



**Office of State Prosecuting Attorney  
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Texas Court of Criminal Appeals Statutory Construction Update  
2016-2017 Term

For the 85th Texas Legislature

“When faced with a challenge to a prior judicial construction of a statute, we have long recognized that prolonged legislative silence or inaction following a judicial interpretation implies that the Legislature has approved of the interpretation. ‘[W]e presume the Legislature intends the same construction to continue to apply to a statute when the Legislature meets without overturning that construction.’” *State v. Colyandro*, 233 S.W.3d 870, 877-878 (Tex. Crim. App. 2007).

The Office of State Prosecuting Attorney has exclusive jurisdiction in the Court of Criminal Appeals. Therefore, we thoroughly review its decisions, including all statutory construction cases. Recognizing that most legislators are busy enacting law, this update provides a straightforward chronicle of the Court’s most recent cases to advise you of the judicial branch’s binding interpretation of criminal statutory law. The decisions are ordered by Code, Topic, Statute, and Court holding.

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# I. Code of Criminal Procedure

## A. Charging Instrument

TEX. CODE CRIM. PROC. art. 2.04  
Shall Draw Complaints

Upon complaint being made before a district or county attorney that an offense has been committed in his district or county, he shall reduce the complaint to writing and cause the same to be signed and sworn to by the complainant, and it shall be duly attested by said attorney.

TEX. CODE CRIM. PROC. art. 21.20  
Information

An “Information” is a written statement filed and presented in behalf of the State by the district or county attorney, charging the defendant with an offense which may by law be so prosecuted.

TEX. CODE CRIM. PROC. art. 21.22  
Information Based Upon Complaint

No information shall be presented until affidavit has been made by some credible person charging the defendant with an offense. The affidavit shall be filed with the information. It may be sworn to before the district or county attorney who, for that purpose, shall have power to administer the oath, or it may be made before any officer authorized by law to administer oaths.

**State v. Drummond**, PD-1238-15 (Sept. 28, 2016):

A single document can meet the statutory requirements for an information (TEX. CODE CRIM. PROC. art. 21.20) and a supporting complaint (TEX. CODE CRIM. PROC. art. 21.22), though two separate documents are preferable. Therefore, a single document can be used to determine whether the offense was charged within the statute of limitations period.

## B. Habeas

TEX. CODE CRIM. PROC. art. 11.07 § 1  
Procedure After Conviction Without Death Penalty

Sec. 1. This article establishes the procedures for an application for writ of habeas corpus in which the applicant seeks relief from a felony judgment imposing a penalty other than death.

**Ex parte Carter**, WR-85,060-01/02 (June 7, 2017):

An unlawful cumulation order under TEX. PENAL CODE § 3.03(a) is not cognizable. An applicant raising this statutory claim is not entitled to relief.

TEX. CODE CRIM. PROC. art. 11.073  
Procedure Related to Certain Scientific Evidence

- (a) This article applies to relevant scientific evidence that:
- (1) was not available to be offered by a convicted person at the convicted person’s trial; or
  - (2) contradicts scientific evidence relied on by the state at trial.
- (b) A court may grant a convicted person relief on an application for a writ of habeas corpus if:
- (1) the convicted person files an application, in the manner provided by Article 11.07, 11.071, or 11.072, containing specific facts indicating that:
    - (A) relevant scientific evidence is currently available and was not available at the time of the convicted person’s trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person’s trial; and
    - (B) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and
  - (2) the court makes the findings described by Subdivisions (1)(A) and (B) and also finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

**Ex parte White**, No. WR-48,152-08  
(Nov. 2, 2016, *cert. filed* Feb. 6, 2017):

TEX. CODE CRIM. PROC. art. 11.073 does not apply to newly discovered scientific evidence affecting the punishment stage of trial, including death eligible capital murder trials.

### **C. Statute of Limitations**

TEX. CODE CRIM. PROC. art. 12.01(7)

Limitations: Felonies

Except as provided in Article 12.03, felony indictments may be presented within these limits, and not afterward:

...  
(7) three years from the date of the commission of the offense: all other felonies.

