



# In Chambers

THE OFFICIAL PUBLICATION OF THE TEXAS CENTER FOR THE JUDICIARY

SUMMER 2019

**Protecting  
Suppression  
Rulings**

**The Ethics of  
Punishment**

**Admissibility  
of Forensic  
Evidence**

**Leadership  
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# In Chambers

The official publication of the Texas Center for the Judiciary

## Summer 2019

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- Hon. Ben Woodward

This is the the official publication of Texas Center for the Judiciary. The magazine is funded in part by a grant from the Texas Court of Criminal Appeals. In Chambers strives to provide the most current information about national and local judicial educational issues and course opportunities available for Texas judges. We keep the Texas Center's mission of "Judicial Excellence Through Education" as our guiding premise. Readers are encouraged to write letters and submit questions, comments, or story ideas for In Chambers. To do so, please contact Courtney Gilason, Curriculum Director, at 512.482.8986 or toll free at 888.785.8986, or via email at [courtneyg@yourhonor.com](mailto:courtneyg@yourhonor.com). Articles subject to editing for clarity or space availability. Layout and design by Christie Dotolo. The Texas Center for the Judiciary is located at 1210 San Antonio Street, Suite 800, Austin, TX 78701.



Cover photo by: Hon. Bert Richardson

## LETTER FROM THE CHAIR

**D**ear Judges,  
Your Texas Center for the Judiciary has had a successful year and is in very good condition.

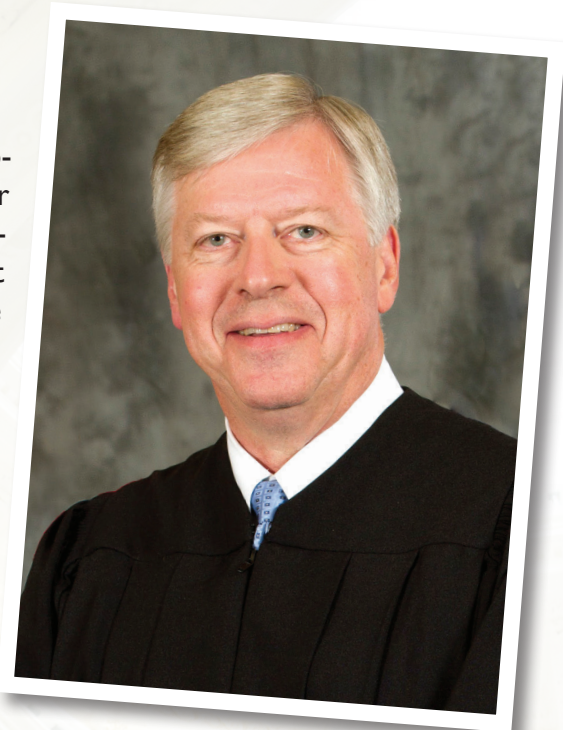
The Curriculum Committee, chaired by Justice Lee Gabriel, planned five outstanding conferences, including the annual conference coming in September. In addition, other committees planned several specialty conferences including DWI Summits, the PDP, and the College for New Judges, which had the largest class of new judges ever trained by the Texas Center. The Center provided education to over 1,000 judges and judicial staff in the past year. Thank you to the Curriculum Committee and to all speakers who prepared and presented

We have excellent relationships with our benefactors. We especially appreciate The Court of Criminal Appeals for their continued support. Judge Barbara Hervey has been invaluable by providing information about grant requirements, additional sources of funds, and legal issues that need to be addressed at future conferences. Thank you.

The Center has a strong Board of Directors. The Board of Directors has provided solid leadership that keeps the Center on course. These directors have heavy dockets, family commitments, and community activities, but they give additional time to the Center to set the Center's policy and measure its performance. Working with these judges has been the highlight of my year and I thank each of them for their friendship, dedication and support.

Perhaps the Center's most valuable asset is its friendly staff. They do so much to produce conferences, manage finances, negotiate with vendors, and so much more. All of their work is for your education, at comfortable venues, and at a bargain price. Please thank them for their service, not only for having your name tag ready or

quickly processing your reimbursements, but also all of the work they do behind the scenes that makes your education experience enjoyable. My thanks to each of them.



The Center is also in solid condition because of your continued support. Thank you for attending our conferences. Your evaluations of programs provide valuable information about future programs as well as what the Center does well and what we can do better. And, thank you for your contributions. Those additional funds provide the "little extras" at conferences and a bit more stability to our finances. Thank you.

The Texas Center for the Judiciary is a great asset for Texas judges, and it is in good condition. I look forward to seeing you at the Annual Conference in San Antonio and many conferences after that.

With Best Regards,

A handwritten signature in black ink that reads "Ben Woodward". The signature is written in a cursive, flowing style.

