

Texas Court of Criminal Appeals — Open Questions Flagged in Side Opinions

Generated 2026-08-06 11:04 CDT from concurrences and dissents in the cca-opinions corpus (Jan 2015–present). Each judge's section lists PDR-worthy doctrinal questions [claude-haiku-4-5-20251001](#) extracted from their side opinions.

Judges

- [Bert Richardson](#) (18 side opinions)
- [David Newell](#) (54 side opinions)
- [Kevin Patrick Yeary](#) (136 side opinions)
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Bert Richardson

Took bench 2015-01-01 · 18 side opinions in the corpus

Pattern

The most significant clusters concern evidence admissibility and jury instructions: whether character evidence such as artistic expression and prior sexual offenses can be admitted without nexus to the charged offense, whether jury charges must conform to properly admitted evidence, and how appellate courts review eyewitness identification under suggestive procedures. A major secondary cluster involves the element-versus-enhancement distinction in multiple statutory contexts—.15 BAC in DWI, prior conviction degree-elevators, and culpable mental state for failure-to-register—each creating widespread confusion about charging, proof burdens, and trial procedure. A third cluster addresses Fourth Amendment privacy doctrine: the *Kyllo* analysis for drug-detection dogs and the reasonable expectation of privacy standard in wiretap communications.

Open Questions

- **Should a .15 BAC allegation in a DWI offense be treated as an element of the crime or as a sentence enhancement?**: The statutory text and case law create confusion among prosecutors, defense attorneys, and trial judges about charging, proof burden, and objection timing. [Do, Phi Van, PD-0556-20](#)
- **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?**: Courts apply inconsistent standards based on whether the prior relates to jurisdiction or substantive conduct, but the doctrinal basis for this distinction remains undefined. [Oliva, Jose, PD-0398-17](#)
- **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?**: The statutory text and prior holdings conflict on whether mens rea is a required element, creating uncertainty about burden of proof and jury instructions. [Febus, Albert Junior, PD-1369-15](#)
- **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?: The permissibility of such character evidence and the procedural safeguards necessary to ensure jury impartiality remain unsettled. [Jacobs, Joshua, PD-1411-16](#)

- **Can artistic expression such as rap videos be admitted as character evidence in guilt-innocence trials without a concrete connection to the charged offense?:** Courts have not definitively established whether such evidence is inherently prejudicial under Rule 403 because it invites jury decision-making based on emotional reaction and cultural taste rather than logical inference about criminal conduct. [Hart, Larry Jean, PD-0677-22](#)
- **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?:** The interaction between evidentiary admissibility and jury charge scope—specifically, whether evidentiary objections constrain jury instructions—remains doctrinally unsettled. [Burnett, Burt Lee, PD-0576-16](#)
- **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?:** This issue determines whether an instructional coach's locker-room speech qualifies as a protected "oral communication" and the scope of privacy protection for educational settings. [Long, Wendee, PD-0984-15](#)
- **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?:** The scope of appellate review duty under the legal sufficiency standard and whether inadequate briefing excuses the appellate court's responsibility remain contested. [Burks, Antwain Maurice, PD-0992-15](#)
- **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?:** The cognizability of such conflicts of interest and their impact on the quality of representation remain unaddressed. [Green, Clifford Wayne, PD-0171-16](#)

- **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?**: The characterization of canine olfaction as analogous to thermal imaging and the scope of Fourth Amendment protection for interior home information remain unsettled, particularly in apartment contexts where residents have diminished expectation of privacy. [Rendon, Michael Eric, PD-0013-15](#); [Rendon, Michael Eric, PD-0015-15](#)

David Newell

Took bench 2015-01-01 · 54 side opinions in the corpus

Pattern

Judge Newell's opinions concentrate on three primary doctrinal fault lines: appellate review standards and remand doctrine, particularly whether appellate courts must remand for inadequate trial court findings of fact or may conduct harmless error analysis from the existing record; statutory interpretation in criminal law, specifically whether courts may impose requirements not express in the statutory text and whether the rule of lenity properly resolves statutory ambiguities; and jury instruction standards, especially the asymmetrical application of the "valid-rational-alternative" test for lesser included offenses. A secondary but persistent cluster involves charging document sufficiency, particularly the relationship between indictment caption and body in defining charged offenses.