TEX. CODE CRIM. PROC. art. 12.02(b)

Limitations: Misdemeanors

(b) A complaint or information for any Class C misdemeanor may be presented within two years from the date of the commission of the offense, and not afterward.

TEX. CODE CRIM. PROC. art. 12.03(d)

Limitations: Aggravated Offenses, Attempt, Conspiracy, Solicitation, Organized Criminal Activity

(d) Except as otherwise provided by this chapter, any offense that bears the title “aggravated” shall carry the same limitation period as the primary crime.

**State v. Schunior**, PD-0526-15 (Nov. 2, 2016):

Assault can be a misdemeanor, and aggravated assault is a felony. “The limitation period for aggravated assault is governed by [TEX. CODE CRIM. PROC.] Article 12.03(d) of the Code of Criminal Procedure. Accordingly, we also conclude that the lesser-included offense

with the greater limitation period does not control when the lesser-included offenses of the aggravated assault include both misdemeanor assault and a felony.” “[TEX. CODE CRIM. PROC.] Article 12.03(d) would have no possible application if [TEX. CODE CRIM. PROC.] 12.01(7) was interpreted to supersede [TEX. CODE CRIM. PROC.] 12.03(d).”

### **D. Pretrial Relief**

TEX. CODE CRIM. PROC. art. 28.01

Pre-trial

Sec. 1. The court may set any criminal case for a pre-trial hearing before it is set for trial upon its merits, and direct the defendant and his attorney, if any of record, and the State’s attorney, to appear before the court at the time and place stated in the court’s order for a conference and hearing. The defendant must be present at the arraignment, and his presence is required during any pre-trial proceeding. The pre-trial hearing shall be to determine any of the following matters:

- (1) Arraignment of the defendant, if such be necessary; and appointment of counsel to represent the defendant, if such be necessary;
- (2) Pleadings of the defendant;
- (3) Special pleas, if any;
- (4) Exceptions to the form or substance of the indictment or information;
- (5) Motions for continuance either by the State or defendant; provided that grounds for continuance not existing or not known at the time may be presented and considered at any time before the defendant announces ready for trial;
- (6) Motions to suppress evidence — When a hearing on the motion to suppress evidence is granted, the court may determine the merits of said motion on the motions themselves, or upon opposing affidavits, or upon oral testimony, subject to the discretion of the court;
- (7) Motions for change of venue by the State or the defendant; provided, however, that such motions for change of venue, if overruled at the pre-trial hearing, may be renewed by the State or the defendant during the voir dire examination of the jury;
- (8) Discovery;
- (9) Entrapment; and
- (10) Motion for appointment of interpreter.

**State v. Hill**, PD-0020-22-15 (Sept. 21, 2016):

The plain language of TEX. CODE CRIM. PROC. art. 28.01 § 1 authorizes the trial court to hold a pretrial hearing on a motion to quash and dismiss. Therefore, it is not an abuse of discretion for a trial court to entertain a prosecutorial vindictiveness claim pretrial.

### **E. Judge Disqualification**

TEX. CODE CRIM. PROC. art. 30.01  
Cases Which Disqualify

No judge or justice of the peace shall sit in any case where he may be the party injured, or where he has been of counsel for the State or the accused, or where the accused or the party injured may be connected with him by consanguinity or affinity within the third degree, as determined under Chapter 573, Government Code.

**Metts v. State**, PD-1054-55-15 (Oct. 19, 2016; Apr. 19, 2017):

A former prosecutor's act of signing a jury waiver form at the initial plea was "an integral step toward the process that resulted in Appellant's deferred adjudication community supervision." Therefore, she was disqualified from presiding over the same defendant's revocation proceedings. The disqualification statute safeguards against even the appearance of judicial bias.

