

SIGNIFICANT DECISIONS
UNITED STATES SUPREME COURT AND THE COURT OF CRIMINAL APPEALS
FROM SEPTEMBER 2021 TO MAY 2022

HON. DAVID C. NEWELL
JUDGE, PLACE 9
Court of Criminal Appeals

Paper prepared in part by
Ryan Katherine Golden
Briefing Attorney

Court of Criminal Appeals
P.O. Box 12308
Austin, TX 78744
(512) 463-1570

Acknowledgement

So, my law clerk is responsible for this paper. She overcame great adversity to bring this to you. My research attorney came onboard after she was hired and left before Christmas. Still, she persevered. All while also trying to draft opinions and do the work of two attorneys. But what do you expect from someone who graduated at the top of her class at Baylor Law? Anything smart comes from her. Any commentary comes from me. Don't blame her, she could not stop me.

Table of Contents

I. INTRODUCTION 1

II. MOTIONS TO SUPPRESS..... 1

A. SEARCH WARRANTS 1

 1. *Boilerplate language may be used in an affidavit for a search warrant, but to support probable cause, the language must also be coupled with other facts and reasonable inferences that establish a nexus between the device and the offense.*..... 1

 2. *In a case involving a warrant that described the place to be searched as a fraternity house but did not specifically identify the rooms to be searched within the fraternity house, the particularity requirement of the Fourth Amendment was satisfied because the warrant incorporated an affidavit, which included a specific description of the rooms to be searched.* 2

 3. *Misrepresentations in a warrant affidavit that referenced a confidential DEA informant as an “anonymous tipster” were ultimately not material, so there was no violation of Franks v. Delaware.* 3

B. CONFESSIONS - DEFENDANT’S SECOND STATEMENT WAS NOT PROPERLY “WARNED AND WAIVED” AS REQUIRED BY ARTICLE 38.22 BECAUSE THAT STATEMENT WAS SURREPTITIOUSLY RECORDED WITHOUT ANY REFERENCE TO EARLIER STATUTORY WARNINGS..... 4

III. TRIAL PROCEDURE 5

A. JURISDICTION AND AUTHORITY 5

 1. *Attorney General lacks authority to independently prosecute criminal cases in trial courts; Election Code § 273.021, which purported to grant the Attorney General the unilateral power to prosecute election-law violations, violates the separation of powers clause.* 5

 2. *County courts share jurisdiction over official-misconduct misdemeanors with district courts unless a statute applicable to that county excludes such offenses from that county court’s jurisdiction.* 6

 3. *A trial court has 30 days of plenary jurisdiction to dismiss an indictment after discharging a defendant from community supervision pursuant to Article 42A.701(f) of the Code of Criminal Procedure.*..... 7

B. STATUTE OF LIMITATIONS – STATUTE OF LIMITATIONS IN POSSESSION OF A CONTROLLED SUBSTANCE CASE WAS NOT TOLLED BY THE PENDENCY OF AN INITIAL INDICTMENT WHEN THE SUBSEQUENT INDICTMENT ALLEGED A DIFFERENT DRUG AND CHARGED BOTH POSSESSION AND ATTEMPTED POSSESSION BY ALL THE POSSIBLE STATUTORY MANNERS AND MEANS. 8

C. WAIVER OF JURY TRIAL - A DEFENDANT MAY WITHDRAW HIS WAIVER OF A JURY TRIAL THAT WAS EXECUTED IN ANTICIPATION OF A NEGOTIATED PLEA THAT WAS NEVER FINALIZED. 9

D. SPEEDY TRIAL - A FOUR-MONTH DELAY DID NOT VIOLATE DEFENDANT’S RIGHT TO A SPEEDY TRIAL IN A MISDEMEANOR CASE AND ANY FURTHER DELAY DUE TO COMPETENCY EVALUATIONS OF THE DEFENDANT COULD NOT BE ASSESSED AGAINST THE STATE. 10

E. DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL 11

 1. *Convictions and sentences for two counts of driving while intoxicated with a child passenger, which arose from the same driving incident but alleged a different child, violated the Double Jeopardy Clause.* 11

 2. *Defendant’s convictions for continuous sexual abuse of a child and prohibited sexual conduct for acts committed against a single victim in the same time frame did not violate the Double Jeopardy Clause.*..... 11

 3. *Collateral estoppel did not bar a subsequent prosecution for reckless aggravated assault causing bodily injury to a driver of a vehicle after a jury found the defendant not guilty of manslaughter and found that he was not reckless in causing the collision which led to the death of the vehicle’s passenger.* 12

F. THE STATE’S FAILURE TO READ A 0.15 ALLEGATION INCLUDED IN A DWI CHARGING INSTRUMENT UNTIL THE PUNISHMENT STAGE OF TRIAL DID NOT CONSTITUTE AN INTENTIONAL ABANDONMENT OF THE ALLEGATION OR A FAILURE TO JOIN ISSUE, NOR WAS ANY ERROR HARMFUL IN LIGHT OF THE DEFENDANT’S DECISION TO HAVE THE TRIAL COURT ASSESS PUNISHMENT. 13

G. ARTICLE 36.28 REQUIRES TRIAL COURT TO HAVE TESTIMONY READ BACK WHEN JURORS HAVE A DISAGREEMENT, BUT PROVIDING A TRANSCRIPT WAS HARMLESS ERROR..... 15