Open Questions

- **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?:** Under *State v. Elias*, do appellate courts have discretion to examine the broader trial record for actual harm despite a silent record on a specific issue, or must they always remand when findings are incomplete or absent? [Coleman, Christopher Tye, PD-0093-25](#); [King, Justin Shane, PD-1003-20](#); [Martinez, Roger Anthony, PD-0324-17](#)
- **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?:** Should appellate courts defer to trial court findings and credibility determinations while applying de novo review only to legal conclusions, or does harmless error analysis require de novo review throughout? [Hradek, Lindsey, PD-0083-23](#)
- **Should courts apply the rule of lenity to resolve irreconcilable ambiguities in criminal statutes in favor of defendants?:** When statutory language conflicts or is ambiguous regarding offense scope or essential elements, must courts resolve the ambiguity in the defendant's favor absent clear legislative intent, and what degree of textual conflict qualifies as "irreconcilable"? [Lennox, Bobby Carl Aka Bobby Carl Leanox, PD-0284-25](#)

- **Can courts impose statutory requirements such as merger, separation of conduct elements, or causation that the statute does not express?:** Does imposing such judicially-created requirements—when the statutory text lacks them—constitute impermissible rewriting of the statute? [Fraser, Marian, PD-0711-17](#); [Johnson, Zimbabwe Raymond, PD-0055-23](#); [Johnson, Zimbabwe Raymond, PD-0056-23](#); [Armstrong, Joshua Ray, PD-0409-22](#)
- **Is the "valid-rational-alternative" test for lesser included offense jury instructions applied symmetrically, and should it be retained or eliminated?:** The test permits jury consideration on prosecution requests yet requires affirmative evidence for defense requests—does this asymmetry violate consistency requirements, and is the test itself doctrinally sound? [Ransier, Charles Robert, PD-0289-20](#); [Chavez, Jose Juan, PD-0759-21](#)
- **Does the "Bible factors" framework for determining continuation of statements impermissibly conflate distinct legal questions under Article 38.22?:** Does the test confuse voluntariness of waiver, statutory continuation of statements, and effectiveness of warnings, and does it misread the statute by focusing on "interviews" rather than discrete "statements"? [Lujan, Erlinda, PD-0244-19](#); [Lujan, Erlinda, PD-0245-19](#)
- **When an indictment body and caption diverge in alleging the charged offense, which controls?:** When the body alleges a complete statutory offense with adequate factual description but the caption names a different charge, should the body limit the prosecution and trial to those allegations, or may the caption supplement or modify the body's allegation? [Crawford, Shawn Edward, PD-0243-23](#)
- **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?:** Does the constitutional notice requirement require specific election, or may the State proceed without specifying which statutory path it intends to prove? [Williams, Jemadari Chinua, PD-0099-23](#)
- **Can a statutory violation constitute Article 38.23 exclusionary rule standing when the trial court suppressed evidence on different legal grounds?:** When a trial court grants suppression based on one theory but the record could support suppression under an alternative statutory-violation theory, may a defendant raise the statutory theory on appeal if the trial court made no findings on it? [Coleman, Christopher Tye, PD-0094-25](#)
- **Can appellate courts impose timeliness requirements on post-conviction habeas corpus applications absent a statutory deadline?:** Does the absence of a statutory

timeliness requirement preclude courts from imposing arbitrary temporal restrictions on habeas relief, and if so, what temporal limitations are impermissible? [*Griffin, Ex Parte Gary*, PD-0611-24](#)

Kevin Patrick Yeary

Took bench 2015-01-01 · 169 side opinions in the corpus

Pattern

Judge Yeary's flagged issues cluster heavily around **jury charge doctrine and harmless error analysis**, particularly Lesser-included-offense instructions, error preservation requirements, and when errors are structural versus curable. A substantial secondary cluster concerns **statutory interpretation methodology**, especially tensions between plain language and legislative intent, with accompanying separation-of-powers concerns. A third recurring area involves **appellate review standards**—what questions warrant de novo versus deferential review, and the proper scope of discretionary review authority. Fourth Amendment/search-and-seizure doctrine and double jeopardy/jury unanimity analysis each constitute a notable but smaller subset.