### **F. Accomplice Witness**

TEX. CODE CRIM. PROC. art. 38.14  
Testimony of Accomplice

A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense

committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

**Ash v. State**, No. PD-0244-16 (June 28, 2017):

A witness is an accomplice as a matter of law:

"(1) If the witness has been charged with the same offense as the defendant or a lesser-included offense; (2) If the State charges a witness with the same offense as the defendant or a lesser-included of that offense, but dismisses the charges in exchange for the witness's testimony against the defendant; and (3) When the evidence is uncontradicted or so one-sided that no reasonable juror could conclude that the witness was not an accomplice."

### **G. Stacked Sentences**

TEX. CODE CRIM. PROC. art. 42.08  
Cumulative or Concurrent Sentence.

(a) When the same defendant has been convicted in two or more cases, judgment and sentence shall be pronounced in each case in the same manner as if there had been but one conviction. Except as provided by Subsections (b) and (c), in the discretion of the court, the judgment in the second and subsequent convictions may either be that the sentence imposed or suspended shall begin when the judgment and the sentence imposed or suspended in the preceding conviction has ceased to operate, or that the sentence imposed or suspended shall run concurrently with the other case or cases, and sentence and execution shall be accordingly; provided, however, that the cumulative total of suspended sentences in felony cases shall not exceed 10 years, and the cumulative total of suspended sentences in misdemeanor cases shall not exceed the maximum period of confinement in jail applicable to the misdemeanor offenses, though in no event more than three years, including extensions of periods of community supervision

under Article 42A.752(a)(2), if none of the offenses are offenses under Chapter 49, Penal Code, or four years, including extensions, if any of the offenses are offenses under Chapter 49, Penal Code.

(b) If a defendant is sentenced for an offense committed while the defendant was an inmate in the Texas Department of Criminal Justice and serving a sentence for an offense other than a state jail felony and the defendant has not completed the sentence he was serving at the time of the offense, the judge shall order the sentence for the subsequent offense to commence immediately on completion of the sentence for the original offense.

(c) If a defendant has been convicted in two or more cases and the court suspends the imposition of the sentence in one of the cases, the court may not order a sentence of confinement to commence on the completion of a suspended sentence for an offense.

***Ex parte Byrd***, PD-0213-15 (Sept. 14, 2016):

Under TEX. CODE CRIM. PROC. art. 42.08, if parole is revoked on the first offense before the defendant is sentenced on the second offense committed while on parole, then the second sentence may be stacked on the first. If parole was not revoked on the first offense before the defendant is sentenced on the second, then the second cannot be stacked on the first.

## **H. New Punishment Hearing**

TEX. CODE CRIM. PROC. art. 44.29(b)  
Effect of Reversal

(b) If the court of appeals or the Court of Criminal Appeals awards a new trial to a defendant other than a defendant convicted of an offense under Section 19.03, Penal Code, only on the basis of an error or errors made in the punishment stage of the trial, the cause shall stand as it would have stood in case the

new trial had been granted by the court below, except that the court shall commence the new trial as if a finding of guilt had been returned and proceed to the punishment stage of the trial under Subsection (b), Section 2, Article 37.07, of this code. If the defendant elects, the court shall empanel a jury for the sentencing stage of the trial in the same manner as a jury is empaneled by the court for other trials before the court. At the new trial, the court shall allow both the state and the defendant to introduce evidence to show the circumstances of the offense and other evidence as permitted by Section 3 of Article 37.07 of this code.

TEX. CODE CRIM. PROC. art. 37.07 § 2(b)  
Verdict Must Be General; Separate Hearing on Proper Punishment

(b) Except as provided by Article 37.071 or 37.072, if a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment applicable to the offense; provided, however, that (1) in any criminal action where the jury may recommend community supervision and the defendant filed his sworn motion for community supervision before the trial began, and (2) in other cases where the defendant so elects in writing before the commencement of the voir dire examination of the jury panel, the punishment shall be assessed by the same jury, except as provided in Section 3(c) of this article and in Article 44.29. If a finding of guilty is returned, the defendant may, with the consent of the attorney for the state, change his election of one who assesses the punishment.