Hon. Ben Woodward  
Chair

# feature

## Protect Your Suppression Rulings with Proper Findings of Fact

By John R. Messinger<sup>1</sup>

**T**hose of you who preside over criminal cases know that, when you rule on a motion to suppress but do not make findings of fact, an appellate court will assume you made whatever implicit findings support the ruling and are supported by the record.<sup>2</sup> This is referred to as the “Ross presumption.” If the thought of appellate courts making assumptions about your work “that may be entirely fictitious”<sup>3</sup> bothers you, you may enter written findings of fact (and conclusions of law) *sua sponte*. You also know that you have no choice if the losing party requests them.<sup>4</sup> In either case, you must enter “essential findings,” *i.e.*, “findings of fact and conclusions of law adequate to provide an appellate court with a basis upon which to review the trial court’s application of the law to the facts.”<sup>5</sup>

What you may not know is that appellate courts often ignore these “essential findings” and sustain the ruling on a theory of law that was neither presented to nor considered by you.<sup>6</sup> As it turns out, it is the appellate courts that decide what is essential—not the judge who made the ruling and the findings.<sup>7</sup> Not surprisingly, your findings can become insufficient when the appellate court goes in a different direction. Rather than apply the Ross presumption to infer the necessary

findings, however, the appellate court assumes that you made no findings on these matters because you “regarded them (however erroneously) as peripheral or non-essential to [your] ultimate legal holding.”<sup>8</sup>

The good news is that the case will be remanded for you to make the findings you “simply failed to make.”<sup>9</sup> [Of course, you didn’t make the findings because a party failed to raise the issue, insist upon a ruling, and/or request any findings.] The Court of Criminal Appeals has called these “future findings.”<sup>10</sup> Four judges on that court recently called this remand process “an incentive . . . to micro-manage trial courts.”<sup>11</sup> However they are viewed, they are proof that adequate appellate review is sometimes impossible without discretionary review, remand, abatement, and remand for findings that could have been included the first time.

If you want to conserve judicial resources (including your own), follow these three rules:

### Make real findings.

A finding should reflect your belief that a historical fact occurred. Findings like “Officer Smith *testified* that the light was red,” or “Trooper Jones *stated* it was raining” contain “weasel words”<sup>12</sup> and offer little more than a commemoration of testimony. Your court reporter

“The most important thing is to make clear you have considered all the testimony you consider credible.”

has dutifully done that. You need to say whether you believed that testimony. You do that by adopting the substance of the witness’s statement as fact. Just say “The light was red,” or “It was raining.”

**Make a finding on every fact, even if you don’t deem it essential.**

Hearings on motions to suppress are usually short, often limited to one or two witnesses. It does not take much more effort to make credibility determinations on all the testimony than it does on only what the parties have highlighted in their arguments or proposed findings. Address everything while the testimony is fresh in your mind rather than four or five years later following remand.<sup>13</sup>

**Make it clear you’ve done your job.**

The most important thing is to make it clear you have considered all the testimony you consider credible. You might think an appellate court would assume that if you believed the testimony you would have put it in your findings, but you’d be wrong. The lynchpin of this line of cases is that a reviewing court should not assume “some selective credibility determination that [the trial court] did not bother to spell out in its written findings of fact.”<sup>14</sup> So spell it out. A simple statement like, “No other testimony from this witness was credible or reliable” will do. That will make remand unnecessary even if the appellate court applies a different theory of law.

It is unfair that trial judges can be faulted for “failing” to make findings that were never requested on theories of law that were never presented. No court—trial or appellate—should work harder than the parties to secure victory. And there may be some hope. The same plurality that views remand for supplemental findings as “micro-management” would overrule the case that calls for it and apply the *Ross* presumption unless the

losing party objected to the findings’ inadequacy.<sup>15</sup> Two of those judges, joined by a third still on the Court, would go further and hold that interlocutory appeals—like those from motions to suppress—should not be upheld on theories not raised in the trial court.<sup>16</sup>

Until either of these changes come to pass, however, it ultimately falls on the trial courts to enter findings of fact that embrace every possible theory of law applicable to the case. The only way to do that is to enter a real finding on all the evidence you find credible and explicitly discount the rest.

*(Endnotes)*

1. John Messinger is an Assistant Prosecuting Attorney with the Office of State Prosecuting Attorney of Texas.
2. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000).
3. *Id.* at 860 (Womack, J., concurring).
4. *State v. Cullen*, 195 S.W.3d 696, 698-99 (Tex. Crim. App. 2006).
5. *Id.* at 699.
6. See, e.g., *Ross*, 32 S.W.3d at 855-56; *State v. Saenz*, 411 S.W.3d 488, 496-97 (Tex. Crim. App. 2013).
7. *State v. Elias*, 339 S.W.3d 667, 675-76 (Tex. Crim. App. 2011).
8. *Id.*
9. *Id.* at 676.
10. *Saenz*, 411 S.W.3d at 496-97.
11. *Martinez v. State* 569 S.W.3d 621, 634 (Tex. Crim. App. 2019) (Newell J. concurring)
12. *State v. Mendoza*, 365 S.W.3d 666, 671 (Tex. Crim. App. 2012).
13. The suppression hearing in *Martinez* took place nearly four years before the CCA’s final opinion.
14. *Elias*, 339 S.W.3d at 676.
15. *Martinez* 569 S.W.3d at 634 (Newell J. concurring)
16. *State v. Esparza*, 413 S.W.3d 81, 92-93 (Tex. Crim. App. 2013) (Keller, P.J., concurring, joined by Keasler and Hervey, JJ.).