Open Questions

- **When is jury charge error "actual" rather than merely superfluous?:** May a trial court be reversed based on a correct but inapplicable jury instruction, or must the appellant first establish that the abstract instruction created actual rather than theoretical harm to the verdict? [Cuevas, Victor Hugo, PD-0144-25](#).
- **What statutory subsections constitute offense-defining elements subject to judgment notation?:** When statutory provisions establish offense variants (e.g., super-aggravated offenses distinguished by subsection), must such subsections be reflected in the judgment's offense designation, or may courts avoid deciding this issue based on party stipulation? [Tucker, Michael, PD-1059-24](#).
- **Are lesser-included offense instructions always mandatory "law applicable to the case"?:** Should jury instructions on lesser-included forgery under Penal Code § 32.21(e-1) be classified as defensive instructions requiring preservation and request, or as statutorily mandated instructions that trial courts must provide regardless of party action? [Lennox, Bobby Carl Aka Bobby Carl Leanox, PD-0284-25](#); [Ransier, Charles Robert, PD-0289-20](#).
- **What methodology governs statutory interpretation in criminal statutes?:** Should courts prioritize plain statutory language or permit judicial importation of limitations based on presumed legislative intent; what role does separation of powers play in choosing

between these approaches? [Joe, Daryl, PD-0423-23](#); [Lang, Terri Regina, PD-0563-17](#); [Watkins, Ralph Dewayne, PD-1015-18](#).

- **When should appellate courts defer to trial court factual or mixed-question determinations?:** Are determinations of reasonable suspicion in legal-sufficiency review subject to appellate de novo review, or should juries' ordinary understanding of such mixed law-fact questions receive deferential appellate treatment? [Hernandez, Israel Garcia, PD-0176-25](#); [Martinez, Roger Anthony, PD-0324-17](#).
- **Must double jeopardy analysis include both elements-test and units-of-prosecution review?:** Does examining only whether statutory elements are identical suffice, or must appellate courts separately determine whether evidence demonstrates distinct units of prosecution on different occasions? [Bien, Michael Joseph, PD-0365-16](#); [Bien, Michael Joseph, PD-0366-16](#).
- **Does double jeopardy or statutory construction control jury unanimity doctrine?:** Should the statutory definition of "element" from Penal Code § 1.07(a)(22) be the primary tool for jury unanimity analysis, or should courts reflexively follow double jeopardy precedent even when it provides inadequate rationale? [Floyd, James Earnest Jr., PD-0148-23](#); [Williams, Jemadari Chinua, PD-0099-23](#).
- **Should harmless-error analysis apply when jury charge omits elements from alternative offense theories?:** When a general verdict permits uncertainty whether all jurors found required elements, does actual harm exist if jurors conflicted on intent might strategically resort to a flawed theory, and should such errors warrant structural-error treatment rather than harmless-error analysis? [Alkayyali, Tareq, PD-0290-23](#); [Becerra, Joe Luis, PD-0280-22](#).
- **What is the proper scope of discretionary review authority on appeal?:** Can the Court of Criminal Appeals decide issues neither raised in the petition for discretionary review nor addressed by the lower court without explicitly sua sponte granting discretionary review authority; does the majority improperly function as a super-appellate court by deciding unadjudicated legal questions? [Hughes, Darren Tramell, PD-0164-22](#); [Cortez, Jose Luis, PD-0228-17](#); [Burks, Antwain Maurice, PD-0992-15](#).
- **Does the plain language of statute-of-limitations tolling provisions admit judicial limitation?:** Does Article 12.05(b)'s language that any pending indictment tolls limitations contain implicit "same transaction" or "relatedness" requirements, or does the statute plainly mean what it states regardless of judicial policy concerns? [West, Timothy, PD-0236-20](#); [Marks, William, PD-0549-17](#); [Marks, William, PD-0550-17](#).

Mary Lou Keel

Took bench 2017-01-01 · 21 side opinions in the corpus

Pattern

Across these opinions, the most prominent clusters involve jury instruction doctrine—particularly conflicting standards for when lesser-included offense instructions must be given—and statutory interpretation of specific criminal-procedure statutes and substantive-offense provisions. Secondary recurring themes include party/accomplice liability scope, the boundary between permissible inference and evidentiary speculation, procedural-rights forfeiture doctrine, and ineffective-assistance prejudice standards.

