officer arrived and observed that Espinosa had slurred speech, was disoriented, was confused about where she lived, was coming from and where she was headed (it was either to work or from home to get her son), was unsteady on her feet, had "glossy" red eyes, and had a strong odor of alcohol emanating from her person. Espinosa refused SFSTs and a blood test, and was arrested without a warrant for DWI. Four empty wine bottles were later found in a search of her car.

Espinosa filed a pretrial motion to suppress, claiming her warrantless arrest was unsupported by probable cause because neither the arresting officer nor any witness saw her drive or operate her vehicle. At the hearing, the arresting officer admitted this was true and that nobody knew how long she had been waiting in the pick-up line, agreeing that she might have arrived at 10 am or even the night before for all he knew (adding that he did not find that likely). The trial court granted the suppression, finding there was "insufficient probable cause to arrest the Defendant based on the State's failure to establish the Defendant 'operated' a motor vehicle. The Fourteenth Court of Appeals upheld the trial court's ruling in a 2-1 opinion, saying that the circumstantial evidence was insufficient to establish a temporal link between Espinosa's intoxication and her driving.

The CCA reversed. Writing for a unanimous court, Judge Hervey disagreed with Espinosa that her statements about coming from work or home to get her son could not be considered admissions that she had recently operated her vehicle. Although the arresting officer had agreed that it was possible that Espinosa had arrived long before she was seen, Judge Hervey noted that the video admitted into evidence didn't support that, and that Espinosa "never indicated that she arrived in her vehicle hours or even a day before she was approached." Rather, her vehicle was fourth or fifth in a line of cars that had begun to form about 15 to 30 minutes before she was found. Judge Hervey also notes that "If Appellee's version of events were true, it could mean that the first three or four drivers to arrive after Appellee saw her sitting in the driver's seat of her vehicle and nonetheless drove past her and reversed until they were ahead of her in the bumper-to-bumper line of traffic," which stretches credulity. As Judge Hervey put it, "we do not look to possible innocent explanations when determining whether probable cause existed to make a warrantless arrest."

## 1.3 Exigent Circumstances

- *Igboji v. State,* 666 S.W.3d 607 (Tex. Crim. App. 2023) (6[Newell]-3[Yeary])

**Affirmative conduct by the suspect is not required for exigent circumstances.**

A fast-food restaurant Igboji worked at was robbed shortly after closing for the night by two armed men who came in through an unlocked back door; Igboji and two coworkers were forced into the freezer while the men emptied the cash register. Officers learned from

employees that Igboji had left the back door unlocked when he took the trash out and that he posted the initial police response to Snapchat. The manager said Igboji had offered to take the trash out, which was suspicious because he usually avoided work, and that taking the trash out the back door was against the restaurant's policy.

A detective spoke with Igboji three days after the robbery and asked to see the videos from Snapchat. Igboji explained that Snapchat automatically deletes videos after 24 hours and that he did not have any other videos relevant to the investigation, which the detective did not believe. The detective asked Igboji for consent to search the phone, and Igboji refused. The detective seized the phone and applied for a search warrant, which was granted. A search of the phone revealed text messages that implicated Igboji in the robbery. The trial court denied Igboji's motion to suppress, and he was found guilty.

Igboji appealed the warrantless seizure, and the Fourteenth Court of Appeals reversed. The COA held that there are two relevant routes to proving exigent circumstances: a showing that evidence will naturally dissipate (not applicable here), and evidence that may be destroyed via "affirmative conduct." The court relied on the CCA opinion in *Turrubiate v. State*, 399 S.W.3d 147 (Tex. Crim. App. 2013), in which the Court held that there must be "proof of imminent destruction based on affirmative conduct" that was not satisfied by a simple showing that a suspect knew that police were present.

The CCA reversed and remanded, holding that "the critical thing the record must show is facts suggesting an imminent destruction of evidence, not necessarily affirmative conduct on the part of the criminal suspect." The Court acknowledged that affirmative conduct that the suspect is destroying evidence or will do so soon (for example, furtive movements) is one way of showing the imminent destruction of evidence, but it is not the only way. The Court held that the COA should have analyzed the totality of the circumstances whether the seizure was reasonably necessary to maintain the status quo until a search warrant was obtained, and remanded the case to reconsider under that standard. Judge Yeary dissented, joined by Judges Keller and Keel, arguing that remand was unnecessary and that the Court should simply acknowledge that the seizure of the phone was reasonable under the Fourth Amendment, reverse the COA's judgment, and affirm the judgment of the trial court.

## 1.4 Exclusionary Rule

- *Massey v. State,* 667 S.W.3d 784 (Tex. Crim. App. 2023) (4[Yeary] +4 [Newell] 2 dissenting without opinion) (plurality) (defendant's resisting illegal search was intervening circumstance that attenuated the taint of the initial illegality and permitted state to use evidence of a still new offense—possession of drugs found in plain view thereafter)

## 1.5 Warrants

- *Parker v. State,* 663 S.W.3d 766 (Tex. Crim. App. 2022) (8[McClure] +1 [Yeary]) (Art. 18.01(b) permits anticipatory search warrants)

An anticipatory search warrant is "a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place." They are generally subject to some "triggering condition" other than the mere passage of time. Police obtained such a warrant against Parker, anticipating a commercial parcel containing psilocybin to be delivered to his house at a certain date and time. Parker argued that anticipatory warrants are illegal under Texas law because Tex. Code Crim Proc. Article 18.01 requires the State to present sufficient facts to the magistrate that "probable cause does in fact exist" for issuance. He argued that probable cause does not exist at the time of an anticipatory warrant. The trial court denied his motion to suppress, and the COA affirmed that denial.

Parker petitioned the CCA, and the Court affirmed the COA. Writing for the court, Judge McClure distinguished between present possession and present probable cause; a plain reading reveals that Article 18.01 does not require the former, and police here had the latter. Judge McClure noted that the Supreme Court had held that in a sense all warrants are anticipatory, because they involve a prediction that evidence will still be there when the warrant is executed. Unlike Article 18.01(c)(3), which concerns "mere evidentiary" warrants, nothing in Article 18.01 requires that the evidence be at the location to be searched at the time the affidavit is submitted, only that facts supporting probable cause exist. Judge Yeary concurred, writing that the court's construction of Article 18.01(c) as prohibiting anticipatory search warrants was questionable and unnecessary.

## 1.6 Standing

- *King v. State,* 670 S.W.3d 653 (Tex. Crim. App. Jun. 28, 2023) (8[McClure]-1[Walker])

> **Employee failed to prove at the time of the seizure that he had standing to contest a search or seizure from his work vehicle days after his arrest and after vehicle had been returned to the employer.**

King was a long-haul truck driver who assaulted a twelve-year-old girl on her way to school in Fort Worth. His truck was owned by his employer, but King lived out of it while on the road. He was arrested in Oklahoma, and his truck was searched pursuant to a warrant. During the search his cellphone was found and detectives intended to seize it, but it was inadvertently left in the truck. When the error was realized, Fort Worth police contacted the truck's owner and asked him to retrieve the phone; he did so, and a warrant for the cellphone was issued and executed,

revealing child pornography. The State sought to admit the child pornography evidence during King's punishment hearing, and King moved to suppress, arguing that the search warrant had expired by the time the cellphone was seized. The State agreed that the warrant had expired but argued that King had no standing to challenge the seizure because he had no expectation of privacy in the truck he did not own. The COA reversed, holding that King's expectation of privacy in the truck had not ended when the phone was seized.

The CCA reversed the COA and affirmed the trial court's suppression. The Court noted that the defendant bears the burden of establishing a reasonable expectation of privacy at the time of the seizure, and that the COA wrongly analyzed King's privacy expectations at the time of his arrest. Also, King did not establish his employment status, whether King's keys or other personal property remained in the truck, whether he had the right to exclude others from the trailer, or whether the truck was still being put to private use by King. The date that the seizure occurred was likewise unknown, as the truck's owner was not called to testify. Judge Walker dissented, explaining that there was no evidence that at the time of the seizure that King had lost the expectation of privacy in his truck (which he previously lived out of) other than the fact that the truck was in his employer's possession due to his arrest.

## 1.7 Findings of Fact

- *Haskell v. State,* 664 S.W.3d 152 (Tex. Crim. App. 2022) (per curiam) (party forfeited right to findings of fact on suppression ruling where he waits more than a year—and after the judge had left the bench—to complain of their absence)

# 2. Confessions

- *State v. Torres*, 666 S.W.3d 735 (Tex. Crim. App. 2023) (8[Yeary]+2[Keller] +1[Newell)

**Family Code § 51.095(f) requires exclusion of juvenile's statement where magistrate invokes procedure to make a voluntariness determination even if officers do not complete that procedure.**

Torres (who was 16) agreed to speak with police about a missing 17-year-old. Police took him to a magistrate for his statutory warnings. The magistrate checked off each warning on a form and selected an optional directive that, pursuant to Family Code § 51.095(f), asked officers to return Torres and a copy of the recorded interview to the magistrate so the magistrate could determine whether it was given voluntarily. Torres initially refused to speak with the officers but after a few hours changed his mind. Officers brought Torres before the magistrate again, who repeated the same admonishments using a fresh form and again selected the § 51.095(f) option. This time Torres spoke with officers and made incriminating statements. Although the

magistrate waited around to meet with Torres, the officers never returned him, and thus no voluntariness finding was made either way.

Torres was certified to stand trial as an adult. Before his trial in district court, Torres moved to suppress his statement for violating § 51.095(f) because the magistrate never determined that his statements were voluntary. That section provides:

> A magistrate ...may...request...that the officer return the child and the recording to the magistrate at the conclusion of ...questioning. The magistrate may then view the recording with the child or have the child view the recording to enable the magistrate to determine whether the child's statements were given voluntarily. The magistrate's determination of voluntariness shall be reduced to writing and signed and dated by the magistrate. **If a magistrate uses the procedure** described by this subsection, a child's statement is not admissible unless the magistrate determines that the statement was given voluntarily.

Tex. Family Code § 51.095(f). Finding the statute had been violated, the trial court suppressed Torres's statement to police. The State appealed.

The COA affirmed. It held that once a magistrate decides to follow the procedure, the statute explicitly makes admissibility conditional on the magistrate's finding of voluntariness.

The State filed PDR. It contested that the Legislature would have permitted suppression of statements that had never been determined to be involuntary. Contrary to the COA's interpretation of the statute, it contended that to "use" the procedure, all the procedure must be followed (particularly the determination of voluntariness), not just the first step in a multi-step process. The CCA disagreed. The majority opinion highlighted that the statute makes it the magistrate's role to "use" the procedure and the sole entity who can invoke subsection (f). Conversely, the officer is simply directed to return the child and recording in compliance with the magistrate's request. Here, it was plain that the magistrate intended to view the recording—he twice chose option (f), asking officers to return Torres to him. "It would be inconsistent with the clear import of Section 51.095(f) to construe it in a way that allows the failure of law enforcement to comply with the magistrate's request to mean that the magistrate did not use the procedure." It rejected the State's interpretation because it would permit a concerned magistrate's request to be frustrated by the State and its agents—"the very parties from whom Subsection(f) seeks to protect the juvenile in the first place."

Presiding Judge Keller (joined by Judge Hervey) concurred. She would have held the statute ambiguous or the State's interpretation absurd, which would permit consideration of extratextual factors like the consequences of a particular construction. But she noted that these consequences come from the statute's text instead of legislative history.

Judge Newell separately concurred. He did not believe the Court adequately addressed the State's arguments. For him, the statute was "obviously designed to exclude a juvenile's involuntary statement after a magistrate determines that the statement was involuntary,"

although he acknowledged that the statute is broader than necessary to accomplish that goal. Nonetheless, officers violated (f) by not returning Torres to the magistrate. Since the exclusionary sanction in (f) was not applicable, the more general exclusionary provision in Art. 38.23 applied, thus providing a different reason to uphold the suppression ruling.

- *Sandoval v. State*, 665 S.W.3d 496 (Tex. Crim. App. 2022) (5[Keller]+4concurring without opinion)

> **Police could reasonably understand a defendant's statement that he did not want to continue talking "right now" as a request for a sleep break, given his earlier statements about wanting sleep.**

Sandoval was convicted of capital murder for attempting to rob a family who was out fishing and killing one of the family members. He was sentenced to death, and appeal to the CCA was automatic.

As far as confession law, the CCA held that Sandoval's statement during a police interview that he wanted to sleep was not an unambiguous invocation of his right to terminate the interview and that his statement that he "did not want to continue talking anymore right now" did not render his entire second interview inadmissible. It was preceded by *Miranda* warnings which Sandoval said were unnecessary and was held two hours later (after Sandoval had an opportunity to sleep). Further, his request not to talk anymore during the first interview was reasonably understood as merely a request for a pause and was harmless anyhow. It rejected other challenges to his statements based on the trial court's disbelief of his testimony that he had been assaulted and coerced and that "some lack of sleep was inevitable given that [Sandoval] appears to have fled until law enforcement caught up with him at 2:00 in the morning."

## 3. Confrontation

- *Samia v. United States*, 143 S. Ct. 2004, No. 22-196 (June 23, 2023) (5 [Thomas]+1[Barrett] - 1[Kagan] -1[Jackson])

> **Admitting a non-testifying co-defendant's redacted confession doesn't violate Confrontation (when a proper limiting instruction is given) when the redactions don't directly implicate the defendant—even if jurors could infer the implication from other trial evidence.**

Samia and Stillwell were hired to pose as real-estate buyers to kill a real estate agent. They were tried in a joint trial with the man who had hired them. Stillwell had given a statement to police that he had been in the van in which the victim was killed but that Samia had shot her. Since his statement was not admissible against Samia and Samia could not confront Stillwell since he wasn't testifying, a DEA agent relayed the content of Stillwell's statement without

explicitly referencing Samia and avoiding any obvious indications of redaction. More specifically, he told the jury Stillwell had described "a time when *the other person he was with* pulled the trigger on that woman in a van that . . . Mr. Stillwell was driving." He also used "other person" to refer to someone he lived and travelled with and who carried a particular firearm. The trial court instructed the jury multiple times that it could only consider Stillwell's statement against Stillwell, not Samia.

Following his conviction, Samia argued that admission of the statement violated his right to Confrontation because other evidence at trial (including testimony that Stillwell and Samia lived and traveled together) enabled the jury to immediately infer Samia was "the other person." The Government's opening statements included that Stillwell drove the van while Samia was in the passenger seat and shot the victim. The COA rejected the claim, and Samia petitioned for certiorari.

The US Supreme Court affirmed, declining the defense invitation to expand the rule in *Bruton v. United States*, 391 U.S. 123 (1968). Giving a limiting instruction not to consider a co-defendant's statement as to the defendant usually means that the co-defendant is not "a witness against" the defendant for Confrontation purposes. Jurors are presumed to follow those instructions. But *Bruton* created an exception where the co-defendant's admitted statement directly implicates the defendant by naming him. In that situation, *Bruton* held, "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Richardson v. Marsh* suggested that redaction can avoid a *Bruton* error if the redacted statement itself does not implicate the defendant—even if other trial evidence might create the implication—because the limiting instruction may well dissuade the jury from "entering onto the path of inference." 481 U.S. 200, 211 (1987). But a redaction violates *Bruton* when—from the face of the statement and without considering any other evidence—an obvious blank space or the word "[deleted]" refers directly to the defendant. *Gray v. Maryland*, 523 U.S. 185, 194 (1998). That circumstance invites speculation as to who the omitted individual might be and "so closely resembled *Bruton*'s unredacted statements" that the result had to be the same. The difference between *Richardson* and *Gray* is whether the statement on its face creates the direct implication. As a result, it is not enough to "flyspeck trial transcripts in search of evidence that could give rise to a collateral inference that the defendant had been named in an altered confession."