## UPCOMING CONFERENCES

(For your security, dates and locations are behind a firewall log in)

### Annual Judicial Education Conference

September 2019

### Child Welfare Conference

October 2019

### Civil Justice Conference

October 2019

### College for New Judges

December 2019

### Family Justice Conference

January 2020

### Criminal Justice Conference

February 2020

### DWI Court Team Basic Training and Advanced Conference

March 2020

### Trauma Institute

March 2020

### Family Justice Conference

September 2020

### Regional A Conference

(Regions 2, 6, 7, 9, 11)  
April 2020

### Regional B Conference

(Regions 1, 3, 4, 5, 8, 10)  
May 2020

### Professional Development Program

June 2020

#### Hon. Lisa Andrews

Northeast Texas Child Protection Court No. 1  
Associate Judge

#### Hon. Dawn Baardsen

Court #16  
Associate Judge

#### Hon. Lesley Briones

Harris County Civil Court at Law No. 4  
Judge

#### Hon. Sarah Bruchmiller

Williamson County  
Associate Judge

#### Hon. Julio de la Llata

Travis County Associate Civil Court  
Associate Judge

#### Hon. Genesis Draper

Harris County Criminal Court at Law No. 12  
Judge

#### Hon. Karl Hays

Hays County  
Associate Judge

# NEW Judges as of 6/10/19

#### Hon. Sydney Hewlett

18th District Court  
Judge

#### Hon. Jeffrey Kaitcer

322nd District Court  
Associate Judge

#### Hon. Jared Robinson

405th District Court  
Judge

#### Hon. Kate Stone

233rd District Court  
Associate Judge

# feature

## A Roadmap to the Admissibility of Forensic Evidence in Texas Criminal Cases

By Lynn Robitaille Garcia and Leigh M. Savage<sup>1</sup>

From time to time, the Texas Court of Criminal Appeals (CCA) issues a decision that causes stakeholders in the criminal justice system to take a collective pause. Michael Morton's case was a good example of this.<sup>1</sup> The San Antonio Four case was another.<sup>2</sup> More recently, the CCA issued a landmark decision in *Ex Parte Chaney*, a bite mark case with national significance.<sup>3</sup> All of these cases involved convictions for which certain scientific evidence and related testimony was offered at trial. At the time, judges, attorneys—and occasionally even the defendants themselves—believed the testifying scientists or medical experts based their analysis on sound scientific principles. But when viewed today with a clearer understanding of the limitations of certain forensic disciplines, the testimony offered at trial is simply unsupported. In some cases, it borders on the absurd (e.g., there is a “one to a million chance” that anyone other than Mr. Chaney inflicted the bite mark on the victim). In all of these cases, the key scientific experts subsequently recanted their most critical testimony, admitting what they originally said at trial is invalid. Combined, the defendants in these three cases spent 132 years incarcerated.

These cases raise an important question for all of us. How can judges, attorneys and juries separate quality scientific evidence and related testimony from subjective speculation? How can we prevent unreliable and/or invalid evidence from being introduced in the first instance? The answer to this question is complex, but the Texas Legislature has taken significant steps over the last decade—more than any other state in the country—to address these questions proactively.

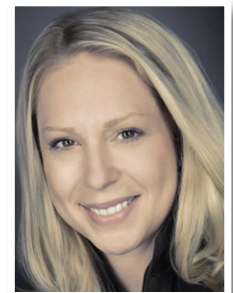
How can we prevent unreliable and/or invalid evidence from being introduced in the first instance? The answer to this question is complex, but the Texas Legislature has taken significant steps over the last decade—more than any other state in the country—to address these questions proactively.

In this article, we provide a roadmap for navigating the applicable statutes, caselaw, and administrative rules with regard to the admissibility of forensic evidence in Texas criminal cases. We then describe efforts underway at the national level to set standards across the various sub-disciplines of forensic science, including a collaboration between the federal agency responsible for this effort and the Texas Forensic Science Commission (“Commission”). Finally, we describe the upcoming Forensic Science Bench Book, which the Commission is currently developing in response to requests from Texas judges.

In Texas, we entrust trial attorneys with the responsibility of proffering expert testimony on scientific issues



Lynn Garcia



Leigh Savage

(continued on next page)



through “...careful navigation of statutory mandates, caselaw, and rules of evidence...” in the “...oftentimes difficult but crucial world of ever-changing forensic science.”<sup>4</sup> Judges are then expected to be the final arbiters of admissibility. But most judges and lawyers do not have a staff of trusted scientific advisors waiting in the wings to whom they can turn for questions regarding the current state of any given forensic discipline. The subdisciplines of forensic science are diverse and involve various scientific concepts—from chemistry to biology, fluid dynamics, physics, statistics and beyond. Separating the wheat from the chafe is a challenging process, especially for non-scientists.

### Admissibility Decision Process for Forensic Analysis in Texas

**Threshold Question: Does Article 38.35 TCCP apply to the evidence?** Texas law requires that certain types of “forensic analysis” be performed in an accredited laboratory in order for it to be admissible in a criminal action.<sup>5</sup> Accordingly, attorneys and judges should first ask whether the forensic science in question is considered “forensic analysis” under Texas law. Forensic analysis is “a medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action.”<sup>6</sup>

If the answer to this threshold question is no, admissibility is determined under Texas Rule of Evidence 702 and related caselaw.<sup>7</sup>

**If the answer is yes, the parties should check for statutory and rule-based exemptions.** TCCP Article 38.35 sets forth certain exemptions to the forensic analysis definition.<sup>8</sup> Examples of forensic disciplines exempt from the definition of forensic analysis by statute include latent print examination, tests on breath specimens, and digital evidence.<sup>9</sup> The Commission may also exempt certain types of forensic analyses from the accreditation requirement through administrative rulemaking.<sup>10</sup> Examples of disciplines exempt from accreditation oversight through the Commission’s administrative rule-making authority include sexual assault nurse exams, forensic anthropology, crime scene reconstruction, fire scene investigation, and voice analysis.<sup>11</sup> A complete list of forensic disciplines subject to and exempt from accreditation requirements, either by the statutory definition of forensic analysis or by administrative authority of the Commission, can be found in Texas Administrative Code §§ 651.5, 651.6 and 651.7.<sup>12</sup>

If there is an exemption for a particular type of forensic analysis, admissibility is assessed under Texas Rule of Evidence 702 and related caselaw. If there is no exemption, the parties should ensure the entity performing the forensic analysis was accredited at the time the analysis was performed.