H. PRESERVATION 16

1.	<i>To challenge the qualifications of the sponsor of business records under Texas Rule of Evidence 803(6)(D), a defendant need not specifically object that a witness is neither a proper custodian of the business records nor another qualified witness.</i>	16
2.	<i>To obtain appellate review of the error that occurs when an alternate juror is permitted to retire with the jury while it deliberates, a defendant is not required to move for a mistrial or file a motion for new trial.</i>	17
3.	<i>To preserve a challenge to a restitution order, defendants must object in the trial court.</i>	17
IV.	EVIDENCE	18
A.	EXTRANEOUS OFFENSES	18
1.	<i>Extraneous evidence that capital murder defendant later murdered one, unalleged, kidnap victim was relevant and admissible in defendant’s capital murder trial for the killing of the other, alleged, kidnap victim.</i>	18
2.	<i>Evidence of extraneous drug offenses or connections was not admissible under the doctrine of chances, nor was it admissible under Texas Rules of Evidence 404(b) and 403.</i>	18
B.	DEMONSTRATIVE EXHIBITS - A TRIAL COURT MAY ADMIT A COMPUTER-GENERATED ANIMATION AS A DEMONSTRATIVE EXHIBIT SHOWING OTHERWISE ADMITTED TESTIMONY OR EVIDENCE SO LONG AS IT: (1) IS AUTHENTICATED, (2) IS RELEVANT, AND (3) HAS PROBATIVE VALUE THAT IS NOT SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE	20
C.	CONFRONTATION CLAUSE	21
1.	<i>Admission of expert testimony regarding a DNA-comparison analysis did not violate the Confrontation Clause where the analysis was based on computer-generated data from the expert’s lab and data from another independent lab.</i>	21
2.	<i>Admission of transcript of other suspect’s plea allocution, which the State used as evidence to rebut the defendant’s theory that the other suspect, who was not available to testify at defendant’s trial, committed the murder, violated the Confrontation Clause.</i>	21
D.	“RAPE SHIELD” RULE — THE COURT OF APPEALS SHOULD HAVE REMANDED THE CASE TO THE TRIAL COURT TO REMEDY TRIAL COURT’S EXCLUSION OF THE STATE, DEFENSE COUNSEL, AND THE DEFENDANT FROM RULE 412 HEARING.	23
E.	CONFIDENTIAL INFORMANTS – DISMISSAL OF CAPITAL MURDER CHARGE ON THE DEFENDANT’S MOTION WAS PROPER UNDER RULE 508 BECAUSE THE STATE REFUSED TO DISCLOSE THE IDENTITY OF A CONFIDENTIAL INFORMANT, AND THERE WAS A REASONABLE PROBABILITY THAT THE INFORMANT COULD GIVE TESTIMONY NECESSARY TO A FAIR DETERMINATION OF GUILT OR INNOCENCE.	24
V.	OFFENSES	25
A.	CONTINUOUS SEXUAL ABUSE OF A CHILD – EVIDENCE THAT ESTABLISHED A DEFINITE END DATE OF THE ABUSE BUT NOT A DEFINITE START DATE WAS NONETHELESS SUFFICIENT TO SUPPORT THE “30 OR MORE DAYS” ELEMENT OF THE OFFENSE BECAUSE A JURY COULD REASONABLY INFER FROM THE TESTIMONY WHEN THE ABUSE BEGAN.	25
B.	CORPUS DELICTI RULE DOES NOT BAR CONVICTION FOR A SEXUAL OFFENSE COMMITTED AGAINST A PRE-VERBAL CHILD THAT SHOWS NO PHYSICAL SIGNS OF HARM SO LONG AS THE CONFESSION TO THE CRIME IS TRUSTWORTHY.	25
C.	POSSESSION OF PENALTY GROUP 4 CONTROLLED SUBSTANCE — DEFENDANT COULD NOT BE CONVICTED OF POSSESSION OF EITHER PENALTY GROUP 1 OR PENALTY GROUP 4 CODEINE WHERE THE EVIDENCE FAILED TO PROVE THE PROPORTION OF THE CODEINE MIXTURE, AS REQUIRED UNDER PENALTY GROUP 4, BUT ALSO DID NOT ESTABLISH THAT THE SUBSTANCE POSSESSED WAS CODEINE NOT LISTED IN PENALTY GROUP 3 OR 4, AS REQUIRED UNDER PENALTY GROUP 1.	26
D.	AGGRAVATED ASSAULT - DEFENDANT’S STATEMENT, “I NEED TO HIT” CONSTITUTED A VERBAL THREAT AND PROVIDED SUFFICIENT EVIDENCE OF THE THREAT ELEMENT OF THE CHARGED AGGRAVATED ASSAULT.	27
E.	FAMILY VIOLENCE - TESTIMONY THAT A VICTIM REFERRED TO THE DEFENDANT AS HER BOYFRIEND WAS SUFFICIENT TO PROVE THE EXISTENCE OF A DATING RELATIONSHIP UNDER TEXAS FAMILY CODE § 71.0021(B) DESPITE THE ABSENCE OF THE STATEMENT ON THE BODY CAMERA FOOTAGE.	28
F.	UNLAWFUL CARRYING OF A WEAPON - TO OBTAIN A CONVICTION FOR THE UNLAWFUL CARRYING OF A WEAPON BY A MEMBER OF A CRIMINAL STREET GANG, THE STATE MUST PROVE THAT THE DEFENDANT ENGAGED IN CRIMINAL ACTIVITY AS PART OF THE CRIMINAL STREET GANG.	29
G.	OFFICIAL OPPRESSION AND TAMPERING WITH A GOVERNMENT RECORD – CHIEF OF POLICE WHO ENTERED A MAN’S HOME AND ARRESTED HIM WITHOUT A WARRANT WITHOUT EXIGENT CIRCUMSTANCES ENGAGED IN OFFICIAL OPPRESSION, BUT	

MERE ABSENCES OF INFORMATION IN THE POLICE REPORT WERE NOT SUFFICIENT TO SUPPORT A CONVICTION FOR TAMPERING WITH A GOVERNMENT RECORD.30

H. TAMPERING WITH EVIDENCE – TRYING TO GET RID OF MARIJUANA BY THROWING IT INTO A TOILET CONTAINING FECES WAS SUFFICIENT TO PROVE THAT THE DEFENDANT ALTERED THE MARIJUANA.32