Here, the statement did not name Samia directly and was not so obviously redacted as to directly implicate him. Even though other evidence suggested Samia and Stillwell travelled and then lived together before the victim was killed, the redacted statement does not directly implicate Samia. The reference to another person could not have been removed entirely because it would suggest Stillwell was the shooter and be impermissibly prejudicial to Stillwell's case. Requiring the prosecutor to forgo the statement or a joint trial is too high a price to pay and the Confrontation Clause compels neither.

- *Allison v. State*, 666 S.W.3d 750 (Tex. Crim. App. 2023) (5 [McClure]+1[Yeary] 2 concurring and 1 dissenting without opinion)

**Expert could testify as to meaning of slang phrase he learned from others during trial without violating Confrontation Clause.**

Jose Jimenez was shot in the head by one of four individuals who robbed him in a home invasion, suffering permanent brain damage and vision loss but surviving. He was unable to identify Allison (the defendant) in a photospread lineup but identified two other individuals involved, Sean Owens-Toombs and Trekeymian Allison (T.K.). Four arrest warrants were issued and three defendants were arrested; Allison was not immediately apprehended. While T.K. was in jail, he and Allison had a phone conversation, during which T.K. repeatedly told Allison he needed him to "pull a Carlos." The day after the phone conversation four masked men surrounded the house where the home invasion occurred and one fired a gun through the bedroom window. No charges were filed for that incident but prosecutors used it to show that Allison had engaged in witness intimidation.

At Allison's trial, a detective testified as to his training and experience and related that he was asked to research the meaning of "pull a Carlos." He testified that he contacted a confidential informant and consulted with other law enforcement officers, and had formed an expert opinion that "pull a Carlos" meant to do a shooting. Allison objected on Confrontation Clause grounds and was overruled. The COA held that this was error and reversed, holding that "allowing a witness to simply parrot . . . out-of-court testimonial statements directly to the jury in the guise of expert opinion would provide an end run around *Crawford*, and this we are loath to do."

The CCA reversed the COA and affirmed the trial court. Writing for the majority, Judge McClure held that that admission of the detective's expert opinion violated neither the Rules of Evidence nor Confrontation. He reiterated that under Rule of Evidence 703, "If experts in [the witness's] field would reasonably rely on ...facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted." Also, because the detective's testimony was specialized knowledge of law enforcement—not scientific knowledge—the *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992), standards for determining when an expert's scientific opinion was reliable (underlying theory & technique are valid and property applied) do not apply. Instead, *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998), applied. Under that analysis, the Court explained that slang interpretation is a legitimate field of expertise, the experienced detective who had significant knowledge of other slang terms concerning drugs and other crimes was qualified to testify on this subject matter, and his act of consulting four trusted experts in his field about the meaning of "pull a Carlos" properly relied upon and used the principles involved in the field since this is how he learned other jargon in the drug and gang trade and was a widely accepted way of determining what an unfamiliar phrase meant. It rejected the COA's conclusion that the detective had only blindly recited what others told him; he investigated and only came to a conclusion after consulting a

range of sources (one whom had known for decades). As for the Confrontation issue, the majority held that the detective's conclusion was non-testimonial. The detective did not tell his sources why he was asking, what the facts of the case were, or even that it was for an investigation. Their answers came in the context of someone who appeared to be trying to expand his slang vocabulary. Thus, a reasonable person would not expect that what they were telling the detective was for the purpose of a prosecution. Moreover, the opinion was the detective's own. The statements of his sources were not offered. Allison had the ability to cross-examine the detective, and his was the only testimonial evidence. Despite ruling on the merits of both evidentiary and constitutional claims, the CCA went on to find admission of the testimony harmless.

Judge Yeary concurred only in the holding on harm. He would have held that the detective's testimony was not admissible as expert opinion, given that he only formed a conclusion about the meaning of the phrase in preparation for trial.

# 4. Double-Jeopardy Related Concepts

## 4.1 Venue & Vicinage

- *Smith v. United States*, 143 S. Ct. 1594 (Jun. 15, 2023) (9 [Alito]-0)

**Retrial is constitutionally permissible following a trial conducted in the improper venue.**

Timothy Smith was indicted in federal district court in Florida for theft of trade secrets from a website owned by a company called "StrikeLines." Smith objected to venue both prior to and after his conviction by a jury, arguing that venue was proper in the Southern District of Alabama where he was alleged to have accessed the information, not in the Northern District of Florida where the company had its headquarters. On appeal the Eleventh Circuit Court of Appeals agreed that venue was improper but disagreed that his trial in an improper venue barred his retrial.

The United States Supreme Court agreed unanimously. Writing for the Court, Justice Alito examined the text, precedent, and historical backdrop of the Venue Clause of Article III and Vicinage Clause of the Sixth Amendment (the Venue Clause regulates the location of the trial, the Vicinage Clause regulates the vicinity that the jury pool is drawn from). He found no basis for an exception to the general rule that a reversal due to trial error does not bar retrial, unlike the Speedy Trial Clause, which is unique in that regard. The Double Jeopardy Clause also did not bar retrial, as venue is unrelated to the factual guilt or innocence of the defendant.

## 4.2 Collateral Estoppel

*Ex parte Richardson*, 664 S.W.3d 141 (Tex. Crim. App. 2022) (jury's acquittal of defendant for murder of one shooting victim at one scene did not preclude State from prosecuting him for aggravated assault of another victim at a different scene on the same day)

## 4.3 Unit of Prosecution

*Ex parte Woods*, 664 S.W.3d 260 (Tex. Crim. App. 2022) (8[Keller]-1[Yeary])

**Possessing multiple firearms during the same incident can result in only one conviction for Felon in Possession.**

Woods, a felon, was charged in two indictments for felon in possession of a firearm; each offense charged was for a different firearm possessed at the same time and under the same circumstances. Woods pled guilty and was sentenced to 18 years on each case. Woods abandoned his direct appeal but later filed an application for writ of habeas corpus, alleging that his circumstances presented only a single "unit of prosecution" for Felon in Possession and that his two convictions accordingly violated the multiple-punishments provision of the Double Jeopardy Clause.

Writing for the majority, Presiding Judge Keller observed that absent explicit legislative direction, the best indicator of legislative intent of the unit of prosecution is determining whether the "focus" of the offense is (1) result of conduct, (2) nature of conduct, or (3) circumstances surrounding the conduct. Here, Woods' status as a felon was the circumstance making the otherwise innocent conduct of possessing a firearm a criminal offense, and so was a "circumstances" offense. For a "circumstances" offense, different or discrete conduct in violation of a statute may nevertheless be part of a single crime if the circumstances are the same. Here, it was Woods' status as a felon at the time he committed the conduct that mattered. Because Woods' possession of two firearms in the same incident presented only a single unit of prosecution, one of his two convictions was vacated. Judge Yeary dissented, arguing that Woods' Double Jeopardy claim was not cognizable on habeas due to his failure to raise it on direct appeal.

# 5. Other US Constitutional Rights

## 5.1 First Amendment

- *Counterman v. Colorado*, 143 S.Ct. 2106 (2023) [5[Kagan]+2[Sotomayor]-1[Thomas]-2[Barrett]) Read NAAG Summary here.

> **That an objectively reasonable person would find the defendant's words to be true threats is not enough to exclude them from First-Amendment protection. To criminalize a threat of violence, the defendant must be at least reckless about whether his words would be viewed in that manner.**

Counterman became obsessed with a local musician who was a stranger to him. Over two years, he sent her hundreds of social media messages, including some that suggested he was surveilling her and that envisioned harm coming to her (*e.g.*, "Staying in cyber life is going to kill you."; "You're not being good for human relations. Die."). She never responded, but the fear that he was following her and would hurt her upended her daily existence and caused her to lose sleep and cancel some performances. Counterman was charged with stalking by repeated communications, which in Colorado requires communicating with another "in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person ...to suffer serious emotional distress." In short, it did not require the State to prove Counterman had a subjective intent to threaten the victim. Counterman argued that his messages could not be criminalized because they were protected under the First Amendment. The Colorado courts disagreed, and Counterman appealed to the Supreme Court.

Justice Kagan's majority decision sided with Counterman. True threats of violence (serious expressions conveying that a speaker means to commit an act of unlawful violence, which can be categorized as such based solely on their objective content) have historically been unprotected. They harm others even when the speaker is clueless that their speech will be understood as threatening. To ensure that criminalizing true threats doesn't chill speech that falls on the fully protected, non-threatening free-speech side of the dichotomy, however, the First Amendment demands the defendant have some subjective awareness that his speech will be viewed as threatening. This means that some otherwise proscribable speech (and that causes real harm) will go unpunished because the State cannot prove the defendant's mental state. But by reducing an honest speaker's fear that he may erroneously incur liability, the *mens rea* requirement provides breathing room for more valuable speech. In the same way, defamation is defamation and obscenity is obscenity, but, to punish either, the defendant must have some subjective awareness of the disregard for truth or of the character and nature of the materials he distributes to avoid the hazard of self-censorship.

The subjective mental state required is recklessness. This means that a speaker must know that others could regard his statements as threatening violence but conveys them anyway. This less onerous standard (compared with purpose/intent or knowledge) is necessary because of

the value in protecting against profound harms to both individuals and society from true threats of violence—harms that formed the basis for this historically unprotected category of speech. Recklessness is also consistent with the standard required for defamation. That standard appears to have given sufficient breathing room to non-defamatory statements. Societal interests in countering threats are at least as high (if not higher) than defamation, and the protected speech near the borderline is typically further from core First Amendment concerns than more frequently political reputation-damaging speech. While incitement of criminal conduct requires a higher mental state (intent), that is because the protected speech at the border is often only a hair's breath from political advocacy.

Because the State in Counterman's case only had to prove whether a reasonable person would understand his statements as threats, not whether he was reckless about that possibility, it violated the First Amendment.

Justice Sotomayor concurred, pointing out that "because petitioner was prosecuted for stalking [for a combination of threatening statements and repeated, unwanted, direct contact with the victim], this case does not require resort to the true-threats exemption to the First Amendment." For the same reason, less First-Amendment scrutiny is warranted than there would be for pure speech (as would occur in prosecutions for a single statement based solely on its content). She stresses the limited holding of the case: "True-threats doctrine came up below only because of the lower courts' doubtful assumption that petitioner could be prosecuted only if his actions fell under the true-threats exception."

- *United States v. Hansen*, 143 S. Ct. 1932 (2023) (federal law criminalizing "encouraging or inducing" an immigrant to come or remain illegally in US was interpreted narrowly to include only what would constitute crimes of solicitation and facilitation—both of which can be constitutionally proscribed under the First Amendment—thus avoiding an overbreadth challenge).

## 5.2 Second Amendment

- *United States v. Rahimi*, 61 F.4th 443 (5th Cir. Mar. 2, 2023) (cert. granted, No. 22-915)

  **Fifth Circuit panel holds federal statute prohibiting firearm possession by persons subject to domestic-violence protective order violates Second Amendment.**

  See Britt's Texas Prosecutor article on this case.

Zackey Rahimi was involved in five shootings in and around Arlington, Texas between December 2020 and January 2021, including shooting into the residence of an individual he

had sold narcotics to, shooting at another driver after an accident and then fleeing (then returning in a different vehicle and shooting again at the other driver's car), shooting at a constable's car, and shooting into the air after his friend's credit card was declined at Whataburger. Arlington police identified Rahimi as a suspect in the shootings and executed a warrant on his home, where they found a rifle and a pistol. Rahimi was at that time under a Texas state court civil protective order for an allegation of assault family violence, the terms of which expressly prohibited him from the possession of a firearm, which is (or was?) a federal crime.

Federal prosecutors indicted Rahimi for possession of a firearm while under a domestic violence restraining order in violation of 18 U.S.C. § 922(g)(8). Rahimi moved to dismiss the federal indictment on the ground that § 922(g)(8) is unconstitutional, while acknowledging that then-existing caselaw in the Fifth Circuit had expressly held otherwise. The federal district court denied his motion to dismiss, and a Fifth Circuit panel upheld that denial based on that court's precedent.

Only fifteen days after the Fifth Circuit issued its first opinion in Rahimi's case the U.S. Supreme Court handed down its opinion in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen,* which held that it is not enough for the government to show that a firearms regulation promotes an important interest. Instead, the government must show that the regulation is "consistent with this Nation's historical tradition of firearm regulation," meaning at the time of the Second Amendment's adoption in 1791 and the Fourteenth Amendment's adoption in 1868. On rehearing, the Fifth Circuit concluded that § 922(g)(8)'s ban on possession of firearms by a person with a domestic violence restraining order is an "outlier[] that our ancestors would never have accepted," that the statute is unconstitutional, and that Rahimi's conviction must be vacated.

The United States Supreme Court granted certiorari on June 30, 2023 and that case is pending as of this writing.

## 5.3 Public Trial

- *Williams v. State*, 664 S.W.3d 266 (Tex. Crim. App. 2022) (5[Slaughter]+3[Newell]-1[Walker]).

  **Moving defendant's family member to watch proceedings via live video feed from a different room for one witness's testimony was trivial closure not warranting analysis under *Waller* factors.**

Williams sold crack cocaine in a controlled buy to a confidential informant, referred to in court documents by the pseudonym "Josh Brown." Brown was called to testify, but the State requested that first the defendant's brother be temporarily excluded from the courtroom, as there was "credible and reliable information" that his presence would intimidate Brown and affect his

testimony. The State offered to set up a live video feed so that the brother could watch the testimony in another room. The court granted the request over Williams' objection. On appeal, the COA reversed Williams' conviction, holding that her Sixth Amendment right to a public trial had been violated by her brother's temporary exclusion from the courtroom and that the closure was unjustified under the factors articulated in *Waller v. Georgia*, 467 U.S. 39 (1984).

The CCA reversed and affirmed the judgment of the trial court. The Court first noted that a number of courts, including nearly all federal courts of appeals, distinguish between the partial and complete closure of a courtroom and that the *Waller* factors apply less stringently in a partial closure. The Court further noted that many jurisdictions have also adopted a distinct approach for situations involving closures deemed so "trivial" or *de minimis* as to not implicate the Sixth Amendment public-trial right at all. Under this approach the Court looked to whether the totality of the circumstances implicates the "values furthered by the public trial guarantee"; namely, 1) to ensure a fair trial; 2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; and 4) to discourage perjury. If the closure did not jeopardize or subvert these values, then it is deemed too trivial to amount to a Sixth Amendment violation, and further analysis under the *Waller* factors becomes unnecessary. Using this approach courts have held that inadvertent or brief closures, or the exclusion of a single spectator, are too trivial to implicate the Sixth Amendment.

The Court observed that these factors were satisfied in the instant case: Williams received a fair trial, the trial participants were "keenly alive to a sense of their responsibility and to the importance of their functions" because they knew that Williams' brother was in a nearby room watching Brown testify, there was nothing about the arrangement that would have discouraged witnesses from coming forward, and there was little to no risk that the physical absence of Williams' brother in the courtroom encouraged perjury. The Court nonetheless found that this was an "exceedingly narrow exception" and cautioned that trial courts should continue to consider the *Waller* factors before excluding anybody from a courtroom.

Judge Newell concurred, joined by Presiding Judge Keller and Judge Hervey. Judge Newell agreed that the trial court did not err under the less stringent application of the *Waller* factors in a partial closure, but disagreed with the Court's adoption and application of the "triviality" standard under the facts presented. Judge Walker dissented, holding that a stringent application of the U.S. Supreme Court's factors in *Waller* are what is required, and that the majority's determination of whether or not to apply a triviality standard is essentially a harm analysis, which structural error does not allow.

