THINGS TO WATCH FOR

CASES IN WHICH DISCRETIONARY REVIEW HAS BEEN GRANTED

SOMETIMES IT'S BETTER TO KNOW WHAT THE LAW COULD BE, THAN WHAT THE LAW IS

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SCOPE OF PAPER

"Discretionary review by the Court of Criminal Appeals is not a matter of right, but of the Court's discretion." TEX. R. APP. PROC. 66.2. The rules enumerate five "reasons for granting review," but also make it clear that these reasons neither control nor fully measure the Court's discretion. TEX. R. APP. PROC. 66.3.

As of August 11, 2021, petitions for discretionary review had been granted by the Texas Court of Criminal Appeals and were awaiting decision in 85 cases.

ASSAULT

★ **Were the elements of a prior conviction in Arkansas "substantially similar" enough to those of enumerated Texas offenses" to qualify for enhancement?**

***Johnson v. State*, 2020 WL 6929375**
(Tex. App.–Beaumont 2020, pet. granted)(not designated for publication)

Johnson was tried for a family violence assault and it was alleged that he had a prior conviction for family violence in Arkansas. The State introduced a certified docket sheet from Arkansas showing he had pleaded guilty to "Battery 3rd Degree Domestic," and two witnesses testified to personal knowledge of his arrest and conviction for the charge. Following his conviction, Johnson argued on appeal that the elements of the Arkansas prior were insufficiently similar to those enumerated in § 22.01(f)(2) of the Texas Penal Code to qualify as an enhancing conviction. The court of appeals disagreed and affirmed his conviction and sentence.

> For purposes of the relevant sections of the statute, "a conviction under the laws of another state for an offense containing elements that are substantially similar to the elements of an offense listed in those subsections is a conviction of the offense listed." Tex. Penal Code Ann. § 22.01(f)(2) Viewing all the evidence in the light most favorable to the verdict and after reviewing all the evidence and considering all reasonable inferences therefrom, we conclude that a rational fact-finder could have found the elements of the offense beyond a reasonable doubt.

The court granted Johnson's petition for discretionary review.

Issue Presented

1. The Beaumont Court of Appeals erred in finding the evidence legally sufficient to prove Petitioner had a qualifying prior conviction for purposes of Texas Penal Code § 22.01(b)(2)(A).

★ **Insufficient evidence to prove "dating relationship?"**

***Edward v. State*, 599 S.W.3d 69**
(Tex. App.–Houston [14th Dist.] 2020, pet. granted)

Edward was accused of assaulting the complainant while they were in a "dating relationship", which the Family Code defines as a "relationship between individuals who have or had a continuing relationship of a romantic or intimate nature." Section 71.0021(b) of the Family Code further provides that "the existence of such a relationship shall be determined based on consideration of: (1) the length of the relationship; (2) the nature of the relationship; and (3) the frequency and type of interaction between the persons involved in the relationship." The complainant did not testify in this case.

Edward was convicted by the jury of the felony, and he appealed, asserting that the evidence was insufficient to prove a dating relationship. The court of appeals agreed, holding that the State failed to prove any of the of the three factors mentioned in §71.0021(b).

The State's petition for discretionary review was granted.

Issue Presented

The court of appeals misapplied the standard of review for sufficiency of the evidence and in a manner that so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court of Criminal Appeals' power of supervision.

★ **Sufficient evidence of recklessness?**

***Spillman v. State*, 2020 WL 4013142**
(Tex. App.–Dallas 2020, pet. granted)(not designated for publication)

The police suspected Spillman of possessing drugs and they grabbed him, and he resisted. Both of the officers, Reeves and his partner, were injured in the struggle, and Spillman was charged with aggravated assault on a public servant. The jury was instructed on the lesser of resisting, but the jury convicted Spillman of the charged

offense.

The court of appeals affirmed, holding that the evidence was sufficient to prove that Spillman recklessly injured the officers.

> Appellant contends he could not have perceived a substantial and unjustifiable risk arising from his actions on the night of his arrest. He suggests it was Reeves's actions rather than his own that caused the officers to be injured. It was appellant's conduct of struggling with the officers that precipitated Reeves's actions, however. Even if appellant only intended to conceal evidence and prevent his arrest, he disregarded a substantial risk that his struggling could result in bodily injury to any of the officers involved in his arrest.

Spillman's petition for discretionary review was granted.

Question Presented

Whether the evidence is legally sufficient to support Petitioner's convictions for two assaults on a Public Servant?

ASSISTANCE OF COUNSEL

★ **Proving prejudice on direct appeal without a motion for new trial is difficult.**

***Swinney v. State*, 2021 WL 261568 (Tex. App.– Beaumont 2021, pet. granted) (not designated for publication)**

Swinney was charged with two counts of aggravated assault with a deadly weapon; he pleaded not guilty but waived his right to have the jury sentence him. The jury found him guilty, and the Court sentenced him to 8 years imprisonment. Swinney complained for the first time on appeal that his trial lawyer rendered ineffective assistance of counsel by misinforming him that the Court could give him probation if he were found guilty. The court of appeals agreed that trial counsel performed deficiently by misinforming Swinney about his eligibility for probation, but affirmed his conviction, holding that he had failed to prove prejudice.

The appellate court noted that Swinney had not filed a motion for new trial, nor had he testified or filed an affidavit claiming that he would have elected the jury to assess punishment had his lawyer advised him that only the jury could give him probation, or "that the advice his attorney gave him was the sole reason he chose to go to the trial court

for punishment, or whether instead, other considerations existed that played a role in that decision."

Issue Presented

The Court of Appeals erred by applying the incorrect prejudice standard to determine that the Appellant cannot meet his burden to show the outcome of his trial would have been different had he been correctly advised that only the jury could consider placing him on probation.

★ **Reasonable strategy, or the inexcusable failure to investigate?**

***Pham v. State*, 595 S.W.3d 769**
(Tex.–Houston [14th Dist.] 2019, pet. granted)
(not designated for publication)

Pham was tried for murder and requested a charge on the use deadly force, pursuant to § 9.04 of the Texas Penal Code. The trial court denied the requested charge, Pham was convicted, and he filed a motion for new trial asserting he had been denied the effective assistance of counsel at the punishment phase. The court of appeals disagreed with this argument, and with his point of error complaining of the denial of an instruction on deadly force.

As to the charge issue, the court noted that appellant received an instruction on self-defense. "Because he did use deadly force, rather than the threat of deadly force, he was not entitled to an instruction pursuant to section 9.04, in addition to the instruction on self-defense."

As to the claim that his lawyer was ineffective, the court acknowledged counsel's affidavit that various of his failures at trial were not strategic, but went on to find that, examination of the entire affidavit belied this claim, and that, in fact, his strategy to prioritize self-defense over mitigation was a reasonable one.

The court of criminal appeals granted Pham's petition for discretionary review.

Questions Presented

1. Whether an attorney provides ineffective assistance when he admits in an affidavit that he failed to interview any potential mitigation witnesses, he made conclusory assumptions about what those witnesses might know about appellant's life, and his decision not to interview any potential witnesses was not based on trial strategy. (C.R. at 329-32, 334-59).

2. Whether trial counsel's failure to investigate even a single avenue of mitigation means that appellant was constructively denied any defense at all in the penalty phase of his trial and therefore prejudice is presumed. (C.R. at 329-32, 334-59).

4. Whether the Court of Appeals erred by holding that because appellant used deadly force, rather than the threat of deadly force, he was not entitled to an instruction on self-defense pursuant to Tex. Pen. Code § 9.04. (VI R.R. at 171-74; XII R.R. at 240).

★ **Can the trial court forbid the lawyer to confer with his client?**

***Villarreal v. State*, 596 S.W.3d 338**
(Tex. App.–San Antonio 2019, pet. granted)

The court called an overnight recess in the middle of the defense's direct examination of Villarreal and ordered him and his lawyer not to talk about his testimony during the overnight break. Counsel objected that this violated his Sixth Amendment right to counsel, and the objection was overruled.

The court of appeals affirmed. "[I]n this matter of first impression in Texas, we conclude the trial court did not abuse its discretion in limiting Villarreal's right to confer with his counsel during an overnight recess to matters other than his ongoing trial testimony."

Justice Martinez dissented, finding that the trial court's order effectively denied him his Sixth Amendment right to counsel, that there was no need to show harm because this was structural error, but that if a harm analysis were appropriate, the error was not harmless beyond a reasonable doubt. Alternatively, Justice Martinez believed that the trial court abused its discretion by acting without reference to guiding principles established by the Supreme Court with the result that Villarreal was denied his right to the unrestricted access to his lawyer for advice.

Villarreal's petition for discretionary review was granted.

Issue Presented

The court of appeals erred in holding that the trial court properly limited the Appellant's ability to consult with trial counsel during an overnight recess in violation of the Appellant's Sixth Amendment right to counsel.

CONFESSIONS

★ Was the "cat out of the bag"?

***State v. Castanedanieto*, 2021 WL 972901**
(Tex. App.–Dallas, pet. granted)
(not designated for publication)

The detective first read the defendant the warnings in English, and when he indicated, only "a little bit," because he did not speak English. The detective then had the defendant read aloud a card that had the rights written in Spanish, and asked if he understood now; the defendant nodded affirmatively, but when asked if he was willing to talk to help figure out what happened, he said, "It's cause – um – I don't understand." Undaunted, the detective said, "Okay, let's talk about what happened tonight," and the defendant responded, "Yes, sir," and incriminated himself in the ensuing questioning. Later, a magistrate advised the defendant of his rights, and the defendant requested a lawyer. The next night a Spanish-speaking detective visited the defendant in jail, read him his rights in Spanish, and, when asked if he was willing to talk, the defendant responded, "Yeah, I'm gonna tell you—I'm gonna start by basically saying what it was I was doing." And he did.

The State argued that the second statement was preceded by the proper warnings, and that the defendant properly waived his rights. The trial court disagreed and suppressed each of his statements. The State appealed, and the court of appeals affirmed the trial court's order of suppression.

The court of appeals recognized that the Supreme Court had "walked back" its "cat in the bag theory" in *Oregon v. Elstad*, 470 U.S. 298, 314 (1985), by holding that unless there are "deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." A subsequent *Miranda* warning will usually suffice to render a subsequent statement admissible. "In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights."

Here, however, the court of appeals distinguished *Elstad*:

> But nothing in *Elstad's* language requires reversal of a grant of suppression under these circumstances simply because the facts could be reweighed to possibly warrant a conclusion denying the suppression motion. Here, there is evidence to support a determination that Mr. Castanedanieto was motivated at least in part by "cat out of the bag" thinking, and nothing in the second video indisputably demonstrates he was not. [citation omitted] On this record, we conclude the trial court did not abuse its discretion by

granting Mr. Castanedanieto's motion to suppress his second statement.

The State's petition for discretionary review was granted.

Issue Presented

Contrary to this Court's prior decision in this case, the court of appeals expressly defied the ordinary applicable rules for examining a waiver of a defendant's rights under Miranda and article 38.22 of the Texas Code of Criminal Procedure by applying the "cat out of the bag" coercion theory to Castanedanieto's claim that his second police interrogation waiver was unknowing.

★ **Who has the burden when the police take a *Garrity* statement from an officer/defendant?**

***Oliver v. State*, 2020 WL 4581644**
(Tex. App.–Dallas 2020, pet. granted)
(not designated for publication)

Oliver was a police officer who killed a citizen. He made several written statements to the department pursuant to *Garrity v. New Jersey,* 385 U.S. 493, 500 (1967), which held that the 14th Amendment prohibits the use of statements obtained from a police officer under threat of removal from office in subsequent criminal proceedings. Oliver was indicted for murder, and before trial he moved to suppress evidence derived from his *Garrity* statements, to dismiss his indictment, and to recuse the district attorney's office, contending that the State's evidence had been tainted by the immunized *Garrity* statements. At the hearing, several officers testified that they had no knowledge of what Oliver had told the department in his *Garrity* statement, and that their testimony was based on their personal knowledge of the events, and on a walk-through of the shooting. The trial court denied Oliver's motions to suppress, dismiss, and recuse, holding that the defense had not met its burden to make some showing that the State's evidence had been tainted by exposure to those immunized statements. Oliver was convicted and he appealed contending that he bore no burden in the *Garrity* analysis. The court of appeals disagreed and affirmed the trial court.

> It was appellant's burden to bring to the trial court some showing that the State's evidence had been tainted by exposure to those immunized statements. . . . We conclude that appellant made no showing that any witness was exposed to his written or recorded statements, either directly or through any law enforcement official. Thus, no evidence offered at the grand jury proceedings or at trial can be traced directly or derivatively to those statements. We likewise conclude that nothing in the record supports

> a suggestion that any member of the Dallas District Attorney's office—other than Lt. Rendon [who had been walled off from the rest of the office]—was aware of the *Garrity* statements' existence. Nor is there anything in the record indicating that Lt. Rendon participated in the investigation or presentation of appellant's case in any fashion. We find no authority concluding that the mere presence of a *Garrity* statement in a sealed file would support disqualifying a district attorney's office. Appellant did not carry his burden to offer a foundation for his contention that his *Garrity* immunity was violated either by witness testimony at the grand jury or at trial or by the presence of his statements in the District Attorney's file.

Oliver's petition for discretionary review was granted.

Question Presented

When the prosecuting authority is in possession of an immunized statement, does the State bear the burden to demonstrate that the statement was not "used" in any way by the prosecution?

★ **Question first, warn later.**

***State v. Lujan*, 2018 WL 4659578**
(Tex. App.–El Paso 2018, pet. granted)
(not designated for publication)

Lujan was charged with murder, and her lawyer moved to suppress statements she made. The trial court denied a motion to suppress the first statement but granted a motion to suppress her second two statements, finding that the police moved Lujan "from police headquarters to their vehicle to acquire an advantage in the interrogation process and to deliberately employ a 'question first, warn later' interrogation technique so as to circumvent Ms. Lujan's *Miranda* protections." The State appealed.

> The appeal raises the question of whether the recorded statements were from a single interview for which Erlinda Lujan was properly informed of her rights at the outset, or whether the police conducted three separate interrogations, and as a part of the second and third sessions, used the "two-step" process (also referred to as the "question-first, warn-later" technique) to gain incriminating information. We also address whether the two-step issue was raised below, and whether the State properly perfected this appeal.

The court of appeals affirmed the trial court's order suppressing the second statement, but reversed the order suppressing the third statement.

The State's petition for discretionary review was granted.

Issues Presented

The Eighth Court erred in upholding the trial court's ruling that the second, in-car session of Lujan's interview was not a continuation of the first, interview-room session, because: (1) under the *Bible* factors, the second-session interview was a continuation of the first; and (2) requiring police to re-Mirandize a suspect if the police engage in ambiguous conduct that could be construed as terminating, or setting a temporal limitation on, the interrogation (and attendant *Miranda* rights) undermines the ease and clarity of *Miranda's* application by requiring officers to continually second-guess whether they made any such potentially ambiguous statements.

CONFIDENTIAL INFORMANTS

★ **Will the court let the police get away with intentionally calling its known confidential informant "anonymous"?**

***Diaz v. State*, 604 S.W.3d 595**
(Tex. App.–Houston [14th Dist. 2020, pet. granted)

Several people burglarized a home and later, one of the burglars talked about the burglary to an acquaintance, who happened to be a confidential informant for the DEA. As they do, the CI informed, and the information led the sheriff's department to seek a search warrant for appellant Diaz's cell phone. The affidavit for the warrant "incorrectly characterized" the CI as an anonymous source, the warrant issued, and the evidence obtained was used to convict Diaz. Diaz appealed, asserting that the trial court erred when it denied his motion to suppress because the affidavit and warrant violated *Franks v. Delaware*.

The court of appeals disagreed and affirmed Diaz's conviction. The court found that the record supported the trial court's conclusion that the misidentification was not material to the magistrate's finding of probable cause.

Justice Spain dissented: "'Citizen informants are considered inherently reliable; confidential informants are not.' *State v. Duarte*, 389 S.W.3d 349, 357 (Tex. Crim. App. 2012). Yet the majority fails to properly address this distinction, and in so doing misapplies *Franks v. Delaware*."

The court of criminal appeals granted Diaz's petition for discretionary review.

Question Presented

1. Does intentionally misdescribing an untested confidential informant as an "anonymous source" in a probable cause affidavit cause the informant's uncorroborated incriminating information to be excised pursuant to *Franks*?