I. HARASSMENT32

1. *The electronic harassment statute, Texas Penal Code § 42.07(a)(7), does not implicate the First Amendment because it prohibits non-speech conduct. Charles Barton and Nathan Sanders were both charged with violating Penal Code § 42.07(a)(7), the electronic harassment statute, which provided:*32

2. *The obscene harassment statute, Texas Penal Code § 42.07(a)(1), was not unconstitutionally vague or overbroad in violation of the First Amendment.*34

J. ILLEGAL VOTING – STATE MUST PROVE THAT THE DEFENDANT KNEW HE OR SHE WAS INELIGIBLE TO VOTE TO SECURE A CONVICTION FOR THE CRIME OF ILLEGAL VOTING, AND THOUGH CASTING A PROVISIONAL BALLOT CAN STILL VIOLATE THE STATUTE, SIGNING A PROVISIONAL BALLOT DOES NOT BY ITSELF ESTABLISH KNOWLEDGE OF INELIGIBILITY TO VOTE.35

VI. JURY INSTRUCTIONS37

A. DEFENSIVE INSTRUCTIONS.....37

1. *Defendant who equivocated in his testimony about whether he committed the charged conduct satisfied the confession-and-avoidance doctrine.*37

2. *Defendant was entitled to jury instruction on necessity based on her testimony that, while she was intoxicated, she attempted to move the vehicle off the road, notwithstanding her denial that she was operating the vehicle.*38

3. *Defendant who claimed he shot victim in self-defense was not entitled to a threat-of-deadly-force instruction under Texas Penal Code § 9.04.*39

B. LESSER-INCLUDED INSTRUCTIONS39

1. *Defendant was entitled to a jury instruction on the lesser-included offense of deadly conduct in an aggravated-assault-with-a-vehicle case based on his testimony that he “must have” dozed off or passed out prior to accident.*....39

2. *A defendant charged with aggravated sexual assault was not entitled to a jury instruction on indecency with a child by contact because it was not a lesser-included offense of the charged crime.*.....41

3. *Defendant who was charged with capital murder committed in the course of a robbery was not entitled to a jury instruction on the lesser-included offense of robbery because no evidence negated conspiracy liability.*.....41

4. *In a prosecution for aggravated assault, the defendant was entitled to an instruction on the lesser-included offense of assault because his testimony, along with other evidence, provided more than a scintilla of evidence from which the jury could have rationally doubted that he caused serious permanent disfigurement by biting off the victim’s earlobe. ...*42

C. DEFENDANT WAS ENTITLED TO A JURY INSTRUCTION UNDER ARTICLE 38.23 OF THE TEXAS CODE OF CRIMINAL PROCEDURE WHEN POLICE OFFICER TESTIFIED THAT DEFENDANT WAS DRIVING A TRUCK WITHOUT A REAR LICENSE PLATE, BUT THE VIDEO OF THE STOP SHOWED THAT THE TRUCK HAD A REAR LICENSE PLATE.44

D. EGREGIOUS HARM45

1. *By considering the cumulative effect of all the errors in a multi-offense jury charge, the court of appeals misapplied the egregious harm standard.*.....45

2. *Defendant was not egregiously harmed by erroneous inclusion of a “duty to retreat” instruction when he was not entitled to a use-of-deadly-force-in-self-defense instruction in the first place.*45

E. PUNISHMENT-PHASE JURY CHARGE THAT FAILED TO PROPERLY TRACK THE LANGUAGE OF THE HABITUAL-OFFENDER STATUTE AMOUNTED TO JURY-CHARGE ERROR SUBJECT TO A HARM ANALYSIS, NOT AN ILLEGAL SENTENCE.46

VII. SENTENCING47

A. DEATH PENALTY47

1. *Mandatory sentence of life without the possibility of parole after the State waived the death penalty was not unconstitutional as applied to an intellectually-disabled defendant convicted of capital murder.*47

2. *Evidence that a capital defendant would pose a continuing threat to society, whether in or out of prison, was sufficient to support jury’s affirmative finding on the future-dangerousness special issue.*48