Open Questions

- **When must lesser-included offense instructions be given—under the "possible-disbelief" test or the "factual-dispute" test?:** Texas courts are divided between requiring instructions whenever a jury might disbelieve evidence of the greater offense versus requiring them only when actual evidence negates a distinguishing element of the greater offense. Which standard properly implements the guilty-only principle? [Chavez, Jose Juan, PD-0759-21](#); [Ransier, Charles Robert, PD-0289-20](#)
- **In a cargo-theft prosecution, must the prohibited activity be distinct from the theft itself?:** The statute's plain language appears to permit conviction for any named activity conducted with stolen cargo, but whether this applies the organized-retail-theft precedent from *Lang v. State* or requires a distinct framework depends on material differences in statutory focus, culpable mental states, and legislative history. [Joe, Daryl, PD-0423-23](#)
- **Can a defendant be held liable as a party when she intended to promote a different crime than her co-defendant actually committed?:** Transferred-intent doctrine permits criminal responsibility for a distinct offense when party-liability's statutory requirements are otherwise satisfied, but the limits on the scope of intent and the range of non-identical offenses remain unresolved. [Metcalf, Lydia, PD-1246-18](#); [Sears, Arnaud, PD-0264-17](#)
- **Under Article 39.14, does "the state" in discovery obligations include law enforcement agencies?:** The statute imposes duties on "the state," but whether this term encompasses law enforcement separately from the prosecution affects suppression standing and Brady obligations in cases involving police conduct. [Heath, Dwayne Robert, PD-0156-22](#)

- **Under Article 14.03(a)(1), are exigent circumstances required for a warrantless arrest in a suspicious place?:** The statute permits arrest when probable cause exists and the defendant is found in a suspicious place, but case law is unsettled whether exigent circumstances are an additional textual or common-law requirement or whether totality-of-circumstances analysis permits arrest based on probable cause and location alone. [McGuire, Sean Michael, PD-0984-19](#)
- **Does the Sixth Amendment Confrontation Clause apply in post-conviction adjudication hearings?:** A circuit split exists among Texas courts of appeals on whether the Confrontation Clause extends to post-conviction relief proceedings such as Article 11.07 adjudication hearings, leaving the scope of confrontation rights at the post-conviction stage unresolved. [Inman, Callie Renee, PD-0251-22](#)
- **Is the Article 33.03 right to be personally present at trial forfeitable or non-forfeitable?:** The statute grants a right to presence, but whether it is forfeitable (requiring defendant objection to preserve) or non-forfeitable (requiring sua sponte trial-court enforcement) depends on whether it implicates the fundamental systemic concerns necessary under the Marin non-forfeiture framework. [Tates, Elijah, PD-0486-23](#)
- **Under Perry v. Leeke, can counsel discuss testimony with a defendant when there is an overnight recess in the defendant's testimony?:** When a defendant's testimony is interrupted by an extended recess, the application of Perry v. Leeke's restriction on post-testimony counsel consultation remains unclear regarding whether recess length matters and whether counsel may discuss the substance of testimony. [Villarreal, David Asa, PD-0048-20](#)
- **Where is the line between permissible lay-witness inference and impermissible speculation in premises-control testimony?:** Lay witnesses may testify about observable facts (proximity, management intervention, design) from which jurors could infer control, but the doctrinal boundary between permissible jury inference from circumstantial evidence and impermissible speculation lacks clear definition. [Baltimore, Ijah Iwasey, PD-0436-22](#)
- **Should rap lyrics be categorically excluded as evidence, or does Rule 403 require case-by-case balancing of probative value against unfair prejudice?:** Courts remain divided on whether rap lyrics are inherently so unfairly prejudicial as to warrant categorical exclusion versus requiring individualized Rule 403 balancing in each case. [Hart, Larry Jean, PD-0677-22](#)

Scott Walker

Took bench 2017-01-01 · 46 side opinions in the corpus

Pattern

Judge Walker's opinions concentrate on recurrent tensions in defining and applying exceptions to constitutional protections. A dominant cluster involves Fourth Amendment boundaries: the search-incident-to-arrest exception's scope when property is in exclusive police control, reasonable expectation of privacy in vehicles serving as residences, and warrant particularity requirements for investigative actions. A second cluster centers on Sixth Amendment issues—the necessity standard for remote confrontation of non-victim witnesses and the scope of trial-court authority to restrict attorney-client consultation during trial recesses. A third concerns harmless-error analysis: whether brief officer testimony opining on witness credibility qualifies as harmless, or whether courts must account for law enforcement's exceptional persuasive weight with jurors. Secondary themes include jury unanimity for alternate modes of committing a single crime and indictment-interpretation questions when statutory charging language diverges from caption or factual allegations.