## 5.4 Jury Trial Waivers

- *Rios v. State,* 665 S.W.3d 467 (Tex. Crim. App. 2022) (6 [Hervey]-1[Keller] 1 concurring and 1 dissenting without opinion)

  **Defendant won a new trial because the record does not expressly show that defendant intelligently and knowingly waived his right to a jury; that error is structural.**

A judge convicted Rios of a sex offense in a bench trial. There was no signed jury trial waiver in the appellate record. On appeal, he argued his federal constitutional right to a jury was violated.

The COA abated the case for an evidentiary hearing on whether Rios had waived a jury. Rios testified that he wanted a jury trial. He read little English, seldom had an interpreter during pretrial settings, and did not know that the case had been passed multiple times for a bench trial setting because the pass slips he signed were blank or what "Trial before the court" meant. Once he learned on the day of trial that he was having a bench trial, he asked counsel to object. He did not tell a probation officer that he wanted a jury trial. Trial counsel testified that they had decided to "go with no jury." He said his clients usually sign blank pass slips, and that Rios knew about his jury trial right. He explained that the judge initially didn't want to try the case because a prior sex case still haunted him, but then changed his mind and rushed the parties to trial such that there wasn't time to fill out a jury trial waiver. The written judgment was prepared by a clerk using software that prepopulates information for every bench trial, including a recital that the defendant had waived his right to a jury. The trial judge found Rios waived his right to a jury trial and voluntarily consented to a bench trial.

The COA panel held that Tex. Code Crim. Proc. Art. 1.13(a) had been violated but was harmless under *Johnson v. State*, 72 S.W.3d 346, 348 (Tex. Crim. App. 2002), which held that a judgment's recital of a jury trial waiver could be enough by itself to render a written-jury-trial-waiver error harmless. In addition to the judgment's recital, Rios's signature was on pass slips setting the case for a bench trial, and he didn't even mention the lack of a jury during the trial. The COA Chief Justice filed a dubitante opinion (expressing doubt on a legal question but without asserting it was wrong) that it was doubtful that the evidence showed a knowing and intelligent waiver.

The CCA majority held that Rios's federal constitutional claim could be raised for the first time on appeal. In a footnote, the majority questioned whether the abatement hearing was proper but ultimately held that, regardless, the record was insufficient to meet the State's burden of showing an intelligent and knowing jury trial waiver.

Along the way, it rejected Rios's argument that—because absence of the State's consent to a jury trial waiver deprived the trial court of authority in a bench trial under *In re Ogg*—absence

of a jury trial waiver should have the same result. It also refused to give less deference to the trial court's findings because some were unsupported by the record.

Yet even in the light most favorable to the trial court's findings, the record did not show the required intentional relinquishment of a known right. Rios had a limited ability to read and write English, and the trial court made no findings about what information was on the pass slips when Rios signed them or whether he understood what they said. While Rios conceded he knew he had a right to a jury trial, a waiver requires sufficient awareness of the relevant circumstances and consequences. The record is silent on what counsel's advice was about his right to a jury. Here it was significant that the judge had misgivings about trying sex cases. Yet, the record does not show what Rios knew about this, despite it being a circumstance almost any defendant charged with a sex crime would want to know before deciding on a bench trial.

The majority found it unremarkable that Rios had not told the probation officer that he wanted a jury trial. That isn't direct evidence of whether Rios had waived the right—a fact that the record must affirmatively establish under Art. 1.13.

*Johnson* was distinguishable since it involved a statutory, rather than a federal constitutional, claim. Further, no authority suggests that the presumption of regularity *Johnson* relied on applies in the federal constitutional context (and may even have been rebutted in this case). The judgment recital stated only that Rios waived the right, not that he did so intelligently and knowingly, which is required. And the State had the burden on direct appeal to develop a record showing an express, knowing, and intelligent waiver. This sparse record doesn't show that.

Deviating from its usual practice of waiting until the U.S. Supreme Court has labeled an error "structural," the CCA majority held this error was. Compared to an erroneous definition of "reasonable doubt" doubt in the charge (which infringes on the jury trial right), it found that a bare violation of the federal constitutional right to a jury trial was sufficiently clear to justify the deviation. Consequently, there can be no harm analysis, and the case was remanded for a new trial.

Presiding Judge Keller dissented and agreed with the COA that the judgment recital, pass slips, and Rios' failure to voice concern at the absence of a jury at multiple points throughout the proceedings shows Rios waived his right to a jury trial.

## 6. Right to Presence

- *Lira v. State & Huddleston v. State*, 666 S.W.3d 498 (Tex. Crim. App. 2023) (5[Newell] - 3[Keller] 1 concurring without opinion)

  **Emergency COVID Orders won't authorize forcing a defendant to conduct a plea hearing via videoconference; without a defendant's consent to the**

**procedure, the trial court lacks authority over the proceeding, and it implicates a substantive right.**

After Lira and Huddleston each reached plea agreements, the trial court scheduled their cases for plea hearings via Zoom. Both objected to proceeding via videoconference, citing violations of various constitutional rights and Tex. Code Crim. Proc. arts. 27.18 and 27.19. The State invoked the Texas Supreme Court's 17th Emergency Order, which provides that "[s]ubject to constitutional limitations" a trial court could (1) "modify or suspend any and all deadlines and procedures" and (2) "require anyone in any hearing, deposition, or other proceeding of any kind...to participate remotely..." The trial court overruled the defense objections and followed the agreements. Everyone agreed the defendants could appeal this issue.

The COA held that the Emergency Order could not authorize a trial court to preside over a video-conferenced plea hearing where the defendant had not waived his right to be present because such authorization would involve modification of a substantive right, not merely a procedure. [Tex. Gov't Code § 22.0035, the authorizing statute for the Supreme Court's Emergency Orders, permits modification or suspension of "procedures for the conduct of any court proceeding" but not substantive rights.] The State filed PDR.

In a majority opinion by Judge Newell, the CCA agreed with the COA decision twice over—the trial court's modification of procedures could not be justified under an Emergency Order because they (1) abrogated substantive rights and (2) as in *In re Ogg*, 618 S.W.3d 361 (Tex. Crim. App. 2021), granted the trial court authority where none existed.

First, the modification abrogated the substantive right to appear in-person and (at least statutorily) in open court prior to entry of a plea. The Court recounted several sources of the constitutional right to presence. In addition, it concluded from multiple statutes that the Legislature had created a substantive guarantee of in-person presence prior to entry of the defendant's plea. Art. 27.13 provides: "A plea of 'guilty' or a plea of 'nolo contendere' in a felony case must be made *in open court* by the defendant *in person*..." Art. 1.15 prohibits a person from being convicted of a felony other than by a jury "unless the defendant, upon entering a plea, has *in open court in person* waived his right of trial by jury." And Art. 33.03 requires the defendant's personal presence at the trial for a felony.

The Court clarified that, given the Code's references to "in person" and electronic means in other contexts (like Arts. 15.17(a) & 43.03), its use of "in person" in these statutes does not include appearance by electronic means.

Even if in-person and in-open-court presence before a plea are only procedural requirements and not substantive rights, they are prerequisites to a valid waiver of a defendant's substantive right to a jury trial—and thus essential to a trial court's authority over a non-jury proceeding.

Regardless, the Court held that the trial court's modifications (disregarding in-person and in-open-court presence without the defendant's consent) impermissibly created authority for a trial court to preside over proceedings over which it had no authority. The Court noted there

is only one exception to Art. 1.13's requirements of an in-person and in-open-court jury-trial waiver—Arts. 27.19 & 27.18's video jail-plea procedures require the defendant's written consent to videoconferencing. Thus, an entire statutory scheme accommodates a person wanting to waive his jury trial right other than in person. To read the "in person" requirement as something less than a prerequisite to trial court authority to proceed would essentially nullify this statutory scheme.

Just as the trial court in *Ogg* lacked authority to preside over a jury trial in absence of the State's consent to a jury-trial waiver, here, Lira and Huddleston's jury-trial waivers were invalid without the defendant's in-person and in-open-court presence (or written waiver of physical presence under Art. 27.19). This was true even though, ironically, they were seeking to waive the jury-trial right. Consequently, the trial court had no authority to proceed without a jury. Structurally, the requirements to waive a jury in person, in writing, and in open court (or consent to videoconference plea) are textual equivalents to the State's consent. Consequently, they also must be a procedure necessary to establish a trial court's authority to proceed to a bench trial. Although the Emergency Order expressly authorizes requiring remote proceedings without a party's consent, as in *Ogg*, the Emergency Order cannot be understood to implicitly grant a trial court authority over proceedings it otherwise lacks authority to conduct.

The State was correct that lack of compliance with Art. 1.13 can be subject to a harm analysis. In other cases, the Court has found such error harmless, as where the record shows consent in fact, just not written consent. Here, however, the error was in not obtaining consent at all. What resulted was the absence of any authority to proceed. As such, the COA was correct to find Lira and Huddleston's pleas "voidable."

The majority was careful to say that Lira & Huddleston had affirmatively objected to remote proceedings and that the holding in their cases does not affect cases where the defendant has pled guilty and *affirmatively waived* his right to be personally present as part of a plea bargain. It also doesn't mean that parties are prohibited from negotiating a waiver of right to be present.

In dissent, Presiding Judge Keller (joined by Keel and Slaughter) disagreed with the majority on the aptness of *Ogg* and harm. *Ogg* did not involve an express authorization in the Emergency Order, as is involved here; *Ogg* only implicitly found no authorization to modify procedures implicating a trial court's authority to preside over bench trials because there was nothing express on that point. The Order's only limits on authorization for compulsory remote participation are constitutional and, here, those are satisfied either because the public policy of safety during the COVID lockdown justifies the denial of any Sixth Amendment right or because (for due process) the defendant's presence to plead guilty and receive a sentence he bargained for has no reasonably substantial relation to his opportunity to mount a defense.

The dissenters saw an in-person appearance for a plea as a "procedure for the conduct of a court proceeding" that the Gov't Code authorized the Supreme Court to modify. The *Ogg* issue was substantive—*whether* both parties consented to a bench trial; this is procedural—*how* both parties consented to a bench trial. The fact of consent went to the core power of the trial

court to proceed, while the method of consent was a mere matter of procedure, which could be overridden in an emergency. While obtaining a conviction without a jury waiver in open court and in person is erroneous, that does not mean the trial court lacks the power to preside over the proceedings. Violating similar requirements (like a lack of evidence in support of a guilty plea) does not render a conviction a nullity; after all, habeas is not available to address such claims.

The dissenters also would have found any error "obviously harmless" since Lira and Huddleston received exactly what they wanted: the sentences they bargained for.

*Note*: The State has filed a PDR in a spin-off case, *Tates v. State*, No. PD-0486-23, after the 13th COA held that conducting Tates's sentencing phase of trial remotely (without a proper affirmative waiver) violated Tex. Code Crim. Proc. art. 33.03 and 42.03 and implicated the legality of his sentence such that Tates did not forfeit the error despite the lack of a trial objection. *Tates v. State*, No. 13-20-00280-CR, 2023 WL 3633492 (Tex. App.—Corpus Christi May 25, 2023, pet. filed).

- *King v. State*, 666 S.W.3d 581 (Tex. Crim. App. 2023) (4[Keller] +3[Newell] 2 concurring without opinion)

**Conducting hearing on defendant's motion in limine outside of defendant's presence did not violate due process; any violation of Art. 28.01 was harmless.**

King, charged with evading arrest and theft of a firearm, was outside the courtroom during a pretrial hearing on King's motion in limine, during which his trial counsel, State's counsel, and the trial court discussed the unopposed motion and how voir dire would be conducted. Two minutes of discussion occurred off the record. King was convicted and sentenced to 20 years in prison. On appeal he argued that his absence from the hearing violated the Fourteenth Amendment's Due Process Clause and Tex. Code Crim. Proc. Article 28.01, Section 1, and that the silent record as to the unrecorded discussion made harm analysis impossible, mandating reversal. The COA held King's absence was error, but was harmless because King's presence did not bear a reasonably substantial relationship to his defense and his absence did not affect the outcome of the trial. King petitioned the CCA.

Writing for the Court, Presiding Judge Keller held that there was no due process violation because King's presence did not bear a reasonably substantial relationship to defending the hearing, and the Article 28.01 violation was harmless because King's absence did not substantially affect the jury's decision. Judge Keller noted that the Supreme Court stated in *Snyder v. Massachusetts* that the due process right to presence is not absolute; rather, the "presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." Article 28.01 requires that a defendant be present during "any pre-trial proceeding," and a violation is non-constitutional error under Texas Rule of Appellate Procedure 44.2(b), to be disregarded unless affecting

substantial rights. Judge Keller noted King's motion for limine was argued by his trial counsel and granted in its entirety, and there is no indication that his presence would have aided in any way. King's claim that he did not have time to consult with his attorney was without merit, as was the claim that his absence from the pretrial hearing affected the jury's decision. The Court further declined to extend immunity from harmless error analysis to the circumstances of the unrecorded 2-minute bench conference in an otherwise typical preliminary hearing.

Judge Newell concurred, joined by Judges Hervey and Walker. Judge Newell observed that King primarily argued that this was one of the rare cases in which a meaningful harm analysis is impossible, citing *VanNortrick v. State*, 227 S.W.3d 706 (Tex. Crim. App. 2007). Judge Newell would simply distinguish *VanNortrick* and affirm the COA, or dismiss the case as improvidently granted.

- *Sandoval v. State*, 665 S.W.3d 496 (Tex. Crim. App. 2022) (5[Keller]+4concurring without opinion)

> **A defendant has no right to be present for a general assembly or central-jury-room venire proceeding to hear disqualifications, exemptions, and non-economic excuses—even if it is a special venire for a particular case.**

Sandoval was convicted of capital murder for attempting to rob a family who was out fishing and killing one of the family members. He was sentenced to death, and appeal to the CCA was automatic.

The CCA rejected Sandoval's complaint that neither he nor his attorney were present during the trial court's preliminary qualification of the venire panel, when the court heard qualifications, excuses, and exemptions. The CCA had previously held there was no right to be present for a general assembly venire before prospective jurors had been assigned to a particular case. In *Sandoval*, it expressly extended that holding to special venires. "Whether the prospective juror is assigned first to the central jury room or to a special venire, a preliminary inquiry into his general qualifications, excuses, and exemptions is not the sort of proceeding that needs to be conducted in the defendant's presence." A defendant *does* have a right to be present when a juror is excused for an economic reason. TEX. GOV'T CODE § 62.110(c). So this kind of excuse should not be entertained during this initial qualification. The CCA also held that the preliminary qualification hearing need not be recorded, even on the off chance that the trial court might excuse a juror for economic reasons.

# 7. Jurisdiction and Authority

## 7.1 Judge's Jurisdiction

- *Ex parte Lozoya*, 666 S.W.3d 618 (Tex. Crim. App. 2023) (5[Hervey] -1[Yeary] 3 concurring without opinion)

**Trial court lacked jurisdiction over motion to revoke after maximum period of supervision ended; Defendant not estopped from complaining.**

The parties agreed to a 10-year probated sentence when the maximum initial period of supervision (before an extension) was five years. Although no one realized Lozoya's probation had already expired, the parties reached an agreement in year six for Lozoya to plead true to probation violations in exchange for a 5-year sentence. The State later noticed the error and brought it to Lozoya's attention. He filed an Art. 11.07 writ and the habeas judge found the judgment purporting to revoke Lozoya's probation was void because the trial judge had already lost jurisdiction over the case.