3. *The United States Supreme Court reinstated the Boston Marathon Bomber’s death sentence.*49

4. *Restrictions on religious touch and audible prayer in the execution chamber burden religious exercise and are not the least restrictive means of furthering the State’s compelling interests.*51

B. STACKING – OFFENSES WERE PROSECUTED IN THE SAME CRIMINAL TRANSACTION, SUCH THAT THE SENTENCES COULD NOT BE STACKED, WHERE THE DEFENDANT WAS ADJUDICATED GUILTY OF THREE OFFENSES, PLEAD GUILTY TO TWO ADDITIONAL OFFENSES, AND WAS SENTENCED FOR ALL FIVE SIMULTANEOUSLY.....53

C. ENHANCEMENTS – AN AGGRAVATED STATE-JAIL FELONY MAY BE ENHANCED UNDER THE HABITUAL-OFFENDER STATUTE TO A FIRST-DEGREE OFFENSE BASED UPON TWO ADDITIONAL AND SEQUENTIAL PRIOR FELONY CONVICTIONS.53

VIII. APPEALS.....54

A. MOTIONS FOR NEW TRIAL – A TRIAL COURT HAS DISCRETION TO GRANT LEAVE OF COURT AND PERMIT A DEFENDANT TO FILE AN AMENDED MOTION FOR NEW TRIAL EVEN AFTER THE TRIAL COURT HAS OVERRULED AN INITIAL MOTION FOR NEW TRIAL.54

B. STATE’S RIGHT TO APPEAL – THE STATE MAY APPEAL A TRIAL COURT’S ORDER THAT GRANTS POST-CONVICTION HABEAS CORPUS RELIEF AND VACATES THE CONVICTION IN A MISDEMEANOR CASE.55

C. REMAND FOR CONSIDERATION OF STATE’S ESTOPPEL ARGUMENT WAS WARRANTED BECAUSE ESTOPPEL CLAIM WAS IMPLICITLY RAISED IN TRIAL COURT AND COURT OF APPEALS.....55

D. HARM56

1. *Any error in admitting police report regarding an extraneous offense over defendant’s objection was harmless.*56

2. *When a trial court fails to suppress evidence that was obtained in violation of only Article I, § 9 of the Texas Constitution, Texas Rule of Appellate Procedure 44.2(b) provides the proper harm analysis.*58

IX. INEFFECTIVE ASSISTANCE OF COUNSEL58

A. DEFICIENT PERFORMANCE - BY FAILING TO RAISE AN ILLEGAL SENTENCE CLAIM BASED ON THE IMPROPER USE OF ENHANCEMENTS, APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE ON APPEAL.....58

B. PREJUDICE59

1. *Assuming trial counsel rendered ineffective assistance by failing to investigate a mitigation case, no prejudice was shown because the proffered witnesses either had not had contact with the defendant for the decade that he was a fugitive or would have given damaging testimony because they knew of his bad acts during that time.*59

2. *In an ineffective-assistance-of-counsel claim based on counsel erroneously advising a defendant that he is eligible for probation, the correct measure of prejudice focuses on the impact of the bad advice on the defendant’s decision making and does not require a showing of a different outcome.*60

X. HABEAS CORPUS61

A. PRE-TRIAL WRITS61

1. *A statute-of-limitations challenge to a sexual assault indictment is not cognizable on pre-trial habeas because the indictment may be amended to allege an exception to the statute of limitations.*.....61

2. *Court of appeals should have addressed cognizability as a threshold issue before reaching the merits of claim.*62

B. FALSE EVIDENCE62

1. *The requirements for the inference of falsity under Ex parte Coty, 418 S.W.3d 597 (Tex. Crim. App. 2014) apply to cases involving a police officer with a demonstrated pattern of misconduct in drug-related cases.*.....62

2. *Court remanded petition for writ of habeas court for the habeas court to fully develop all the applicant’s claims.*63