Open Questions

- **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?:** A defendant's interest in a vehicle used as a dwelling may survive physical separation during arrest absent clear proof of relinquishment. [King, Terry Wayne, II, PD-0330-22](#)
- **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?:** The exception's traditional purposes may not extend beyond the arrestee's immediate control and vicinity. [Price, Braden Daniel, PD-0722-19](#)
- **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?:** The Fourth Amendment's particularity requirement may demand explicit rather

than implied scope, particularly for intrusive investigative procedures. [Crider, Robert Lee Jr., PD-1070-19](#)

- **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?:** Those cases may require particularized, case-specific factual findings that cannot be satisfied by mere assertions of inconvenience or unsubstantiated fear. [McCumber, Jeffrey Merritt Jr., PD-0467-23](#)
- **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?:** Officer testimony carries inherent authority that may prevent proper harmless analysis based on case strength or brevity alone. [Cook, Kennie Lewis Jr., PD-0850-21](#); [Cook, Kennie Lewis Jr., PD-0853-21](#); [Cook, Kennie Lewis Jr., PD-0854-21](#)
- **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?:** The offenses differ in conduct-versus-result focus and may require that jurors unanimously agree on the specific gravamen violated. [Floyd, James Earnest Jr., PD-0148-23](#)
- **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*?:** Merely brandishing and aiming a firearm may constitute mere preparation that does not tend to cause death and does not satisfy the attempt standard. [Swenson, Aaron Caleb, PD-0589-22](#)
- **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*?:** The duration of the restriction may necessarily encompass consultations beyond ongoing testimony and thereby violate the Sixth Amendment right to counsel as a matter of law. [Villarreal, David Asa, PD-0048-20](#)

- **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?:** The statutory term in the indictment's body may dictate the charged offense regardless of caption or factual description, and courts may not rewrite the indictment based on what they believe the facts actually describe. [Crawford, Shawn Edward, PD-0243-23](#)

Jesse F. McClure III

Took bench 2021-01-01 · 3 side opinions in the corpus

Pattern

Judge McClure has flagged structural doctrinal tensions in criminal law, most notably between statutory elements that require jury fact-finding on legal questions (reasonable suspicion for arrest) and constitutional principles reserving such determinations to judges; and between the scope of Penal Code liability and fair notice when criminal conduct is defined by reference to duties created outside the Penal Code. A secondary cluster involves Fourth Amendment privacy expectations and whether property-law authority permits third parties to unilaterally strip such protections.

Open Questions

- **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?:** By requiring juries to find that arrest was lawful (supported by reasonable suspicion), the statute forces juries to resolve a legal question constitutionally reserved to judges, creating a structural tension with the constitutional principle that juries find facts and judges apply law. [Hernandez, Israel Garcia, PD-0176-25](#).
- **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?:** When the Penal Code criminalizes conduct through reference to duties created outside the Penal Code without explicit statement, this creates uncertainty about what conduct is criminal and risks arbitrary prosecution. Whether Texas courts should require a bright-line Penal Code statement before importing external duties remains unresolved. [Cockrell, Ray Lee, PD-0760-24](#).
- **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*?:** While a hotel may have property-law authority to remove a guest, whether that authority extends to silently and unilaterally stripping Fourth Amendment protections is uncertain, creating

an unresolved tension between property rights and constitutional protections. [Tilghman, Michael Joseph, PD-0676-19](#).

- **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?:** If a guest is unaware that eviction will strip Fourth Amendment protections, whether those protections can be said to have been truly abandoned or whether notice is a prerequisite to their valid loss remains contested. [Tilghman, Michael Joseph, PD-0676-19](#).

David J. Schenck

Took bench 2025-01-01 · 10 side opinions in the corpus

Pattern

Most flagged issues involve appellate review standards, particularly the appropriate deference courts should afford to trial-court decisions and jury factual findings in reasonable-suspicion cases, prosecutorial-vindictiveness determinations, and race-related trial arguments. A secondary cluster concerns Fourth Amendment doctrine, including the good-faith exception's scope in warrant-service contexts, reasonable-suspicion standards in border-interdiction cases, and dog-sniff analysis. Article 38.23 interpretation recurs as a tension between the court's precedential construction and plain-language statutory meaning.