★ **Did the trial court err under TEX. R. EVID. 508 when it dismissed a capital murder case after the State refused to identify a confidential informant; if so, was this error preserved?**

***State v. Lerma*, 2018 WL 5289452**
(Tex. App.–Austin 2018, pet. granted)
(not designated for publication)

When the State refused to disclose the identity of its confidential informant, the trial court granted Lerma's motion to dismiss his capital murder charges pursuant to Rule 508 of the Texas Rules of Evidence. The trial court made findings that the State's witnesses's testimonies – that they did not know the CI's identity – were not credible.

The state appealed from that order, and the court of appeals reversed: "Because we conclude that Lerma failed to meet his burden of showing that a reasonable probability exists that the informer could give testimony necessary to a fair determination of his guilt or innocence, we will reverse the trial court's order and remand this cause to the trial court for further proceedings."

The court of appeals also rejected Lerma's argument that the State waived the error by not objecting to the dismissal at the time that was ordered. First, the court said there was no authority requiring the State to object in addition to filing notice of appeal concerning the dismissal. Second, the court held that the State did object by asking the court to note its exception.

The court of criminal appeals granted Lerma's petition for discretionary review.

Questions Presented

1. Can an appellate court disregard the issue of error preservation so that the State has a remedy when a capital murder case is dismissed because of the State's own actions in disappearing a confidential informant?

2. Can an appellate court reverse a trial court's dismissal under TRE 508 without ever

addressing the untrustworthiness of the State's position that the State does not know the identity of the confidential informant?

CONFRONTATION

★ **Computer-generated DNA data is non-testimonial, and its admission does not violate the Confrontation Clause.**

***Molina v. State*, 587 S.W.3d 100**
(Tex. App.–Houston [1st Dist.] 2019, pet. granted)

Molina was indicted for aggravated sexual assault 15 years after the fact. The complainant could not identify him, and there was no other evidence connecting him to the crime except his DNA. The complainant's undergarments were tested for DNA by an out-of-state lab and neither the analyst nor any other employee of the lab testified. Instead, the results were interpreted by Halsell, the operations coordinator of the Houston Forensic Science Center. Halsell did not supervise anyone at the testing lab and did not know what standards or protocols it used. Halsell relied on his own testing of Molina's DNA, and on the computer-generated data from the other lab to conclude that the two DNA samples matched. Molina's objections that this evidence violated his right to confront were overruled, the evidence was admitted, and he was convicted.

The court of appeals affirmed.

> The question before us is whether the Confrontation Clause bars a testifying expert from relying on computer-generated data gathered by employees of a different laboratory who processed physical evidence for DNA unless those employees also testify. . . . [W]e hold that computer-generated DNA data from another lab is not testimonial, and the Confrontation Clause thus does not bar a testifying expert from relying on it even though the persons who accumulated the data do not take the stand and are not subject to cross-examination.

Molina's petition for discretionary review was granted.

<u>Questions Presented</u>

Whether the majority opinion conflicts with *Burch v. State*, when the majority opinion affirmed the trial court's admission of DNA testimony over Appellant's Confrontation Clause objection?

DEMONSTRATIVE EVIDENCE

★ **Animation.**

***Pugh v. State*, 2019 WL 4130793**
(Tex. App.–Eastland 2019, pet. granted)
(not designated for publication)

Pugh was charged with murder by running over the complainant with a car. Pugh objected to three animated videoclips, that the animations did not base the deceased's demeanor or behavior on any scientific information, and that they portrayed him as stationary and unarmed, which contradicted Pugh's testimony that he was lunging toward him with a knife. Pugh was convicted, and he appealed. The court of appeals affirmed.

> Having viewed—several times—all three videoclips in the exhibit and having reviewed the testimony from the witnesses at the hearing on the motion to suppress and at trial, we cannot hold that the trial court abused its discretion when it admitted the animation into evidence. According to the testimony of the expert witnesses, the animation was a computer-generated recreation based on objective data and measurements obtained from the scene, objective evidence obtained from Appellant's pickup, and the autopsy findings. In each of the three videoclips admitted into evidence, the scene is depicted from a distance and shows nothing gruesome. We hold that the trial court did not abuse its discretion by admitting the exhibit containing these three videoclips into evidence over Appellant's objections that the animation depicted in the exhibit was speculative and unfairly prejudicial. We overrule Appellant's first issue.

Pugh's petition for discretionary review was granted.

Issue Presented

The Court of Appeals erred in holding the trial court acted within its discretion when it allowed the State to introduce three animations to the jury which depicted the decedent Delorme as unarmed and stationary, contrary to the evidence.

DRUGS

★ Mixtures of codeine and promethezine, and lesser included offenses.

***Biggers v. State*, 601 S.W.3d 369**
(Tex. App.–Amarillo 2020, pet. granted)

Biggers was indicted for possessing more than 400 grams of codeine, and the jury convicted him. On appeal he asserted that the evidence was insufficient.

> Based on this record, Appellant asserts the evidence presented was insufficient because the State was unable to provide any testimony establishing an essential element of the State's case, namely the level of concentration of codeine in the substances possessed by Appellant. Furthermore, Appellant contends the evidence was insufficient because the State only established the mere presence of promethazine, rather than the presence of promethazine in a sufficient proportion to the whole to confer on the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the codeine alone. We agree.

The court next considered whether it was required to remand for acquittal, or find Biggers guilty of the lesser included offense of possession of 28 to 200 grams of codeine.

> Because the insufficiency of the evidence in this case goes to the nature of the substance possessed, as opposed to the amount possessed, applying the standards of evidentiary review to each of these lesser-included offenses, we find the evidence is still insufficient to support a conviction as to any of the lesser-included offenses. Accordingly, we reverse the judgment finding Appellant guilty of possession of a Penalty Group 4 controlled substance, over 400 grams, and we render a judgment of acquittal.

The State's petition for discretionary review was granted.

Question Presented

When the State alleges, but fails to prove, the codeine mixture the defendant possessed contains a sufficient proportion of another medicine to be medicinal, should he be acquitted?

★ **Are the possession or attempted possession by misrepresentation, etc of tramadol and oxycodone the same conduct, act, or transaction, for purposes of the statute of limitations?**

***State v. West*, 597 S.W.3d 4**
(Tex. App.–El Paso 2020, pet. granted)

The State indicted West for possessing or attempting to possess tramadol by misrepresentation, fraud, forgery, deception or subterfuge on three separate occasions. Eventually, perhaps after reading their lab report, the prosecutors dismissed that indictment, and next indicted him for doing all those things, but with a different drug — oxycodone. The second indictment was dismissed because the State failed to include a tolling paragraph, and West was indicted a third time. The trial court granted West's motion to quash the third indictment that asserted it was handed down after the statute of limitations had expired. The court rejected the State's argument that the statute had been tolled by the first indictment.

The court of appeals reversed.

> The issue presented in this appeal is whether an original indictment that charges three counts of possession or attempted possession of a controlled substance, to-wit: tramadol, by misrepresentation, fraud, forgery, deception or subterfuge, on three separate dates, alleges the same conduct, act, or transaction, as a subsequent indictment that charges the same conduct in the same manner except that the controlled substance identified by the charges is not tramadol but oxycodone. Because we conclude that the prior and subsequent indictments alleged the same conduct and shared the same factual basis, we reverse and remand.

West's petition for discretionary review was granted.

Issue Presented

In finding that the original indictment that charged three counts of possession or attempted possession of a controlled substance, to wit: tramadol (by misrepresentation, fraud, forgery, deception or subterfuge, on or about three separate dates), alleged the same conduct, act or transaction as a subsequent indictment that charged the possession or attempted possession of oxycodone, the Court of Appeals decision conflicts with decisions of the Court of Criminal Appeals and the United States Supreme Court, Tex. R. App, P. 66.3(a)(c).

DWI

★ **Harm where the element of 0.15 alcohol concentration level is not submitted to the convicting jury.**

***Do v. State*, 2020 WL 1619995**
(Tex. App . –Houston [14th Dist.] 2020, pet. granted)
(not designated for publication)

During appellant's arraignment, the State did not read the portion of appellant's information that alleged the at-least 0.15 alcohol concentration level. Appellant pleaded not guilty but was convicted by the jury. Punishment was before the jury and the State announced to the court that it would "further allege the .15 allegation." The defense objected to the enhancement because "that element was not presented to the jury for their consideration as part of deliberations." The State argued that this was a punishment, not a guilt/innocence issue, and the trial court overruled the objection, found the enhancement true, and sentenced accordingly.

The State conceded that the 0.15 concentration is an element of the offense, and that the trial court erred in not submitting it to the jury, but argued that the error was harmless beyond a reasonable doubt. The court of appeals held that "when the charge error concerns 'a violation of the federal constitution that did not amount to a structural defect, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.'"

> Lacking knowledge beyond a reasonable doubt that the jury unanimously found the intoxication element based on the per se theory, we cannot conclude that the additional 0.15 element of Class A misdemeanor DWI was either inherent in the elements the jury found or logically encompassed by its guilty verdict. . . . Under these circumstances, we cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the constitutional error.

The court of criminal appeals granted the State's petition for discretionary review.

Issues Presented

1. The Fourteenth Court erred by applying the constitutional harm standard to unobjected-to charge error.

2. Alternatively, the Fourteenth Court erred by concluding that a punishment-phase objection preserved error in the guilt-phase charge.

3. The Fourteenth Court erred by finding reversible harm even though the error concerned an uncontested matter established by objective facts.

ELECTION CODE

★ Must a voter know she is legally ineligible to vote; is submitting a provisional ballot that is later rejected "voting"?

***Mason v. State*, 598 S.W.3d 755**
(Tex. App.–Fort Worth 2020, pet. granted)

Following Mason's conviction of, and sentence of imprisonment for, a federal felony offense, Tarrant County Elections Administration mailed her notice that her voter registration would be cancelled in 30 days if she failed to prove her entitlement to registration. When 30 days passed without response, Mason was mailed another notice that her registration had been cancelled. Following her release from prison, Mason completed a provisional ballot and voted. She was later indicted and convicted of voting illegally, and she appealed. The court of appeals found the evidence of Mason's guilt was sufficient, and affirmed her conviction.

Mason's petition for discretionary review was granted.

Questions Presented

1. The Illegal Voting statute requires that "the person knows the person is not eligible to vote." Tex. Elec. Code § 64.012(a)(1). This Court's precedent, notably *Delay v. State*, 465 S.W. 3d 232 (Tex. Crim. App. 2014), confirms that the State must prove that the person knew her conduct violated the Election Code. Did the court of appeals err in holding that "the fact that [Ms. Mason] did not know she was legally ineligible to vote was irrelevant to her prosecution?"

2. Did the court of appeals err by adopting an interpretation of the Illegal Voting statute that is preempted by the federal Helping America Vote Act — specifically by interpreting the Illegal Voting statute to criminalize the good faith submission of provisional ballots where individuals turn out to be incorrect about their eligibility to vote?

3. In an issue of first impression, did the court of appeals misinterpret the Illegal Voting statute by holding that submitting a provisional ballot that is rejected constitutes "vot[ing] in an election"?

★ **Does Texas's Attorney General have jurisdiction to prosecute election law cases outside the Election Code; if so, is § 37.10 of the Texas Penal Code an "election law"?; if so, are campaign finance reports "election records" under § 37.10?**

***State v. Stephens*, 608 S.W.3d 245**
(Tex. App.–Houston [1st Dist.] 2020, pet. granted)

Stephens was indicted by a Chambers County Grand Jury for activity allegedly committed during her campaign for Sheriff in neighboring Jefferson County. Count I of the 3-count indictment in this case alleged that Stephens violated § 37.10 of the Texas Penal Code by fraudulently presenting or using a record or document "namely: a Candidate/Officeholder campaign Finance Report, by reporting a $5,000.00 individual cash contribution in the political contributions of $50 or less section of said Report, with knowledge of Its falsity and with intent that it be taken as a genuine governmental record."

The trial court granted Stephens's motion to quash Count I which asserted that the Texas Attorney General's authority to prosecute violations of the election laws did not allow it to prosecute violations of the penal code.

Counts II and III alleged that Stephens violated the election code by accepting cash contributions in excess of $100.00. Stephens filed a pretrial application for writ of habeas corpus asserting that the election code statute giving the Attorney General prosecutorial authority. Specifically, she said that § 273.021(c) violated the separation of powers clause by delegating a duty belonging to the judiciary to the executive branch. And she asserted that that portion of the election code that permitted prosecution of a violation in an adjoining county violated the penal code which requires prosecution in the county where the offense allegedly occurred.

The trial court denied Stephens's pretrial application for writ of habeas corpus. Stephens and the State appealed.

The State contended that the trial court erred in holding that the Attorney General's authority to prosecute election law violations is limited to violations of the election code. The court of appeals agreed and reversed the trial court's order quashing Count I. "Section 273.021(a) of the Election Code clearly and unambiguously gives the Attorney General power to prosecute criminal laws prescribed by election laws generally, whether those laws are inside or outside of the Code. . . . A campaign-finance report that has been presented to the county, as mandated by election law, is a 'governmental record' for purposes of prosecution under section 37.10 of the Penal Code, and we hold that the Attorney General has authority to indict and prosecute an allegation of presentment of a

false report."

The court affirmed the trial court's denial of Stephens's application for writ of habeas corpus. "The trial court did not abuse its discretion in denying Stephens's pretrial habeas because the statutory delegation to the Attorney General does not violate the Texas Constitution." And, since venue (unlike jurisdiction) cannot be challenged in a pretrial application for writ of habeas corpus, the trial court did not abuse its discretion by denying Stephen's application.

The court of criminal appeals granted Stephens's petition for discretionary review.

Questions Presented

1. Whether, if the Attorney General has the authority to prosecute this case under § 273.021, the statute's grant of prosecutorial authority violates the separation of powers requirement in the Texas Constitution.

2. Whether the Attorney General has the authority to prosecute "election law" cases outside of the Election Code, and if so, whether Penal Code § 37.10 is an "election law" within the meaning of Election Code § 273.021.

3. Whether campaign finance reports are "election records" within the meaning of Penal Code § 37.10.

EVADING ARREST

★ **Must the State prove that a defendant accused of evading arrest knew that the officer was making a lawful arrest?**

***Nicholson v. State*, 594 S.W.3d 480**
(Tex. App.– Waco 2019, pet. granted)

The statute prohibits "intentionally flee[ing] from a person he knows is a peace officer or federal special investigator attempting lawfully to arrest or detain him." Nicholson was convicted of evading arrest and argued that the evidence was insufficient because it did not show that he knew that the officer was "attempting *lawfully* to arrest or detain him."

The court disagreed that the evading statute requires proof that the defendant knew the officer was attempting a lawful arrest. "Contrary to Nicholson's assertion, many Texas cases have come to the conclusion that it is not necessary for the State to prove that

the defendant knew that the detention was lawful." Additionally, according to the court, "none of this matters under the facts of this case," since sufficiency is determined on appeal by the hypothetically correct jury charge. That is, even if the law did require proof that the defendant knew he was being lawfully arrested, the evidence here was sufficient to prove that.

Questions Presented

1. Whether the plain language of the evading arrest statute requires proof of knowledge that the attempted arrest or detention is lawful.

2. Whether it matters in this case; whether the evidence is legally insufficient to show that Nicholson knew he was being lawfully detained.

EXTRANEOUS MISCONDUCT

★ **Proper rebuttal, similarity of evidence, and harm.**

***Lynch v. State*, 612 S.W.3d 602**
(Tex. App.–Houston – 1st Dist.] 2020, pet granted)

Lynch was arrested in his home which he shared with Moreno. Crack cocaine was found in the house, and Moreno testified at Lynch's trial that the drugs were hers, not Lynch's. The trial court received into evidence two pen packets showing prior convictions for possession with intent to deliver, which were offered by the State to intent, motive, opportunity, etc. Lynch was convicted and he appealed.

The court of appeals reversed. Presuming that the State had the right to impeach Moreno's testimony that Lynch would not have approved her use of drugs, the proper way to do that was through cross examination of Moreno, and not through the introduction of the pen packets. Additionally, the court found the extraneous misconduct evidence unfairly prejudicial, in violation of Rule 403. "According to the pen packets, the two extraneous offenses occurred in 2004 and 2006, not near the time of the 2017 events recounted at trial. The record does not include whether the convictions occurred under circumstances similar to the State's theory in this case." And, because the inadmissible evidence affected Lynch's substantial rights, reversal was required under Rule 44.2(b) of the Texas Rules of Appellate Procedure.

The court of criminal appeals granted the State's petition for discretionary review.