C. ILLEGAL SENTENCES – APPLICANT WHO HAD BEEN AUTOMATICALLY SENTENCED TO LIFE IMPRISONMENT BASED ON AN ENHANCEMENT WAS ENTITLED TO BE RESENTENCED WHERE THE COURT HAD VACATED THE PREDICATE ENHANCING CONVICTION.....63

D. INVOLUNTARY PLEAS – DEFENDANT WHO PLED GUILTY TO ATTEMPTED FORGERY BASED ON AN ALLEGEDLY-COUNTERFEIT \$100 BILL, WHICH WAS LATER DETERMINED TO BE GENUINE, HAD NOT PROVEN HE WAS ACTUALLY INNOCENT OF THE OFFENSE, BUT HE WAS ENTITLED TO RELIEF ON THE GROUND THAT HIS PLEA WAS INVOLUNTARY.....64

E. POST-CONVICTION DNA TESTING – A FEDERAL DISTRICT COURT’S RULING ON THE CONSTITUTIONALITY OF ARTICLE 64.03(A)(1)(C)(2)(A) OF THE TEXAS CODE OF CRIMINAL PROCEDURE DOES NOT DEPRIVE TEXAS STATE COURTS OF THEIR JURISDICTION UNDER CHAPTER 64 OF THE TEXAS CODE OF CRIMINAL PROCEDURE.65

F. EVEN THOUGH APPLICANT WAS NOT ENTITLED TO IMMEDIATE RELEASE ON ALL OF HIS CONVICTIONS, APPLICANT WAS ENTITLED TO RELIEF IN THE FORM OF “PAPER PAROLE” BECAUSE HE WAS ELIGIBLE FOR MANDATORY SUPERVISION RELEASE ON ONE OF HIS CONVICTIONS.65

XII. FEDERAL LAW66

A. § 1983 CLAIMS66

1. *A police officer did not violate clearly established law and was not made ineligible for qualified immunity by briefly placing his knee on a defendant’s back.*66

2. *Officers, who shot and killed a defendant after he raised and attempted to throw a hammer at them, did not violate clearly established law on excessive force and were eligible for qualified immunity.*66

3. *To demonstrate a favorable termination of a criminal prosecution for purposes of a Fourth Amendment claim under § 1983 for malicious prosecution, a plaintiff need only show that his prosecution ended without a conviction.*67

B. ARMED CAREER CRIMINALS ACT – DEFENDANT’S TEN BURGLARY CONVICTIONS ARISING FROM A SINGLE CRIMINAL EPISODE DID NOT OCCUR ON DIFFERENT “OCCASIONS” AND THUS COUNT AS ONLY ONE PRIOR CONVICTION FOR PURPOSES OF ACCA.....68

C. FEDERAL HABEAS CORPUS – WHEN A STATE COURT HAS RULED ON THE MERITS OF A STATE PRISONER’S CLAIM, A FEDERAL COURT CANNOT GRANT HABEAS RELIEF WITHOUT APPLYING BOTH THE TEST OUTLINED IN *BRECHT V. ABRAHAMSON* AND THE TEST CONGRESS PRESCRIBED IN THE AEDPA.....69

XII. IMMUNITY UNDER THE TORT CLAIMS ACT70

A. IN TORT CASE STEMMING FROM A FATAL ACCIDENT CAUSED BY A SUSPECT WHO WAS BEING PURSUED BY POLICE, CITY’S GOVERNMENT IMMUNITY WAS NOT WAIVED UNDER THE TEXAS TORT CLAIMS ACT.....70

B. CITY WAS NOT REQUIRED TO PROVE THAT POLICE OFFICER BALANCED THE NEED FOR AND RISK OF ACTIVATING HIS EMERGENCY LIGHTS TO PREVAIL IN A CASE CHALLENGING THE OFFICER’S OFFICIAL IMMUNITY UNDER THE TEXAS TORT CLAIMS ACT.71

XIII. EXPUNCTIONS – DEFENDANTS WHO WERE ACQUITTED OF DRIVING WHILE INTOXICATED WERE ENTITLED TO AN EXPUNCTION UNDER ARTICLE 55.01 OF THE TEXAS CODE OF CRIMINAL PROCEDURE EVEN THOUGH THEY EACH HAD A PRIOR CONVICTION FOR DRIVING WHILE INTOXICATED.72

SCOTUS/CCA Update

Significant Decisions from September 2021 to May 2022.