***Ex parte Pete***, PD-0771-16 (April 26, 2017):

TEX. CODE CRIM. PROC. art. 44.29(b) does not prohibit a trial court from granting a mistrial limited to a new punishment phase under appropriate circumstances. However, TEX. CODE CRIM. PROC. art. 37.07 § 2(b) may. “A defendant who has followed the procedural steps necessary to trigger his statutory right to jury assessment of punishment has the statutory right to have that punishment assessed by ‘the

same jury' as the one that found him guilty." But "[a] defendant who has failed to properly invoke his right to jury sentencing in the first place, in the manner required by [TEX. CODE CRIM. PROC. art. 37.07 § 2(b)], may not later insist that he was deprived of his right to have the 'same jury' assess punishment as assessed guilt." Further, the doctrine of estoppel may bar a defendant from asserting such a compliant.

## **I. Interstate Detainers**

TEX. CODE CRIM. PROC. art. 51.14  
Interstate Agreement on Detainers

### Article III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint; provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the state parole agency relating to the prisoner.

### Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and

who is serving a term of imprisonment in any party state made available in accordance with Paragraph (a) of Article V hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated; provided that the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request; and provided further that there shall be a period of 30 days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

**Hopper v. State**, PD-0703-16 (June 7, 2017; June 12, 2017):

A defendant's failure to invoke the IAD, TEX. CODE CRIM. PROC. art. 51.14, and waive extradition when timely notified of his right to do so may count against him in asserting that he was denied his constitutional right to a speedy trial.

## **II. Government Code**

### **A. Judge Recusal**

TEX. GOV'T CODE § 24.002  
Assignment of Judges or Transfer of Case on Recusal

If a district judge determines on the judge's own motion that the judge should not sit in a case pending in the judge's court because the judge is disqualified or otherwise should recuse himself or herself, the judge shall enter a recusal order, request the presiding judge of that administrative judicial region to assign another judge to sit, and take no further action in the case except for good cause stated in the order in which the action is taken. A change of venue is not necessary because of the disqualification of a district judge in a case or proceeding pending in the judge's court.

**Ex parte Thuesen**, WR-81,584-01 (Feb. 8, 2017, *reh'g granted* May 5, 2017):

A judge who recused himself/herself has no authority to act on the case unless there is a “statement of good cause” in the order for which the action is taken. “[A]n adequate statement of ‘good cause’ in the context of [TEX. GOV’T CODE] Section 24.002 must articulate the nature of the exigency that necessitates that the recused judge, in lieu of the judge with actual judicial authority over the case, render the particular order at issue.” A judge’s determination that the recusal is moot due to a change the circumstances that prompted the recusal will not be sufficient unless exigency is shown.

### **III. Family Code**

#### **A. Juvenile Transfer Proceedings**

TEX. FAM. CODE § 54.02(j)(4)(A)  
Waiver of Jurisdiction and Discretionary Transfer to Criminal Court

(j) The juvenile court may waive its exclusive original jurisdiction and transfer a person to the appropriate district court or criminal district court for criminal proceedings if:

...  
(4) the juvenile court finds from a preponderance of the evidence that:

(A) for a reason beyond the control of the state it was not practicable to proceed in juvenile court before the 18th birthday of the person; or

**Moore v. State**, PD-1634-14 (Feb. 8, 2017, *on reh’g*):

“State” for purposes of TEX. FAM. CODE § 54.02(j)(4)(A) includes the law enforcement in addition to the prosecutor’s office. So, any delay

caused by the Sheriff in investigating the case can be counted against the “State” in assessing what was “beyond the State’s control.”

### **IV. HEALTH AND SAFETY CODE**

#### **A. Drug-Free Zone**

TEX. HEALTH & SAFETY CODE § 481.134(d)  
Drug-Free Zones

(d) An offense otherwise punishable under Section 481.112(b), 481.1121(b)(1), 481.113(b), 481.114(b), 481.115(b), 481.1151(b)(1), 481.116(b), 481.1161(b)(3), 481.120(b)(3), or 481.121(b)(3) is a felony of the third degree if it is shown on the trial of the offense that the offense was committed:

- (1) in, on, or within 1,000 feet of any real property that is owned, rented, or leased to a school or school board, the premises of a public or private youth center, or a playground; or
- (2) on a school bus.