Following is a quick reference list of disciplines that must be performed in an accredited laboratory. However, please note that disciplines may be added to this list over time through administrative rulemaking or statutory changes. Parties should check the Commission’s website before retaining an expert to perform forensic analysis.

#### *Forensic Disciplines Subject to Accreditation and Licensing Requirements*

- Seized Drugs
- Toxicology (Includes Blood Alcohol)
- Firearms/Toolmarks
- Forensic Biology
- Materials (Trace)

**Checking a laboratory’s accreditation status.** The Commission recognizes accreditation for crime laboratories already accredited by certain national accrediting bodies.<sup>13</sup> A complete list of Texas-recognized accrediting bodies may be found in Texas Administra-

tive Code Chapter 651.4.<sup>14</sup> The Commission publishes lists of accredited crime laboratories both in Texas and outside of Texas on its website at <http://www.txcourts.gov/fsc/accreditation/>, including the particular forensic disciplines each laboratory is accredited to perform.

**A final question—is the forensic analyst licensed?** As of January 1, 2019, Texas law requires forensic analysts performing forensic analysis in accredited crime laboratories to be licensed by the Commission.<sup>15</sup> If a forensic analyst is performing a forensic analysis in a discipline subject to accreditation, the forensic analyst must be licensed by the Commission to perform the type of forensic analysis in question.<sup>16</sup> A complete list of licensed forensic analysts and their license status, including licensed disciplines may be found by visiting the Commission’s website at <http://www.txcourts.gov/fsc/licensing/licenses/>.

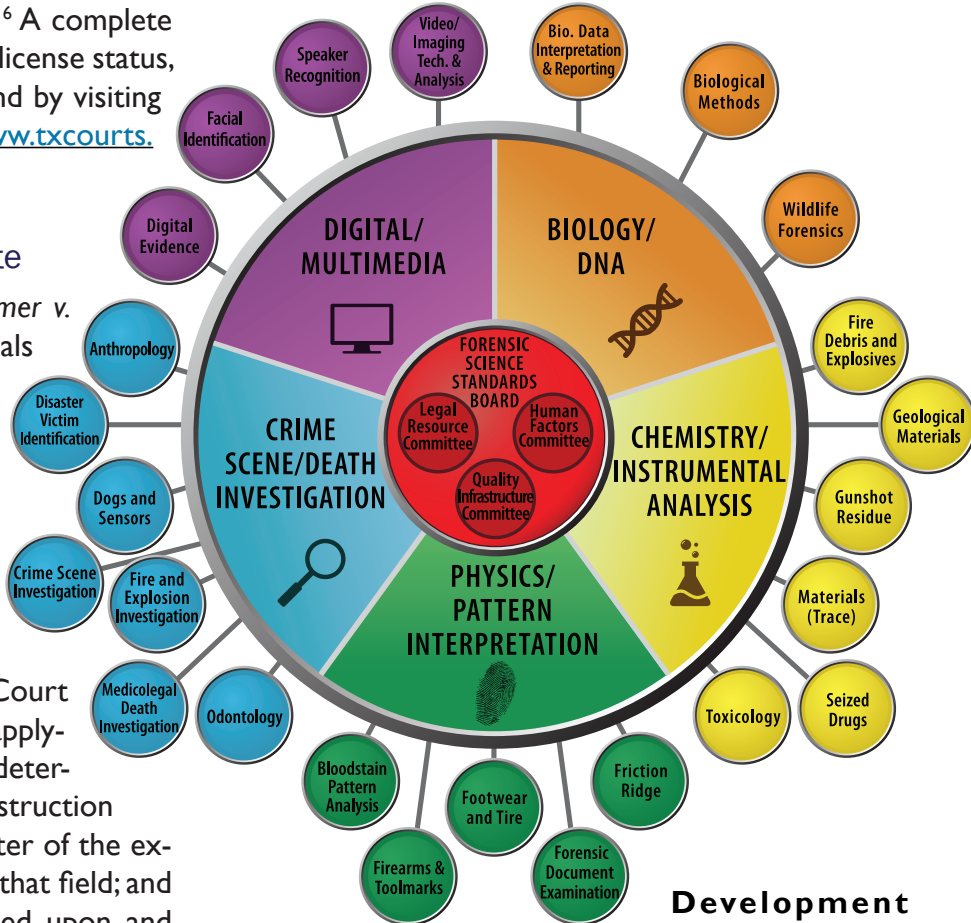
### Recent CCA Decision: Rhomer v. State

In its January 30, 2019 opinion in *Rhomer v. State*, the Texas Court of Criminal Appeals discussed the admissibility of certain forensic evidence.<sup>17</sup> Specifically, the Court considered whether a particular type of accident reconstruction expert could testify about a specific type of accident reconstruction in which he had no formal training and whether accident reconstruction should be governed by tests in *Kelly* or *Nenno*.<sup>18</sup> Ultimately, the Court affirmed the Court of Appeals decision applying the *Nenno* test in its evaluation to determine that (1) the field of accident reconstruction was a legitimate one; (2) the subject matter of the expert’s testimony was within the scope of that field; and (3) the expert’s testimony properly relied upon and utilized the appropriate principles in the field.<sup>19</sup>

In a concurring opinion, Judge Hervey emphasized the importance of Texas’ exclusionary rule for forensic evidence pursuant to Code of Criminal Procedure Article 38.35 as a first step in any forensic admissibility determination.<sup>20</sup> This concurring opinion is extremely helpful to stakeholders in describing the various issues that should be considered when admitting forensic evidence.