Issues Presented

1. The court of appeals erred in holding the trial judge abused her discretion in admitting into evidence two of appellant's prior cocaine convictions in order to prove appellant's knowledge and/or intent with regard to the cocaine recovered in the charged offense, even after a defense witness claimed appellant had no knowledge or intent to commit the charged offense.

2. The court of appeals erred in holding that, upon introducing a defendant's prior narcotics convictions into evidence in order to prove a defendant's knowledge and/or intent in his current narcotics prosecution, the State must also show the facts or details of the prior narcotics cases in order to show their similarity to the charged offense.

3. The court of appeals erred in holding appellant's substantial rights were adversely affected, for the purposes of TEX. R. APP. P. 44.2(b), merely because the purported error occurred—and nothing more.

★ **The "doctrine of chances:" If you doubt the strength of your case law, consider citing Ian Fleming.**

***Valadez v. State*, 2019 WL 2147625**
(Tex. App.–Waco 2019, pet. granted)
(not designated for publication)

Eighteen pounds of marijuana found in duffel bags in the trunk of a car in which Valadez was a passenger. His defense was that he was an innocent passenger with no knowledge of the drugs in the trunk. The State introduced evidence of nine extraneous offenses, eight of which involved marijuana, one of which involved cocaine. Valadez objected that this evidence was inadmissible to prove intent, knowledge, or to rebut his innocent-passenger defense, and that if improperly portrayed him as a habitual marijuana possessor or cocaine dealer.

The court of appeals disagreed and affirmed, finding that neither Rule 404(b), nor Rule 403, were violated.

Counsel's repeated assertions of Valadez's innocent-passenger defense during voir dir, opening statement, and cross-examination, opened the door to the extraneous misconduct evidence. This evidence rebutted that defense, and Valadez's claim that he lacked the intent or knowledge necessary to possess the marijuana in the trunk, and its admission did not violate Rule 404(b). In so ruling, the court also made a parenthetical reference to the "doctrine of chances," namely that "highly unusual events are unlikely to repeat themselves inadvertently or by happenstance," and cited the well-respected legal authority "infamous James Bond villain," Auric Goldfinger.

Nor was Rule 403 violated, considering the State's need for the evidence, that it did not spend an inordinate amount of time on the evidence, that the evidence did not confuse or distract the jury, and that similar evidence came in without objection. "We cannot say that there is a "clear disparity" between the danger of unfair prejudice posed by the complained-of evidence and its probative value."

The court of criminal appeals granted Valadez's petition for discretionary review.

Questions Presented

1. Whether prior possession and use of contraband may be admitted to prove knowledge of contraband and intent to possess contraband under Rules 403 and 404(b) of the Texas Rules of Evidence.

2. Whether prior possession and use of contraband may be admitted under Rules 403 and 404(b) of the Texas Rules of Evidence to rebut the defensive theory that the defendant lacked knowledge of the presence of contraband.

3. Whether prior possession and use of contraband may be admitted under Rules 403 and 404(b) of the Texas Rules of Evidence to prove the identity of the person who possessed the contraband.

4. Whether prior possession and use of contraband may be admitted under the doctrine of chances.

★ Can a defendant force the State to stipulate to an extraneous offense to prevent the jury from hearing extensive details about that offense?

***Perkins v. State*, 2020 WL 976941**
(Tex. App.–Eastland 2020, pet. granted)(not designated for publication)

Perkins was charged with aggravated assault with a deadly weapon against a family member. The complainant testified that Perkins pushed her head into the console of a vehicle, causing an injury to her nose. Perkins testified that the complainant threw the moving vehicle's gear into reverse or park, and that caused her head to strike the console. The State put on a former girlfriend who testified in detail about an unadjudicated extraneous offense in which Perkins had punched her repeatedly and dragged her by the hair, and that she lost consciousness and sustained multiple injuries including a brain bleed and two broken ribs. This evidence was offered to rebut Perkins defense that the complainant was injured by accident or mistake. Perkins offered to stipulate to the extraneous offense to prevent the "extensive details" from being heard by the jury, but the State declined the offer. Perkins was convicted, and he appealed, arguing

that the trial court erred by not permitting the stipulation.

The court of appeals affirmed the conviction. "Absent circumstances not relevant here,2 the State was not required to accept Appellant's offer to stipulate." (Here the court distinguished cases in which the defendants offered to stipulate to a jurisdictional DWI enhancement.). The trial court did not abuse its discretion by admitting the details of the extraneous offense evidence.

The court granted Perkins's petition for discretionary review.

Issue Presented

2. The Court of Appeals erred in holding the trial court acted within its discretion in allowing the State to introduce extensive details about an extraneous offense during the guilt-innocence phase when Perkins was willing to stipulate to it.

★ **When appellant is charged with murdering one person in the course of kidnapping another, is the murder of the kidnapped person inadmissible as irrelevant and unfairly prejudicial?**

***Inthalangsy v. State*, 610 S.W.3d 138**
(Tex. App.–Houston [14th Dist.] 2020, pet. granted)
(not designated for publication)

The State alleged that appellant and accomplices committed the capital murder of Jimmy in the course of kidnapping Cassie and the State introduced evidence that they also murdered Cassie. The court of appeals reversed, holding that Cassie's murder was an extraneous offense, inadmissible under Rules 402 and 403 of the Texas Rules of Evidence.

The court of criminal appeals granted the State's petition for discretionary review.

Issues Presented

1. The Fourteenth Court of Appeals misapplied Texas Rules of Evidence 401 and 402 by disregarding evidence connecting Appellant to Cassie's murder and, thus, erroneously concluding that the extraneous-offense evidence of Cassie's murder was irrelevant.

2. The Fourteenth Court of Appeals erred by failing to consider whether the extraneous-offense evidence of Cassie's murder was admissible under Texas Rule of Evidence 404(b)(2) for the non-character-conformity purposes of: demonstrating that Appellant restrained Cassie without her consent; showing Appellant's intent to use deadly

force against Cassie to prevent her liberation; and providing same-transaction contextual evidence.

3. The Fourteenth Court of Appeals failed to conduct a meaningful assessment of whether, per Texas Rule of Evidence 403, the probative value of the extraneous-offense evidence of Cassie's murder was substantially outweighed by the danger of unfair prejudice.

FORGERY

★ **Does the forgery statute give the State absolute discretion to charge either a Class C misdemeanor or a third degree felony?**

***State v. Green*, 613 S.W.3d 571**
(Tex. App.–Texarkana 2020, pet. granted)

Green's indictment alleged forgery of a $20 bill with intent to defraud or harm another. The undisputed evidence showed that he used this forged bill to purchase a $2 lighter. Under the governing statute, forgery of a writing that is or purports to be an "issue of money" is a third degree felony. Under the same statute, forgery of a $20 bill passed to obtain goods or services of less than $100.00 is a class C misdemeanor. Green moved to quash the indictment asserting that his offense was a misdemeanor over which the district court had no jurisdiction, and the trial court granted the motion. The State appealed, and the court of appeals affirmed the trial court's dismissal order.

The court of criminal appeals granted the State's petition for discretionary review.

Issues Presented

1. The Court of Appeals decided an important question of state law that has not been, but should be, settled by the Court of Criminal Appeals, concerning whether the value ladder provisions of Section 32.21(e-1) of the Texas Penal Code are mandatory or whether those provisions only apply when specifically pled by the State.

2. The Court of Appeals decided an important question of state law that has not been, but should be, settled by the Court of Criminal Appeals, concerning whether the defendant's purpose for committing the forgery offense is an element of the offense under Section 32.21(e) of the Texas Penal Code.

★ **Correctly charging forgery.**

Lennox v. State, 613 S.W.3d 597
(Tex. App.–Texarkana 2020, pet. granted)

Lennox presented for payment three checks, each valued at $100.00 but less than $750.00, payable to him but written on the account of another. He was convicted of forgery, and the jury was instructed at punishment that the charges were state jail felonies.

Lennox contended on appeal that his crimes were class B misdemeanors because of the value of the checks, and that his sentence for state jail felonies exceeded the applicable punishment range. The court of appeals agreed that this was charge error, and that it egregiously harmed Lennox. His case was reversed and remanded for a new punishment trial.

> The undisputed evidence established that Lennox forged the checks in question "to obtain or attempt to obtain a property or service," and there is no evidence in the record that he did so for any other purpose. Under Section 32.21(e-1)(2), a forgery committed "to obtain or attempt to obtain a property or service" in an aggregate amount of more than $100.00 but less than $750.00 is a class B misdemeanor.

The State's petition for discretionary review was granted.

Issue Presented

From the appellate court's statutory construction of Section 32.21(e-1) of the Texas Penal Code, there was no jury-charge error; but more importantly, this Court should resolve a jurisdictional conflict that now exists in Texas law as to how county and district attorneys in the State of Texas should correctly charge and prosecute criminal offenses for forgery of financial instruments – specifically, checks which, as writings, serve a historic role in the forgery statute in Texas jurisprudence and the economies of Texas the United States of America.

HABEAS CORPUS

★ **Can a defendant use a pretrial writ of habeas corpus to complain that the statute of limitations bars his prosecution?**

***Ex parte Edwards*, 608 S.W.3d 325**
(Tex. App.– Houston [1st Dist.] 2020, pet. granted)

Fourteen years after the commission of the crime alleged, the State indicted Edwards for aggravated sexual assault of an adult. He filed a pretrial application for writ of habeas corpus asserting that prosecution was barred by the 10-year statute of limitations, in violation of the State and Federal Constitutions, and article 12.01 of the Texas Penal Code. The trial court denied relief, and the court of appeals reversed.

The court of appeals held that an applicant may use a pretrial writ to raise the statute of limitations where the charging instrument shows on its face that the prosecution is barred. "Limitations is an absolute bar to prosecution."

The court observed that generally, the statute of limitations for aggravated sexual assault of an adult is 10 years, but that there is no limitation if biological material was collected during the investigation and DNA-tested, but did not match the victim, or any other person whose identity was "readily ascertained." The court rejected the State's argument that the exception applied here, because there was no evidence that forensic testing results showed that the DNA did not match a person whose identity was "readily ascertained."

The State's petition for discretionary review was granted.

Issues Presented

1. The First Court erred by holding that a shotgun objection and a complaint about another part of the statute preserved the appellant's appellate argument. This conflicts with this Court's holding in *Resendez*.

2. The First Court erred by holding that the State had to admit DNA test results at a pretrial habeas hearing challenging the validity of the charging instrument.

3. This limitations claim is not cognizable on pretrial habeas because it is a fact-intensive non-constitutional defense. The appellant has an adequate remedy at law through a motion to quash.

★ **Can the State appeal an order granting relief under article 11.09 of the code of criminal procedure?**

***State v. Garcia*, 619 S.W.3d 380**
(Tex. App.–Houston [14th Dist.] 2021, pet. granted)

Garcia filed an application for writ of habeas corpus under article 11.09 of the code of criminal procedure asserting that his plea of guilty to an information charging misdemeanor theft was involuntary because he had not been advised of the immigration consequences. The trial court granted relief, and the State appealed.

The court of appeals held that the State has no right to appeal an order from the trial court granting relief under article 11.09. No right to appeal is explicitly provided by article 44.01 of the code of criminal procedure. The court also rejected the State's argument that article 44.01(a)(3) allowed the appeal because the court's ruling had the effect of granting a new trial. Likewise, the court of appeals rejected the State's argument that article 44.01(a)(2) authorized the appeal, because the trial court's order was tantamount to an order granting a motion in arrest of judgment. "Having determined that the State's appeal does not properly invoke the jurisdiction of the court, we dismiss the appeal for want of jurisdiction."

The State's petition for discretionary review was granted.

Issues Presented

The Fourteenth Court of Appeals misconstrued Article 44.01 of the Texas Code of Criminal Procedure and erred in concluding that the State does not have the right to appeal the trial court's order granting relief in a habeas corpus proceeding brought under Article 11.09 of the Texas Code of Criminal Procedure when the trial court's order functionally served to either grant a new trial or to dismiss the information—both of which would constitute an appealable order under Article 44.01(a).

HARASSMENT

★ **Is Texas's harassment statute facially unconstitutional, in violation of the First Amendment?**

***Ex parte Nuncio*, 579 S.W. 3d 448**
(Tex. App.– San Antonio 2019, pet granted)

Nuncio was charged with harassment and he filed a pretrial application for writ of habeas corpus challenging the statute, TEX. PENAL CODE ANN. § 42.07, as facially unconstitutional. When the trial court denied relief, Nuncio took an interlocutory appeal. The court of appeals affirmed the trial court. "Based on the foregoing analysis, we hold sections 42.07(a)(1) and (b)(3) of the Texas Penal Code are neither unconstitutionally overbroad nor vague." Justice Rodriguez dissented.

The court of criminal appeals granted Nuncio's petition for discretionary review:

Issues Presented

1. Justice Rodriguez's dissent contains the same criticisms of the challenged statute that were addressed in 1983 by the U.S. Fifth Circuit Court of Appeals in *Kramer v. Price*. Kramer v. Price struck down the previous version of Penal Code § 42.07. The defects described in Justice Rodriguez's dissent and in *Kramer v. Price* have not been resolved.

2. The Fourth Court of Appeals' decision, and the text of the challenged statute depart from accepted social norms and common understandings of the meaning of the word "harassment." The Fourth Court's majority opinion, and the challenged statute, risk the criminalization of conduct that would not generally be considered 'criminal' by people of ordinary intelligence. Further, because of this disconnect between common sense and the text of the statute, the challenged statute chills emotional speech, hyperbolic speech, metaphor, sharply critical speech and sexual overtures; TRAP § 66.3 (f).

3. Texas Courts' attempts to construe § 42.07 have led to baffling decisions that show no discernible logic or pattern that can be followed. The resulting authorities constitute a case by case evaluation of whether the subject speech makes reference to an "ultimate sex act." As a result of this lack of clear guidance, the statute is overly broad and chills too much speech.

4. The Court of Appeals should settle this important question because the statute unconstitutionally delegates prosecutorial decision-making and because the potential chilling effect is broad, TRAP § 66.3(b).

★ **Are the President's tweets annoying or offensive? Well, then, is Texas's harassment statute vague and overbroad?**

***Ex parte Barton*, 2019 WL 4866036**
(Tex. App.–Fort Worth 2019, pet. granted)
(not designated for publication)

Barton was charged by information with harassment for sending electronic text

messages or email communications to his ex-wife. His motion to quash the information asserting that § 42.07(a)(7) is unconstitutional was overruled. Barton then filed an application for writ of habeas corpus, again challenging the constitutionality of § 42.07(a)(7), and the trial court denied relief. Barton took an interlocutory appeal.

The court of appeals reversed the trial court's order denying relief, finding, first, that the statute affected protected speech, and then that it was facially vague and overbroad.

> Experience has taught us that whether the President's tweets—or an ex-spouse's emails—are annoying or offensive is a highly subjective inquiry, and the view of whether these communications are innocuous, humorous, annoying, or offensive will differ greatly from person to person. [citations omitted] Consequently, we agree with Barton that the electronic-communications subsection is facially unconstitutional as vague and overbroad; as such, it is void and unenforceable.

Issue and Question Presented

1. The court of appeals decided a facial overbreadth claim that was not preserved at trial or raised on appeal.

2. Is Tex. Penal Code § 42.07(a)(7), which prohibits harassing electronic communications, facially unconstitutional?

★ **Another challenge to the harassment statute.**

Ex parte Sanders, 2019 WL 1576076
(Tex. App.–Amarillo 2019, pet. granted)
(not designated for publication)

The information alleged harassment, specifically that "with intent to harass, annoy, alarm, abuse, torment, or embarrass [the complainant]" [Sanders] sent "repeated electronic communications to [the complainant] in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another, to-wit: telephone calls, text messages, social media messages, handwritten letters, and in person communication."

Prior to trial, Sanders filed an application for writ of habeas corpus and motion to quash information, arguing that TEX. PENAL CODE ANN. § 42.07(a)(7) is "facially overbroad" in "violation of the First Amendment of the United States Constitution." The trial court denied the application, and Sanders appealed.

The court of appeals affirmed, noting that it did "not write on a clean slate. . . . [W]e find the repeated electronic communications the section proscribes, made with the 'intent to inflict emotional distress for its own sake' . . . are not protected speech under the First Amendment because they invade the substantial privacy interests of the victim 'in an essentially intolerable manner.'"

The court of criminal appeals granted Sanders petition for discretionary review.

Issue Presented

Texas Penal Code section 42.07(a)(7) is a content-based restriction that restricts a real and substantial amount of speech as protected by the First Amendment; speech which invades privacy interests of the listener has never been held by the United States Supreme Court to be a category of unprotected speech.