**White v. State**, PD-1596-15 (Feb. 15, 2017):

No culpable mental state applies to TEX. HEALTH & SAFETY CODE § 481.134(d). Therefore, the State does not have to prove that the defendant was aware that the offense was committed “within 1,000 feet of any real property that is owned, rented, or leased to a school or school board, the premises of a public or private youth center, or a playground.”

## **B. Charging Delivery**

TEX. HEALTH & SAFETY CODE § 483.042  
Deliver or Offer of Delivery of Dangerous Drug

(a) A person commits an offense if the person delivers or offers to deliver a dangerous drug: . . .  
TEX. HEALTH & SAFETY CODE § 481.002  
Definitions

(16) “Drug” means a substance, other than a device or a component, part, or accessory of a device, that is:

(B) intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or animals;

**Jarraeu v. State**, PD-0840-16 (Mar. 1, 2017):

The definition or type of drug (e.g., 25B-NBOMe) or device is not a manner and means of the offense under TEX. HEALTH & SAFETY CODE § 483.042. It “does not describe, concern, involve or go to the act of delivery.” The charging instrument, therefore, does not have to specify a “device” or “drug.”

## **C. Violation of Civil Commitment Order**

TEX. HEALTH & SAFETY CODE § 841.085  
Criminal Penalty; Prosecution of Offense

(a) A person commits an offense if, after having been adjudicated and civilly committed as a sexually violent predator under this chapter, the person violates a civil commitment requirement imposed under Section 841.082(a)(1), (2), (4), or (5).  
(b) An offense under this section is a felony of the third degree.

TEX. HEALTH & SAFETY CODE § 841.081  
Civil Commitment of Predator

(a) If at a trial conducted under Subchapter D the judge or jury determines that the person is a sexually violent predator, the judge shall commit the person for treatment and supervision to be coordinated by

the office. The commitment order is effective immediately on entry of the order, except that the treatment and supervision begins on the person’s release from a secure correctional facility and continues until the person’s behavioral abnormality has changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence.

**Stevenson v. State**, PD-0122-15 (Sept. 21, 2016):

Because a civil commitment order takes effect immediately according to TEX. HEALTH & SAFETY CODE § 841.081(a), a person may be convicted of violating it under TEX. HEALTH & SAFETY CODE § 841.085 even if the person’s appeal of the commitment order is still pending at the time of the violation.

The forbidden act under TEX. HEALTH & SAFETY CODE § 841.081(a) is violating the commitment order—a circumstances surrounding conduct category of offense. Therefore, Double Jeopardy is implicated if numerous violations are used for multiple convictions. “The statute creates a single offense for violating [TEX. HEALTH & SAFETY CODE §] 841.082’s requirements, not a separate, punishable offense for each alleged way that a violation occurred.”

## V. Local Government Code

### A. Court Costs

TEX. LOCAL GOV'T CODE § 133.102(a), (b), (e)  
Consolidated Fees on Conviction

(a) A person convicted of an offense shall pay as a court cost, in addition to all other costs:

- (1) \$133 on conviction of a felony;
- (2) \$83 on conviction of a Class A or Class B misdemeanor; or
- (3) \$40 on conviction of a nonjailable misdemeanor offense, including a criminal violation of a municipal ordinance, other than a conviction of an offense relating to a pedestrian or the parking of a motor vehicle.

...

(b) The court costs under Subsection (a) shall be collected and remitted to the comptroller in the manner provided by Subchapter B.

...

(e) The comptroller shall allocate the court costs received under this section to the following accounts and funds so that each receives to the extent practicable, utilizing historical data as applicable, the same amount of money the account or fund would have received if the court costs for the accounts and funds had been collected and reported separately, except that the account or fund may not receive less than the following percentages:

- (1) abused children's counseling 0.0088 percent;

...