The CCA agreed. Even though the trial court had jurisdiction to place Lozoya on probation, a court must have jurisdiction for each action it takes, and the Court's precedents had established that a court's jurisdiction to revoke ends when the supervision period ends (unless a motion to revoke and capias had been filed before that time).

Along the way, the Court decided that Lozoya should not have been estopped from making his claim and distinguished two estoppel doctrines:

*Estoppel by Contract:*

- Prevents a party from denying the truth of facts agreed on in the contract or taking a position inconsistent with the essential facts recited in the contract to the other party's prejudice;
- Binds a party to the terms of his own contract until it has been set aside;
- The party need not have accepted any benefits.

*Estoppel by Acceptance of Benefits under a Contract or Judgment:*

- Prevents a party who has accepted the benefits of a contract or judgment to later challenge that contract or judgment as invalid;
- Requires the party to have knowledge or be on notice of all the material facts at the time of acceptance;
- Requires the party to have voluntarily accepted a benefit.

Neither estoppel doctrine applied here. There were no facts in the plea agreement that Lozoya was denying for estoppel by contract to apply, and (even if probation was a benefit) he did not have knowledge of the material fact that he was bargaining for an unlawful period of supervision.

The Court also distinguished *Ex parte Williams*, 65 S.W.3d 656 (Tex. Crim. App. 2001). In that case, Williams's probation was revoked, and he argued the order placing him on probation was invalid because he had never been eligible for probation. The Court denied Williams's claim that, as a result of his ineligibility, his guilty plea had been involuntary or his sentence, illegal. He failed to prove how the unlawful grant of probation negatively affected his plea. Lozoya, by contrast, is challenging the order revoking his probation, not the order placing him on it.

The original plea agreement also included another charge for which Lozoya agreed to pen-time. The State could have invoked its right to unwind the entire plea agreement on the theory that it had been a package deal. *See Ex parte Cox*, 482 S.W.3d 112 (Tex. Crim. App. 2016). But here the State asked that only the erroneous revocation case be set aside, which the Court did.

Judge Yeary dissented. He would have denied relief based on estoppel under *Ex parte Williams* and suggests the issue may not be cognizable on habeas because it may be the type of record-based claim that was available on direct appeal and thus should have been raised and disposed of then. As it was, Lozoya waived his appeal and so has forfeited the claim. Although there is an exception to the record-based-claims rule for illegal sentences, *Ex parte Williams* held that the exception doesn't apply to unauthorized probation orders, which is what is involved here. He also suggests the Court's precedents did not deprive the trial court of jurisdiction to revoke probation; a trial court exceeding its statutory *authority* by imposing a longer-than-authorized probationary period is not the same thing as jurisdiction. The majority's resolution disregards *Ex parte Williams*.

*In re State ex rel. Wice*, 668 S.W.3d 662 (Tex. Crim. App. 2023) (6[Richardson]+4 [Slaughter]-2[Keller]-1[Yeary])

Mandamus conditionally granted. Holdings include:

- one regional administrative judge's assignment of case to active (elected) district court judge in another region was valid, making the active judge's transfer-of-venue order effective;

- expiration of judge's home regional administrative judge's order—purporting to appoint him to another region for assignment—was irrelevant as the constitution bestows on active, elected district judges the state-wide authority to hold court for other district judges when properly requested;

- the Gov't Code provisions do not require active district court judges to have permission or an order from their home regional administrative judge to accept an assignment from another region.

## 7.2 Prosecutor Jurisdiction & Authority

- *State v. Stephens*, 664 S.W.3d 293 (Tex. Crim. App. 2022) (rehearing challenging Court's earlier decision—that Election Code statute giving A.G. power to prosecute independent of consent of local district or county attorney violates separation of powers—is denied) (Judge Walker concurred to the denial of rehearing and Judges Slaughter and Yeary filed separate dissents).

# 8. Jury Charges

## 8.1 Concurrent Cause

- *Cyr v. State*, 665 S.W.3d 551 (Tex. Crim. App. 2022) (5[McClure]-1[Yeary] 1 judge concurred and 2 judges dissented without opinion)

> **Defendant charged with failing to protect her baby from her abusive husband is not entitled to a concurrent cause instruction as to the abusive father; to raise a concurrent-cause issue concerning the abuser's failure to provide medical care alongside her own, Defendant must point to evidence both that his omission was clearly sufficient to cause additional injury and that her omission was clearly insufficient.**

Cyr's husband Justin violently assaulted their 4-month-old baby and "an avalanche of evidence" showed that Cyr knew of Justin's ongoing abuse of the baby even before the latest incident. After the baby exhibited multiple signs of distress, she and Justin took the baby to an out-of-the-way hospital to avoid CPS involvement. The baby survived but had permanent physical and cognitive dysfunction. Justin was separately tried and convicted for injury to a child.

Cyr was charged with reckless injury to a child under two theories (1) failing to protect the baby from Justin, and (2) failing to seek reasonable medical care. A doctor testified that immediate medical treatment could have reduced the extent of the damage. Cyr argued that her failure to obtain medical treatment did not worsen the baby's injuries and that she was not aware that Justin posed a risk to the baby. She asked for an instruction on concurrent causation, which was denied. The jury charge required the jury to find that—by her failure to protect the baby from Justin or by her failure to provide medical care—she caused bodily injury to the baby. She was convicted and given a 15-year sentence.

On appeal, Cyr argued that there was evidence to support a concurrent-cause instruction, namely that her acts alone were clearly insufficient to cause the harm and that Justin's acts alone were clearly sufficient to cause the harm. The COA agreed, specifying that her actions alone were clearly insufficient to produce the harm to the baby as it did not cause aggravation of the injury and were otherwise insufficient to cause the original injury. It reversed Cyr's conviction.

The State filed PDR and argued that no concurrent causation instruction was warranted. The CCA held that as to her omission of failure to protect, Cyr was really arguing for an alternative cause (not that she was an insufficient concurrent cause) and that as to her omission of failure to obtain medical care, no evidence was relevant to a concurrent-cause instruction.

As a preliminary matter, the Court held that concurrent cause can apply to omission offenses. The Court observed that, statutorily, causation in Texas criminal law is very broad but that the CCA has previously recognized some foreseeability limitations, citing *Williams v. State*, 235 S.W.3d 742, 755 (Tex. Crim. App. 2007) ("Obviously some element of foreseeability limits criminal causation."). [Parents, for example, can't be held liable for just *any* action earlier in the causal chain that led to the child's harm such as meeting the other parent or having children with him, etc.] Still, causation is established if a defendant's conduct was either sufficient to cause the result alone or if her conduct and another cause were sufficient to cause the result. In the latter case, the defendant is criminally responsible unless

- The concurrent cause was clearly sufficient to produce the result, AND
- The conduct of the defendant was clearly insufficient.

Tex. Penal Code § 6.04(a). Thus, if the defendant's own conduct is independently sufficient to cause the result, he is not entitled to a concurrent causation instruction. Imagine an arsonist who sets fire to the east side of the house. If his fire is independently sufficient to burn the house to the ground regardless of another arsonist setting fire to the west side of the house, he is not entitled to a concurrent cause instruction. In that situation, there would be no evidence of the second requirement--that the east arsonist's conduct was clearly insufficient. "Only where the east arsonist can produce evidence that his fire was clearly insufficient to burn the house to the ground, and the west arsonist's clearly sufficient acting alone, would the east arsonist be entitled to an instruction on concurrent causation."

Contrary to Cyr's contention, evidence that she was unaware of Justin's prior abuse did not entitle her to a concurrent cause instruction regarding failure to protect. This was the essence of the State's case—that she was aware of his risk to the baby and failed to protect him. If she had been unaware, this would negate the required reckless mental state. Consequently, her theory is more like an alternative cause—a different version of the facts that negates an element of the State's case. Cyr asserts that she lacked the required mental state and that some other cause was entirely responsible for harm to the baby. This was already accounted for in the jury charge, which required Cyr's conscious appreciation of a substantial risk of harm. Cyr did not need a concurrent causation instruction for that. To the extent her argument is one of foreseeability, that is addressed through the reckless mental state. The jury was required to find Justin's actions a foreseeable consequence of Cyr's omission by virtue of the definition of recklessness.

Also, the fact that she was in a different room when Justin last assaulted the baby is not incompatible with her being a "but for" cause of the baby's injuries. Even if she could not have

intervened to prevent that particular attack, she could have removed the children earlier or otherwise taken action to keep them safe. She cannot absolve herself of responsibility on the theory that Justin directly caused the baby's injuries. That was the nature of this crime by omission. Defendants can remain independently liable for their harmful omissions even where the injury occurs vis-à-vis a third party. Permitting defendants who are charged with an omission to blame another person, thing, or condition would undermine the intention of the legislature in making an omission a crime under Penal Code § 22.04 within a larger framework of but-for causation in § 6.04.

The State's allegation that Cyr caused the baby's injuries by failing to provide medical care was analyzed separately. Because injury to a child is a result-oriented offense, a conviction under this theory required the State to prove that the defendant failed to provide reasonable medical care and that doing so caused a separate injury or worsening of the child's condition. Thus, any dispute over who was a contributing cause of the initial injury does not affect whether Cyr is responsible for any separate or worsening injury stemming from her delay in getting the baby care. Because the delay in providing medical care must also cause injury (even if it was worsening of the child's condition), the question of causality for that additional injury was necessarily separate from the initial injury.

Cyr could have argued that Justin's failure to provide medical care was a potential concurrent cause, but there was no evidence that her failure was clearly insufficient and his clearly sufficient.

And this wasn't a case where there was evidence the harm would inevitably have occurred despite performance of her statutory duty to protect the baby. Consequently, Cyr was not entitled to a concurrent causation instruction on either theory raised at trial.

Judge Yeary dissented. As far as Cyr's alleged failure to protect the baby from Justin, Judge Yeary explained that the operative part of concurrent cause "could hardly have any plainer application than it does to the facts of this case" because Justin's causing the child's initial injuries was clearly sufficient to produce those injuries and her conduct could not have produced them at all. As far as her failure to seek medical attention, the majority is right that Cyr would need evidence that her delay was "clearly insufficient" to cause whatever incrementally greater injury may have occurred. But on the theory that Justin's assaultive conduct was also a cause of the incrementally greater injury that occurred by virtue of time regardless of any medical intervention, the COA was correct that concurrent cause was raised. Because the medical experts could only say that it was "possible" timely medical intervention "could" have mitigated the child's injuries, a rational jury could have found Cyr's conduct clearly insufficient to cause the incrementally greater (*i.e.*, worsening) injury and her husband's initial assault clearly sufficient.

## 8.2 Lesser-Included Offenses

- *Sandoval v. State*, 665 S.W.3d 496 (Tex. Crim. App. 2022) (5[Keller]+4concurring without opinion)

**The jury should be instructed it must unanimously reject the greater offense before returning a verdict on a lesser.**

Sandoval was on trial for capital murder for attempting to rob a family who was out fishing and killing one of the family members. The trial court instructed the jury on murder as a LIO using an "acquit-first" approach to how lessers are submitted. Such an instruction requires jurors to convict or acquit of the greater offense before moving on to the lesser. In Sandoval's case: "Unless you ...find [guilt of the greater], or if you have a reasonable doubt thereof, you will acquit the defendant of Capital Murder and next consider whether the defendant is guilty of the lesser offense of murder." Sandoval objected to that language and asked that instead of requiring an acquittal for capital murder, the jury should be asked to make "all reasonable efforts to [reach a unanimous verdict on Capital Murder] but if it could not do so, it could go on to decide his guilt of the LIO. That instruction was suggested in dicta in *Barrios v. State*, 283 S.W.3d 348, 353 (Tex. Crim. App. 2009), and is sometimes called the "reasonable efforts" approach. As drafted, the "acquit-first" instruction could result in a mistrial without a verdict on the lesser if an *Allen* charge failed to resolve a jury's deadlock over its verdict on capital murder. Sandoval's proposed instruction would permit the jury to skip past their disagreement on the greater and return a verdict on the lesser. Nonetheless, the trial court refused Sandoval's instruction. It also rejected his proposed "benefit of the doubt" instruction: "If you believe...that the defendant is guilty of either capital murder or murder, but you have a reasonable doubt about which offense he is guilty of, you must resolve the doubt in the defendant's favor...[and] find him guilty of ...murder."

In an automatic appeal following his death sentence, Sandoval challenged the charge's approach to lessers. He relied on *Beck v. Alabama*, 447 U.S. 625 (1980), which invalidated an Alabama statute prohibiting lesser-included instructions in a death-penalty case. The evidence against Beck unquestionably established his guilt for a serious, violent offense but left doubt on the element elevating the offense to a capital crime. The Supreme Court held that this stark choice for jurors—between convicting him of something that may not have been exactly proven or acquitting him altogether (despite his unquestionable guilt of something quite serious)—created an unacceptable enhanced risk of an unwarranted conviction. The CCA held that Sandoval's jury was not faced with this stark choice; it could convict him of murder. Moreover, none of the out-of-state cases Sandoval relied on held that an acquit-first instruction violates *Beck*. In fact, some state statutes require such an instruction. To determine Texas law, the Court looked to Tex. Code Crim. Proc. art. 37.08, which provides:

> In a prosecution for an offense with lesser included offenses, the jury may find the defendant not guilty of the greater offense, but guilty of any lesser included offense.

It concluded from this language that the Legislature contemplated that a conviction on a lesser would necessarily be a verdict of acquittal on the greater, not just a situation where the jury was unable to agree on the greater. Code of Criminal Procedure art. 37.14 cements this interpretation since it provides as a matter of statute that a conviction on a lesser constitutes an acquittal of the greater. The acquit-first approach exemplified in *Boyett v. State*, 692 S.W.2d 512 (Tex. Crim. App. 1985), had been the dominant approach since the early 1900s. It was only dicta in *Barrios v. State* that undermined that historical approach by suggesting it would be the better practice to permit jurors to convict on a lesser if they were "unable to agree" on the greater—an instruction that is consistent with the "reasonable efforts" approach. *Sandoval* disavowed this aspect of *Barrios* and held, "a jury must be required to agree on an acquittal of the greater offense before it can return a conviction on a lesser-included offense." It is thus error to instruct jurors with *Barrios*'s recommended "unable to agree" language. Nor is it permissible to leave it up to the jurors to decide which of these two approaches to follow (sometimes called the "optional" approach).

The Court held that the statutes do not clearly dictate another aspect of submission of LIO instructions—whether the jury should be expressly told that it could consider greater and lesser included offenses in any order. This kind of express instruction combined with an acquit-first instruction makes up the *modified* acquit-first approach. The Court assumed without deciding that both the modified approach and a "benefit of the doubt" instruction were required. Also, any error in not submitting those instructions was harmless. There was no practical difference between what they required and what the jury was told, particularly since the charge was read to the jury in its entirety before deliberations began and the jury was aware that it had to acquit Sandoval of capital murder if it had a reasonable doubt on the element distinguishing the greater and lesser.

- *Chavez v. State,* 666 S.W.3d 772 (Tex. Crim. App. 2023) (5[Hervey]+1[Newell]+3[Keel]-1[Yeary])

> **Accomplice's mental state was not evidence that *defendant* lacked mental state necessary to raise lesser-included offense.**

Chavez was tried for capital murder for the kidnapping and murders of two teenage boys who were last seen on social media at Chavez's home. Chavez's roommate Brandon was the State's main witness. He testified that one of the teens pulled a gun, and after the teens were subdued, he, Chavez, and two other friends decided to take them to a remote property belonging to Chavez's grandmother. Brandon claimed that once they got there, Chavez told him to take the young men to the back of the property and kill them, which he did. On the return home, the group stopped at a convenience store where they were captured on surveillance video. Later,

Brandon, Chavez, and one other person returned to the property to dispose of the bodies. Chavez told police that he wasn't present when the two young men left his home and he had nothing to do with their murders.