HEARSAY

★ **"Another qualified witness" who can sponsor evidence under Rule 803(6).**

***Bahena v. State*, 604 S.W.3d 527**
(Tex. App.–Houston [14th Dist.] 2020, pet. granted)

Deputy Franks testified about recorded telephone calls made from the Harris County Jail, explaining to the jury that the calls are stored according to each inmate's specifically assigned number, which the inmate enters along with the inmate's personal identification number into the phone before any call can be made. Based on this predicate, the deputy was allowed to testify that he recorded on a disk 7 jail calls from a caller who was using Bahena's identification numbers and codes. Bahena was convicted and he appealed, asserting that the deputy should not have been allowed to testify because he was not the custodian of the records for the recordings. The court of appeals disagreed and affirmed.

A party may satisfy Rule 803(6) of the Texas Rules of Evidence, by either a custodian of the records, or by "another qualified witness." Bahena did not object that Franks was not "another qualified witness" or that Franks was not qualified to offer testimony under Rule 803(6), nor did he assert that on appeal.

> In substantially similar circumstances, this court has held that the appellant's appellate issue failed to show that the witness was not a qualified witness for Rule 803(6) purposes when the appellant complained that the record contained no evidence showing the witness was the

custodian of records but did not complain that the witness was not "another qualified witness." Following this precedent, we conclude that in his third issue appellant has failed to demonstrate that Franks was not a witness qualified to testify to the elements of the hearsay exception under Rule 803(6). Even presuming that Franks was not the custodian of records, that status would not mean that he was unqualified to give Rule 803(6) testimony. So, the trial court did not abuse its discretion in overruling appellant's objections to Franks's testimony authenticating the jailhouse call recordings. [citations omitted].

The court of criminal appeals granted Bahena's petition for discretionary review.

Issue Presented

The Court of Appeals erred in affirming the trial court's admission of a disc of inmate telephone calls over Appellant's objection that the State's witness was not the custodian of records.

HOMICIDE

★ **Was defendant entitled to an instruction on the right to use deadly force?**

***Lozano v. State*, 2019 WL 5616975**
(Tex. App.–El Paso 2019, pet. granted)
(not designated for publication)

Lozano and Hinojos fought outside a bar, and Lozano shot Hinojos three times, killing him. Lozano's only defense at trial was self-defense, which the trial court instructed the jury on. The court also instructed the jury, without objection, that Lozano had a duty to retreat. He was convicted and appealed, and the court of appeals reversed.

In 2007, the legislature deleted the statute imposing a general duty to retreat before using deadly force, provided the person did not provoke the difficulty, and that he was not engaged in criminal activity at the time. In this case, the jury was erroneously instructed on the general duty to retreat, and was not instructed on what statutory circumstances would limit his right to stand his ground. Instead, the jury was instructed "in no uncertain terms, that it could not find the shooting justified, and could not acquit [Lozano] if it found that a reasonable person in [his] situation would have retreated before using deadly force to defend himself, which was a clear misstatement of the current law." The court went on to find that this error egregiously harmed Lozano, hence the reversal.

The court of criminal appeals granted the State's petition for discretionary review.

Issue Presented

The Eighth Court of Appeals erred in its preliminary holding that Appellant was entitled to jury instructions on the use of deadly force in self-defense because there was no evidence presented from any source of Appellant's subjective state of mind at the time of the shooting, that is, whether he was in immediate apprehension or fear that the deceased was about to kill or seriously injure him at the time he shot the deceased, such that Appellant was not entitled to any self-defense instructions. Therefore, any errors in the self-defense instructions actually submitted did not result in egregious harm because Appellant was not entitled to the instructions in the first place.

JEOPARDY

★ Yet another opportunity for the court of criminal appeals to express its dislike of the Collateral Estoppel Doctrine.

***Ex parte Richardson*, 2021 WL 1134458**
(Tex. App.–Fort Worth 2021, pet. granted)
(not designated for publication)

Richardson and Polk were initially charged with the capital murder of Robinson during the course of aggravated robbery. The State claimed that Polk shot Richardson twice within an hour. The first shots did not kill him. Robinson's friend, Levi, attempted to drive him to the hospital, and Polk shot both Robinson and Levi. Robinson died, but Levi survived and testified at the capital murder trial. Richardson and Polk were tried separately; Polk was convicted of capital murder, and Richardson was acquitted as a party to the offense.

Following his acquittal, the State indicted Richardson for the aggravated robbery and the aggravated assault of Levi, and Richardson filed a pretrial application for writ of habeas corpus, asserting that the charges were barred by the doctrine of collateral estoppel. The trial court agreed with Richardson regarding the aggravated robbery charge, and granted relief, but denied relief as to the aggravated assault charge. Richardson appealed, and the court of appeals reversed the order of the trial court that denied the pretrial application for writ of habeas corpus. The court of appeals held that the State was collaterally estopped from relitigating in a second trial an issue that a jury had already determined, namely, that Richardson was not a party to the shootings.

Given the pleadings, the jury charge, the disputed issues, and the evidence

presented at trial, the jury in the first trial necessarily decided that Richardson was not a shooter and that he had been merely present rather than an accomplice to Polk's acting as the shooter. [citations omitted]. Because the jury had already acquitted Richardson of murder by shooting with the requisite mental state, either as the actual shooter or as a party, the question of whether Richardson was the shooter was decided in the first trial. Accordingly, the trial court erred by denying Richardson's request to dismiss the aggravated assault charge.

The State's petition for discretionary review was granted.

Questions Presented

1. Does collateral estoppel bar the State from prosecuting a defendant for conduct occurring at a different time and place than the original conduct for which the defendant was acquitted?

2. Does collateral estoppel mean that a defendant's mental state cannot change due to intervening circumstances between the original conduct for which he was acquitted and the subsequent conduct for which he remains charged?

3. Does collateral estoppel mean that a defendant whose ongoing conduct may constitute multiple criminal offenses can only be prosecuted for a single offense despite the conduct occurring in different places, at different times and with intervening circumstances between the originally-prosecuted conduct and the potentially-prosecutable latter conduct?

4. Does the Court of Appeals' expansive view of collateral estoppel implicitly resuscitate the long-abandoned carving doctrine limiting prosecution to a single offense when justice and reason demand prosecution for each potential criminal misconduct?

★ **Is the State collaterally estopped from trying a defendant for the reckless aggravated assault of one passenger in a car, following his acquittal of the reckless manslaughter of another passenger in the car?**

***Ex parte Rion*, 2019 WL 4386371**
(Tex. App.– Dallas 2019, pet. granted)
(not designated for publication)

Rion collided with another car, injuring one passenger in it, and killing another. He was charged with manslaughter for recklessly causing the death of one person, and aggravated assault, for recklessly causing serious bodily injury to the other. Over Rion's

objection, the State tried the manslaughter first, and the jury found him not guilty. At the motion for instructed verdict, the State claimed Rion was reckless for driving 71 mph in a 40 mph zone. Over Rion's objection, the trial court also charged on the lesser offense of criminally negligent homicide.

After his acquittal, Rion filed a pretrial application for writ of habeas corpus asserting that his aggravated assault trial was barred by collateral estoppel because the relevant facts were necessarily decided at the first trial. The trial court denied relief, and Rion took an interlocutory appeal. The court of appeals reversed.

A two-step analysis is required when the issue is collateral estoppel. First, the court must determine exactly what facts were necessarily decided at the first proceeding. Second, the court decides "whether those necessarily decided facts constitute essential elements of the offense in the second trial." The court of appeals found that the State would be collaterally estopped from trying Rion for the reckless assault in a second trial.

The State's petition for discretionary review was granted.

Question Presented

Collateral estoppel applies only when two issues are identical. In appellant's manslaughter trial, the jury was charged to consider whether appellant "recklessly caused the death" of the complainant. In a pending aggravated assault trial, the jury will be charged to consider whether he "recklessly caused bodily injury" to a different complainant. The court of appeals held that collateral estoppel applies. Was the court right?

JURY CHARGE

★ Was appellant entitled to a lesser included instruction on attempted tampering with physical evidence?

***Ransier v. State*, 594 S.W.3d 1**
(Tex. App.–Houston [14th Dist.] 2019, pet. granted)

The trooper saw Ransier trying to shove a syringe under his car seat and break it. A struggle ensued, Ransier wound up on the ground, where he threw the syringe, and it landed a few feet away. The tip of the needle was broken off and never found. Later he was asked if he was trying to break the syringe or get rid of it, and he admitted, "That was

the intention, yes sir." Ransier was charged with tampering with physical evidence, and the trooper testified Ransier concealed the syringe from him, and that he altered syringe both by moving it, and by breaking it. The trooper admitted he did not know if the needle broke when Ransier fell to the ground. Ransier's request that the jury be instructed on the lesser included offense of attempted tampering with physical evidence was denied, and he was convicted.

The court of appeals found that the trial court erred in not instructing on the lesser.

> Appellant makes this argument with respect to each alternative statutory theory on which the jury was charged. Appellant argues that a jury could have rationally found him only guilty of attempted tampering with regard to altering the syringe. Appellant argues that a jury could have rationally found him only guilty of attempted tampering with regard to destroying the syringe. Appellant argues that a jury could have rationally found him only guilty of attempted tampering with regard to concealing the syringe. We agree. Appellant shows more than a scintilla of evidence directly germane to attempted tampering was presented at trial.

The State's petition for discretionary review was granted.

Question Presented

1. When—as the *Ransier* Dissent recognizes—the record does not support a rational conclusion that if Appellant was guilty of anything, it was only attempted tampering, should the Fourteenth Court have nevertheless reversed Appellant's conviction because of the failure to include a 'lesser-included offense' instruction to which he was not entitled?

★ **Is one who actually uses deadly force entitled to a charge on threats as justifiable force?**

Pham v. State, 595 S.W.3d 769 (Tex.–Houston [14th Dist.] 2019, pet. granted) (not designated for publication)

Pham was tried for murder and requested a charge on the use deadly force, pursuant to § 9.04 of the Texas Penal Code. The trial court denied the requested charge, Pham was convicted, and he filed a motion for new trial asserting he had been denied the effective assistance of counsel at the punishment phase. The court of appeals disagreed with this argument, and rejected his point of error complaining of the denial of an instruction on deadly force.

As to the charge issue, the court noted that appellant received an instruction on self-defense. "Because he did use deadly force, rather than the threat of deadly force, he was not entitled to an instruction pursuant to section 9.04, in addition to the instruction on self-defense."

As to the claim that his lawyer was ineffective, the court acknowledged counsel's affidavit that various of his failures at trial were not strategic, but went on to find that, examination of the entire affidavit belied this claim, and that, in fact, his strategy to prioritize self-defense over mitigation was a reasonable one.

The court of criminal appeals granted Pham's petition for discretionary review.

Questions Presented

1. Whether an attorney provides ineffective assistance when he admits in an affidavit that he failed to interview any potential mitigation witnesses, he made conclusory assumptions about what those witnesses might know about appellant's life, and his decision not to interview any potential witnesses was not based on trial strategy. (C.R. at 329-32, 334-59).

2. Whether trial counsel's failure to investigate even a single avenue of mitigation means that appellant was constructively denied any defense at all in the penalty phase of his trial and therefore prejudice is presumed. (C.R. at 329-32, 334-59).

4. Whether the Court of Appeals erred by holding that because appellant used deadly force, rather than the threat of deadly force, he was not entitled to an instruction on self-defense pursuant to Tex. Pen. Code § 9.04. (VI R.R. at 171-74; XII R.R. at 240).
★ **Will this be the case that clarifies "confession and avoidance"? (I doubt it.)**

***Selectman v. State*, 2020 WL 1442645**
(Tex. App.–San Antonio 2020, pet. granted)(not designated for publication)

Selectman was tried for shooting Erica, but the evidence was conflicting as to who shot her and under what circumstances. Selectman requested instructions on self defense and defense of third person were denied and she appealed. The court of appeals affirmed.

> The only evidence Selectman presented on the need to use deadly force was that Erica and her boyfriend, who Selectman thought was an intruder, were arguing about money, and she and Erica's boyfriend got into in a scuffle and were tussling around. This evidence is insufficient to permit a jury to rationally infer: (1) Selectman shot the gun and "admit[ted] to [her] otherwise illegal conduct; and (2) Selectman reasonably believed immediate

use of deadly force—shooting at Erica's boyfriend or an intruder, but missing and hitting Erica—was necessary for the defense of herself or of Erica.

The court found, alternative, that if there was error, it was harmless. "Had the jury believed the evidence, this explanation would have negated the required mental states. In other words, had the jury believed Thomas's testimony, it would not have found that Selectman intentionally, knowingly, or recklessly caused Erica serious bodily injury."

The court granted Selectman's petition for discretionary review.

Issues Presented

1. The court of appeals erred by ruling the instant record insufficient, as a matter of law, to permit a rational finding that appellant reasonably believed that deadly force was immediately necessary to defend herself or Erica Rollins against a violent home intruder on April 2, 2015.

2. The court of appeals erred by ruling the instant record insufficient, as a matter of law, to satisfy the "confession and avoidance" doctrine because: (1) appellant never "flatly denied" any essential element of the offense charged; and (2) the record contains more than ample evidence from which the jury could find that appellant either did fire, or otherwise cause, the shot that injured the complainant here.

3. The intermediate appellate court effectively substituted its own harm analysis for findings of fact by a properly instructed jury.

★ **Once again, the court-created doctrine "confession and avoidance" rears its ugly head.**

***Maciel v. State*, 2020 WL 4035513**
(Tex. App.–Corpus Christi 2020, pet. granted)
(not designated for publication)

Maciel drank too much so she let her brother drive, but when he began vomiting and stopped in the middle of the road, she took the wheel. She admitted she was intoxicated, but said that her intentions were to move the car from the road to a parking lot. And officer arrived and saw Maciel behind the wheel with the engine running, trying to get the car in gear. Smoke was coming from the car and the officer smelled a burning mechanical odor. He arrested Maciel for DWI.

Maciel testified and explained her presence behind the wheel, but testified she

"couldn't get the car to move, so I wasn't driving. I don't think I was operating it." The trial court refused her request to instruct the jury on necessity, she was convicted, and she appealed. The court of appeals affirmed.

> [U]nder the facts of this case, we cannot say the evidence raised the defense of necessity. Because Maciel denied she operated the vehicle, she denied she committed the offense of DWI. [citation omitted] For this reason, she was not entitled to a jury instruction on the defense of necessity, and we hold the trial court properly refused to submit an instruction on the defense of necessity.

Questions Presented

1. Did the court of appeals ignore this Court's confession and avoidance precedent set out in *Juarez v. State*?

2. Does a Defendant need to know what "operating" a vehicle means in order to satisfactorily admit to "operating" a vehicle?

★ Who has the burden of proving that the witness is an accomplice?

***Ruffins v. State*, ___ S.W. 3d ___ 2020 WL 4782668**
(Tex. App.–Austin 2020, pet. granted)

Ruffins was charged with joining others in committing an aggravated robbery, and some of his alleged accomplices testified against him. Hogarth was named as an accomplice as a matter of fact in the jury charge; Trevino was an accomplice as a matter of law. Ruffins was convicted, he appealed, and the court of appeals reversed.

The court of appeals held that the trial court erred by instructing the jury that it only needed to require corroboration of Hogarth's testimony if it found him to be an accomplice beyond a reasonable doubt. This inverted the legal test which says that the jury must find the witness to be an accomplice unless it is shown beyond a reasonable doubt that he is not. The court also found that the defense did not invite the error, nor did he waive it when he responded he was "good", and that the erroneous charge egregiously harmed Ruffins.

The court of criminal appeals granted the State's petition for discretionary review.

Questions Presented

1. If the testimony from an alleged accomplice witness-in-fact is completely removed

from consideration, where the jury charge contained two accomplice witness instructions —one clearly correct regarding the accomplice as a matter of law—and there was substantial non-accomplice evidence to corroborate either accomplice witness's testimony, did Appellant suffer egregious harm from any alleged error in the accomplice-in-fact instruction?

2. Did Appellant invite—or is he otherwise estopped from challenging—the allegedly erroneous instruction he requested and now complains of on appeal?

3. Was Appellant even entitled to an instruction on whether Hogarth was an accomplice as a matter of fact?

4. In a case where the Defense argues a witness was an accomplice, who bears the burden to prove a witness's status as an accomplice as a matter of fact, and what is the appropriate burden?