- (6) comprehensive rehabilitation 9.8218 percent

**Salinas v. State**, PD-01-70-16 (Mar. 8, 2017, *reh'g denied* June 28, 2017):

TEX. LOCAL GOV'T CODE § 133.102 is facially unconstitutional to the extent it collects and allocates funds to the comprehensive rehabilitation and abused children's counseling accounts. It violates separation of powers because, in practice, it constitutes a tax.

## VI. Penal Code

### A. Deadly Weapon

TEX. PENAL CODE § 1.07  
Definitions

(17) "Deadly weapon" means:

(A) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury;

or

(B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

**Pruett v. State**, PD-0251-16 (Jan. 25, 2017):

Fire qualifies as a deadly weapon in arson cases when the property ignited is left unattended.

**Johnson v. State**, PD-0699-16 (Feb. 15, 2017):

A butter/table knife qualifies as a deadly weapon when it was brandished and used during a robbery.

**Moore v. State**, PD-1056-16 (June 7, 2017):

Driver who was three times the legal limit for intoxication and caused a chain-reaction accident with cars idling at a red light used his vehicle as a deadly weapon.

**Prichard v. State**, PD-0712-16 (June 28, 2017, *reh'g filed* July 13, 2017):

A deadly weapon finding cannot be entered when the weapon was used against an animal when committing the

offense of Cruelty to Non-Live Stock Animals. TEX. PENAL CODE § 29.092. A deadly weapon only applies when it is used or exhibited on a person.

## **B. Defenses & Exemptions**

TEX. PENAL CODE § 2.02

Exception

- (a) An exception to an offense in this code is so labeled by the phrase: “It is an exception to the application of ....”
- (b) The prosecuting attorney must negate the existence of an exception in the accusation charging commission of the offense and prove beyond a reasonable doubt that the defendant or defendant’s conduct does not fall within the exception.
- (c) This section does not affect exceptions applicable to offenses enacted prior to the effective date of this code.

TEX. PENAL CODE § 2.03

Defense

- (a) A defense to prosecution for an offense in this code is so labeled by the phrase: “It is a defense to prosecution ....”
- (b) The prosecuting attorney is not required to negate the existence of a defense in the accusation charging commission of the offense.
- (c) The issue of the existence of a defense is not submitted to the jury unless evidence is admitted supporting the defense.
- (d) If the issue of the existence of a defense is submitted to the jury, the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted.
- (e) A ground of defense in a penal law that is not plainly labeled in accordance with this chapter has the procedural and evidentiary consequences of a defense.

TEX. PENAL CODE § 2.04

Affirmative Defense

- (a) An affirmative defense in this code is so labeled by the phrase: “It is an affirmative defense to prosecution ....”
- (b) The prosecuting attorney is not required to negate the existence of an affirmative defense in the accusation charging commission of the offense.

**Baumgart v. State**, PD-1358-61-15 (Mar. 1, 2017):

For statutes enacted before TEX. PENAL CODE § 2.02, the common-law rules on defenses and exception govern. The Legislature, based on a reading of TEX. PENAL CODE §§ 2.02, 2.03, and 2.04 has determined that when a defensive matter is not plainly labeled as an exception, defense, or an affirmative defense, then it is a defense. And it has further decided that TEX. PENAL CODE § 2.02(a) is applicable to offenses defined outside the Penal Code. Therefore, the Private Securities Act’s (codified in the Occupations Code) applicability exemptions are defenses, not exceptions that the State would have to negate in an indictment/information.

## **C. Stacking & Same Episode**

TEX. PENAL CODE § 3.03(b)(5)

Sentences for Offenses Arising Out of the Same Criminal Episode

- (b) If the accused is found guilty of more than one offense arising out of the same criminal episode, the sentences may run concurrently or consecutively if each sentence is for a conviction of:

...