At trial, Chavez requested but was denied lesser-included-offense instructions for kidnapping and felony murder. On appeal following his conviction, a divided COA reversed for failing to grant the request. The majority reasoned that lessers were warranted on the theory that Brandon might have been the only one with the intent to kill the victims since he alone had done the shooting, he testified someone (not Chavez) had the idea of killing them, and he didn't have a plan to kill the teens when they kidnapped them. The dissent argued that none of this evidence rebutted Chavez's intent to kill.

The CCA agreed with the dissenting justice. Notably, evidence of Brandon's state of mind has no bearing on Chavez's state of mind. Neither does the lack of a plan at the time of the kidnappings or that someone else was first to come up with the idea of killing the victims negated Chavez's intent to kill at the time of the murders. And evidence that an accomplice pulled the trigger also does not show that Chavez did not have the required intent. Chavez's not-guilty plea is not evidence and thus cannot support a lesser, and his out-of-court assertions of innocence only show that he is guilty of no crime at all, not that he is guilty only of a lesser.

Judge Keel, with two judges joining, concurred. She wanted a more radical resolution: (1) hold that a factual dispute in the evidence is required to meet the standard for submission of a lesser (*i.e.*, that the defendant is guilty-only of a LIO) and (2) "put the kibosh" on the Court's other test that suggests selectively believing parts of the defendant's testimony and disbelieving others (along with some of the State's evidence) can raise a LIO. She argues this "possible-disbelief approach" (epitomized in *Jones v. State*, 984 S.W.2d 254 (Tex. Crim. App. 1998)) is incompatible with the "factual-dispute approach" because it does not require *evidence* to negate the element distinguishing the greater from the lesser, only possible disbelief by the factfinder. Consider a defendant on trial for robbery who specifies that he didn't steal anything or assault anyone. Under current law, a court should pair his testimony that he *didn't* commit theft with the State's evidence that he hit the victim, thus entitling him to a lesser of assault. It should also pair his denial of assault with the State's evidence that he stole something, thus entitling him to a lesser of theft. *Bullock v. State*, 509 S.W.3d 921 (Tex. Crim. App. 2016), and several other cases also followed this approach: focusing on the jury's ability to disbelieve certain evidence and overlooking that there was no comprehensive evidence that the defendant was guilty exclusively of the lesser. The "factual-dispute" approach properly dismisses evidence that a defendant was guilty of no crime at all, but the "possible-disbelief" approach embraces it. The majority should have overruled *Jones* and similar cases before reversing the COA, or at least reconciled the approaches or explained when to apply one or the other.

Judge Yeary dissented. He outlined the history of the guilty-only test, which at one time was aligned with federal law in *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993), and

noted the traditional formulation of the 2 guilty-only approaches: (1) the evidence affirmatively refutes or negates an element establishing the greater offense; or (2) the evidence is subject to two different interpretations, one of which negates or rebuts an element of the greater. He equates the second of these approaches with Judge Keel's "possible-disbelief approach"—which she proposes to scrap. Judge Yeary rejects that proposal. Based on the plain language of Tex. Crim. Proc. art. 36.14, he would hold that a LIO instruction should be given whenever a jury could rationally find that the defendant is not guilty of the greater but is guilty of the lesser. This would include whenever there was a not-irrational doubt concerning the elevating element (which he believed was the case here). Requiring the defendant to shoulder a burden of producing conflicting evidence on the elevating element, as Judge Keel proposes, has the effect of making that elevating element presumptively conclusive. As a result, there will often be no LIO instruction and the jury will have no easy way to register its reasonable doubt with respect to that element. This "stops just short" of being a patently unconstitutional instructed verdict in the State's favor on that element. It also produces the anomalous result that a defendant who requests a LIO can receive one only if he produces evidence contrary to the elevating element, but the State can receive a LIO instruction without any evidence at all under *Grey v. State*, 298 S.W.3d 644, 650 (Tex. Crim. App. 2009). Because there was a lot to suggest to the jury that Brandon was not credible (he was an accomplice, he fled to Mexico after the killings, he took a deal to testify against Chavez, and his statement to police contradicted his trial testimony), the jury might have rationally disbelieved the State's evidence on the element elevating felony murder and kidnapping to capital murder.

Judge Newell concurred. Contrary to Judge Keel, he understood the Court's precedents as almost uniformly requiring affirmative evidence to negate the greater offense—even under the conflicting-inferences approach. The only exception he found was *Saunders v. State*, 840 S.W.2d 392, which he agreed arguably held a LIO was warranted solely on possible disbelief of the evidence. Like Judge Yeary, Judge Newell could not justify making the guilty-only test harder for defendants when (1) *Grey* exempts the State from the guilty-only test (and thus the jury can consider the *State's* proposed LIO based on simple disbelief of evidence—even irrational disbelief) and (2) *Sandoval*, 665 S.W.3d 496, demands juries to be unanimous in rejecting the greater before convicting on a lesser. Instead, he proposes getting rid of the guilty-only/valid-rational-alternative test altogether since it is court-made and not required by statute. He thinks the rationality test too easily permits judges to substitute their own view of the persuasiveness of the evidence. He is unperturbed by the idea that it would clog up jury charges with tons of LIO instructions (given that the Court has recognized requests for LIO as a strategic decision). Like Judge Yeary, he thought that refusing to consider whether an inference from affirmative evidence created a reasonable doubt about the greater risked unconstitutionally shifting the burden of proof to the defendant.

He agreed with the majority that there was no affirmative evidence in this case capable of even an inference that would negate the greater offense.

He also proposes replacing *Almanza*'s special jury-charge preservation rules with the usual rules: (1) determine if the claim can be made for the first time on appeal under *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993); (2) if not, determine if it was procedurally defaulted; and (3) if error, decide if it is structural or resulted in constitutional or non-constitutional harm.

- *Lang v. State,* 664 S.W.3d 155 (Tex. Crim. App. 2022) (7[Walker]-1[Yeary], one judge concurred without opinion)

**Theft is a lesser-included offense of Organized Retail Theft.**

Lang was convicted of organized retail theft (ORT) under the 2011 version of Texas Penal Code § 31.16(b)(1), (c)(3). The CCA found the evidence legally insufficient to support that conviction and remanded to the COA to determine if the judgment should be reformed to a lesser included offense of theft (both partied agreed for different reasons that the offense could not be reformed to attempted ORT). The COA found that the identity of the property owner was not reflected in Lang's indictment, concluded that theft could not be a lesser-included offense of ORT as charged, and rendered a judgment of acquittal.

The CCA granted review (again). It rejected the COA's position that a missing allegation of the owner's identity could prevent reformation. The Court explained that the *existence* of an owner is the element of theft that the State must prove, not the identity of the specific owner (which is only a pleadings issue). After all, the State can obtain a theft conviction even when it can't prove who the original owner of the property was, provided it can prove the property was stolen. The Court further held that this element can be deduced from the ORT indictment using the cognate pleadings approach, that the jury found every element it needed to convict Lang of theft, and that the evidence adduced at trial was legally sufficient to support a theft conviction. The court reversed the judgment of the COA, modified the judgment to reflect a conviction for theft, and remanded the case to the trial court for a new sentencing hearing. Judge Yeary dissented, disagreeing that the jury's verdict in this case necessarily embraced every constituent element of the lesser theft offense.

- *Ransier v. State,* 670 S.W.3d 646 (Tex. Crim. App. 2023) (6[Keller]+2[Keel]-1[Newell]-1[Yeary], one judge concurred without opinion)

**In finding the evidence raised *attempted* tampering by concealment as a lesser, the court of appeals erroneously considered the wrong time period. No evidence refuted that—before the officer first saw the syringe—the defendant was concealing it from him.**

DPS Trooper Kral was investigating a truck parked beside a children's slide at the side of the road. He approached Ransier in the truck. Although Ransier refused to consent to Kral searching the truck, he agreed to remove items on his own. While watching Ransier, the

trooper noticed something in Ransier's hand. He was shoving his right hand underneath the driver's side seat. The trooper stooped and bent over and saw it was a syringe Ransier was trying to break the needle off and shoving under his seat. Ransier ignored the trooper's command to drop the item and get away from the truck. The trooper grabbed his shoulder and arm, causing Ransier to fall to the ground and the syringe to land, broken, about two feet away.

He was charged with tampering with evidence by concealing the syringe. The trooper repeated his account at trial. During cross-examination, defense counsel asked: "*from the point that you saw Mr. Ransier with the syringe in his hand until the time you got him to the ground*, would it be fair to say that you knew where that syringe was the whole time?" Kral said yes. He also agreed that "it [would] be fair to say that since the syringe was in his hand, that it was partially concealed ... so [the trooper] couldn't really see the full condition of it while it was in [Ransier's] hand." The prosecutor asked on redirect about the syringe before Kral saw it, and Kral clarified that he could tell Ransier had something in his hand that he was concealing, eventually he was able to lean over and see that it was a syringe, but that until that point Ransier had concealed the syringe from him. Ransier asked for a LIO instruction on attempted tampering, but this was denied.

On appeal, the COA held that attempted tampering was raised because "from the point [the trooper] saw [Ransier] with the syringe in his hand until the time he got him to the ground, he knew where the syringe was the whole time."

The CCA reversed. It held that the COA "did not look back far enough in time because Kral testified that, before he saw the syringe, [Ransier] was concealing it from him, and there was no evidence from any source suggesting otherwise." The COA read too much into Kral's testimony about the syringe being partially concealed. It is clear this was so only after he first saw it. There was no conflict in Kral's testimony, and no other testimony suggested it was ever only partially concealed from the trooper. There needed to be some evidence negating full concealment. The mere fact that the jury could disbelieve crucial evidence distinguishing the greater from the lesser is not enough. There must either be "evidence presented [that] is subject to different interpretations consistent with either the greater or lesser-included offense" or "affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense."

Ransier argued that *Bullock v. State*, 509 S.W.3d 921, 924 (Tex. Crim. App. 2016), requires submission of a LIO based on the jury's ability to disbelieve evidence, but the CCA disagreed. It reiterated that "the possibility that inculpatory evidence could be disbelieved is not enough to raise a lesser-included offense." What raised the lesser in *Bullock* was exculpatory evidence. Bullock testified that he did not intend to steal the truck and never exercised control over it. If the jury believed both things, it would fully acquit Bullock. But if it believed only that Bullock didn't exercise control (and from other evidence believed he intended to steal the truck), then the jury could find him guilty only of the LIO of attempted theft. His testimony that he did not exercise control was affirmative evidence negating the distinguishing element between the greater and lesser. Ransier had no exculpatory evidence that the jury could have believed. His

later partial concealing of the syringe (after Kral had already glimpsed it) "was evidence of additional criminality, not evidence of lesser criminality."

Judge Keel concurred and agreed with the majority that "there was testimony both that he concealed the syringe and tried to conceal it, [but] there was no evidence that he only tried to conceal the syringe." She endorsed the narrowing of *Bullock* but still thinks LIO caselaw is muddled and warrants clearing up.

Judge Yeary, as in *Chavez*, dissented on the theory that disbelief of the evidence is enough to submit a LIO if such disbelief was rational.

Judge Newell dissented. He believed the majority failed to view the evidence in the light most favorable to the requested instruction. He read Kral's testimony to say "from the point he saw [Ransier] with the syringe in his hand until he got [Ransier] to the ground, he knew where the syringe was the whole time." But he acknowledged that this case illustrates the difficulty applying the test for when a LIO is raised by the evidence and suggests the test should be eliminated for the defendant as it has been for the State.

- *Campbell v. State*, 664 S.W.3d 240 (Tex. Crim. App. 2022) (9[Slaughter]-0) (murder charge that erroneously failed to limit definition of "intent" to result was harmless even where defensive theory was that he intended erotic asphyxiation rather than serious bodily injury or death because the defensive evidence was weak and closing arguments properly focused on his intending the result, not just the conduct)

## 8.3 Art. 38.23 Instructions

- *Chambers v. State*, 663 S.W.3d 1 (Tex. Crim. App. 2022) (op. on reh'g) (7 [Richardson]+1-1)(Art. 38.23 issue—based on photos and video disputing officer's view that he saw no license plate—was material; Court rejects State's reh'g arguments that other reasons independently justified traffic stop: *e.g.*, because officer saw no license plate, he could not base stop on its being expired)

# 9. Evidence

## 9.1 Extraneous Offenses

- *Perkins v. State*, 664 S.W.3d 209 (Tex. Crim. App. 2022) (9-0 [Newell])

**State is not required to accept a defendant's stipulation to an extraneous offense in lieu of presenting its own evidence.**

Perkins was charged with aggravated assault against a person with whom he had previously had a dating relationship. At trial, the State announced its intent to offer testimony regarding an unadjudicated extraneous assault committed by Perkins six months prior against a different

victim called Rogers. The State argued the evidence was admissible under Tex. Code Crim. Proc. Article 38.371, the doctrine of chances, and Texas Rule of Evidence 404(b) to show motive, intent, absence of mistake, or lack of accident. The State also urged that the evidence was admissible to rebut the defensive theory, suggested through cross-examination, that the victim caused the injury to her face. Perkins offered to stipulate to assaulting Rogers rather than have the State call her. The State rejected the offer and noted its intent to offer the testimony despite Perkins's offer to stipulate. Perkins then objected to the testimony on the grounds that it would confuse the jury and be more prejudicial than probative. The trial court allowed the testimony, and Perkins was convicted.

Perkins argued on appeal that the trial court erred by admitting Rogers's testimony regarding the details of the extraneous offense over his objection and offer to stipulate to the assault. The COA held that the State was not required to accept Perkins' offer of stipulation and that the trial court did not abuse its discretion in admitting the testimony under Rule 404(b).

Perkins petitioned the CCA, and the Court unanimously affirmed the COA holdings concerning the offer of stipulation and Rule 404(b). Writing for the majority, Judge Newell distinguished between jurisdictional priors that form an element of the offense, and extraneous offenses that do not. The U.S. Supreme Court interpreted Federal Rule 403 in *Old Chief v. United States*, 519 U.S. 172 (1997), to hold that when the fact of a conviction is an element of an offense, the details of the conviction have very little probative value in the face of an offer to stipulate. In those circumstances, allowing the government to prove the particular felony that led to the defendant's status as a felon could substantially prejudice the defendant by allowing the jury to improperly focus on the previous crime rather than the charged offense. The CCA harmonized Article 36.01 and *Old Chief* in *Tamez v. State*, 11 S.W.3d 198 (Tex. Crim. App. 2000), and held that the State may not refuse a defendant's offer to stipulate to jurisdictional priors (as in felony DWI). However, that rationale does not apply to Perkins' extraneous unadjudicated offense. Judge Newell noted that, although the COA had decided that issue correctly on those points, it had not addressed Perkins' argument under Rule 403, and remanded the case for consideration of that issue.

Judge Yeary joined in the court's opinion but wrote a separate concurrence joined by Judge Slaughter to further address why the trial court properly rejected the offer to stipulate. In his analysis, the mere existence of a qualifying jurisdictional prior conviction establishes the element in such a case, but when an extraneous offense is offered under 404(b) as was done here, it is the details themselves that are relevant.

