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## **Don't Skip the Criminal Opinions**

Hon. Elsa Alcala  
Court of Criminal Appeals  
201 W. 14th Street  
Austin, Texas 78701  
512-463-1551

Hon. Craig Stoddart  
5th Court of Appeals  
600 Commerce Street  
Dallas, Texas 75202  
214-712-3450

Hon. Marc Brown  
14th Court of Appeals  
301 Fannin  
Houston, Texas 77002  
713-274-2800

Hon. Bill Boyce  
14th Court of Appeals  
301 Fannin  
Houston, Texas 77002  
713-274-2800

## **INTRODUCTION**

So here you are, busy civil appellate lawyer and all, trying to get cases in the door; read the records; do the research; write them up; get your motions, notices, and briefs filed timely; draft a jury charge from time to time; negotiate with the other side; negotiate with your clients; prepare for argument; argue; handle the rest of your docket; get paid; have some semblance of a life outside the office; and remember to get the car inspected because the registration sticker expired last month.

Oh, and you're expected to keep up with recent developments in the law, too. You manage to carve out time for a seminar or two; skim the latest Texas Supreme Court opinions each Friday morning for holdings that may affect your pending cases; and maybe follow a couple of legal blogs to keep an eye on what's new and alarming.

You really don't need another checkbox on your to-do list, right? Because you already have plenty of homework to do.

Even with all that, perhaps there is some added value to be captured by doing a small bit of extra homework. Not a lot, just enough to (1) take advantage of the unusual Texas judicial structure featuring separate civil and criminal courts of last resort; and (2) mine Texas criminal jurisprudence for ideas and legal support that will give you extra ammunition for your civil appeals.

Stated another way, it may be worth a modest amount of your time – and your clients' resources – to research Texas criminal case law looking for support to address issues that come up in both civil and criminal cases.

To be sure, there are many areas in which civil and criminal law operate in separate spheres. There are other areas in which criminal and civil cases establish divergent methods for addressing similar questions. But there also are overlaps on the great big Texas jurisprudential Venn diagram, and that's where some curiosity on your part may pay off.

One way to approach this topic is to look at the circumstances under which the Texas Supreme Court cites and relies upon cases decided by the Court of Criminal Appeals in the course of answering questions in civil appeals.

A list of categories includes cases involving

- the supreme court's efforts to demarcate the reach of its civil jurisdiction and the CCA's criminal jurisdiction; and
- civil and criminal concepts that overlap and lead to occasional cross-pollination, such as
  - admissibility of expert testimony;
  - evidentiary issues at trial;
  - jury selection and voir dire; and
  - quasi-criminal matters that are addressed in civil proceedings, *e.g.*, juvenile delinquency, parental termination, administrative revocation of a Texas driver's license following a DWI arrest, and civil monetary compensation for wrongful imprisonment.

Another way to approach this topic is to look at situations in which the CCA is the first to address a novel issue that can arise in both types of cases. Sometimes the supreme court acts consistently with the CCA's approach; sometimes it goes in a different direction.

The cases listed below offer some specific examples. The list is not exhaustive; rather, it is intended to provoke further reflection about areas in which civil and criminal law overlap in Texas – and about opportunities for creative lawyering at that intersection.

## **CASES**

### **I. Marking Jurisdictional Boundaries**

*Heckman v. Williamson Cty*, 369 S.W.3d 137 (Tex. 2011)

The plaintiffs filed a section 1983 action on behalf of a putative class whose members previously had been charged with misdemeanor offenses carrying the possibility of confinement. The section 1983 claims were based on the asserted denial of class members' rights to court-appointed counsel, self-representation, and open-court proceedings. Among other things, the supreme court held that determining whether the named plaintiffs had a justiciable interest in the putative class action was a civil law matter rather than a criminal law matter; thus, the supreme court had appellate jurisdiction to decide whether these plaintiffs had standing to bring the pleaded claims.

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