Open Questions

- **Does Article 38.23's precedential interpretation align with the statute's plain language?:** The Texas Court of Criminal Appeals has established a construction that may diverge from straightforward statutory reading, presenting grounds for reconsideration on petitions challenging that interpretation. [Coleman, Christopher Tye, PD-0093-25](#); [Coleman, Christopher Tye, PD-0094-25](#)
- **What appellate-deference standard applies to jury reasonable-suspicion findings in border-policing cases?:** When a totality of circumstances includes a 911 report, vehicle isolation, and officer knowledge, must appellate courts defer to rational jury findings or apply independent review? [Hernandez, Israel Garcia, PD-0176-25](#)
- **Should ineffective-assistance-of-counsel claims proceed on direct appeal or in postconviction habeas?:** Habeas courts possess factfinding authority to overcome the Strickland presumption of reasonableness, which appellate courts cannot exercise, creating tension over the proper jurisdictional vehicle. [Jackson, Larry Dewitt Jr., PD-0451-24](#)
- **Does the good-faith exception apply to warrant-service statutory violations unrelated to Fourth Amendment privacy?:** Procedural defects in inter-county warrant delivery may trigger the good-faith exception even if the warrant itself was valid, raising questions about the exclusionary rule's scope. [Barber, Grady Jack, PD-0510-25](#)
- **Is demeanor observation a constitutionally distinct element of the Sixth Amendment Confrontation Clause?:** If demeanor is essential to confrontation separate

from physical presence, then measures obstructing demeanor could violate the Clause even without deprivation of physical presence. [Smith, Champagne, PD-0230-24](#)

- **Does Fourth Amendment reasonableness apply to dog-sniff intrusions lacking law-enforcement direction?:** A dog's instinctive action may constitute common-law trespass but lack the human agency traditionally required for Fourth Amendment violations, creating ambiguity about the Amendment's reach. [Organ, Courtney James-varnell, PD-0841-24](#)
- **What appellate review standard applies to prosecutorial-vindictiveness findings, and what remedies are available?:** Clear-error review may apply rather than abuse-of-discretion review, and remedies beyond case dismissal—such as office disqualification—may be available to remedy unconstitutional prosecution. [Gabaldon, Ivan, PD-0149-23](#)
- **What deference standard governs trial judges' decisions on prosecutorial statements regarding victim race?:** When a defendant arguably places victim race in issue, the zone of reasonable disagreement for trial-court permission or restriction of race-based prosecutorial statements remains unclear. [Kitchens, William Travis, PD-0541-24](#)
- **Does a contempt conviction bar prosecution for the underlying crime under the Blockburger test?:** When a defendant violates bond conditions and faces contempt conviction, that conviction may preclude prosecution for the specific crime only if the contempt judgment necessarily encompasses all elements of that offense. [Estevez, Ex Parte Amarillyz, PD-0581-24](#)

Gina Parker

Took bench 2025-01-01 · 7 side opinions in the corpus

Pattern

Flagged issues concentrate in two primary areas: jury-charge doctrine (lesser-included-offense instructions, application-paragraph completeness) and Fourth Amendment law (reasonable suspicion for vehicle stops, canine intrusions). Secondary issues emerge in statutory construction (retail-theft scope, voluntary absence) and postconviction appellate timing.