## 9.2 Rule 703—Experts

- *See Allison v. State*, 666 S.W.3d 750 (Tex. Crim. App. 2023) (5 [McClure]+1[Yeary] 2 concurring and 1 dissenting without opinion) (summarized above)

## 9.3 Opinion on Child Victim's Credibility

- *Cook v. State,* 665 S.W.3d 595 (Tex. Crim. App. 2023) (any error in admitting opinion testimony on victim's credibility was harmless).

# 10. Trial Procedure

## 10.1 Discovery

- *In re City of Lubbock*, 666 S.W.3d 546 (Tex. Crim. App. 2023) (6[Newell]+2[Keller]

> **Because *ex parte* matters are unauthorized unless expressly permitted by law, mandamus would lie to void an order to the city police department to produce records without notice to the prosecutor.**

The Lubbock County CDA charged Zambrano with sexual assault of a child. He filed an *ex parte* motion asking the judge to order the Lubbock Police Department to produce any records where the child had been reported to be a victim of sexual abuse. Zambrano asked that the police department be prohibited from telling the prosecutor about the order for production (so they wouldn't catch on to the defensive strategy). Zambrano argued he could not subpoena the records because that required notice to the State. He relied on *Ake v. Oklahoma*, 470 U.S. 68 (1985) and *Williams v. State*, 958 S.W.2d 186 (Tex. Crim. App. 1997), to support the *ex parte* nature of his request. The department was ultimately given a hearing, after which the records were required to be produced for the court's *in camera* inspection and the department was ordered not to tell the prosecutor.

The department filed a petition for writ of mandamus in the COA, arguing the trial court should not have issued an *ex parte* order for discovery without meeting statutory requirements for discovery and giving notice to the State. The COA denied the petition. It held that the widely accepted need to protect defensive strategy warranted use of *ex parte* proceedings. In concurrence, the Chief Justice noted that the prosecutor should have the opportunity to participate in the discovery dispute.

The department sought relief in the CCA. The DA's Office, who learned of the proceedings for the first time when the COA issued its opinion, also filed a petition for mandamus in the CCA. This was treated as an amicus brief in the department's case. Thus, the CCA did not decide whether the DA should have first filed its mandamus petition in the COA. *In re State ex rel. Stanek*, No. WR-93,160-01, 666 S.W.3d 543 (Tex. Crim. App. 2023); *See In re State ex rel. Best*, 616 S.W.3d 594 (Tex. Crim. App. 2021) (finding compelling reasons not to require presentation of mandamus first to the COA).

In a majority decision by Judge Newell, the Court held that mandamus was the proper vehicle because (as a non-party) the department had no remedy at law by way of appeal. It also had a clear right to relief because the trial court was without authority to entertain an *ex parte* request for third-party discovery and to enter an *ex parte* order for that discovery. The Court noted that judges in an adversarial system are impartial, neutral arbiters who do not carry out their own investigations. Consistent with this role, they are prohibited from permitting or considering *ex parte* communications from a party to pending litigation unless expressly authorized by law. *See* Judicial Canon 3(B)(8). No statute expressly permits an *ex parte* proceeding relating to a criminal discovery request, and it is not part of a trial court's inherent authority. Neither *Ake* nor *Williams* (which involve a request for expert assistance required by due process to protect an indigent defendant's meaningful access to justice and accessing that right without disclosing defensive theories) provides such authority. Neither case purports to extend (nor has been extended) beyond the context of appointment of an expert. And unlike in that context, which necessarily requires disclosure of strategy and privileged information to satisfy a certain threshold, statutory discovery does not even require "good cause" anymore. Neither does the right to effective assistance, right to present a defense, or the work product doctrine expressly authorize *ex parte* discovery. If requiring notice to raise an alibi defense doesn't violate the constitution, requiring notice of a general discovery request shouldn't either. A discovery request isn't work product; otherwise, almost any motion that revealed some aspect of strategy would be.

The probation against *ex parte* communications is clear and indisputable. Without express authorization for the trial court's *ex parte* order, it is void.

> *Note*: The CCA extended this holding to post-conviction discovery orders issued during the investigation stage of a capital writ. *In re Tex. Dept. of Crim. Justice*, WR-91,688-01, No. 2023 WL 4003792 (Tex. Crim. App. Jun. 14, 2023) (unpublished decision).

Presiding Judge Keller concurred. She agreed with the majority that, without any legal source to provide express authorization for proceeding *ex parte*, the trial judge's conduct was "indisputably impermissible." She observed that the majority quoted a Texas Supreme Court case approvingly even though the civil standard for when mandamus relief is appropriate is more lenient; an erroneous understanding or application of the law constituting an abuse of discretion is enough. Mandamus is appropriate in criminal cases when a court was without jurisdiction or authority or (where issues of first impression are involved) an unambiguous statute or the combined weight of precedent clearly establish the proposition of law at issue. She notes that if the majority had intended to relax the criminal standard, it would have explicitly acknowledged and justified that choice.

## 10.2 Plea-Bargain Agreements

- *State v. Hatter*, 665 S.W.3d 584 (Tex. Crim. App. 2023) (prosecutor's agreement to dismiss felony assault if defendant pled to two misdemeanor cases was not an immunity agreement).

# 11. Offenses

## 11.1 Failure to Maintain a Single Lane

- *State v. Hardin,* 664 S.W.3d 867 (Tex. Crim. App. 2022) (6 [Newell] +1[Slaughter] -3 [Keller] -3[Yeary])

**Failure to maintain a single lane requires both movement from the lane and circumstances that made that movement unsafe.**

A patrol officer saw Hardin's U-Haul truck parked at a closed fast-food restaurant, and had previously received a BOLO regarding a U-Haul suspected in multiple burglaries. He followed the vehicle and pulled it over for a traffic violation, failure to maintain a single lane. Evidence collected in the vehicle led to charging the driver with fraudulent possession of identifying information and forgery of a government instrument. Hardin challenged the legality of the traffic stop. Dashcam footage showed the U-Haul traveling in the middle lane of a three-lane divided highway with no other vehicles on either side; at one point the right rear tire of Appellee's U-Haul crossed over the center lane divider on the right for "a couple seconds" and rode on top of it for a few more. The trial court granted the suppression, which was affirmed by the COA after a State's appeal.

The State filed a PDR and urged the CCA to adopt the view taken previously by a four-judge plurality in *Leming v. State.* The CCA declined and affirmed the COA. Judge Newell, writing for the Court, observed that the question for the court hinged on a *de novo* statutory analysis of Transportation Code §545.060, "Driving on Roadway Laned for Traffic," section (a) of which is colloquially referred to as the offense of "failure to maintain a single lane." That section reads:

> (a) An operator on a roadway divided into two or more clearly marked lanes for traffic:
>
> (1) shall drive as nearly as practical entirely within a single lane; and
>
> (2) may not move from the lane unless that movement can be made safely.

Judge Newell found that there was no dispute in the common understanding of the terms used, but rather in whether the two subsections create two offenses or one. He determined that it creates a single offense, for a number of reasons. First, subsection (a)(1) requires only that a motorist remain in a single marked lane "as nearly as practical," which is designed to protect motorists from being accused of a crime due to an inability to stay entirely within a single marked lane at all times. Subsection (a)(2) prohibits any movement from the lane unless that movement can be made safely. Read in conjunction, the two subsections prohibit any unsafe weaving out of the lane, but weaving out of the lane without creating a safety risk does not

violate the statute because incidental weaving is still staying "as nearly as practical" entirely within the single lane. The legislature's intent to read the two subsections together is clear in the use of the word "and" and in the use of "a single lane" in (a)(1) and "the lane" in (a)(2), which makes clear that both refer to the same lane. Because there was no evidence that Hardin's movement from the lane was unsafe, the officer lacked reasonable suspicion for the traffic stop. The Court nevertheless cautioned that its opinion not be misconstrued to suggest that a traffic stop is always unreasonable when a driver weaves in and out of the lane, and that even when other safety concerns are not present that such behavior may be considered with other facts to provide reasonable suspicion for a DWI stop. Judge Slaughter concurred but wrote separately to note that she would have considered a mistake of law argument had the State raised it.

Presiding Judge Keller and Judge Yeary each wrote a dissenting opinion in which the other joined, both also joined by Judge Keel. Presiding Judge Keller would find that the two subsections imposed separate requirements, and that Harding violated the statute when she failed to drive as nearly as practicable within a single lane. Judge Yeary agreed and said that he would adhere to the view of the four-judge plurality in *Leming*.

## 11.2 Injury to a Child

- *Edwards v. State,* 666 S.W.3d 571 (Tex. Crim. App. 2023) (9-0 [Slaughter])

  **Evidence insufficient for jury to infer infant suffered serious mental injury from ingestion of cocaine.**

Edwards was the subject of a CPS investigation for suspected child abuse. During the investigation she tested positive for cocaine and admitted to recent use, which led to the removal of her infant daughter, L.B. A hair follicle test on L.B. showed cocaine and cocaine metabolites at levels of 20,000 picograms per milligram, the maximum amount the test will register. Edwards was indicted for injury to a child for recklessly causing L.B. a "serious mental deficiency, impairment, or injury" by "allowing [L.B.] access to cocaine and the infant was able to ingest the cocaine[.]

At trial a drug screening and assessment counselor testified that he was "shocked" at the levels of cocaine, that they were usually associated with an addicted user, that withdrawals occur at that amount, and that a number of negative short- and long-term effects "could" happen. The child's guardian described her as "very small for her age...very clingy, [and] very fussy," but noted that she displayed no developmental delays. Edwards was convicted by a jury and sentenced to 12 years in prison. On direct appeal, the COA rejected Edwards' legal sufficiency argument and affirmed the judgment of the trial court.

Edwards petitioned the CCA, and the Court reversed and remanded to the COA to determine if reformation was appropriate. Judge Slaughter, writing for the unanimous Court, observed

that there was no evidence that the infant's ingestion of cocaine actually caused any serious mental deficiency, impairment, or injury. The testimony provided was in general and hypothetical terms of what the drug "could" do, what the "possible" effects were, and what "increased risk" the child could suffer. However, there was no testimony that L.B. actually suffered any of these effects. The State argued that the negative effects of drug addiction are so well known that the jury could infer those negative effects even without direct testimony, but the Court disagreed, saying that the jury could not do so here without engaging in impermissible speculation.

Judge Slaughter was careful to note that the Court's holding should not be misread to indicate that a child who has ingested a large amount of drugs can never be shown to have suffered a "serious mental deficiency, impairment, or injury," only that the evidence here did not do so. If you have a similar case to bring, keep in mind that you'll need stronger medical testimony and evidence as to the actual, non-hypothetical harm suffered to cover the evidentiary gap.

## 11.3 Aggravated Assault

- *Garcia v. State,* 667 S.W.3d 756 (Tex. Crim. App. 2023) (8 [Slaughter] 1 concurring without opinion)

  **Victim's two gunshot wounds to thigh and chest and passing out on drive to hospital was sufficient evidence for serious bodily injury element.**

Garcia shot his live-in girlfriend repeatedly with a .40 caliber handgun, striking her with two through-and-through injuries through the back of the right thigh and through the right side of her breast. She attempted to drive herself to the hospital, then saw a police officer and pulled over to ask for help. Records of emergency medical personnel arriving on the scene described her as "ambulatory on scene" and "conscious and alert." She testified that she blacked out after being put in the ambulance and thought that she was going to die. The wounds required twelve staples to close and bullet fragments remained in her leg, but she did not require surgery and was discharged from the hospital within a few hours. The emergency room physician who treated her testified that based on the location of her wounds, he believed she sustained serious bodily injury. Although the bullets did not strike any of her vital organs, the bullets' paths were close to her ribs, which have "a lot of vessels right underneath . . . as well as [the vessels] in her thorax." He further noted that the bullets had struck in close proximity to her heart, lungs, aorta, vena cava, femur, femoral artery, and femoral vein. The jury convicted Garcia of first-degree felony aggravated assault with a deadly weapon of a family member resulting in serious bodily injury.

Garcia's direct appeal argued that the evidence was legally insufficient to establish that the victim suffered serious bodily injury. The COA agreed, in a 2-1 split. The majority opinion held that there was no evidence that the two bullets "hit any vital organs or caused any serious or

lasting impairment or disfigurement." The court noted that the shots did not knock the victim down, she was able to grab her things and drive away, there was little evidence as to how much blood she lost, and there was no evidence as to how serious her scarring was. The court acknowledged that the victim thought that she was going to die, but was not asked to explain that feeling and describe whether it was "just a fear or whether it was an assessment of her physical condition." The dissent took the majority to task for improperly reevaluating the weight and credibility of the evidence and "sitting as a thirteenth juror."

The State filed a PDR to the CCA, and the Court unanimously reversed. Writing for the court, Judge Slaughter observed that the COA failed to view the evidence in the light most favorable to the verdict and impermissibly substituted its own judgment for that of the factfinder. She emphasized that the definition of serious bodily injury looks to the nature of the injury as it is inflicted, and not after the victim receives medical treatment. Testimony was adduced about the victim's deep lacerations, significant bleeding, loss of consciousness, and a medical opinion that gunshot wounds can cause death and that she did suffer serious bodily injury. The jury was free to apply its own knowledge and common sense that had the victim not received emergency medical treatment to control the bleeding and clean and repair the wounds that she would have faced a substantial risk of death, which Judge Slaughter noted is the sole relevant inquiry rather than organ impairment as the COA implied. While evidence of damage to a major organ would likely suffice to show serious bodily injury, it is not a *sine qua non,* i.e. a necessary condition to a showing of serious bodily injury.

Judge Slaughter also noted that the COA focused on what the evidence failed to show and discussed where the evidence could have been stronger, rather than analyzing the facts that actually were adduced. Judge Slaughter noted that the COA relied on the fact that the victim did not receive a blood transfusion and pointed out perceived weaknesses in the treating physician's testimony, such as the fact that he did not testify about the statutory definition of serious bodily injury. While Judge Slaughter agreed that the physician could have provided a more detailed explanation, that does not mean that his testimony (when considered with the evidence of her injuries) was legally insufficient evidence to support the jury's verdict.

Judge Newell concurred without written opinion.

## 11.4 Deceptive Business Practices

- *Dunham v. State,* 666 S.W.3d 477 (Tex. Crim. App. 2023) (8[Richardson]-1[Yeary])

> **For Deceptive Business Practices, "representing" a product or service as a style, grade, or model that it is not is not limited to statements made as the contract is being signed. Jury unanimity is not required as to which statutory manner of deceptive practice the defendant committed.**

Dunham worked for a home security company called Capital Connect. He rang the doorbell at an elderly lady's home and suggested he was from her current home-security provider by pointing to his rival (Central Security Group)'s sign in her front yard, telling her "I'm here to update your security," and saying he would put a light on her sign to make it visible from the street. Dunham wasn't wearing any insignia for any company, and the elderly lady (Moody) understood that he worked for Central. He then stepped into her doorway, saying "I don't know what your panel looks like," prompting Moody to fully let him into her home. After briefly looking at the panel, he sat down at a table and presented various new features to her that he said would be free. She learned later that the features came with a contract that was far more expensive them her contract with Central. Although Moody told him that she could not do anything without her daughter's approval, Dunham called Central to have Moody cancel her contract, all while a technician from Capital was already removing the Central system and rewiring the house. Dunham also called Capital and had Moody talk to a representative. When she was asked whether she understood that by accepting the offer she would be changing security companies, she said, "That I will what" and "I'm not understanding you." But by the time Dunham presented her with the contract, she realized that he did not work for her current company, and she signed the contract anyway, although she did not realize how much it was going to cost. She cancelled the new contract several days later.