★ **Pay attention to the category of your offense, especially when a trial involves multiple different offenses.**

***Alcoser v. State*, 596 S.W.3d 320**
(Tex. App.–Amarillo 2019, pet. granted)

Alcoser was charged with three different crimes: felony assault (family violence by choking); child endangerment; and interference with a 911 call. He was convicted of all three, and complained on appeal that he had been egregiously harmed by the court's erroneous jury charge.

The court of appeals reversed, finding a host of charge errors, which, when considered cumulatively, caused Alcoser egregious harm and required reversal.

First, the court begins with lengthy tutorials on, generally, the function of the jury charge, and specifically, the three different categories of offenses respecting culpable mental states: "result-of-conduct"; nature-of-conduct"; and "circumstances-of-conduct."

Then the appellate court reminded that trial courts must be careful, when trying multiple offenses, to "carefully distinguish the culpable mental states applicable to each offense—because the failure to do so is error." Here the trial court was far from careful, and the court of appeals pointed out one mistake after the other: at no point did the court set out abstractly the elements of child endangerment or interference with a 911 call; the court made no distinction between the various possible definitions of culpable mental states applicable to the three different offenses; the charge impermissibly commented on

the weight of the evidence; the charge on self-defense was arguably limited to only one of the three offenses; the charge did not properly apply the law of self-defense to the facts of the case; the charge on self-defense did not define "reasonable belief"; the charge did not recite the presumption of reasonableness.

Issues Presented

1. The court of appeals misapplied the egregious harm standard of review for unobjected-to jury charge error under *Almanza v. State*, 686 S.W. 2d 157 (Tex. Crim. App. 1984), in a manner that so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court of Criminal Appeals' power of supervision.

2. The court of appeals' misapplication of the cumulative error doctrine in its analysis of unobjected-to jury charge error so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court of Criminal Appeals' power of supervision.

★ **Just because you bite a man's ear off does not mean you cannot rationally opine that the injury was not serious. Even if you are not an expert.**

***Wade v. State*, 594 S.W.3d 804**
(Tex. App.–Austin 2020, pet. granted)

Sughrue testified that Wade bit his ear, and "ripped [it] away a little bit from his actual head," resulting in the loss of his earlobe which "devastated" him, and caused him permanent disfigurement. Wade admitted the biting, but said he did not intend to sever the lobe. "Wade acknowledged that Sughrue's ear was disfigured but denied that Wade suffered serious bodily injury and further stated that if he saw Sughrue on the street and did not know who Sughrue was, he would be unable to notice any difference between Sughrue's two ears."

Wade was tried for aggravated assault by causing serious bodily injury, and requested an instruction on the lesser included offense of assault. The trial court refused the instruction, Wade was convicted, and he appealed.

The court of appeals first held that the evidence was sufficient to establish that Sughrue suffered serious bodily injury. But the court reversed the trial court for refusing to instruct on the lesser included offense. Wade denied more than once that his actions seriously injured Sughrue, and, as noted he explained that, if he did not know Sughrue and saw him on the street, the injury would not be noticeable. The court held that testimony from a defendant, even if he is not an expert, can be sufficient to raise the need

for a lesser included offense. "[W]e we conclude that more than a scintilla of evidence was presented during trial that negated the greater offense of aggravated assault by causing serious bodily injury and raised the lesser offense of assault by causing bodily injury and that the district court erred by denying Wade's request for a lesser included offense instruction for assault."

The State's petition for discretionary review was granted.

Question Presented

1. Whether conclusory lay testimony can contradict undisputed testimony from medical sources and a victim on the issue of serious bodily injury such that a lesser-included offense is a "valid, rational alternative" to the charged offense.

★ **Did appellant's admission of recklessness authorize the trial court to refuse a lesser included instruction on deadly conduct in this aggravated assault case?**

***Simms v. State*, 2019 WL 5996378**
(Tex. App.–Houston [1st Dist.] 2019, pet. granted)
(not designated for publication)

At his trial for aggravated assault, Simms testified that he must have dozed off just before crashing head on with another car in the Washburn Tunnel, which seriously injured Pineda. He also conceded that he was reckless in speeding into the tunnel, and that he had failed to keep a proper lookout and failed to stay in his lane. The trial court refused to instruct the jury on the lesser included offense of deadly conduct, Simms was convicted and he appealed.

The court of appeals affirmed, holding that Simms's recklessness supported both deadly conduct and aggravated assault. "Because Simms admitted to his reckless state of mind and that his conduct caused Pineda serious bodily injury, the second step of the two-prong test for instructing a jury on a lesser-included offense is not satisfied. We hold that the trial court did not abuse its discretion by denying Simms's requested jury instruction."

Simms's petition for discretionary review was granted.

Question Presented

Whether the Court of Appeals properly protected Appellant's right to an instruction on a lesser included offense by failing to consider his testimony regarding an intervening circumstance that caused the accident resulting in death?

★ **Was the defendant egregiously harmed by this instruction that authorized a conviction on a theory different from that pled in the indictment?**

***Castillo-Ramirez v. State*, 2019 WL 3937270**
(Tex. App.–San Antonio 2019, pet. granted)
(not designated for publication)

The indictment alleged that Ramirez penetrated the complainant's anus with his sexual organ, but the jury charge allowed the jury to convict him if it found he had penetrated the complainant's anus "by any means." Thus, the "charge enlarged the offense alleged and authorized the jury to convict Ramirez on a different theory than the one that was alleged in the indictment." And the error was reversible, even though no objection was made at trial. "Because the jury charge affected the very basis of the case and vitally affected Ramirez's defensive theory, we hold the erroneous charge resulted in Ramirez suffering egregious harm."

The State's petition for discretionary review was granted.

Question Presented

Can error in a sexual-assault charge–which fails to specify that the defendant used his penis–be harmful when there was no evidence or claim that he used anything else?

★ **"The Penal Code provides little guidance as to exactly how a proper jury charge on voluntariness-of-conduct should be structured or worded." No kidding.**

***Hervey v. State*, 2019 WL 3729505**
(Tex. App.–Dallas 2019, pet. granted)
(not designated for publication)

Hervey and Hawkins disagreed on the terms of a drug deal, and Hervey drew his gun, just to scare Hawkins. They struggled over the gun, and, according to Hervey, Hawkins pulled on the gun, Hervey pulled back, his finger slipped from the trigger guard to the trigger, and the gun went off. Hawkins died, and Hervey was tried for murder. The court charged the jury *sua sponte* on voluntariness with regard to murder. Specifically, the court instructed, that for an act to be criminal, it must be voluntary, and that conduct is not involuntary just because the actor did not intend the results. Although the court also instructed on the lesser included offenses of manslaughter and criminally negligent homicide, neither of those instructions contained instructions on voluntariness. Hervey was convicted of murder and he appealed.

The court of appeals reversed. The question here was not whether Hervey was entitled to an instruction on voluntariness; he was, and he got an instruction. Rather the question was whether the instruction given was adequate to guide the jury in its deliberations. The court held that it was not. "The Penal Code provides little guidance as to exactly how a proper jury charge on voluntariness-of-conduct should be structured or worded." Only a few Texas cases have addressed the sufficiency of a voluntariness instruction. That said, the court of appeals believed that this instruction was inadequate for at least three reasons.

First, the instruction was "incomplete" because it did not instruct the jury that it should acquit if it found that the shooting was caused by Hawkins's independent act of pulling on the gun which caused Hervey to pull the trigger. Second, there was no instruction applying the law of voluntariness to the lesser included offenses of manslaughter and criminally negligent homicide. Third, Texas law distinguishes between culpable mental states and voluntariness, and the charge given here did not make that distinction. The charge given here was erroneous, and caused "some harm" to Hervey.

The State's petition for discretionary review was granted.

Questions Presented

1. Does a trial court's *sua sponte* submission of an issue in the jury charge prevent a court of appeals from considering whether the evidence raised such an issue?

2. If, under a defensive view of the evidence, the defendant in a murder case drew, pointed, and wrestled over the gun of his own volition, is he nonetheless entitled to a voluntary-act instruction if testimony shows that another person's conduct precipitated the gun's discharge?

3. Alternatively, should a voluntary-act instruction resemble the instruction in *Simpkins v. State*, 590 S.W.2d 129 (Tex. Crim. App. [Panel Op.] 1979), and specify the facts that would render the defendant's conduct involuntary or inform the jury that voluntariness is distinct from the culpable mental state?

4. Alternatively, does an instruction result in some harm to the defense if it lacks this specificity and is missing from lesser-included-offense instructions never reached by the jury?

★ **More tests for lesser included offenses?**

***Lang v. State*, 586 S.W.3d 125**
(Tex. App.–Austin 2019, pet. granted)

The Texas Court of Criminal Appeals found the evidence legally insufficient to prove that Lang committed the offense of organized retail theft, and remanded to the court of appeals to determine whether the conviction could be reformed to some lesser included offense. The court of appeals held that neither the offense of attempted organized retail theft nor the offense of theft of property were lesser included offenses in this case.

The State's petition for discretionary review was granted.

Question Presented

Is reformation unauthorized unless the State pled all the elements and statutorily required notice allegations of the lesser-included offense?

★ **Should a robber anticipate murder?**

***George v. State*, 2019 WL 5781917**
(Tex. App.–Dallas 2019, pet. granted)
(not designated for publication)

George and others were charged with capital murder during the course of a robbery, and the trial court denied his request to submit a lesser included instruction on robbery. The jury was instructed that it could convict George on a party-co-conspirator theory, if, among other things, he should have anticipated that the murder would occur. The court of appeals held that the trial court properly refused to submit the lesser. "[W]hen one decides to steal property from another, he should anticipate he or his co-conspirator might be confronted by that individual and that his co-conspirator might react violently to that confrontation."

George's petition for discretionary review was granted.

Question Presented

Is the Fifth Court of Appeals right, or are the First and Second Courts of Appeals right? Should murder always be anticipated as a potential result of robbery?

★ **Is a defendant entitled to a 38.23 instruction when there is a factual dispute regarding the officer's credibility and a conflict between his testimony and the dash camera video?**

***Chambers v. State*, 2019 WL 1412230**
(Tex. App.–Texarkana 2019, pet. granted)

(not designated for publication)

Chambers was stopped by an officer who believed the truck had no rear license plate. Pictures take after the fact proved that the truck did have a paper plate, and, according to Chambers's lawyer, the officer's dash cam clearly revealed the plate. The trial court denied the motion to suppress, Chambers was convicted, and he appealed, asserting, among other things, that the officer had no reasonable suspicion to stop him for the license plate violation, and that the trial court erred in denying his request for a jury instruction pursuant to article 38.23.

The court of appeals disagreed and affirmed. According to the court, the glare on the video was so great that the video did not definitively depict a license plate. An instruction under article 38.23 was not required here because there was no evidence creating a "genuine dispute" about whether the officer's mistake about the plate was unreasonable, or that he was lying about his observation.

Chambers's petition for discretionary review was granted.

Question Presented

Is Appellant entitled to an instruction pursuant to Article 38.23 of the Code of Criminal Procedure when there is a factual dispute regarding the officer's credibility and a conflict between his testimony and his dashcam video?

★ **Is a deceptive business practice a "nature-of-conduct crime" which would require that the jury be unanimous as to the underlying acts alleged?**

***Dunham v. State*, 554 S.W.3d 222**
(Tex. App.–Houston [14th Dist.] 2018, pet. granted)

Dunham worked for one home security system, and he marketed services and equipment to an elderly home owner. According to the State, he represented that the equipment was of a certain type, and price, when it was not. Dunham was convicted and he appealed, asserting that the evidence was legally insufficient, and that the jury charge erroneously authorized a non-unanimous verdict. The court of appeals rejected both assertions.

The jury could rationally have found that Dunham represented that a commodity or service was of a particular style, grade, or model when it was of another, and that this misrepresentation was made recklessly.

The court also rejected the non-unanimity challenge. The issue was one of first

impression for the offense of deceptive business practices. Dunham contended that the jury charge erroneously authorized a non-unanimous verdict because the charge did not require the jury to agree about which of the three statutory allegations appellant committed. The court held that deceptive business practice is a "circumstance-of-the conduct crime", not a "nature-of-conduct" crime. "Thus, under the plain text of the statute, unanimity is not required for the "one or more" underlying acts listed in subsection (b)."

Dunham's petition for discretionary review was granted.

Issues and Questions Presented

1. The evidence is legally insufficient to sustain Appellant's conviction for deceptive business practice where Appellant did not make any affirmative mis-representation, the State's theory of liability was based on an omission rather than an act, and the complainant accurately understood the commercial terms when the transaction occurred.

2. Whether deceptive business practice is a "nature-of-conduct" or" circumstance-of-conduct" offense and whether the jury must agree unanimously that the defendant committed the same specific act of deception to convict him. (C.R.87-88; 4 R.R. 103-08).

JURY TRIAL

★ **Did the legislature mean it when it wrote that disputed testimony can only be "read" back to the jury?**

***Stredic v. State*, 609 S.W.3d 257**
(Tex. App.–Houston [14th Dist.] 2020, pet. granted)

Stredic was tried for murder, and testified that he felt threatened by the complainant and fired the gun accidentally went off. The sole question was Stredic's intent and the jury was instructed on the lesser-included offenses of manslaughter and negligent homicide. Responding to a request from the jury specifically identifying a dispute about a portion of Stredic's testimony concerning his intent, and the trial court ordered the court reporter to type four pages, and then, over Stredic's objection, sent that transcription to the jury. Stredic was convicted of murder and sentenced to 30 years imprisonment as a habitual offender, and he appealed. The court of appeals reversed.

Article 36.28 of the Texas Code of Criminal Procedure unambiguously provides that "if the jury disagree as to the statement of any witness they may, upon applying to the court, *have read to them from the court reporter's notes* that part of such witness

testimony or the particular point in dispute, and no other. . . .")(emphasis supplied). The trial court would not have erred had it followed the plain statutory language and read back the disputed testimony. It abused its discretion by sending back the written transcription.

> Although bringing out the jury and providing it with one-time oral readback of disputed testimonial evidence properly strikes a balance between the trial court's commenting on the weight of the evidence with the need to provide the jury with the means to resolve any factual disputes . . .we conclude that the provision of excerpts from the court reporter's notes in transcript form concerning an essential element of the alleged offenses to be accessed and considered as written evidence in the jury room, over objection, amounted to an impermissible comment on its importance by the trial court and unfairly tipped that balance in favor of the State (and the highest degree of offense, murder) in appellant's case.

The State's petition for discretionary review was granted.

Issues Presented

1. The Fourteenth Court erred by holding a trial court cannot grant a jury's request for a transcript of disputed testimony.

2. The Fourteenth Court erred by conducting a harm analysis that did not consider the strength of the State's evidence, the weakness of the defense, or the lack of a logical connection between the supposed error and any legally determinative issue.

★ Should the trial court have allowed appellant to withdraw his jury waiver?

***Sanchez v. State*, 2020 WL 2837023**
(Tex. App.–Eastland 2020, pet. granted)
(not designated for publication)

Sanchez agreed to waive a jury, but told the judge that he did not understand that he was giving up his right to a jury. He spoke to the court through an interpreter (Spanish/English). Counsel informed the court that he (counsel) was fluent in both English and Spanish, that he had thoroughly explained the waiver, and that he was 100% confident Sanchez understood it. More than a month later, Sanchez filed a written motion to withdraw his jury waiver. Five days later, Sanchez reurged his motion to withdraw and the motion was denied. Although the request was submitted sufficiently in advance of trial, the court found that granting the motion would interfere with the orderly administration of the business of the court. The State also complained that withdrawal would result in an unnecessary delay and the court agreed this would prejudice the State.

A bench trial was had, Sanchez was convicted, sentenced to life, and he appealed.

The court of appeals affirmed. A defendant does not have an unfettered right to withdraw his jury waiver; the decision is within the discretion of the trial court. The defendant bears the burden of showing an "absence of adverse consequences" if the withdrawal is permitted. That requires the defendant to show that his request to withdraw was made sufficiently in advance of trial that granting the request "will not (1) interfere with the orderly administration of the business of the court, (2) result in unnecessary delay or inconvenience to witnesses, or (3) prejudice the State." The court of appeals "believe[d] that the record supports the trial court's findings and its ruling."

Issue Presented

The Court of Appeals erred by finding: . . . (ii) that the trial court did not err by refusing to permit Petitioner to withdraw his jury waiver.