**Notes about the Texas Rules of Evidence and Related Caselaw.** The Texas Rules of Evidence and related caselaw *still apply* in admissibility determinations with regard to forensic issues. When a type of test is

not considered a forensic analysis under Texas law but there is still expert testimony, *Kelly* applies for the “hard sciences” and *Nenno* applies for the “soft sciences.”<sup>21</sup> When a forensic discipline has an exemption, either by statute or administrative rule of the Commission, *Kelly* and/or *Nenno* must be applied depending upon the type of analysis. Indeed, even where there is an accredited discipline and a licensed analyst, admissibility hearings may still be necessary for cases in which a certain forensic method is new or has not been addressed by courts, or where other legitimate admissibility issues are raised by the parties.



**Development of National Standards and Guidelines in Forensic Science.** The National Institute for Standards and Technology (“NIST”) has gathered a group of forensic practitioners, attorneys, judges, statisticians and other professionals to develop consensus-based standards in the area of forensic science. Texas has many representatives from law enforcement, crime laboratories and other areas of forensic science. To date, fifteen forensic science standards have been posted to the national registry of standards. Recently, the Commission partnered with NIST to review and adopt OSAC standards and guidelines.

(continued on next page)

Some may be adopted as is and others may be modified as needed to suit the needs of Texas stakeholders. OSAC standards may be found by visiting the registry at <https://www.nist.gov/topics/organization-scientific-area-committees-forensic-science/osac-registry>.

**The Forensic Bench Book.** The Commission is dedicated to assisting judges in their gatekeeping role with respect to the challenging forensic issues that arise in criminal cases. Commission staff is beginning work with subject matter experts on a Forensic Bench Book that will be available to judges and updated regularly. By offering this resource, the Commission hopes to assist the judiciary in: 1) understanding foundational scientific principles; 2) identifying unsettled areas/areas of debate within a discipline; and 3) identifying red flags in an evaluation of scientific evidence that may come before the court.

Commission staff is always available to help. Please feel free to contact us at [lynn.garcia@fsc.texas.gov](mailto:lynn.garcia@fsc.texas.gov) or [leigh.savage@fsc.texas.gov](mailto:leigh.savage@fsc.texas.gov) or 512-936-0770.

(Endnotes)

1. Lynn Robitaille Garcia and Leigh M. Savage both work for the Texas Forensic Science Commission, with Lynn serving as General Counsel/Director and Leigh M. Savage serving as Associate General Counsel.
2. *Ex parte Morton*, (Tex. Crim.App. 2011).
3. *Ex parte Mayhugh*, (Tex. Crim.App. 2016).

4. <https://www.texastribune.org/2018/12/19/steven-mark-chaney-murder-conviction-overtumed/>.
5. *Rhomer v. State*, 569 S.W.3d 664, 672 (Tex. Crim.App. 2019) (Hervey, J., concurring).
6. TEX. CODE CRIM. PROC. art. 38.35(d)(1).
7. TEX. CODE CRIM. PROC. art. 38.35(a)(4).
8. TEX. R. EVID. 702; *Kelly v. State*, 824 S.W.2d 568, 572-573 (Tex. Crim. App. 1992) (stating that the threshold issue for a trial court when dealing with the admission of expert testimony is whether the proponent has shown by clear and convincing proof that the testimony will assist the trier of fact in understanding the evidence or determining a factual issue); *Nenno v. State*, 970 S.W.2d 549, 560-61 (Tex. Crim.App. 1998) (later set forth a framework for evaluating the reliability of expert testimony in fields of study outside the hard sciences).
9. TEX. CODE CRIM. PROC. ART. 38.35 § (4)(A)-(F).
10. *Id.*
11. TEX. CODE CRIM. PROC. ART. 38.01 §4-d.
12. 37 TEX. ADMIN. CODE § 651.5-7 (2010) (Tex. Forensic Sci. Comm'n, Accreditation).
13. *Id.*
14. *Id.*
15. 37 TEX. ADMIN. CODE § 651.4 (2010) (Tex. Forensic Sci. Comm'n, Accreditation).
16. TEX. CODE CRIM. PROC. ART. 38.01 §4-a(b).
17. *Id.*
18. *Rhomer v. State*, 569 S.W.3d 644 (Tex. Crim.App. 2019).
19. *Id.* at 667.
20. *Id.*
21. *Id.* at 672.
22. *Rhomer v. State*, 569 S.W.3d 644, 670 (Tex. Crim.App. 2019).

## Texas Pattern Jury Charges updates available on our website

Don't forget that Texas Pattern Jury Charges are available to judges, free of charge, through the Texas Center for the Judiciary's website. Just select the link under the "Resources" tab on the Texas Center's homepage.