Open Questions

- **When evidence supports only an omitted lesser-included offense, should a conviction be reformed to that lesser offense rather than vacated for retrial?:** Jury-charge error, evidentiary insufficiency, and remedy doctrine interact in ways that remain unclear—what remedy should apply when a jury lacks an instruction on the lesser-included offense that the evidence actually supports? [Lennox, Bobby Carl Aka Bobby Carl Leanox, PD-0284-25](#)
- **Does omission of an element from a jury charge's application paragraph constitute reversible error when the element appears in the abstract instruction?:** The proper standard for evaluating charge completeness and whether reading the entire charge "as a whole" cures such omissions requires clarification in unpreserved jury-charge claims. [Alkayyali, Tareq, PD-0290-23](#)
- **How should vehicle description discrepancies factor into reasonable-suspicion analysis when supported by other totality-of-circumstances factors?:** The balance between inaccurate identifying details (make, model) and contextual investigative indicia (geography, timing, proximity to reported location) lacks clear guidance for warrantless stops. [Hernandez, Israel Garcia, PD-0176-25](#)
- **Does a single canine intrusion into a vehicle constitute a Fourth Amendment search, or is repeated intrusion or demonstrated handler responsibility required?:** The doctrinal standard for determining when a police dog's actions trigger Fourth Amendment protections and what constitutes a "search" remains unsettled. [Organ, Courtney James-varnell, PD-0841-24](#)
- **Can a lone shoplifter be convicted under the retail-theft statute for conduct beyond ordinary theft, such as advertising stolen merchandise for resale?:** The scope of

conduct elements supporting retail-theft convictions against presumptions limiting such liability for individual shoplifters requires clarification. [Joe, Daryl, PD-0423-23](#)

- **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?:** The statutory waiver of the right to presence requires defining the boundary between voluntary action and submission to judicial authority or custody constraints. [Tates, Elijah, PD-0486-23](#)
- **Do due process protections for appellate rights extend beyond the standard 45-day appellate timeline in postconviction habeas proceedings?:** The constitutional dimension of postconviction appellate timing and whether heightened protections apply beyond a first appeal of right requires resolution. [Griffin, Ex Parte Gary, PD-0611-24](#)

Lee Finley

Took bench 2025-01-01 · 11 side opinions in the corpus

Pattern

Judge Finley's side opinions flag issues concentrated in Fourth Amendment doctrine (plain view standards and location data privacy), statutory interpretation of substantive criminal law (felony murder merger; omission liability duty requirements), and procedural/constitutional frameworks (jury charge harmless error; ineffective assistance standards; jurisdiction classification; trial court remedial authority; appellate scope constraints). The opinions recurrently involve questions about the proper threshold or standard within existing doctrinal frameworks rather than entirely novel legal areas.

Open Questions

- **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?:** The incriminating nature of a cell phone and the proper standard for seizure under plain view have generated disagreement about whether the inquiry is subjective certainty or objective probable cause. Examples: [Rodriguez, Erik, PD-0377-24](#); [Rodriguez, Erik, PD-0378-24](#)
- **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?:** Texas's felony murder jurisprudence may improperly allow predicate acts to satisfy both requirements, contradicting the statute's plain language and the merger principle previously established. Example: [Fraser, Marian, PD-0964-24](#)
- **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?:** The statute's application in child injury cases has generated disagreement about whether prosecutors must prove a duty directed at the particular child victim or whether general protective duties suffice. Example: [Cockrell, Ray Lee, PD-0760-24](#)
- **Does complete abandonment of advocacy during the capital punishment phase constitute a Cronic violation entitling a defendant to presumed prejudice, or must the defendant meet the Strickland standard to demonstrate actual prejudice from**

ineffective assistance?: The treatment of capital punishment phase advocacy failures as per se ineffectiveness remains unsettled in Texas jurisprudence. Example: [Jackson, Larry Dewitt Jr., PD-0451-24](#)

- **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?**: The remedial framework for prosecutorial retaliation violations and the proper role of trial court discretion in fashioning relief remain contested. Example: [Gabaldon, Ivan, PD-0149-23](#)
- **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?**: The relationship between contested factual issues and the egregious harm doctrine in jury charge cases requires clarification. Example: [Alkayyali, Tareq, PD-0290-23](#)
- **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?**: The characterization of notice defects in contempt proceedings and their interaction with double jeopardy protection for the underlying crime requires resolution. Example: [Estevez, Ex Parte Amarillyz, PD-0581-24](#)
- **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?**: The scope of privacy protection for modern location data services and the applicability of the third-party doctrine to tech company data sharing remain unsettled. Example: [Wells, Aaron Rayshan, PD-0669-23](#)
- **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?**: The constitutional framework for denying self-representation in mental competency cases and its relationship to the waiver doctrine requires clarification. Example: [Bluntson, Demond Depree, AP-77,067](#)
- **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?: The scope of appellate review constraints under the party presentation principle in Texas appellate procedure requires definition. Example: [*Barber, Grady Jack*, PD-0510-25](#)