

Texas Court of Criminal Appeals — Open Questions

Generated 2026-08-06 · 79 questions raised by current CCA judges in concurrences and dissents (Jan 2015 – present).

1. Should a .15 BAC allegation in a DWI offense be treated as an element of the crime or as a sentence enhancement?
2. When a prior conviction elevates an offense to a higher statutory degree, should that prior conviction be treated as an element of the offense or merely as a sentence enhancement?
3. Does the sex offender registration statute's failure-to-register provision require proof of a culpable mental state (intent, knowledge, or recklessness), or does it establish a strict liability offense?
4. Can a defendant's prior sexual offense conviction be admitted during the guilt-innocence phase, and if so, does he have a constitutional right to conduct voir dire questioning specifically about juror bias against repeat sexual offenders?
5. Can artistic expression such as rap videos be admitted as character evidence in guilt-innocence trials without a concrete connection to the charged offense?
6. When a trial court excludes evidence through a defendant's pretrial objection, must the jury charge be revised to exclude theories of liability that depend on that excluded evidence, or may the charge remain open to those theories?
7. Under the wiretap statute, should courts determine "reasonable expectation of privacy" in communications by focusing determinatively on the location of communication, or by examining the totality of circumstances including content, manner, and educational context?
8. When an appellant's brief inadequately addresses one or more elements of an offense charged, may an appellate court limit its *Jackson v. Virginia* legal sufficiency review to the elements the appellant briefed, or must the court conduct a complete review of all offense elements regardless of briefing?
9. Does a defendant's *Cuyler v. Sullivan* right to conflict-free representation extend beyond defense counsel to defense experts who are retained and paid by the defense but also paid by the state to testify adversely?
10. Should drug-detection dogs be analyzed under *Kyllo v. United States* as "sense-enhancing technology not in general public use," such that their detection of information inside a home constitutes a search?

11. Does Article 38.23's precedential interpretation align with the statute's plain language?
12. What appellate-deference standard applies to jury reasonable-suspicion findings in border-policing cases?
13. Should ineffective-assistance-of-counsel claims proceed on direct appeal or in postconviction habeas?
14. Does the good-faith exception apply to warrant-service statutory violations unrelated to Fourth Amendment privacy?
15. Is demeanor observation a constitutionally distinct element of the Sixth Amendment Confrontation Clause?
16. Does Fourth Amendment reasonableness apply to dog-sniff intrusions lacking law-enforcement direction?
17. What appellate review standard applies to prosecutorial-vindictiveness findings, and what remedies are available?
18. What deference standard governs trial judges' decisions on prosecutorial statements regarding victim race?
19. Does a contempt conviction bar prosecution for the underlying crime under the Blockburger test?
20. When must appellate courts remand for inadequate trial court findings on essential elements, and when may they conduct harmless error analysis from the existing record?
21. What standard of review applies to trial court factual findings in harmless error analysis of Strickland prejudice claims—mixed review deferential to credibility, or categorical de novo review?
22. Should courts apply the rule of lenity to resolve irreconcilable ambiguities in criminal statutes in favor of defendants?
23. Can courts impose statutory requirements such as merger, separation of conduct elements, or causation that the statute does not express?
24. Is the "valid-rational-alternative" test for lesser included offense jury instructions applied symmetrically, and should it be retained or eliminated?
25. Does the "Bible factors" framework for determining continuation of statements impermissibly conflate distinct legal questions under Article 38.22?

26. When an indictment body and caption diverge in alleging the charged offense, which controls?
27. Must the prosecution make a timely election of which statutory alternative method or means it will prove when a statute defines an offense through multiple options?
28. Can a statutory violation constitute Article 38.23 exclusionary rule standing when the trial court suppressed evidence on different legal grounds?
29. Can appellate courts impose timeliness requirements on post-conviction habeas corpus applications absent a statutory deadline?
30. When evidence supports only an omitted lesser-included offense, should a conviction be reformed to that lesser offense rather than vacated for retrial?
31. Does omission of an element from a jury charge's application paragraph constitute reversible error when the element appears in the abstract instruction?
32. How should vehicle description discrepancies factor into reasonable-suspicion analysis when supported by other totality-of-circumstances factors?
33. Does a single canine intrusion into a vehicle constitute a Fourth Amendment search, or is repeated intrusion or demonstrated handler responsibility required?
34. Can a lone shoplifter be convicted under the retail-theft statute for conduct beyond ordinary theft, such as advertising stolen merchandise for resale?
35. Does Article 33.03's requirement that a defendant "voluntarily absent himself" include a defendant court-ordered excluded or prevented by incarceration from attending trial?
36. Do due process protections for appellate rights extend beyond the standard 45-day appellate timeline in postconviction habeas proceedings?
37. Does Texas Penal Code § 38.04's structure—making arrest or detention lawfulness an element of the evading offense—unconstitutionally assign to juries a legal determination (reasonable suspicion) that should remain a judicial function?
38. Does the Penal Code's incorporation of criminal liability for violation of external statutory duties, without clear legislative statement that such conduct is punishable, violate rule-of-law principles by creating risk of arbitrary prosecution and depriving defendants of adequate notice?
39. Can a hotel's property-law authority to evict a guest unilaterally extinguish the guest's Fourth Amendment privacy expectations in a way that circumvents the protection against third-party waiver established in *Stoner v. California*?