- (5) an offense:
  - (A) under Section 20A.02 [Trafficking of Persons] or 43.05 [Compelling Prostitution], regardless of whether the accused is convicted of violations of the same section more than once or is convicted of violations of both sections; or
  - (B) for which a plea agreement was reached in a case in which the accused was charged with more than one offense listed in Paragraph (A), regardless of whether the accused is charged with violations of the same section more than once or is charged with violations of both sections; or

**Miles v. State**, PD-0847-48-15 (Nov. 16, 2016, *reh'g denied* Dec. 6, 2016):

TEX. PENAL CODE § 3.03(b)(5)'s sentence cumulative/stacking authorization only refers to human trafficking and compelling prostitution; thus, only the combination of those two offenses can be stacked. Sentences that are listed in different subsections of TEX. PENAL CODE § 3.03(b) cannot be stacked; there can be no cross-sub-section stacking.

### **D. Habitual Enhancement**

TEX. PENAL CODE § 12.42

Penalties for Repeat and Habitual Felony Offenders on Trial for First, Second, or Third Degree Felony

(d) Except as provided by Subsection (c)(2) or (c)(4), if it is shown on the trial of a felony offense other than a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished by imprisonment in the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 25 years. A previous conviction for a state jail felony punishable under Section 12.35(a) may not be used for enhancement purposes under this subsection.

TEX. CODE CRIM. PROC. art. 62.102(c)  
Failure to Comply with [Sex Offender] Registration Requirements

(c) If it is shown at the trial of a person for an offense or an attempt to commit an offense under this article that the person has previously been convicted of an offense or an attempt to commit an offense under this article, the punishment for the offense or the attempt to commit the offense is increased to the punishment for the next highest degree of felony.

**Crawford v. State**, PD-1283-15 (Feb. 15, 2017):

TEX. CODE CRIM. PROC. art. 62.102(b)(2) does not cover the field for purposes of using a prior failure to register offense to enhance punishment on a current failure to register conviction. A prior failure to register can also be used to enhance punishment under the sequential habitual felony statute—TEX. PENAL CODE § 12.42(d). A defendant's current offense, therefore, can be enhanced with a prior failure to register convictions under art. 62.102(b)(2) and be further enhanced under § 12.42(d).

### **E. Wiretapping**

TEX. PENAL CODE § 16.02

Unlawful Interception, Use, or Disclosure of Wire, Oral, or Electronic Communications

(a) In this section, “computer trespasser,” “covert entry,” “communication common carrier,” “contents,” “electronic communication,” “electronic, mechanical, or other device,” “immediate life-threatening situation,” “intercept,” “investigative or law enforcement officer,” “member of a law enforcement unit specially trained to respond to and deal with life-threatening situations,” “oral communication,” “protected computer,” “readily accessible to the general public,” and “wire communication” have the meanings given those terms in Article 18.20, Code of Criminal Procedure.

(b) A person commits an offense if the person:  
(1) intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication;

TEX. CODE CRIM. PROC. art. 18.20  
Detection, Interception, and Use of Wire, or Electric Communications

(2) “Oral communication” means an oral communication uttered by a person exhibiting an expectation that the communication is not subject to

interception under circumstances justifying that expectation. The term does not include an electronic communication.

**Long v. State**, PD-0984-15 (June 28, 2017, *reh'g* filed July 7, 2017):

Fourth Amendment expectation of privacy standards are used to determine whether a defendant has intercepted or disclosed an “oral communication” under TEX. PENAL CODE § 16.02. The test is not an “expectation of non-interception” standard—whether the recorded parties exhibited a justified expectation that they would not be recorded by a non-participant to a conversation.

## **F. Improper Student-Teacher Relationship**

TEX. PENAL CODE § 21.12

Improper Relationship Between Educator and Student

(a) An employee of a public or private primary or secondary school commits an offense if the employee:

(1) engages in sexual contact, sexual intercourse, or deviate sexual intercourse with a person who is enrolled in a public or private primary or secondary school at which the employee works; . . .

**State v. Sutton**, PD-1051-15 (Sept. 14, 2016):

TEX. PENAL CODE § 21.12(a)(1) applies to school employees engaging in sexual activity with students enrolled at the school where that employee works; employment by the school district elsewhere is insufficient.

## **G. Assault & Dating Relationship**

TEX. PENAL CODE § 22.01

Assault

(b) An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:

...