In a single-count, single-paragraph information, Dunham was charged with Deceptive Business Practices in three different ways, set out in separate subsections of the statute: (1) representing that a commodity or service was a particular style, grade or model when it was another, (2) representing the price of property or service in a way tending to mislead, and (3) making a materially false or misleading statement in connection with the sale of property. Tex. Penal Code § 32.42(b)(7), (9), (12). The jury returned a general verdict of guilty.

On appeal, Dunham challenged the sufficiency of the evidence and argued the jury should have been required to be unanimous about which of the three alleged statutory deceptive business practices he committed. The COA affirmed his conviction, and Dunham filed a PDR.

In the CCA, Dunham argued that a "representation" within the meaning of Deceptive Business Practices must include the entirety of the transaction and that because he had disclosed his true employment status by the time the contract was signed, he had not made an "affirmative misrepresentation." The Court rejected that argument. "Represents" is undefined in the Penal Code but, in common usage, it presumes the action can occur before a completed transaction (like a contract). As a result, the statute criminalizes conduct leading up to and during the competition of a business transaction.

The Court also rejected Dunham's argument that the evidence was insufficient because he did not make any express statements that were false. In total, his words and actions were either recklessly deceptive or intentionally engineered to deceive. Other witnesses testified to encounters like Moody's, and thus the jury could have found Moody's misimpression was the result of a calculated scheme to confuse and deceive.

Moreover, the jury did not have to be unanimous about the statutory manner of committing Deceptive Business Practices. The statute focuses on whether a person committed "one or more of the following deceptive business practices." There is no focus on which of the twelve is triggered, as long as one is. This is evidence that the Legislature intended to punish the act of deceptive business practices in general, not establish separate units of prosecution for each subsection. Consequently, these are manners and means that the jury need not be unanimous about.

Judge Yeary dissented to both the majority's sufficiency and jury unanimity holdings. He argues that even if Dunham created the misimpression that he worked for Central instead of Capital, this was not a representation that the alarm system was of a different style, grade, or model than it really was. It was exactly the upgraded system he promised her, just from another service provider. "Style, grade, or model" in context should be understood to denote quality, characteristics, or value, but this is different from source, provider, or supplier. The defendant must mischaracterize something about the product's essential nature, not who is providing it. As to jury unanimity, Judge Yeary would have considered more factors than the introductory "one or more of the following" phrase, which, for him, militate in favor of requiring unanimity. These include:

- the statutory history indicates deceptive practices used to be separately criminalized in various corners of the Texas statutes and then were consolidated into a single statute;
- it may be a nature-of-conduct and circumstances-of-conduct offense, which identifies very specific kinds of acts;
- the culpable mental state directly modifies the actus reus (the various practices);
- the Legislature was unlikely to have contemplated that a defendant could receive only one conviction regardless of how many different deceptive practices he engaged in;
- the different subsections carry different grades of offense;
- the subsections describe such different conduct that they are like the generic "Crime" offense imagined in *Schad v. Arizona*, 501 U.S. 624 (1991).

## 11.5 Sex-Offender Registration

- *Ex parte Kibler,* 664 S.W.3d 220 (Tex. Crim. App. 2022) (4 [Newell]+1 [Yeary]-1[Keller]-2[Walker] 2 judges dissented without opinion) (plurality)

  **Plurality: Statute provides that an indecency-by-exposure adjudication requires lifetime registration if "before or after" adjudication he receives another reportable adjudication/conviction. Two pleas to indecency-by-exposure in the same proceeding will satisfy this requirement if the record doesn't show he was convicted of two offenses "simultaneously."**

Kibler pled guilty to two indictments of indecency with a child by exposure. Kibler was placed on eight years' deferred adjudication for each, but did not successfully complete his term. A motion to adjudicate was filed in each case and Kibler pleaded true and was sentenced to two concurrent prison sentences of two years. After discharging his sentences Kibler received conflicting information from state officials as to whether he was required to register for life or for ten years. He was ultimately told by the Sex Offender Registration Bureau that he was required to register for life. Kibler filed an application for a writ of habeas corpus alleging that he was improperly being required to register for life based on an erroneous interpretation of Tex. Code Crim. Proc. Article 62.101(a)(4). The trial court recommended that relief be denied.

The CCA denied relief, with Judge Newell writing for the Court. Kibler relied on language in Article 62.101(a)(4) stating that the duty to register continues for life if "before or after" he was adjudicated or convicted for one offense of indecency with a child by exposure, he "received" another reportable conviction or adjudication for a reportable offense. Kibler argued that because both of his convictions occurred in the same proceeding that he "received" them simultaneously, but the Court did not agree. Judge Newell pointed out that unlike sentence enhancement, there is no requirement in the statute requiring finality and that would foreclose multiple convictions in the same proceeding. Without that language, there is nothing that logically prevents two convictions from the same proceeding from meeting the requirement for lifetime registration, so long as one conviction occurs before the other. Judge Newell observed that this is what happens when the trial court considers separate cases in the same proceeding: the trial court will recite one cause number before the other. There is no provision in the statute requiring that the convictions be separated by a time period of a certain length, and Judge Newell expressed that the Court was disinclined to write one into it.

Judge Yeary concurred with the result, but took issue with the plurality's assertions that the goal of statutory construction is to effectuate the collective (or subjective) intent of the legislature. Citing Judge Scalia and Bryan Garner, Judge Yeary would adopt an approach that eliminates any reference to discerning legislative intent and relies solely on the language and structure of the statute.

Judge Walker dissented, joined by Presiding Judge Keller. Judge Walker argued that under the Court's opinion simultaneous convictions are impossible, rendering the "before and after" language superfluous. Presiding Judge Keller also dissented, saying that she would apply the general rule that everything that happens on a particular day is considered to have happened at the same time, and quoting Lord Coke: "regularly the law maketh no fraction of a day." Judges Hervey and Keel dissented without written opinion.

## 12. Death Penalty

- *Compton v. State*, 666 S.W.3d 685 (Tex. Crim. App. 2023) (7 [Slaughter]+1 [Walker], 1 judge concurred without opinion) (that two unidentified jurors might have seen defendant in shackles did not require mid-trial inquiry to satisfy due process; uniformed correctional officers in the gallery during penalty phase did not violate right to fair trial).

## 13. Bond Forfeitures

- *Green d/b/a A to Z Bail Bonds v. State*, 670 S.W.3d 633 (Tex. Crim. App. Jun. 28, 2023) (7 [Slaughter]-1[Yeary], 1 judge dissenting without opinion)

  **Because calling Defendant's name at the court*room* door substantially complies with the requirement of calling it at the court*house* door, conclusive proof of the same suffices for summary judgment.**

## 14. Punishment

- *Anastassov v. State,* 664 S.W.3d 815 (Tex. Crim. App. 2022) (9[Slaughter]-0) (when the trial court orders fines on multiple indictments to be paid concurrently, the defendant will pay only once, but each judgment should reflect the fine; COA erred to strike the fine from second judgment).

## 15. DNA Motions

- *Skinner v. State,* 665 S.W.3d 1 (2022) (9[Hervey]-0) (following new DNA testing and reanalysis of DNA mixture results under new DPS protocols, defendant did not show reasonable probability that he would not have been convicted had results been available during his trial in part due to strength of the circumstantial evidence pointing to defendant's guilt, including DNA consistent with his profile on 19 items intimately connected with the offense).

## 16. Motions for New Trial and Direct Appeal

## 16.1 Motions for New Trial

- *Sledge v. State*, 666 S.W.3d 592 (Tex. Crim. App. 2023) (5[McClure]-1[Yeary]3 judges dissented without opinion)

  **A motion for new trial granted solely on the ground that "the verdict is contrary to the law and evidence" means the trial court has found the evidence legally**

**insufficient. The State must appeal that ruling or it bars any retrial, even though it purports to grant a new trial.**

Following his convictions for drug and weapon charges, Sledge filed a motion for new trial on the sole ground that "the verdict is contrary to the law and evidence." According to the judge's docket sheet, the State did not oppose the motion (perhaps to have a second chance at enhancement after the first jury rejected the enhancement allegations). The trial court's order—part of the same document as the motion for new trial—merely invoked the same ground as the motion alleged, stating, "The above Motion is hereby ☑ Granted." The State never challenged the contrary-to-the-law-and-evidence assertion in the trial court or appealed the granting of the new trial motion.

As the case proceeded, all the parties generally appeared to understand that the State would retry Sledge. He was convicted again, and this time the jury found the enhancement allegations true. Sledge appealed and argued counsel was ineffective for failing to argue the first jury's "not true" findings collaterally estopped the State from pursuing the enhancements on retrial. The COA agreed and ordered a new punishment hearing.

In a motion for rehearing, the State brought to light a new issue in Sledge's favor. It argued that, because under *State v. Zalman*, 400 S.W.3d 590, 594 (Tex. Crim. App. 2013), "contrary-to-the-law-and-evidence" language equates to legal insufficiency, the trial court appeared to have found the evidence legally insufficient, and Sledge may be entitled to an acquittal. The State asked for abatement to determine the trial court's basis for granting the new trials. The COA denied the State's motion for rehearing and reiterated its original remedy to grant a new punishment hearing without addressing what effect the "contrary to" language had on this decision.

The State Prosecuting Attorney petitioned for discretionary review and argued that *Zalman* should not apply where none of the trial participants acted as if they understood the trial court to have been making a legal sufficiency ruling. [The defense never alleged that the trial court had acquitted him—not before retrial, during, or on appeal.] SPA maintained that *Zalman* (following earlier caselaw) equated the "contrary to" phrase with legal insufficiency so the State and trial court would be on notice of a specific claim and that because this rule operated for the State's benefit, the State could waive it. The CCA saw SPA's argument as asking for a double standard and rejected it, calling this case "a cautionary tale." Judge McClure's majority opinion reiterated that a *defendant* who asserts only that the verdict is contrary to the law and evidence has presented only a legal sufficiency claim. Consequently, this language must have the same meaning when the trial court grants a motion solely on that basis and the record does not otherwise expressly indicate that the phrase has some other meaning. While SPA argued that an alternative meaning should be ascribed to the trial court's new trial grant, it provided no *evidence* to that effect. It acknowledged it was strange that the State did not oppose the motions for new trial and did not appeal the trial court's decision to grant them and found it perplexing that both parties had the false impression Sledge could be tried again, but that wasn't enough to rebut the inference.

The Court acknowledges that there is some indication the "contrary to" phrase can mean something other than legal sufficiency. After all, Rule of Appellate Procedure 21.3 lists it as a reason for granting a new *trial* and previous cases have used the language when referring to errors in jury instructions. So the Court holds open the possibility that the record could show it had a different meaning. But the record would need to show that the order had a specific meaning other than legal sufficiency.

To prevent an acquittal and double jeopardy bar to retrial in this case, the State should have sought immediate clarification in the trial court or appealed. Otherwise, the vague motion for new trial and corresponding order (with no record of a hearing to the contrary) presents nothing other than the usual rule: the granting of a legal insufficiency claim. Both litigants and the trial court must inspect the contents of the motion to avoid that result.

Judge Yeary, in dissent, would have held that given how (and how late) this issue was raised, the COA both had the discretion not to, and in fact did not, address the issue posed in the State's motion for rehearing. Consequently, the majority should not have reached it. He also found it almost inconceivable that the trial judge understood he was declaring the evidence to be legally insufficient. There were several other possible understandings of the "contrary to" phrase. Its presence in Rule 21.3 may be a vestige of old law invoking factual sufficiency or a catch-all phrase that could refer to any legal error. Or, from the defense perspective, it might be nothing more than intending to extend the time for filing notice of appeal. Since the defendant stands to benefit, it makes some sense that he should bear the risk of the underdeveloped record. While the State raised the issue, there is no justification for also making it substantiate Sledge's claim.

## 16.2 Error Preservation in the Charge

- *Ruffins v. State*, 666 S.W.3d 636 (Tex. Crim. App. 2023) (7[McClure]+1[Yeary] one judge concurred without opinion)

> **When the judge asserts a particular instruction is responsive to the defendant's objection about a missing instruction, saying "I'm good" after it is then read aloud judicially estops him from complaining about that instruction on appeal.**

Gustavo Trevino and Olanda Taylor planned to rob a tattoo studio owned by Taylor's cousin; defendant Anthony Ruffins, Kenneth McMichael, and defendant's cousin Robert Ruffins agreed to participate. Surveillance footage of the robbery showed four men with masks and handguns. The clothing they wore, an exposed tattoo, and tracking information on a phone stolen in the robbery led to an investigation of those involved. While speaking with sources at the apartment complex Taylor lived in, police learned a man named David Hogarth was acquainted with the

suspects. Hogarth reluctantly identified the robbers in the surveillance video. Hogarth had been present when the others planned the robbery but did not participate.

Hogarth and Trevino testified at Anthony Ruffins' trial. The jury charge contained a Tex. Code Crim. Proc. art. 38.14 "accomplice as a matter of law" instruction for Trevino (because he was charged) and an "accomplice in fact" instruction for Hogarth, which wrongly instructed the jury that they must (1) determine whether Hogarth was an accomplice beyond a reasonable doubt, and (2) if they do so determine, they must also determine whether his testimony was corroborated. It should have required corroboration if they found Hogarth was an accomplice or had a reasonable doubt whether he was. In the charge conference, Ruffins' defense counsel recited a proper charge with doubt going in the defendant's favor on this issue and asserted that there was nothing in the charge that instructed jurors "if you have a reasonable doubt or not" with respect to a witness's status as an accomplice. Then confusingly, he added more specifically (and wrongly) that "they have to agree beyond a reasonable doubt that he is an accomplice." The judge asserted there was such an instruction, and the prosecutor read the improper instruction aloud. Thereafter, Ruffins' defense counsel responded, "I'm good."

On appeal, Ruffins argued that the charge was erroneous. The State responded that Ruffins was estopped from arguing that point, because he (through counsel) actually requested that language at the charge conference. The COA found that Ruffins was not estopped, because (1) what he was actually requesting was "an instruction specifying that there must be evidence corroborating Hogarth's testimony if the jury had a reasonable doubt as to whether or not Hogarth was an accomplice," and (2) the instruction was already in the charge at the time that he was speaking, so Ruffins could not have invited the error. The court further found that failure to include the instruction was egregiously harmful. The dissent agreed that the court's failure to include the instruction *sua sponte* was error, but found the harm to be theoretical, not actual.

The State filed a PDR, and the Court unanimously reversed. Writing for the majority, Judge McClure found that the COA erred in two points. First, the COA conclusion that defense counsel was actually requesting a proper charge was not persuasive. The discussion on the record indicated that defense counsel did not believe the language that he was requesting was in the charge. While his initial statement did refer to the language "if you have a reasonable doubt or not," counsel later clarified that he wanted an instruction that " they have to agree beyond a reasonable doubt that he is an accomplice," which is what was in the charge given. When he learned that this language was already in the charge, he stated, "I'm good." Secondly, the COA wrongly held that Ruffins was not estopped because he did not invite the error, but invited error is not the only form of estoppel. Even if Ruffins did not invite the error, his taking issue on appeal with the reasonable doubt instruction that he specifically requested at trial is asserting an inconsistent position that would give him an unfair advantage if not estopped. Once Ruffins stated "I'm good" with the instruction, he was estopped from thereafter claiming that the instruction was improper.

Judge Yeary wrote a concurring opinion. In Yeary's view, Ruffins was not estopped from claiming the instructions was improper; he could not have requested it, because it was already in the charge. Rather, Judge Yeary would reverse because Ruffins was not entitled to an accomplice in fact instruction as to Hogarth in the first place.