I. INTRODUCTION

This paper covers the published opinions issued by the Court of Criminal Appeals between September 1, 2021, and May 20, 2022. It also includes the significant criminal cases from the United States Supreme Court that have broad applicability, issued between September 1, 2021, and May 20, 2022. However, we continue to update the paper as the respective court terms roll on. If you would like a copy of the complete paper at the end of the respective terms, please email me through Nichole Reedy at nichole.reedy@txcourts.gov and we'll do our best to get you a copy this summer. Because that's when the respective terms end. Not because we are sitting around or anything. Nichole is very busy you know.

Oh, and one more thing. I've tried a little something new on this paper and it may or may not work. If it doesn't work, then you aren't in any different position than you were reading last year's version of the paper so don't worry. But this year I have included hyperlinks to the related opinions online. So if you click on a case citation in this paper, hopefully, Google Chrome will pull up a link to the related opinions. Cases from the CCA and SCOTX have separate PDF files for majority and side opinions, so for those summaries I have tried to incorporate separate hyperlinks for corresponding opinions. United States Supreme Court opinions consist of only one file that has all opinions on it so there was no way for me to separate them out. For those cases you just get one hyperlink if you are interest. Of course, I can't guarantee that the version of the paper you receive at whatever CLE you choose to attend will have working functionality on this point. So, if you get a copy of this paper and it looks like there's a hyperlink, but it doesn't work when you click it, I'm sorry.

Of course, my sorrow does not translate into a license to email me or Nichole to ask how to make it work. I'm not volunteering to be your personal IT person and neither is Nichole. Nevertheless, if you

want a copy of *our* PDF version of the paper so you can see if that does work, you can reach out to us and we will send our master PDF copy to you. I know, master PDF sounds so serious. I just mean the original PDF we send out to be included in CLE material. It's not that serious. In any event, I wish you way more than luck.

II. MOTIONS TO SUPPRESS

A. Search Warrants

1 Boilerplate language may be used in an affidavit for a search warrant, but to support probable cause, the language must also be coupled with other facts and reasonable inferences that establish a nexus between the device and the offense. John Wesley Baldwin became a suspect for the murder of Adrianus Kusuma after his white sedan was identified as the vehicle witnesses saw leaving the victim's house the day of the murder. After being stopped by police while driving the white sedan, Baldwin consented to a search of the sedan, and a cell phone was found inside. He refused to consent to a search of the phone, so investigators obtained a search warrant. The affidavit for the search warrant recited that multiple witnesses observed two Black men fleeing the victim's house or leaving the neighborhood at a high rate of speed in a white, 4-door sedan on the day of the murder; the neighborhood only had one point of ingress and egress; the same white sedan had also been observed repeatedly circling the neighborhood in the days before the murder; one of the witnesses recorded the vehicle's license plate number, which police used to connect the vehicle to Baldwin; Baldwin was pulled over while driving the white sedan days after the murder, and a cell phone was found inside the vehicle; and cell phones are commonly used to communicate about crimes and can often provide an approximate location of a suspect at or near the time of an offense.

A grand jury later indicted Baldwin for capital murder for murdering Adrianus Kusuma in the course of robbing him. Baldwin filed a pre-trial motion to suppress the evidence found on the phone. The trial court concluded that the search warrant affidavit was insufficient to connect either Baldwin or his cell phone to the murder and suppressed the evidence from the phone. The State appealed, and an en banc court of

appeals affirmed. The court of appeals held that the affidavit did not establish a nexus between Baldwin's car and the murder, nor did it show a nexus between the cell phone and the offense.