### 2019 Edition:

*Texas Criminal Pattern Jury Charges - Intoxication, Controlled Substance & Public Order Offenses*

### 2018 Editions:

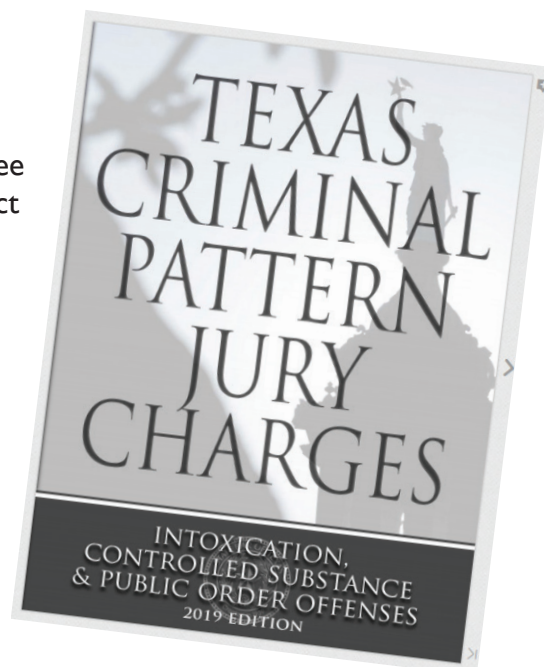
*Texas Criminal Pattern Jury Charges - Criminal Defenses*

*Texas Pattern Jury Charges - Business, Consumer, Insurance & Employment*

*Texas Pattern Jury Charges - General Negligence, Intentional Personal Torts & Workers' Compensation*

*Texas Pattern Jury Charges - Malpractice, Premises & Products*

*Texas Pattern Jury Charges - Oil & Gas*



# Meet Your 2019-2020 Leadership Nominees



**Incoming  
Chair:  
Pat Pirtle,  
7th Court of  
Appeals,  
Amarillo**

Justice Patrick Pirtle was appointed by Governor Perry to serve as a justice of the 7th Court of Appeals in 2006. Prior to that appointment, Justice Pirtle served as district judge of the 251st District Court serving Potter and Randall counties from 1988 until 2006. He is a member of the State Bar of Texas, the Texas Bar Foundation and the Amarillo Area Bar Association. He is a past-chair of the Judicial Section of the Texas Bar Association. He is active in the Kairos Prison Ministry. Justice Pirtle received a bachelor's degree in business from Texas Tech University and a law degree from Texas Tech School of Law.

**Chair-Elect: Lori Valenzuela,  
437th District Court, San Antonio**



Appointed by former Governor Perry to the newly created court, Judge Lori I. Valenzuela has been presiding over the 437th Criminal District Court since 2009. She has served as the Criminal District Court Administrative Judge, serves on numerous local Judicial Committees, including the Bexar County Juvenile Board, and co-presides over a Felony Veteran's Treatment Court. Prior to taking the bench, Judge Valenzuela served as a Bexar County Assistant District Attorney from 1998-2007. Upon leaving the District Attorney's Office in 2007, Judge Valenzuela started her own criminal defense practice and later served as a Bexar County Magistrate. Judge Valenzuela was recently appointed by the Texas Supreme Court to Chair the Court Reporters Certification Advisory Board. Prior to this, she was appointed by Senators Cornyn and Cruz to the Federal Judicial Executive Commission (FJEC) and served from 2013-2018. She also served on the board of the Texas Center for the Judiciary from 2015-2018. Judge Valenzuela is a member of several legal organizations and has been named a Fellow by the San Antonio Bar Association. Judge Valenzuela earned her degree from The University of Texas at Austin and her J.D. from St. Mary's University School of Law. Judge Valenzuela is married to Robert Sean McCleskey, a retired Secret Service Agent, who currently serves as the Chief Investigator at the Bexar County District Attorney's Office. They have one daughter and two sons.

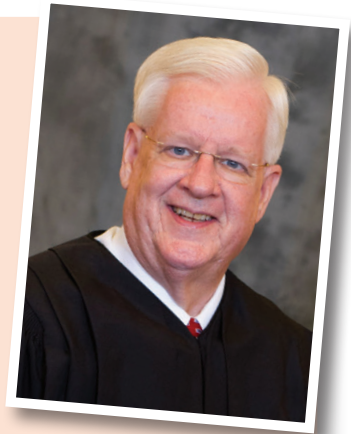
## Place 2: Jeff Rose, 3rd Court of Appeals, Austin

Jeff Rose serves as Chief Justice of the Texas Third Court of Appeals in Austin. Before joining the Court in 2010, he served as a state district Judge in Travis County and previously as Chief of Civil Litigation and then as Deputy First Assistant Attorney General under then-Texas Attorney General Greg Abbott. Board Certified in Civil Trial Law, he entered public service after being a litigation partner at Strasburger & Price. He is an officer of the Texas Bar Appellate Law Section, a director of the State Bar Administrative Law Section, a Fellow of the Texas and Austin Bar Foundations, and a Master Barrister of the Lloyd Lochridge Inn of Court. He also served as Chair of the Texas Council of Chief Justices, having been elected by his fellow Chief Justices to lead their efforts in organizing and advocating for the Texas appellate court system. Chief Justice Rose is a frequent speaker on the court system, the Constitution, legal ethics, and litigation strategy. He is a graduate of Baylor University's Hankamer School of Business and the Vanderbilt Law School. Outside the bar, he is active in the Austin community through leadership roles on the boards of Big Brothers/Big Sisters, the Rise School of Austin, and the Central Texas Food Bank, as well as involvement with the Ronald McDonald House of Central Texas, of which his wife of 23 years, Kim, is former board president.