*Note*: This decision is context dependent. When the context makes it clear that a defendant did not intend to abandon or forfeit error he previously preserved, the CCA has held that error has been preserved. *See Stairhime v. State*, 463 S.W.3d 902, 908 (Tex. Crim. App. 2015) ("no objection" to the seating of the jury doesn't waive otherwise preserved voir dire error); *Thomas v. State*, 408 S.W.3d 877, 885 (Tex. Crim. App. 2013) (whether saying "no objection" when evidence is introduced forfeits an earlier litigated suppression claim depends on context).

## 17. Ineffective Assistance of Counsel

- *Ex parte Lane*, No. WR-90,084-01, 670 S.W.3d 662 (Tex. Crim. App. 2023) (5[Slaughter]+2[Richardson]-1[Yeary] 2 judges dissent without opinion)

> **Judicial clemency does not remove the duty to register. Counsel was not deficient for pleading client guilty to failure to register, despite having received judicial clemency; at the time of his plea, statute and caselaw were not clear about the effect of judicial clemency on registration.**

Lane obtained judicial clemency for a sex offense before 1999, when they became ineligible for that relief. The judicial clemency statute provides that a defendant will be "released from all penalties and disabilities resulting from the offense or crime of which he has been convicted." In 2007, Lane was charged with failure to register as a sex offender, and on the advice of counsel, he pleaded guilty and accepted the State's 10-year offer (despite facing a 25-year-habitual offender minimum enhancement). At the time, the law was not clear whether judicial clemency granted prior to 1999 removed the obligation to register as a sex offender. Several years later in writ, however, Lane relied on *Hall v. State*, 440 S.W.3d 690 (Tex. App.—Texarkana 2013, pet. ref'd), to argue that his plea was involuntary, he was actually innocent, and counsel was ineffective—all because under *Hall*, he never had a duty to register since the judicial clemency order, as the CCA said in a felon-in-possession case, "wiped away" his prior conviction.

The CCA denied relief. Because the law was unsettled at the time of his plea in 2007, counsel was not deficient in allowing his client to plead guilty to failure to register. Lane cannot fault counsel for not relying on *Hall* because that decision was not available at the time of his plea. The habeas court erred when it concluded counsel failed to sufficiently investigate the legal consequences of the judicial clemency order. Even if he had investigated, the statute and caselaw were at best unclear. The CCA's prior felon-in-possession case (*Cuellar v. State*, 70

S.W.3d 815 (Tex. Crim. App. 2002)) did not control because Ch. 62 determines when a defendant must register, and *Cuellar* did not involve sex-offender registration.

Further, the Court held as an issue of first impression that, contrary to *Hall*, he was still required to register notwithstanding the judicial clemency. While the statute provides that a defendant is released from all penalties and disabilities, Ch. 62 uses *broad* language to define the circumstances when a conviction or adjudication requires registration (even in "an appeal...or a pardon") and *narrow* language to define the circumstances under which the duty to register terminates ("a conviction ...is set aside on appeal by a court or if the person...receives a pardon on the basis of subsequent proof of innocence.") Because judicial clemency doesn't fall within the narrow termination circumstances and the express mention of those circumstances suggests they are exclusive, this factor favors registration. Moreover, judicial clemency is analogous to an executive pardon, and it would be anomalous to require registration for an executive pardon but not for a judicial one. Deferred adjudication, which results in no conviction at all, similarly requires registration. There is also a statutory procedure for early termination of the duty to register. If a trial judge's grant of judicial clemency were treated as no longer requiring registration, this would allow a single judge to circumvent the more complex statutory procedure for early termination.

Judge Yeary dissented. He believed that the COA in *Hall* was right that a conviction that was set aside under the judicial clemency statute was not a reportable conviction. Judge Yeary disagreed with the majority's reading of Ch. 62—which neither includes set aside convictions from the offenses that are nevertheless registerable nor excludes them from the type of convictions that are not. It only speaks of executive clemency, not judicial. Without more specific legislative language elsewhere, the nullifying language of the judicial clemency statute would seem to control, meaning Lane never had a duty to register. He would therefore have granted Lane relief.

- *Jefferson v. State*, 663 S.W.3d 758 (Tex. Crim. App. 2022) (9[Keller]+1[Yeary])

> **Code of Criminal Procedure Article 28.10(c) doesn't allow the amendment of an indictment to add additional counts; case remanded to the court of appeals to determine if counsel was ineffective for not objecting to the indictment.**
>
> **Read Britt's Texas Prosecutor summary here.**

The victim, C.N.M., was a 15-year-old runaway. The defendant, Harold Gene Jefferson, was indicted on two counts: sexual assault of a child and indecency with a child by contact. Based on additional outcry from the child shortly before trial, the trial prosecutor filed a motion to amend the indictment pursuant to Tex. Code Crim. Proc. Art. 28.10 to add two more counts of sexual assault of a child that arose out of the same incident on the same date. The trial prosecutor relied on the unpublished case of *Duran v. State*, No. 07-07-0110-CR, 2008 WL

794869, 2008 Tex. App. LEXIS 2160 (Tex. App.—Amarillo Mar. 26, 2008, pet. ref'd) (mem. op.), which held that amending an indictment to add additional counts of the same statutory offense is allowed under Art. 28.10(c), citing the CCA case of *Flowers v. State* 815 S.W.2d 724, 725-27 (Tex. Crim. App. 1991). Jefferson's attorney requested and received the 10-day trial postponement he was entitled to under Art. 28.10(a). Jefferson was convicted of all four counts, receiving 35 and 25 years on the original two counts and 45 years on each of the amended counts.

On appeal, Jefferson argued that the judgment was rendered void by the amended indictment under *Nix v. State,* 65 S.W.3d 664 (Tex. Crim. App. 2001). He also included four discrete arguments that his trial counsel was ineffective, including trial counsel's alleged failure to object to the indictment. As to Jefferson's fourth ineffective assistance argument, the COA noted that under Art. 28.10(c), an indictment may not be amended over the defendant's objection as to form or substance if the amended indictment charges the defendant with an additional or different offense or prejudices his substantial rights, and that the CCA held in *Flowers v. State* that an amended indictment charges a defendant with a different offense if the amendment changes the statutory offense. The COA further noted that at least one COA had interpreted *Flowers* to say that an amended indictment does not allege an additional offense if it adds another count of the same charged offense: the aforementioned *Duran* case. Because there was some authority for the amendment and also authority that defense counsel may strategically decide not to oppose an amendment to avoid unnecessary delay, Jefferson failed to prove that counsel was ineffective.

Jefferson petitioned the CCA, and the Court unanimously reversed. Writing for the court, Presiding Judge Keller held that Art. 28.10(c) doesn't allow the amendment of an indictment to add additional counts. The Court was unconvinced that Jefferson's counsel could have relied on unpublished caselaw, saying, "An attorney's failure to raise a claim is not deficient if the law is unsettled, but an unpublished court-of-appeals opinion in a criminal case does not constitute precedent, so it cannot create an uncertainty when the law is otherwise clear" (which contradicts the Court's holding in *Ex parte Roemer*, 215 S.W.3d 887 (Tex. Crim. App. 2007)). Presiding Judge Keller stopped short of saying that trial counsel was ineffective, but stated that trial counsel's statement at a motion for new trial hearing that he did object to the indictment seemed to be at odds with the COA's finding that he may have had a strategy for not objecting, and remanded back to the COA for further proceedings, saying, "We think more explanation is required to resolve this apparent inconsistency than what was given by the court of appeals." The case is at the time of this writing pending in the COA on that issue.

Judge Yeary's concurrence lamented that Jefferson's petition didn't pursue his void judgment claim, in which he saw some merit and which "might even have mooted his ineffective assistance of counsel claim." In Judge Yeary's view, trial counsel's failure to object or reasoning for not doing so is beside the point as to the amended counts. Absent a valid affirmative waiver on the record from Jefferson, those counts would be void whether there was an objection in the trial court or not, as the right to indictment by the grand jury is a *Marin* category two right. This issue was re-raised by the parties in the courts of appeal and could ultimately decide the case.

- *Hart v. State*, 667 S.W.3d 774 (Tex. Crim. App. 2023) (7[Slaughter] two judges concurred without opinion) (COA erred in finding counsel ineffective for rejecting trial judge's offer of sudden-passion instruction where record did not reflect counsel's reasoning and presumption of reasonable strategy was not rebutted).

- *Ex parte Salinas*, 664 S.W.3d 894 (Tex. Crim. App. 2022) (5[Yeary] one judge concurred and one judge dissented, without opinions]) (the law is unsettled about when a defendant has effectively invoked his right to silence—particularly when he does so selectively—thus counsel not ineffective for failing make the argument).

- *Ex parte Castillo*, 664 S.W.3d 833 (Tex. Crim. App. 2022) (5[Keller] +3-1]) (counsel not ineffective for failing to file notice of appeal where defendant had no right to appeal in the first place, distinguishing *Garza v. Idaho*, 139 S.Ct. 738 (2019) (where defendant had right and waived it)).

# 18. Habeas Corpus

## 18.1 State Habeas

- *Ex parte Sheffield*, 2023 WL 4092747 (Tex. Crim. App. 2023) (8[Walker] one judge concurred without opinion)

  **Speedy trial claims are not cognizable on pretrial habeas; a refusal to ever set trial could be raised on mandamus. Because habeas is a separate lawsuit and no stay was granted, the trial court had jurisdiction to proceed to trial despite pendency of the appeal from the pretrial habeas claim.**

Sheffield had been in jail on multiple felony drug- and evading-arrest offenses for eight or nine months when the Covid shut-downs halted the proceedings in his case. In denying Sheffield's request for a speedy trial, the trial court said, in June 2020 over Zoom, that he was prevented by various emergency orders from convening a trial. Sheffield then filed a pretrial writ of habeas corpus, re-urging his speedy trial request and, in the alternative, asking to be released, which the trial court also denied.

Sheffield appealed, and the COA reversed the trial court's denial of his pretrial habeas speedy trial claim. It distinguished prior cases holding that speedy trial was not cognizable on habeas because Sheffield asked for a speedy trial, not a dismissal. The state filed a petition for discretionary review.

While the State's petition was pending, Sheffield was tried and convicted.

Writing for an 8-judge majority, Judge Walker reaffirmed that speedy trial claims are not cognizable on habeas corpus. It acknowledged that between the 3-judge plurality and 3-judge concurrence in *Ex parte Perry*, 483 S.W.3d 884 (Tex. Crim. App. 2016), a majority of the court had held that certain as-applied constitutional challenges could be raised pretrial if they would effectively be undermined if not vindicated prior to trial. But Sheffield's claim did not qualify under the *Perry* rule. It is not the type a claim that must be upheld prior to trial if it is to be enjoyed at all (as would be the case for Double Jeopardy). Waiting for an appeal after trial irreparably harms the double jeopardy right because the defendant's unconstitutional exposure to double jeopardy cannot be undone. The opposite is true for a speedy trial claim; it is aided by proceeding on to trial and undermined by pretrial habeas and the corresponding ability to immediately appeal. In the event a trial judge were to indefinitely forgo trial (and thereby indefinitely foreclose the possibility of appellate review), a defendant could seek mandamus to compel the trial court to set the case for trial or dismiss for violation of the speedy trial right.

The trial court was perfectly right to hold trial while the appeal of the pretrial habeas matter was pending. Texas Rule of Appellate Procedure 25.2(g) provides that once the appellate record has been filed, all proceedings will be suspended until the trial court receives the appellate mandate. But this did not suspend proceedings in Sheffield's criminal cases. A habeas corpus proceeding is separate from the criminal prosecution. Although no statute grants a defendant an immediate right to appeal from an order denying relief in the habeas action, the reason an appeal can occur is because that order is a final judgment in the habeas case. In the absence of a stay, the habeas appeal has no effect on the underlying criminal prosecution. Because Sheffield did not obtain a stay, the trial court had jurisdiction to proceed to trial. [The Court did not address whether the trial and/or conviction rendered the pretrial habeas question moot as having no practical effect on the parties.]

- *Ex parte Dennis*, 665 S.W.3d 569 (Tex. Crim. App. 2022) (9[Newell]-0)

**Being confined on a 3-year prison sentence at the time the writ was filed sufficed for the pleading requirement of "confinement" despite his sentence discharging while the writ was pending.**

Dennis was convicted of felony DWI and sentenced to three years imprisonment. While imprisoned he filed a postconviction application for writ of habeas corpus, alleging ineffective assistance of trial counsel. While his application was pending, he was released from confinement. Ordinarily a person who files a writ after being released from confinement must allege that they continue to suffer continuing adverse collateral consequences, such as loss of job opportunities due to being a felon, but Dennis did not allege collateral consequences.

The CCA held unanimously that Dennis did not have to do so. Writing for the Court, Judge Newell noted that the two possible dispositions were to (1) dismiss Dennis's application so that he could refile with collateral consequences allegations, and (2) treat his pleadings as sufficient at the time they were filed and consider the merits of his claims. The Court opted for the latter approach. Dennis was incarcerated at the time he filed his application, which was sufficient to reach the merits. It was a short-lived victory, however, as the Court then denied the merits of his claim.

- *Ex parte Reed*, 664 S.W.3d 109 (Tex. Crim. App. 2022) (improper cumulation order was struck based on ineffective assistance of trial/appellate counsel for failing to complain of it; Judge Newell in concurrence—and over three dissenters—distinguishes *Ex parte Carter*, 521 S.W.3d 344 (Tex. Crim. App. 2017), which held that bare challenges to cumulation orders—*i.e.*, not through the vehicle of ineffective assistance—are not cognizable on habeas).

- *Ex parte Mathews*, 666 S.W.3d 475 (Tex. Crim. App. 2023) (5[Keller] +3-1]) (officer's other acts of intentional misconduct of false testimony and fictional drug buys occurred around same time as investigation of Mathews's case, warranting inference of falsity in his case).

- *Ex parte Covarrubias*, 665 S.W.3d 605 (Tex. Crim. App. 2023) (7[Keller] one judge dissented without opinion) (habeas judge's recommendation to grant relief for IAC was rejected, in part because (1) potential appellate claims were not preserved or harmless, (2) a voluntariness instruction wasn't raised by defendant's testimony that he did not remember shooting the victim, (3) instruction that jury must unanimously reject the greater offense before considering a lesser didn't require objection given that trial preceded *Barrios*, 283 S.W.3d 353, and even if it did not, applicant cannot claim harm from possibility jury would not have been unanimous, (4) defendant's absence from reading of and responding to jury notes did not bear reasonably substantial relationship to the opportunity to defend nor would his presence have changed the trial court's response to the pure legal questions raised by jury notes).

- *Ex parte Rodney Reed*, 670 S.W.3d 689 (Tex. Crim. App. 2023) ([McClure]) (Reed's new witnesses would have put him in better position at trial but did not establish it was more likely than not that his trial would have ended differently, the standard necessary for standalone actual innocence; the Court did not find some of his evidence credible).

- *Ex parte Moon*, 667 S.W.3d 796 (Tex. Crim. App. 2023) (7[Yeary]+2-1) (CCA has jurisdiction to determine the COA lacked jurisdiction to consider appeal of pre-trial writ challenging a juvenile transfer order. Under Art. 44.47, the defendant must raise that challenge following conviction on direct appeal of the criminal case).

## 18.2 Federal Habeas

- *Cruz v. Arizona*, 143 S.Ct. 650 (2023) (Arizona's supposedly independent state-law-ground basis not to review Cruz's claim—that the S. Ct's decision in *Lynch v. Arizona*, correcting Arizona's own refusal to apply *Simmons v. South Carolina*, 512 U.S. 154, in Arizona, was not a "significant change in the law" and only a significant change in the *application* of the law—was itself so unforeseeable and unsupportable that it could not bar federal review). Read NAAG summary here.