The Court of Criminal Appeals affirmed. [State v. Baldwin, --- S.W.3d ---, 2022 WL 1499508 \(Tex. Crim. App. May 11, 2022\) \(5:0:4\)](#). Writing for the Court, Judge McClure explained that there was a nexus between Baldwin's car and the offense. It was reasonable for the magistrate to infer that Baldwin's car, which he was driving days after the murder, was linked to the offense based on the information included in the affidavit. In concluding otherwise, the court of appeals failed to give deference to the magistrate's implied findings with respect to the nexus between the sedan and murder, and it applied an overly demanding standard for probable cause. However, the Court agreed with the court of appeals that the affidavit failed to establish a nexus between the cell phone and the offense. For the magistrate to reasonably determine probable cause, the search warrant affidavit must contain specific facts connecting the items to be searched to the alleged offense. In this case, the affidavit contained generic, conclusory statements regarding the use of cell phones in criminal activity in general, but it did not allege any particular facts tying Baldwin's phone to the offense. Such boilerplate language was alone insufficient to establish a fair probability that evidence of the murder would be found on the cell phone.

Presiding Judge Keller filed a [dissenting opinion](#), joined by Judges Yearly, Keel, and Slaughter. Presiding Judge Keller agreed that boilerplate language in a probable-cause affidavit for the search of a cell phone had to be coupled with other facts and reasonable inferences to establish a nexus between the device and the offense. But she disagreed that the affidavit in this case failed to establish a nexus. In Presiding Judge Keller's view, the affidavit sufficiently connected the cell phone to the offense because (1) the cell phone was found in Baldwin's car, which was linked to the crime; and (2) the offense was committed by two people and would have required coordination, so cell phone use could be expected.

Judge Yearly filed a [dissenting opinion](#). Judge Yearly clarified that he understood the Court's use of

"boilerplate" to mean "generic." He also agreed with Presiding Judge Keller that the affidavit established a sufficient nexus to search the phone. But even if he did not agree, Judge Yearly would have considered whether the affidavit contained sufficient facts to at least search certain applications on the phone to identify the name of the service provider, which could have led to more facts tying Baldwin to the offense. Judge Yearly also faulted the Court for not strictly limiting its opinion to the specific grounds granted for review. Though he would not have joined a narrower opinion either, he would have found it favorable to the Court's opinion.

[Commentary: It will be interesting to see if the State seeks review from the United States Supreme Court. It's rare that state prosecutors have the opportunity to argue a case before SCOTUS and this case might be a good ticket. Not sure how it will go, but it's a search of a cell phone in a capital murder case, which makes it "sexy" for lack of a better word. So far, SCOTUS has only taken cases rejecting cell phone searches, this might be a good one to take if they want practitioners to know how a cell phone can be searched constitutionally. And on a smaller note, the officer in the affidavit noted that a small search of the phone could have led to information regarding the cell phone provider and that could have led to an order for cell site location information. Does there have to be probable cause to believe the phone was involved in the crime to perform a limited search of the phone for provider information? Time will tell. Oh, and PS, the "boilerplate" labeling is unfortunate because it's just putting a new name on an old area of law that has already been thoroughly mined. This is really just an opinion about "conclusory" language in the warrant affidavit even though the court of appeals tried to re-brand the language it as "boilerplate." Everything gets a reboot these days. First Spiderman, now this.]

2. In a case involving a warrant that described the place to be searched as a fraternity house but did not specifically identify the rooms to be searched within the fraternity house, the particularity requirement of the Fourth Amendment was satisfied because the warrant incorporated an affidavit, which included a specific description of the rooms to be searched. Samuel Crawford Patterson was a member of a fraternity and was living in the fraternity house in 2016, when one of

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Significant Decisions of the U.S. Supreme Court and Texas Court of Criminal Appeals

Also available as part of the eCourse

[2022 Robert O. Dawson eConference on Criminal Appeals](#)

First appeared as part of the conference materials for the 2022 Robert O. Dawson Conference on Criminal Appeals session "Significant Decisions of the Texas Court of Criminal Appeals"