JUVENILES

★ **40 years, or until he turns 19: What is the maximum term a child determined unfit to be tried can be kept in residential care when the State never sought the grand jury's approval for a determinate sentence?**

***Ex parte Brown*, 591 S.W.3d 705**
(Tex. App.–Fort Worth 2019, pet. granted)

In 2012, when he was 12-years-old, Brown was charged as a juvenile with having engaged in delinquent conduct by committing aggravated sexual assault against a child under 14. About two weeks after the State filed its petition, the juvenile court found Brown unfit to proceed, and committed him to a residential-care facility. The State did not seek grand jury approval for a determinate sentence, but in 2017, when Brown was about to age out of the juvenile system, the court transferred him to district court. For some reason the State filed a "complaint" against Brown, and later that year the district court found him incompetent and committed him to a residential-care facility. He is not expected to become competent in the future. Brown says he must be released when he turns 19. The State says he may be held for up to 40 years, until he is 52-years old.

The trial court agreed with the State, and denied habeas relief. Brown appealed and the court of appeals reversed.

The Texas Code of Criminal Procedure provides that a person may not be committed to a residential care facility for a period longer than their maximum sentence.

An adult could be sentenced to life imprisonment for aggravated sexual assault, but because Brown's alleged delinquent conduct occurred when he was 12, he was ineligible to be certified as an adult. A juvenile who receives a determinate sentence may be required to serve no more than 40 years, but the State cannot get such a sentence with the approval of a grand jury, and that approval has not been sought here.

> Because the State never obtained grand-jury approval, neither the juvenile court nor the district court had jurisdiction to impose a determinate sentence. . . . For the same reason that Brown was not subject to the adult punishment scheme, he was not subject to the determinate-sentence scheme—neither one applied to him. . . . If Brown ever becomes competent to stand trial, he "may not receive a punishment for the delinquent conduct ... that results in confinement for a period longer than the maximum period of confinement [that he] could have received if [he] had been adjudicated for the delinquent conduct while still a child and within the jurisdiction of the juvenile court [which in this case was until his 19th birthday].
>
> The State's petition for discretionary review was granted.

Questions Presented

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

2. Should the Second Court of Appeals have considered the State's defense that it was prohibited from pursuing a determinate-sentence finding from the grand jury because the juvenile was found unfit to proceed and the judicial proceedings were stayed as a matter of law?

MOTION FOR NEW TRIAL

★ **Beware! The trial court may be able to prevent an amended motion for new trial by denying the original motion before the expiration of 30 days.**

***Rubio v. State*, 596 S.W.3d 410**

(Tex. App.–Dallas 2020, pet. granted)

Rubio was convicted of capital murder and sentenced to life imprisonment, and the same day he filed a general motion for new trial which the trial court promptly overruled. Thirty days after sentencing, Rubio, now represented by a new lawyer, filed a motion to amend the motion for new trial, and an amended motion for new trial, alleging, among other things, that the original lawyer was ineffective The State objected that the amended motion was untimely and requested that the court take no action on it. Seventy-two days after sentencing, the court held a hearing on the motion, received documentary evidence, and denied the motion. Rubio appealed, and the State cross-appealed, re-urging that the amended motion for new trial was untimely and that it should not have heard the motion or received evidence.

The court of appeals agreed with the State's argument on cross-appeal. Under TRAP 21.4(b) a motion for new trial may be amended before the original motion was denied, or within 30 days of sentencing, whichever happens first. The State properly objected to the amendment since it came after the original motion was denied, and the trial court should not have heard the motion or received the exhibits. The court went on to consider Rubio's claim that his trial lawyer was ineffective, but based only on the trial record, and gave no consideration to the arguments in, or the evidence received in support of, his motion for new trial..

Rubio's petition for discretionary review was granted.

Question Presented

Did the Court of Appeals resolve a procedural issue relating to the timely filing and hearing of an amended motion for new trial in a manner that conflicts with Courts of Appeals and Court of Criminal Appeals precedent?

OFFICIAL OPPRESSION

★ **Does a County Court at Law have jurisdiction to hear an official oppression case?**

***Roland v. State*, 617 S.W.3d 52**
(Tex. App.–Houson [1st Dist.] 2020, pet. granted)

Roland was employed as a drill instructor for the juvenile probation department and was initially charged by information with two counts of official oppression, both misdemeanors. This case was set in a county court at law, and the State filed a motion to

transfer the case to district court, asserting that that was the proper court to hear the offense of official oppression.

Subsequently the State presented the case to a grand jury and obtained an indictment, and this case was presided over by a district judge. The misdemeanors pending in county court were put on hold. The defense filed a motion to dismiss the indicted case pending in district court based on the statute of limitations and the trial court granted the motion.

Next, the defense moved to dismiss the case pending in county court, asserting that the county court lacked jurisdiction because only district courts have original jurisdiction over official oppression cases. In response, the State argued that district courts and county courts have concurrent jurisdiction over official oppression cases. The trial court denied this motion to dismiss, Roland pleaded no contest, was put on deferred adjudication, and appealed.

The court of appeals reversed. Official oppression is a misdemeanor involving official misconduct.

> Neither the Code of Criminal Procedure nor the Government Code grants original jurisdiction over misdemeanors involving official misconduct to county courts at law. . . . We therefore hold that the county court at law lacked jurisdiction to enter a judgment of conviction for official oppression against Roland. . . . We vacate and dismiss the judgment of the trial court. [citations omitted]

The State's petition for discretionary review was granted.

Questions Presented

Does TEX. CODE CRIM. PROC. art. 4.07's grant of "original jurisdiction of all misdemeanors" give county courts jurisdiction—concurrent with district courts—over official misconduct cases?

★ Oppression by the warrantless arrest of one in his home for public intoxication.

***Ratliff v. State*, 604 S.W.3d 65**
(Tex. App.–Austin 2020, pet. granted)

Ratliff was chief of police, and one of the officers who arrested Nutt for public intoxication. Ratliff initialed a police report made by one of the other officers who

participated in Nutt's arrest, and Ratliff was later charged with tampering with a governmental record, and official oppression. The jury convicted Ratliff of both offenses, and he appealed, complaining, among other things, that the evidence was insufficient to support his conviction for either offense. The court of appeals disagreed, and affirmed.

Regarding the conviction for tampering, the court held "that a rational jury could have concluded that when Ratliff affixed his initials to the offense report that contained omissions of events pertaining to the legality of Nutt's arrest that Ratliff himself witnessed, he made or used a governmental record knowing that the report was false."

There were two counts of official oppression. Count one alleged that Ratliff had illegally arrested Nutt for public intoxication after entering his house without a warrant, and the court held that the evidence was legally sufficient to support this conviction. The court also found the evidence legally sufficient to support Ratliff's conviction under count two, based on Ratliff's criminal trespass.

The court of criminal appeals granted Ratliff's petition for discretionary review.

Issue Presented

The Court of Appeals erred to find that the evidence was sufficient to sustain the convictions entered in the instant case.

PRETRIAL HEARINGS

★ The defendant's right to be present at his pretrial hearing.

***King v. State*, 2020 WL 5667148**
(Tex. App.–Waco 2020, pet. granted)(not designated for publication)

After qualifying the venire panel, the court held a hearing on King's motion in limine regarding punishment evidence while King was outside the courtroom. The State did not object to the motion, and it was granted. While King was still absent, the parties discussed whether King would stipulate to each paragraph of the indictment, whether he would want to agree to anything, and whether he might possibly be disruptive in the courtroom. King's lawyer told the court King "believes he can fire me and get another attorney and delay this trial," and the court advised that there would be no further delays. And the court and the lawyers discussed how to handle voir dire, assuming King would plead guilty. King was convicted and he argued on appeal that the trial court violated his statutory and constitutional rights to be present.

The majority affirmed, agreeing that article 28.01§ 1 of the Texas Code of Criminal Procedure had been violated, but holding that, since the error did not affect King's substantial rights, reversal was not required under Rule 44.2(b) of the Texas Rules of Appellate Procedure. The court also determined that there King's absence bore no substantial relationship to his opportunity to defend himself.

The court also held that King had a Sixth Amendment right to be present at all phases of the proceedings when threatened with a loss of liberty, and that this constitutional right was violated. Again, though, reversal was not required since the Court determined, beyond a reasonable doubt, that the error did not affect the outcome of the trial, pursuant to Rule 44(a).

Chief Justice Gray dissented, because counsel had brought up a concern that King might be disruptive during the trial, and that this might have affected the trial judge's attitude toward King. Additionally, there was an off-the-record discussion while King was in the hallway.

> I do not know what occurred during the hearing off the record; and neither do you. Under the applicable standard of review, because I do not know what happened, I cannot reach the necessary conclusion to hold the error harmless that "beyond a reasonable doubt, the error did not affect the outcome of the trial." This might be the time to note that the defendant was sentenced to the maximum punishment for the offense as enhanced. Thus, being unable to find that the constitutional error was harmless, I would reverse the judgment of the trial court and remand for a new trial.

Question Presented

Can harmlessness be presumed from a silent record when a defendant has been denied his constitutional and statutory rights to be present during a pretrial proceeding?

PUBLIC TRIALS

★ **Another case testing the court's resolve to enforce the Sixth Amendment's public trial guarantee.**

***Williams v. State*, 2020 WL 2543308**
(Tex. App. San Antonio 2020, pet. granted)
(not designated for publication)

The trial court granted the State's motion to exclude a member of Williams's

family from the courtroom during the testimony of its confidential informant in this drug case, asserting that Williams's presence might traumatize or intimidate the informant. Williams was allowed to watch the proceedings from another room on a live stream video feed.

The court of appeals reversed, finding that appellant had met her two-part burden to prove a Sixth Amendment violation. First, the court room was closed, albeit to just one person during the testimony of one witness. Second, the closure was not justified. Recognizing that the possibility of witness intimidation can justify partial closure, the court held that "the trial court's findings must express more than a generic concern," which they failed to do in this case.

> We do not diminish the need to protect confidential informants. However, in this case, the record lacks specific factual findings, or any other evidence, identifying how the exclusion of Williams's family member from the courtroom serves the interest advanced by the State of preventing intimidation of the confidential informant. . . . Therefore, given the record before us, we must find Williams's Sixth Amendment right to a public trial was violated. The violation of a defendant's public trial right is structural error that does not require a showing of harm.

Issues Presented

1. The judge, on an at best, partially developed record, required one spectator to view one witness's testimony contemporaneously from a neighboring room. Is this the sort of closure requiring reversal contemplated by the right to a public trial?

2. Did the Fourth Court of Appeals fail to adequately address petitioner's argument that the courtroom was not closed as required by Rule 47.1 of the Texas Rules of Appellate Procedure?

3. Does the Fourth Court of Appeals's opinion fail to provide proper guidance and risk creating confusion for other courts when it failed to make a clear distinction between full and partial courtroom closures and the standards applicable to each type of closure?

SEARCH AND SEIZURE

★ **What is the standard for determining harm – Rule 44.2(a), or Rule 44(b) – when the error involves evidence obtained in violation of Article I, § 9 of the Texas Constitution, and inadmissible under article 38.23(a)?**

Holder v. State, 2020 WL 7350627
(Tex. App.–Dallas 2020, pet. granted)(not designated for publication)

The court of criminal appeals held that Holder's reasonable expectation of privacy under Article I, § 9 of the Texas Constitution was violated when the State accessed 23 days worth of cell phone information without probable cause, and remanded the case to the court of appeals to determine harm.

The court of appeals first determined that the more protective, constitutional standard for harm – Rule 44(2)(a) applies to this error. This is so even though the Texas exclusionary rule is not expressly a part of Article I, § 9, and requires resort to our statutory exclusionary rule, article 38.23(a) of the Texas Code of Criminal Procedure.

The court then found the error harmful because it was unable to determine that the admission of this information from Holder's cell phone was harmless beyond a reasonable doubt.

The State's petition for discretionary review was granted.

Questions Presented

1. If the error at trial was in admitting evidence under a non-constitutional rule–TEX. CODE. CRIM. PROC. art.38.23–shouldn't harm be assessed under the non-constitutional harm standard in TEX. R. APP. P. 44.2(b)?

2. If the non-constitutional "substantial rights" standard applies, was the error harmless?

★ **Did the affidavit for a warrant to search a cell phone sufficiently state probable cause?**

State v. Baldwin, 614 S.W.3d 411
(Tex. App.–Houston [14th Dist.] 2020, pet. granted)

The affidavit to search a cell phone found in the car Baldwin was driving four days after a capital murder asserted that the perpetrators, two Black males, left the scene in a white, four-dour sedan; that around that time, a neighbor saw a white, four-door sedan exiting the neighborhood at a very high rate of speed; that two neighbors saw a white, four-door sedan in the neighborhood the day before and the day of the murder, that video surveillance showed a white sedan entering the street and circling the neighborhood four times; a neighbor saw a white sedan driven by a large Black male pass his house three different times shortly before the crime; another neighbor saw a four-door, white sedan occupied by two Black males the day before the crime and she took a picture of the

license plate; the sedan in the photo was registered to Baldwin's step father, who told investigators he had sold it to Baldwin, and that Baldwin was living with his girlfriend. Four days after the murder, Baldwin was seen driving the sedan and he was arrested. He consented to the search of the car, but refused consent to search the cell phone.

The trial court held that the affidavit failed to state probable cause to search the cell phone, and the court of appeals agreed. There were no facts supporting the inference that all the witnesses saw the same white car or that the car they saw was the one in the surveillance videotape. "The only fact tying Baldwin to the neighborhood is the photograph of the license plate on his car taken the day before the murder. None of the facts in the affidavit ties Baldwin or the cellphone found in his vehicle to the commission of this or any other offense. At most, the magistrate could infer that Baldwin (or someone driving his car) was in the neighborhood the day before the murder."

The court found it "would strain credulity to conclude in a county with nearly five million people that evidence of a crime probably would be found in someone's car just because he was in the neighborhood on the day before the offense in a car the same color as the one driven by a suspect who also happened to be Black."

The court also found the magistrate was unreasonable to find a connection between the cell phone seized and the crime. "[G]eneric, boilerplate language like the language in the affidavit that a smart phone may reveal information relevant to an offense and that suspects might communicate about their plans via cellphone is not sufficient to establish probable cause to seize and search a cellphone."

> In this case, the nexus between the vehicle that Baldwin was driving and the vehicle seen at the crime is tenuous at best. Extending that nexus to include Baldwin's cellphone based on nothing more than a recitation that it is common for people to communicate their plans via text messaging, phone calls, or other communication applications would be extending the reach of probable cause too far.

The court of criminal appeals granted the State's petition for discretionary review.

Issues Presented

1. The court of appeals departed from the proper standard of review by substituting its own judgment for that of the magistrate who viewed the warrant affidavit and found probable cause.

2. The court of appeals employed a heightened standard for probable cause, departing from the flexible standard required by law.

★ **Exigent circumstances and the warrantless seizure of a cell phone containing Snapchat information.**

***Igboji v. State*, 607 S.W.3d 157**
(Tex. App.–Houston [14th Dist.] 2020, pet. granted)

The police suspected Igboji committed aggravated robbery, and during an interview told him they were going to seize his phone and get a search warrant if he did not give it to them. Hearing this, he gave them the phone and several days later they got a search warrant. Igboji moved to suppress the contents of the cell phone, the trial court denied the motion, he was convicted, and he appealed. The court of appeals reversed.

The State argued that the seizure of the phone was legal, either because it was consensual, or because it was justified by exigent circumstances. The court disagreed.

The State failed to show by clear and convincing evidence that Igboji voluntarily consented to the seizure of his phone. Nor was there "any evidence showing that Appellant, by his affirmative conduct, was actively deleting evidence on his phone. [citations omitted] Detective Ramirez's beliefs regarding Snapchat, though reasonable, do not by themselves establish the existence of exigent circumstances. Therefore, Detective Ramirez's warrantless seizure of Appellant's phone did not fall within the exigent-circumstances exception."

The State's petition for discretionary review was granted.

Questions Presented

1. Do exigent circumstances to seize a cellular phone for fear of unintentional loss of evidence require that law enforcement act at the earliest possible opportunity?

2. Do exigent circumstances to seize a cellular phone for fear of intentional destruction of evidence require "affirmative conduct" by the suspect?