(2) a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code, if:

(A) it is shown on the trial of the offense that the defendant has been previously convicted of an offense under this chapter, Chapter 19, or Section 20.03, 20.04, 21.11, or 25.11 against a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code; or

TEX. FAMILY CODE § 71.0021

Dating Violence.

(b) For purposes of this title, “dating relationship” means a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature. 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.

(c) A casual acquaintanceship or ordinary fraternization in a business or social context does not constitute a “dating relationship” under Subsection (b).

**Sanchez v. State**, PD-0372-15 (Sept. 14, 2016):

A defendant may be convicted of assaulting his now-spouse under TEX. PENAL CODE § 22.01 based solely on their past dating relationship. “If the

legislature had intended for there to be an explicit limit on the length of time between the dating relationship and the assault, it would have inserted one into the statute.”

## **H. Sexual Assault & Bigamy**

TEX. PENAL CODE § 22.011(f)

Sexual Assault

- (a) A person commits an offense if the person:
  - (2) intentionally or knowingly:
    - (A) causes the penetration of the anus or sexual organ of a child by any means;

...

- (f) An offense under this section is a felony of the second degree, except that an offense under this section is a felony of the first degree if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under Section 25.01.

TEX. PENAL CODE § 25.01

Bigamy

- (a) An individual commits an offense if:
  - (1) he is legally married and he:
    - (A) purports to marry or does marry a person other than his spouse in this state, or any other state or foreign country, under circumstances that would, but for the actor’s prior marriage, constitute a marriage; or
    - (B) lives with a person other than his spouse in this state under the appearance of being married; or
  - (2) he knows that a married person other than his spouse is married and he:
    - (A) purports to marry or does marry that person in this state, or any other state or foreign country, under circumstances that would, but for the person’s prior marriage, constitute a marriage; or
    - (B) lives with that person in this state under the appearance of being married.

TEX. FAM. CODE § 6.201

Consanguinity

A marriage is void if one party to the marriage is related to the other as:

- (1) an ancestor or descendant, by blood or adoption;
- (2) a brother or sister, of the whole or half blood or by adoption;
- (3) a parent’s brother or sister, of the whole or half blood or by adoption; or
- (4) a son or daughter of a brother or sister, of the whole or half blood or by adoption.

**Arteaga v. State**, PD-1648-15 (June 7, 2017):

“The Legislature intended for the State to prove facts constituting bigamy whenever it alleges that the defendant committed sexual assault, and the State invokes [TEX. PENAL CODE § 22.011(f)].” “[O]ur interpretation of 22.011(f) is in line with the intent of Senate Bill 6 because protecting children from the blight of bigamy and polygamy fits well within the goal of ‘strengthening the state’s ability to protect society’s most vulnerable citizens: abused children, the elderly and the frail.’”

## **I. Burglary & Cohabitation**

TEX. PENAL CODE § 30.02(a)(1)

Burglary

- (a) A person commits an offense if, without the effective consent of the owner, the person:
  - (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
  - (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or
  - (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

TEX. PENAL CODE § 1.07(a)(35)(A)

“Owner” means a person who:

- (A) has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor;
- or
- (B) is a holder in due course of a negotiable instrument.

indictment gave the defendant adequate notice.

***Morgan v. State***, PD-0758-15 (Sept. 28, 2016; Oct. 3, 2017):

“Owner” is a person, who at the time of the commission of the offense, has a greater right to possess/occupy the property. The absence of consent can be established when an apartment leaseholder revokes his/her consent to co-habitat with another.

## **J. Tampering & Vagueness**

TEX. PENAL CODE § 37.09

Tampering with or Fabricating Physical Evidence

(a) A person commits an offense if, knowing that an investigation or official proceeding is pending or in progress, he:

- (1) alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding; or

***State v. Zuniga***, PD-1317-15 (Mar. 8, 2017):

When the State charges tampering with physical evidence, the specific identity of the tampered-with evidence is not an essential element of the offense and therefore need not be pled in the charging instrument. However, there is a question as to whether the term “thing,” as stated in the statute, provides adequate notice of what is criminal. Consequently, a remand is warranted so the lower court can decide whether the