## Place 6: Steve Smith, 361st District Court, Bryan

Judge Steve Smith presently serves as Judge of the 361st District Court in Bryan. From 1995-1998, he presided over County Court at Law No. 1. His undergraduate degree is from Abilene Christian University, and he earned his JD from the University of Texas School of Law in 1977. Judge Smith engaged in private practice in Brazos County, Texas from 1977-1994 and was an associate and presiding municipal judge for the City of College Station, Texas, from 1988-1994. Board certified in Civil Trial Law, he is a member of the American Bar Association, American Judges Association, and the State Bar of Texas. He's also a Texas Bar Foundation sustaining Life Fellow and a sustaining Life Fellow of the American Bar Foundation. Judge Smith served as Chair of the Judicial Section of the State Bar of Texas in 2010-2011, and is a past chair of the ABA Judicial Division's National Conference of Specialized Court Judges. He's presently serving as the ABA Judicial Division Liaison to the ABA Standing Committee on the American Judicial System. A 17-year faculty member of the National Judicial College, he's previously taught for the Texas Center for the Judiciary, the Texas Justice Courts Training Center and the Texas Municipal Courts Association.



## Place 7: Susan Harris, Kerr County Court at Law, Kerrville

Susan Harris was elected as judge of Kerr County Court at Law in November 2014. Prior to her appointment, she served as a Title IV-D associate judge for 23 years. In her career, Judge Harris has traveled to hear cases in over 20 counties from Fort Davis to Del Rio, and from Rankin to Seguin. Before she became an associate judge, she practiced law in Kerrville, in the family law firm of Harris and Harris. Judge Harris then worked as an attorney-mediator and served as a speaker for the Hill Country Dispute Resolution Mediation Training Seminars. She previously served as the board president of the Hill Country Crisis Council and was a member of the Kerrville Junior Service Guild and the Executive Women's Club. Judge Harris attended the University of Texas in Austin before transferring to Columbia University in New York, where she completed her bachelor's in Political Science. She attended law school at Southern Methodist University in Dallas and was admitted to the bar in 1985.



# feature

## The Ethics of Punishment

by Justice Gordon Goodman

“Punishment is a vital need of the human soul.”  
— Simone Weil<sup>1</sup>

Though this quotation was written during the Second World War, it is still a striking assertion and surprisingly true. As the people of Texas look for how best to prevent crime while also reducing incarceration, our legal and judicial communities should take a renewed interest in Simone Weil’s ethical theory and framework for punishment.

The purpose of this article is to reintroduce Weil’s commentary on punishment in her work titled “Taking Root” (“L’enracinement” written in 1943) to lawyers and judges here in Texas and the broader law enforcement community. Obviously, Weil was reacting to an extreme case of ethical failure during the Second World War, and her goal was to shape a future France that would correct many ethical failures that she perceived in her own lifetime. But her discussion of the need for and purpose of punishment is directly relevant to many of the recent ethical questions regarding incarceration that we face here in Texas.

### The Network of Human Obligations

“By committing a crime, a man sets himself apart from the network of eternal obligations that binds each human being to all others. He can be reinstated only by punishment; fully so, if there is consent on his part; otherwise only partially so.”

Weil argues that the primary purpose of punishment should be to reinstate men and women into the network of eternal obligations (*le réseau d’obligations éternelles*) from which they have been removed when they commit

a crime. In making this claim, she is implicitly saying that the other purposes of punishment—including deterrence, revenge for victims, and concerns about public safety—should be secondary to the goal of reinstating criminals into society after serving their sentences. This directly contradicts much of the current thinking about crime.

She notes that just as “the only way to show respect to those who suffer from hunger is to feed them, so the only way to show respect to one who has been outlawed is to reinstate him in the law by subjecting him to the punishment the law prescribes.” This image is confusing on first reading—how can the imposition of punishment be like feeding the hungry? Her point is that there is nothing we can give to a criminal that is more valuable than the punishment prescribed by law since that is what leads him or her back into a full and



(continued on next page)

“The purpose of punishment should be to reinstate the criminal into society...not to alienate [him]...”

healthy relationship with their community. Essentially, she is saying that giving an appropriate punishment to a criminal is a form of blessing, and judges should not shy away from this essential part of their duties.

### A Method of Coercion by Terror

She also notes that the “need for punishment is not satisfied where, as is generally the case, the penal code is only a method of coercion by terror” (*une contrainte par la terreur*). To the extent that a penal code is primarily designed as a form of revenge for victims with excessive penalties and unreasonably long sentences, we are not satisfying a criminal’s “need for punishment” since it will be perceived by criminals as a method of exercising pressure through fear. The purpose of punishment should be to reinstate the criminal into society and not to alienate the criminal from their fellow men and women.

In this regard, she states that “the severity of sentences should respond to the nature of the obligations violated and not to the interests of public security.” The fear of the public from actual crime, or occasionally the fear that can arise from false suggestions of increasing crime during periods of decreased criminal activity, has sometimes driven legislators to impose longer and harsher sentences over time. A thoughtful discussion of actual criminal trends, and not these imaginary fears, should take place immediately in our legislature, and excessive penalties should be modified.

Weil also comments that “the scale of penalties which provide a much harsher punishment for ten acts of petty larceny than for one rape or certain types of murder, and which even provide punishments for ordinary misfortune—all this makes it impossible for there to exist among us anything that deserves the name of punishment.” This touches closely on our current use of enhancements and other sentence multipliers that can result in excessively long sentences.

She reminds us that “there is punishment only if the

suffering is accompanied at some point, even afterwards, in the memory, by a feeling of justice” (*un sentiment de justice*). To instill this feeling, we must always be mindful of the majesty of the law.