3. Does the exigent circumstances exception require proof that the evidence was unavailable from other sources?

★ **Does article 14.03 have an exigency requirement? If so, did the State meet that requirement based on the tendency of alcohol to dissipate in the blood?**

State v. McGuire, 586 S.W.3d 451
(Tex. App.–Houston [1st. Dist.] 2019, pet. granted)

McGuire collided with a motorcycle and the motorcyclist was killed. McGuire pulled over and waited in a nearby gas station where the police found him and arrested him after smelling alcohol on his breath and suspecting he was intoxicated. His blood was taken without warrant or consent. He was convicted and appealed, and the court of appeals reversed, holding that the blood draw was illegal. His case was remanded for a new trial and he filed another motion to suppress, this time asserting that his warrantless arrest was illegal. The trial court found the warrantless arrest illegal and the State appealed, claiming the arrest was legal under article 14.03(a)(1) because probable cause existed and the arrest was made in a "suspicious place."

The court of appeals affirmed. The authority to arrest without a warrant in Texas is limited by chapter 14, and the State bears the burden of proving that some exception justifies the arrest under that chapter. One recognized requirement to the application of article 14.03(a)(1) is that there be exigent circumstances. "The State had the burden at the 2018 suppression hearing to establish exigent circumstances to permit the warrantless arrest of McGuire, but it did not."

Questions Presented

1. Does Tex. Code Crim. Proc. Art.14.03(a)(1) have an exigency requirement for warrantless arrests?

2. If Article 14.03(a)(1) has an exigency requirement for a warrantless arrest in public, it was satisfied here because the integrity of blood-alcohol-content evidence would have been compromised had Appellee been free to leave.

★ **Will weaving alone, whether safe or not, now constitute reasonable suspicion to stop, thus overruling *Hernandez, Tarvin*, and *Cerny*?**

State v. Hardin, 2019 WL 3484428
(Tex. App.–Corpus Christi 2019, pet. granted)
(not designated for publication)

An officer stopped Hardin after observing the tires on her car "cross minimally into an adjacent lane after rounding a curve in the road." She moved to suppress evidence found in her car, asserting the officer lacked reasonable suspicion for the stop, since there was no evidence that her lane change was unsafe. The trial court granted the motion, the State appealed, and the court of appeals affirmed.

The State relied on this language from a four-Judge plurality decision in *Leming v. State*, 493 S.W.3d 552, 559 (Tex. Crim. App. 2016):

> [I]t is an offense to change marked lanes when it is unsafe to do so; but it is also an independent offense to fail to remain entirely within a marked lane of traffic so long as it remains practical to do so, regardless of whether the deviation from the marked lane is, under the particular circumstances, unsafe.

The court of appeals acknowledged this language but, since it was merely a plurality decision, the court believed itself bound by its own opinion in *State v. Cerny*, 28 S.W.3d 796, 801 (Tex. App.—Corpus Christi–Edinburg 2000, no pet.), that failure to stay within one's own lane is not grounds for a stop, unless this movement is also unsafe. The court also cited the well known and often relied upon cases of *Hernandez* and *Tarvin*.

The State's petition for discretionary review was granted.

Issue Presented

The Thirteenth Court of Appeals erred in concluding that the officer who stopped Hardin's vehicle lacked reasonable suspicion to stop her for failing to maintain a single lane by swerving into another lane, whether or not this movement could be done safely.

SENTENCING

★ Consecutive sentences and the "same criminal episode" doctrine.

***Middleton v. State*, 2020 WL 6929642**
(Tex. App.–Beaumont, pet. granted)(not designated for publication)

Middleton pleaded guilty to three theft-of-property cases pursuant to a plea bargain and was placed on deferred adjudication probation. The State alleged that Middleton committed two new theft-of-property offenses, and the State indicted him for these two offenses and filed motions to adjudicate his guilt on the three earlier offenses. The trial court pleaded guilty to the two new theft cases, the trial court found him guilty on these two cases, and also found that he violated his deferred probation on the first three, and sentenced him to two years imprisonment on all five cases. The court ordered all five sentences to be served consecutively, and Middleton appealed, asserting that the cumulation order was prohibited, since the five cases arose from the same criminal episode, as that phrase is defined by § 3.01 of the Texas Penal Code. The court of appeals agreed, and modified the trial court's sentence accordingly.

> Because we conclude that Middleton's offenses were part of the same criminal episode, not expressly listed in 3.03(b) allowing cumulative sentences, and because the charges were prosecuted jointly, we sustain Middleton's sole issue.

The State's petition for discretionary review was granted.

Question Presented

If a case at the petition-to-adjudicate stage and a defendant's subsequent similar crime at the guilt phase are heard simultaneously, are they "prosecuted in a single criminal action" such that any imposed sentences must run concurrently?

★ Can the trial court order restitution paid to the Attorney General to reimburse it for paying for the victim's SANE examination?

***Garcia v. State*, 2020 WL 6750910**
(Tex. App.–Austin 2020, pet. granted)(not designated for publication)

Garcia was convicted of aggravated sexual assault and sentenced to 12 years imprisonment. The trial court ordered Garcia to pay $1,000 in restitution to the Office of the Attorney General to compensate it for reimbursing the Bell County District Attorney's

Office for the cost of a sexual assault nurse examiner's (SANE) examination of the victim.

> This does not constitute a payment to the victim to compensate her for her loss. Rather, it is a payment to the Office of the Attorney General to compensate it for reimbursing the Bell County District Attorney's Office, which paid for the victim's examination by a SANE. . . . Such a payment is not one made to compensate the victim for her injury or loss and, consequently the trial lacked authority to order Garcia to pay for the cost of the forensic exam as restitution.

The court of appeals modified the judgment to delete the order to pay restitution to the Attorney General. The State's petition for discretionary review was granted.

Questions Presented

1. Is an objection required to preserve a challenge to restitution ordered payable to the Attorney General for a crime victim-fund payment made on behalf of a sexual assault victim for a forensic medical exam?

2.Alternatively, does a restitution order payable to the Attorney General for a crime-victim-fund payment made on behalf of a sexual assault victim for a forensic medical exam qualify as victim compensation?

3. Alternatively, is a restitution order payable to the Attorney General for a crime-victim-fund payment made on behalf of a sexual assault victim for a forensic medical exam a proper reimbursement cost?

★ **Is the Texas statute which precludes consideration of intellectual disability when the trial court assesses a sentence of life without possibility of parole unconstitutional?**

***Avalos v. State*, 616 S.W.3d 207**
(Tex. App.–San Antonio 2020, pet. granted)

Avalos is an intellectually disabled person. He pleaded guilty to capital murder in a case in which the State did not seek the death penalty. As required by Texas law, the court could not consider mitigating circumstances surrounding his disability, and imposed a sentence of life imprisonment, without possibility of parole.

> On appeal, Avalos argues that the automatic imposition of life sentences without parole amounted to cruel and unusual punishment under the Eighth

> Amendment to the United States Constitution and Article I, section 13, of the Texas Constitution because he was denied an individualized assessment prior to the imposition of these harshest penalties. We agree with Avalos that the Eighth Amendment prohibits the automatic imposition of the punishment of life imprisonment without parole for an intellectually disabled person, and, consequently, we reverse the trial court's judgments and remand for resentencing.

The court of criminal appeals granted the State's petition for discretionary review.

Questions Presented

1. Are mandatory life-without-parole sentences cruel and unusual as applied to intellectually disabled offenders?

2. If the opinion below is affirmed, what are the available punishment options?

★ **Is there a jurisdictional time limit on a court's ability to grant "judicial clemency"?**

State v. Brent, 615 S.W.3d 667
(Tex. App.–Houston [1st. Dist.] 2020, pet. granted)

More than two-and-a-half years after Brent successfully completed her deferred adjudication probation for misdemeanor theft, the trial court granted her application for "judicial clemency." The State appealed, asserting that the trial court had lost jurisdiction to do so 30 days after the trial court entered its order discharging Brent's community supervision. The court of appeals affirmed.

> In sum, based on the statute's text, structure, and purpose, we hold that article 42A.701 gives trial courts the discretionary power to grant judicial clemency at any time after the defendant is discharged from community supervision under the article. Because the trial court granted Brent's motion after discharging her from community supervision and had not previously entered an order granting or denying judicial clemency, we hold that the trial court had jurisdiction to grant the motion.

Issue Presented

1. The Court of Appeals for the First District erred when it found, contrary to five other courts of appeals, that a trial court maintains unending jurisdiction over community supervision cases to grant "judicial clemency."

★ **Estoppel and the affirmative defense of due diligence.**

***Martell v. State*, 615 S.W. 3d 269**
(Tex. App.–El Paso 2020, pet. granted)

The court put Martell on deferred adjudication and allowed him to live at a certain address in Juarez, but ordered him to report to a community supervision officer in El Paso in 1999. After a few months he stopped reporting, and in 2002, the State filed a motion to adjudicate; the same day, the court issued a capias, but he was not arrested until 2017, at which time he reported that he had been living for the last seven years in El Paso. At the adjudication hearing it was shown that no one in law enforcement ever attempted to contact Martell in Juarez. Martell argued that the State had failed to exercise due diligence by failing to attempt an in-person contact with him in Mexico. The trial court adjudicated Martell guilty, finding he had failed his burden of establishing a due diligence affirmative defense. Martell appealed.

The court of appeals reversed, and rejected the State's argument that, since its officers were prohibited from going to Mexico to conduct a home visit, it was not required to do a futile act.

> Based on the facts established at the revocation hearing, it is undisputed that no supervision officer, peace officer, or other officer attempted in-person contact with Martell at the address used for both his residence and employment, and Martell satisfied his burden of proving the due-diligence affirmative defense. See TEX. CODE CRIM. PROC. ANN. art. 42A.109. No record evidence exists to the contrary. Therefore, the evidence was both legally and factually insufficient to support the trial court's rejection of the due-diligence affirmative defense.

The State's petition for discretionary review was granted.

Issue Presented

After holding that the evidence was legally and factually insufficient to support the trial court's rejection of the defendant's due-diligence affirmative defense, the Court of Appeals erred in failing to further address the issue of estoppel, even though the State raised the estoppel issue in the trial court, the trial court relied on the estoppel issue in proceeding to adjudicate the defendant's guilt, and the State again raised the estoppel issue in the Court of Appeals.

★ **Is hearsay evidence admissible at the sentencing phase of a jury trial as long as it is relevant?**

***Macedo v. State*, 609 S.W.3d 342**
(Tex. App.–Houston [14th Dist.] 2020, pet. granted)

Macedo was tried for murdering his wife, and the during the punishment phase the State called the decedent's father to testify about a time in 2002 when Macedo was arrested for beating her. Over Macedo's hearsay objection, the State introduced a police offense report of the 2002 incident and copies of his signed guilty plea and waiver of rights, and a record of the court's adjudication of that offense. The jury heard other evidence of Macedo's violent behavior, and sentenced him to life imprisonment.

The court of appeals reversed. The police report was hearsay, inadmissible in its entirety, and Macedo objection was therefore sufficient, even though he did not single our portions of the report as inadmissible. The court rejected the State's argument that hearsay is admissible at punishment as long as it is relevant to sentencing. "[W]e conclude that if a police offense report (not included as part of a pre-sentence investigation) is offered into evidence during a jury punishment trial and the opponent objects on hearsay grounds, the proponent must establish the report's admissibility through a sponsoring witness or applicable hearsay exception." The court also found that the erroneous admission of this evidence was harmful under Texas Rule of Appellate Procedure 44.2(b). Although the jury could have felt a life sentence was appropriate given the brutality of the crime, the court could not "say with fair assurance that the 2002 offense report . . . did not influence the jury or influenced the sentence only slightly, given that the State emphasized it in closing and the jury asked to see it before returning a verdict for the maximum sentence."

The court of criminal appeals granted the State's petition for discretionary review.

Issues Presented

2. State's Exhibit 177 was admissible under Article 37.07, §3(a)(1) because it was "relevant to sentencing" and the Fourteenth Court of Appeals erred in not being guided by the language of the statute.

3. If State's Exhibit 177 was admitted in error, the Fourteenth Court of Appeals erred in finding appellant was harmed when it only added evidence that his 2002 domestic violence conviction involved him kicking and biting his wife.

★ Concurrent fines?

***Anastassov v. State*, 2020 WL 4669880**
(Tex. App.–Dallas 2020, pet. granted)(not designated for publication)

> Here, the trial court conducted a single proceeding for multiple offenses alleged to have been committed on or about December 24, 2011, and the trial court entered judgments in 2019 which imposed $10,000 fines and $599 in court costs in both cases. Because the sentences run concurrently and involve multiple offenses tried together in a single proceeding, the trial court could not assess multiple fines or duplicate costs in the two judgments. See TEX. PENAL CODE § 3.03(a); TEX. CODE CRIM. PROC. art. 102.073(a). Accordingly, we modify the judgment in Case No. F-1550350-V by deleting the $10,000 fine and the $599 in court costs.

The court of criminal appeals granted the State's petition for discretionary review.

Question Presented

Should concurrent fines be discharged concurrently like concurrent terms of confinement?

★ **Enhancement of an aggravated state jail felony to habitual status.**

***State v. Kahookele*, 604 S.W.3d 200**
(Tex. App.–Austin 2020, pet. granted)

Kahookele was charged with the State Jail felony of Possession of a controlled substance less than a gram, and the offense was enhanced to a third degree felony because of a prior conviction for a 3g offense. And that, according to the State, permitted habitual enhancement because of two prior final non-state jail felony convictions. Kahookele moved to quash the indictment for several reasons, including that the charged offense of possession of a controlled-substance itself is still a state-jail felony and that such offense may not be further enhanced except as provided by subsection 12.425(c) of the penal code. The trial court granted Kahookele's motion to quash and the State appealed.

The court of appeals reversed. "Punishment for an aggravated state-jail felony may be enhanced under the habitual-offender statute in subsection 12.42(d) when an indictment alleges that a defendant has two prior, sequential convictions for felonies not classified as state-jail felonies."

Question Presented

Whether the Court of Appeals erred in holding that aggravated state jail felonies [Tex. Penal Code, Section 12.35(c)] are subject to further enhancement under the repeat and habitual-offender statute governing first, second, or third degree felonies [Tex. Penal Code 12.42(d)], rather than Section 12.425, Penalties for Repeat and Habitual Felony

Offenders on Trial for State Jail Felony.

★ **An illegal sentence, or a harmless charge error?**

***Bell v. State*, 2019 WL 6205460**
(Tex. App.–Amarillo 2019, pet. granted)
(not designated for publication)

Bell was charged with failing to comply with sex registration requirements, ordinarily a third-degree felony, but here it was double-enhanced with allegations of two prior convictions. He was convicted and the jury assessed punishment at 50 years imprisonment.

The court of appeals affirmed the conviction, but reversed and remanded for a new punishment hearing, holding that, because of the wording of the court's charge, the State failed to obtain a finding that the second final conviction occurred subsequent to the first conviction having become final. The State had argued that Bell suffered, not from an illegal sentence, but merely from charge error, and that the proper remedy was to remand for a harm analysis. The court rejected this argument for two reasons.

First, it is not true that the jury instructions omitted an element of the offense. Instead, it omitted a fact essential to the determination of the applicable range of punishment. "Where the State has failed to request a finding essential to its claimed range of punishment, it waives any right to claim that punishment should be assessed within that range." Second, even if a harmless error analysis was appropriate, the failure to prove the chronological sequence of punishment enhancement allegations as required under Section 12.42(d) is never harmless. "This is so because an accused will always be harmed by being subjected to a range of punishment where the minimum sentence under the State's scenario is in excess of the maximum potential sentence otherwise subject to imposition."

The State's petition for discretionary review was granted.

Questions Presented

1. Should error in the punishment enhancement charge be reviewed as charge error rather than as an "illegal sentence?"

2. What standard of harm applies to charge errors that authorize a greater punishment?

SEXUAL OFFENSES

★ **Proving "continuous" sexual abuse.**

***Witcher v. State*, 2020 WL 7483953**
(Tex. App.–Texarkana 2020, pet. granted)

Witcher was convicted of continuous sexual abuse of a child when she was 10 or 11 years old. The child testified that Witcher had engaged in various sexual acts with her more than five times, beginning when her brother went to jail, and ending when she told her sister. Her sister testified that the complainant told her of the abuse around July 26, 2018, and this sufficiently established the last sexual act; the problem was fixing the first sexual act, due to the State's badly worded question: "'In about June of -- maybe June 10th, give or take, did [the brother] get arrested and end up in the Bowie County Jail?' To which [the sister] responded, 'Yes, ma'am.'" Despite this, the jury found Witcher guilty of continuous sexual abuse, and he appealed, asserting that the evidence that evidence of multiple sexual acts continuing for 30 days or more was insufficient. The court of appeals agreed and reversed.