40. Should a guest's Fourth Amendment privacy expectations in a hotel room persist until the guest has clear notice that eviction will result in loss of constitutional protection, or does property-law authority permit silent, unilateral termination of privacy rights?
41. When is jury charge error "actual" rather than merely superfluous?
42. What statutory subsections constitute offense-defining elements subject to judgment notation?
43. Are lesser-included offense instructions always mandatory "law applicable to the case"?
44. What methodology governs statutory interpretation in criminal statutes?
45. When should appellate courts defer to trial court factual or mixed-question determinations?
46. Must double jeopardy analysis include both elements-test and units-of-prosecution review?
47. Does double jeopardy or statutory construction control jury unanimity doctrine?
48. Should harmless-error analysis apply when jury charge omits elements from alternative offense theories?
49. What is the proper scope of discretionary review authority on appeal?
50. Does the plain language of statute-of-limitations tolling provisions admit judicial limitation?
51. Does the "immediately apparent" requirement in the plain view doctrine demand absolute certainty that a seized item is connected to criminal activity, or is probable cause based on reasonable inference sufficient?
52. Can a single act serve as both the underlying predicate felony and the required "act clearly dangerous to human life" under the felony murder statute, or does the merger doctrine prohibit such overlap?
53. Under Texas Penal Code Section 22.04(b)(1), must a legal or statutory duty to act be victim-specific, or do general public duties satisfy the omission liability requirement?
54. Does complete abandonment of advocacy during the capital punishment phase constitute a Chronic violation entitling a defendant to presumed prejudice, or must the defendant meet the Strickland standard to demonstrate actual prejudice from ineffective assistance?
55. May a trial court dismiss an indictment with prejudice as a remedy for prosecutorial vindictiveness without prosecutorial consent, or does such dismissal exceed the trial court's remedial authority as an abuse of discretion?

56. Under the Almanza egregious harm standard, must an omitted jury charge element be contested at trial to constitute reversible error, or can omissions of uncontested elements trigger egregious harm reversal?
57. When a contempt judgment contains notice defects, do these defects implicate personal jurisdiction (waivable) or subject-matter jurisdiction, and how does the jurisdictional classification affect double jeopardy protection against successive prosecution for the underlying offense?
58. Does the third-party doctrine eliminate Fourth Amendment protection for location data voluntarily disclosed to technology companies, or is there a separate constitutional privacy interest in modern geofencing and location history distinct from cell-site location information?
59. Should a trial court's denial of self-representation based on mental incompetency be understood as the state's separate authority to limit self-representation under *Indiana v. Edwards*, or does it constitute an invalid waiver of the Sixth Amendment right to counsel?
60. May an appellate court sua sponte raise and address potentially relevant issues not presented by the parties, or must courts remain confined to the issues the parties frame for decision in an adversarial system?
61. When must lesser-included offense instructions be given—under the "possible-disbelief" test or the "factual-dispute" test?
62. In a cargo-theft prosecution, must the prohibited activity be distinct from the theft itself?
63. Can a defendant be held liable as a party when she intended to promote a different crime than her co-defendant actually committed?
64. Under Article 39.14, does "the state" in discovery obligations include law enforcement agencies?
65. Under Article 14.03(a)(1), are exigent circumstances required for a warrantless arrest in a suspicious place?
66. Does the Sixth Amendment Confrontation Clause apply in post-conviction adjudication hearings?
67. Is the Article 33.03 right to be personally present at trial forfeitable or non-forfeitable?
68. Under *Perry v. Leeke*, can counsel discuss testimony with a defendant when there is an overnight recess in the defendant's testimony?

69. Where is the line between permissible lay-witness inference and impermissible speculation in premises-control testimony?
70. Should rap lyrics be categorically excluded as evidence, or does Rule 403 require case-by-case balancing of probative value against unfair prejudice?
71. Does temporary loss of access to a vehicle during arrest eliminate a defendant's reasonable expectation of privacy in that vehicle when it serves as both transportation and residential space, or must the state establish affirmative evidence of actual eviction or loss of occupancy rights?
72. When law enforcement has reduced luggage to its exclusive control and the arrestee is handcuffed and physically separated from the property, do the officer-safety and evidence-preservation justifications for search-incident-to-arrest still apply?
73. Must a search warrant's operative language explicitly authorize specific investigative actions, or may probable cause established in an attached affidavit implicitly authorize investigative steps not expressly described in the warrant itself?
74. What quantum of necessity suffices to override a defendant's Sixth Amendment right to face-to-face confrontation when the witness is an adult non-victim—does a witness's subjective and uncorroborated fear of retaliation combined with a trial court's conclusory necessity finding satisfy the Craig and Haggard standard?
75. When a peace officer testifies that a witness is "not lying" or otherwise opines on the witness's truthfulness, can such evidentiary error be found harmless merely because the statement is brief, or must harmless-error analysis account for law enforcement testimony's exceptional persuasive weight in causing jurors to abdicate their credibility-assessment role?
76. Are aggravated robbery by threat and aggravated bodily-injury robbery separate, distinct offenses with different gravamina requiring jury unanimity on which specific offense was committed, or are they merely alternate modes of committing a single crime?
77. Should the line between criminal preparation and criminal attempt in attempted capital murder be drawn at pulling the trigger rather than at pointing a firearm, contrary to the holding in *Godsey v. State*?
78. Does a trial court's 24-hour prohibition on attorney-client communication during a trial recess constitute structural error under the Sixth Amendment, and does such an extended restriction exceed the narrow exception established in *Perry v. Leeke*?

79. When an indictment's operative language uses one statutory term ("public servant") but its caption or factual allegations identify a different classification ("peace officer"), which controls the charged offense and the defendant's notice of the specific charge under the Delarosa doctrine?