> [T]the jury could have inferred that the first assault occurred on or before June 26 or it could have inferred that the first assault occurred after June 26, but there is no evidence by which it could have inferred one over the other. Although such inferences "may not be completely unreasonable, ... [they are] not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt." Consequently, we find that no rational jury could find beyond a reasonable doubt that the sexual abuse occurred during a period that is thirty days or more in duration. [citations omitted]

The court of criminal appeals granted the State's petition for discretionary review.

Issue Presented

The court of appeals ignored important evidence and substituted its interpretation of the victim's testimony for the jury's.

★ **[Sealed opinion]**

***Villafranco v. State*, No. 11-18-00102-CR**
(Tex. App.–Eastland April 23, 2020)(not designated for publication)

> Because the opinion issued in this cause on April 23, 2020, contains information from the sealed briefs and a sealed record, this court has determined that the opinion should be placed under seal. Accordingly, by order of this court, the attached opinion is hereby sealed. See TEX. R. APP.

P. 9.10(g).

Issues Presented

1. This Court should review this case because the court of appeals refused to remand this case to the trial court to remedy its error as required by this Court's holding in *Lapointe v. State*.

2. Assuming that the error in this case should have been reviewed pursuant to the harmless beyond a reasonable doubt standard, the error clearly was not harmless beyond a reasonable doubt.

★ **Double Jeopardy for convictions of continuous sexual abuse and prohibited conduct.**

***Ramos v. State*, 2020 WL 4219574**
(Tex. App.–Corpus Christi 2020, pet. granted)
(not designated for publication)

Ramos was convicted of continuous sexual abuse of a child and prohibited sexual conduct, both offenses involving the same complainant. The focus and unit of prosecution on both was penetration, the mode of commission was penile to vaginal, and the period of time was the same date. On appeal Ramos contended that punishment for both offenses violated double jeopardy, and considering the 8-factor test set out in *Ervin v. State*, 991 S.W.2d 804, 814 (Tex. Crim. App. 1999), the court of appeals agreed. The conviction for continuous sexual abuse was affirmed, but the judgment modified to vacate the conviction for prohibited sexual conduct.

The State's petition for discretionary review was granted.

Question Presented

Did the Legislature intend punishments for both continuous sexual abuse, TEX. PENAL CODE § 21.02, and prohibited sexual conduct, TEX. PENAL CODE § 25.02, against the same child?

★ **Is touching with the hand a lesser included offense of penile penetration of the mouth?**

***Hernandez v. State*, 2020 WL 4360789**
(Tex. App.–Fort Worth 2020, pet. granted)(not designated for publication)

Hernandez was charged with aggravated sexual assault by penetrating the complainant's mouth with his sexual organ. The child testified that Hernandez put his penis in her mouth. Hernandez testified and denied doing that, and denied touching her with his penis at all. He did admit that he had touched the child inappropriately with his hands with intent to arouse his sexual desire, and that they had both pulled their pants down, that he had pulled her close to him, and rubbed their bodies together. The trial court denied Hernandez's request for the lesser included offense of indecency with a child by contact and he was convicted.

The court of appeals reversed.

> Because the jury may believe all, some, or none of any witness's testimony, [citations omitted] a reasonable jury—in light of all the evidence in the record—could have disbelieved the child victim's testimony, as well as the other witnesses called by the State, and believed appellant's version of the events—that he only committed the offense of indecency with a child by contact, not aggravated sexual assault of a child. As such, a reasonable juror could have found appellant guilty of only indecency with a child by contact—an option that was not available to the jury in this case. We therefore conclude that the trial court abused its discretion by denying appellant's request for an instruction on the offense of indecency with a child by contact as a lesser-included offense.

The State's petition for discretionary review was granted.

Questions Presented

1. Is indecency by touching the victim's sexual organ a lesser-included offense of penetrating the child's mouth with the defendant's sexual organ if the former is the defendant's version of the incident?

2. For indecency by contact to be a lesser of aggravated sexual assault, must the act on which the indecency is predicated have the potential to be factually subsumed within the aggravated sexual assault?

★ The corpus delicti rule and indecency with a child.

***Shumway v. State*, 2020 WL 86780**
(Tex. App.–Beaumont 2020, pet. granted)
(not designated for publication)

Shumway was convicted of indecency with a child and argued that there was insufficient evidence of the corpus delicti because his confessions to his bishop and his wife were not sufficient evidence of guilt absent independent evidence that someone had committed a crime. The court of appeals disagreed and affirmed, concluding that there was some evidence outside of the extra-judicial confessions which, considered alone or in connection with the confessions, showed that the crime actually occurred.

Shumway's petition for discretionary review was granted.

Questions Presented

1. Does the corpus delicti rule require evidence totally independent of a defendant's extrajudicial confession showing that the'essential nature' of the charged crime was committed by someone?

2. Can independent evidence as to time, motive, opportunity, state of mind of the defendant, and/or contextual background information satisfy the corpus delicti rule in an indecency with a child charge when there is zero evidence of sexual contact?

3. Is the evidence legally sufficient to support convictions for indecency with a child when the independent evidence does not tend to establish sexual contact?

4. Did the Ninth Court of Appeals improperly circumvent The Court of Criminal Appeals 2015 ruling on corpus delicti doctrine in *Miller v. State*, 457 S.W.3d 919 (TEX. CRIM. APP. 2015) which expressly declined to use a trustworthiness standard regarding the legal sufficiency standard?

★ Can a 4-year old commit prostitution?

***Turley v. State*, 597 S.W.3d 30**
(Tex. App.–Houston [14th Dist.] 2020, pet. granted)

The police began an investigation based on a Craiglist ad that eventually let them to charge Turley with compelling prostitution of a 4-year old and trafficking this child based on compelling prostitution. Turley was convicted of both offenses, and appealed, asserting that the evidence was legally insufficient, and the court of appeals agreed.

> Following the plain meaning of the compelling-prostitution statute, which requires as a necessary element a showing that another person (in this case, the four-year-old) was caused to commit prostitution, when the other person is a "child" and that child cannot commit the offense of prostitution, we conclude the defendant cannot be convicted for compelling prostitution.

Since a 4-year old cannot commit the offense of prostitution, a defendant cannot be convicted of compelling that child to engage in prostitution, and, accordingly, the evidence is legally insufficient to prove both offenses. The court reversed the convictions and remanded for entry of a judgment of acquittal.

The court of criminal appeals granted the State's petition for discretionary review.

Questions Presented

1. Did the court of appeals err when it held as a matter of law that selling sexual contact with a four-year-old child could never constitute compelled prostitution?

2. Must a child knowingly engage in an act of prostitution for the person who sold sex with her to be guilty of compelling prostitution?

SPEEDY TRIAL

★ **"[T]he facts of this case are relatively uncommon in speedy trial cases."**

***State v. Lopez,* 563 S.W.3d 409**
(Tex. App.–San Antonio 2018, pet. granted)

> The State appeals the trial court's order dismissing a misdemeanor assault charge against Martin Lopez on speedy trial grounds. As the parties acknowledge, the facts of this case are relatively uncommon in speedy trial cases. Lopez, who suffers from mental health disorders, was arrested for "putting his teeth [on his elderly mother's face] while trying to bite her." Lopez was placed in county jail, and he could not make bail. The State took nearly three months to decide whether a felony or misdemeanor assault charge would be more appropriate, determining ultimately to file a misdemeanor charge. A visiting judge thereafter denied Lopez's request for bail and set trial for twelve days later. Despite Lopez's trial counsel raising the issue of his incompetence to stand trial at the pretrial hearing, Lopez was not evaluated. At trial, the State and Lopez's trial counsel expressed concerns about Lopez's competency. Based on the length of Lopez's pretrial incarceration and inevitable future delays for competency proceedings, Lopez requested that the trial court dismiss the case on speedy trial grounds. The trial court agreed and dismissed the misdemeanor assault charge. Considering the factors set out by the Supreme Court of the United States in *Barker v. Wingo*, . . . we conclude the trial court did not err and, accordingly, affirm the trial court's order.

Issues Presented

1. The court of appeals erred by concluding that a 112 day delay was presumptively prejudicial based on potential delay that had not yet occurred and by weighing the first *Barker* factor against the State.

2. The court of appeals erred by concluding that the State was responsible for the delay and by weighing the second *Barker* factor against the State.

3. The court of appeals erred by weighing the third *Barker* factor against the State without any evidence that Lopez asserted his right to a speedy trial.

TAMPERING WITH EVIDENCE

★ **A double-failure of proof: the evidence was insufficient to prove that the defendant dumped the marijuana down the toilet, and, also that dumping marijuana in the toilet altered or destroyed it.**

***David v. State*, 621 S.W.3d 920**
(Tex. App.– El Paso 2021, pet. granted)

The police had information that drug activity was taking place at a motel in El Paso, and after a period of surveillance, they forced their way into number 18 where they found two women in the living area, drug paraphernalia in plain view, and a "very, very strong odor of marijuana." Hearing movement inside the bathroom, the officers demanded that the occupant open the door, and when he did not, they forced their way in and found David inside, fully dressed, and standing near the toilet which contained a substance that looked like marijuana, paraphernalia, and fecal matter. It appeared to the officers that someone had tried to flush the toilet, although they had not heard the sound of flushing while they stood outside the door, nor had they seen anyone flushing. David was convicted of tampering with evidence and he appealed.

The court of appeals reversed, concluding, "the evidence adduced at trial was legally insufficient to support a finding, first, David was the individual that destroyed or altered the marijuana and second, the marijuana was in fact, altered or destroyed."

The State's petition for discretionary review was granted.

Issues Presented

1. By holding that the evidence was legally insufficient to establish David's identity as

the individual who committed the offense when he was alone in a locked bathroom with the tampered-with evidence, the Court of Appeals erred by ignoring the circumstantial evidence establishing David's identity and requiring the State to disprove an alternative hypothesis regarding the offender's identity.

2. By holding that placing marijuana in a toilet bowl containing feces does not constitute "altering" or "destroying" within the meaning of the tampering-with-physical-evidence offense, the Court of Appeals failed to apply the appropriate legal-sufficiency standard by improperly substituting its judgment for that of the jury's and disregarding the jury's common-sense inference that marijuana that has been contaminated with feces has been altered or destroyed.

3. Even if the Court of Appeals did not err by holding that the evidence was legally insufficient to support David's conviction for tampering with physical evidence, the Court of Appeals erred by failing to reform the conviction to the lesser-included offense of attempted tampering with physical evidence, thereby violating this Court's instruction in Thornton v. State.

TAMPERING WITH A GOVERNMENTAL RECORD

★ **An offense report.**

***Ratliff v. State*, 604 S.W.3d 65**
(Tex. App.–Austin 2020, pet. granted)

Ratliff was chief of police, and one of the officers who arrested Nutt for public intoxication. Ratliff initialed a police report made by one of the other officers who participated in Nutt's arrest, and Ratliff was later charged with tampering with a governmental record, and official oppression. The jury convicted Ratliff of both offenses, and he appealed, complaining, among other things, that the evidence was insufficient to support his conviction for either offense. The court of appeals disagreed, and affirmed.

Regarding the conviction for tampering, the court held "that a rational jury could have concluded that when Ratliff affixed his initials to the offense report that contained omissions of events pertaining to the legality of Nutt's arrest that Ratliff himself witnessed, he made or used a governmental record knowing that the report was false."

The court of criminal appeals granted Ratliff's petition for discretionary review.

Issue Presented

The Court of Appeals erred to find that the evidence was sufficient to sustain the convictions entered in the instant case.

VOIR DIRE

★ **Picky, picky.**

***Laws v. State*, 2020 WL 6051343**
(Tex. App.–Texarkana 2020, pet. granted)
(not designated for publication)

Counsel objected to allowing the alternate juror to attend the deliberations of the jury, but he did not "argue that allowing the alternate juror to remain in the jury room during deliberation constituted a statutory violation of Article 36.22." The court of appeals held that Laws's argument did not meet Rule 33.1(a)(1)'s "specificity requirement." Additionally, the court faulted counsel for not addressing how he was harmed, in light of the trial court's instruction that the alternate not participate in the deliberations or speak, and that the other jurors disregard anything he said.

The court of criminal appeals granted Laws's petition for discretionary review.

Questions Presented

1. Did the Court of Appeals err in concluding that Appellant failed to preserve error?

2. Did the trial court violate Art. 36.22?

3. Is harm presumed when a trial court violates the first sentence of Art. 36.22?

4. Was Appellant harmed by the violation of the first sentence of Art. 36.22?

WEAPONS

★ **What must be proven to convict a gang member of unlawfully carrying?**

***Martin v. State*, 2020 WL 5790424**
(Tex. App.–Amarillo 2020, pet. granted)
(not designated for publication)

Martin was stopped for a traffic offense and arrested for unlawfully carrying while a member of a street gang. He admitted he was a member of the Cossacks motorcycle club, and that he had been present at Twin Peaks in 2015 when the Cossacks and

Bandidos shot each other, but he denied that he had ever associated in the commission of criminal activities. He was convicted, and appealed, and the court of appeals reversed:

> To be a gang member for purposes of prosecution under the statute, "an individual must be one of three or more persons with a common identifying sign, symbol, or identifiable leadership and must also continuously or regularly associate in the commission of criminal activities." *Ex parte Flores*, 483 S.W.3d at 648 (emphasis added). While the evidence establishes the first half of the equation, i.e., appellant's membership as a Cossack, the record is devoid of evidence of the second half, i.e., a showing that he associated in the commission of criminal activities. Under *Ex parte Flores*, both gang membership and a connection to criminal conduct are required.

Question Presented

Does unlawful carrying a weapon by a gang member, TEX. PENAL CODE § 46.02(a-1)(2)(C), require proof the defendant was continuously or regularly committing gang crimes?

★ **Licensed premises and their parking lots.**

***Baltimore v. State*, 608 S.W.3d 864**
(Tex. App.–Waco 2020, pet. granted)

Witnesses testified that Baltimore was carrying a handgun in the parking lot of a bar, he was convicted and he appealed, asserting that the evidence was insufficient because the State failed to present specific evidence that the parking lot was "grounds or an adjacent premises" that were directly or indirectly under the control of the bar. The court of appeals disagreed that the evidence was insufficient, and affirmed.

> While certainly the State could have presented more precise evidence defining the legal standing between Crying Shame and the parking lot, Baltimore has not provided any authority to show that the testimony that the parking lot was the parking lot of Crying Shame was not sufficient for any rational juror to find that the parking lot was part of the licensed premises of Crying Shame.
>
> Baltimore's petition for discretionary review was granted.

Question Presented

Must the State offer proof of the parameters of a licensed premises to secure a conviction for unlawfully carrying a weapon on licensed premises?

ZOOM

★ **Can a trial court force a defendant to appear by videoconferencing, over his objection?**

***Lira v. State*, 2021 WL 1134801**
(Tex. App.–Eastland 2021, pet. granted)
(not designated for publication)

The trial court ordered that Lira's plea hearing be conducted by Zoom video conference, pursuant to the Governor's 17th Emergency Order. Lira filed a motion to rescind the order, indicated he did not consent to plea by videoconference, and moved for a continuance until he could appear in person and with his attorney in his physical presence. Lira objected that trial by videoconference violated his rights to counsel and to a public trial and was contrary to state law, including article 27.18(a) of the code of criminal procedure. The trial court overruled Lira's objections and the hearing was conducted by Zoom videoconference with Lira in a unit at TDCJ, and his lawyer in another location. Lira pleaded guilty to assault on a public servant, pleaded true to the enhancement. The court found him guilty, found the enhancement true, and assessed punishment according to the plea agreement.

"In his sole issue on appeal, Appellant asserts that he had a statutory right to enter his guilty plea in open court and that his right to do so was a substantive right and was therefore not subject to the Texas Supreme Court's emergency orders authorizing a trial court to modify or suspend any and all procedures." The court of appeals agreed with Lira and reversed his conviction and sentence.

Notwithstanding paragraph 3(c) of the Governor's order, the court refused to hold that a defendant in a criminal case could be required to appear via videoconferencing over his objection. The Governor's order does not authorize a court to modify "substantive rights," and a defendant's right to appear in person in open court is a substantive right provided for by statute.

The State's petition for discretionary review was granted.

Question Presented

If a defendant has to accept the benefit of a negotiated plea agreement via

videoconferencing, has he lost a substantive right or been harmed?

***Huddleston v. State*, 2021 WL 1134806**
(Tex. App.–Eastland 2021, pet. granted)(not designated for publication)

Question Presented

If a defendant has to accept the benefit of a negotiated plea agreement via videoconferencing, has he lost a substantive right or been harmed?