### The Majesty of the Law

“The satisfaction of this need for punishment requires, first of all, that everything relating to criminal law should be solemn and sacred; that the majesty of the law is communicated to the court, to the police, to the accused, to the condemned—even in minor cases, provided it entails the possible deprivation of liberty.”

The robes, the bailiff, the forms of address—these are not secondary to the administration of justice since they are all intended to re-enforce the majesty of the law (*la majesté de la loi*). Judges should avoid doing anything that diminishes their solemn and sacred responsibility of administering justice, and this is true even for the smallest cases when loss of liberty is involved.

She asserts that punishment “must be an honor, not only to erase the shame of crime, but to be regarded as an additional education which requires a greater degree of devotion to the public good.” This is another disturbing concept—how can punishment be considered an honor and a form of additional education by the criminal, or that accepting punishment is a form of devotion to the public good? Though a criminal record is often considered a badge of shame within our society, we should emphasize the benefits that arise from satisfaction of lawful punishment in all considerations for employment, and we should also encourage full and fair participation in the network of human society by those individuals who have served their time.

#### (Endnotes)

1. All quotations are from pages 24-25 of Simone Weil’s “L’enracinement. Prélude à une déclaration des devoirs envers l’être humain.” Paris : Les Éditions Gallimard, 1949. Translations from the French are by the current author.

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## Speaker Highlights



### **Chief Justice Wallace Jefferson**

*Partner, Alexander Dubose Jefferson & Townsend  
Former Chief Justice of the Supreme Court of Texas*

#### **The Independence & Integrity of the Judiciary**

Judicial decisions, and even judges themselves, are often under intense public scrutiny. Retired Chief Justice Wallace B. Jefferson will examine the competing societal concerns of judicial independence and judicial responsibility. He will offer suggestions for meeting modern challenges and strengthening the public's perception of the Courts.

### **Dr. Thomas Nakagawa, MD, FAA, FCCMP**

*Pediatric Care Specialist*

*Former Chief of Critical Care, Director of the Pediatric Intensive Care Unit, and Medical Director for Respiratory Care at Johns Hopkins All Children's Hospital*

#### **The Complicated Process Called Death**

Recent highly publicized cases of patients maintained on artificial mechanical support after being declared brain dead have resonated deeply across the world. These cases have called into question how we define and determine when a patient is truly dead. Dr. Nakagawa is the former Chief of the Division of Critical Care Medicine and Director of the Pediatric Intensive Care Unit at Johns Hopkins All Children's Hospital. He is the lead author on the Guidelines for Determination of Brain Death in Infants and Children from the Society of Critical Care Medicine, American Academy of Pediatrics, and the Child Neurology Society. Dr. Nakagawa will examine how death is defined and determined, consequences when families disagree with the medical team, and how legal interventions affect the medical team and the family.



### **Michael Josephson**

*Founder and President, Joseph and Edna Josephson Institute of Ethics*

#### **Ethics Beyond the Code: Real Ethics for the Real World**

Examine principles of public service ethics and the role they play in judicial decision-making.



# feature



## Parenting from the Bench: Training Our Children to Make Wise Decisions

*By Hon. Derrick John Morrison<sup>1</sup>*

**I** oversee juvenile misdemeanor and felony cases on a daily basis. I have the opportunity to interact with the parents and their children who are involved in various juvenile delinquent cases. I must admit, there are days when it seems overwhelming. From the outside looking in, the current condition often looks hopeless and bleak.

In each case that comes before me, I try to apply a balance of mercy and justice. I see many children who, because of the lack of parental guidance and proper structure, are making poor life decisions. The parents and/or guardians often have minimum parenting skills. Although this is no excuse for the child's behavior, I believe that you will do better when you know better. This is usually the situation of many of the children that appear in my courtroom. The majority of juveniles have not been taught to do better nor have not seen what better looks like. As a parent and a Judge, I often find myself "parenting from the bench."

I can still remember my grandmother teaching me my "times tables." She also taught me how to tie my shoes. In other words, she took the time to invest in me. Fortunately, my two brothers and I had both of

our parents in the home. However, our parents worked full-time and my grandmother took care of us after school. My grandmother was also a great positive influence in our lives. Where are these types of parents and grandparents today?

The parents' outlook and their parenting skills are severely lacking. This is usually because they may not have received knowledge or examples of healthy and positive parenting skills. I instruct the children, their parents, grandparents and/or guardians in regard to legal and family matters. I often spend time reprimanding the parent as well as the child. This is why I mentioned my grandmother, because in the absence of my parents, my grandmother would definitely provide structure and discipline. This is also why, on many occasions, I find myself "parenting from the bench."

During the summer months, our mother taught us how to use an encyclopedia and she provided us with educational resources to help prepare us for the next school year. Of course, the children of today are not

*(continued on next page)*

“This type of parental support and heritage is missing from many families.”

aware of what an encyclopedia is or was. Encyclopedias are no longer necessary or useful. When my wife and I had children, we also provided our daughters with some form of educational workbooks during the summer months. We would purchase math and reading books in order to prepare them for the upcoming school year. We utilized the parenting skills that we learned and inherited from our parents. Therefore, we make our children accountable and train them on the importance of following instructions, education and discipline (i.e., correcting bad behavior).

This type of parental support and heritage is missing from many families. As parents, we are to provide our children with the skills and tools to enable them to become productive citizens.

Education in the home helps to form the future of the man/woman throughout his/her lifetime. We must cease sacrificing our children on the altar of selfishness. We must start by giving our children a greater chance of success by exposing them to greater opportunities (i.e., the arts, higher education opportunities), simply put, exposure. As parents, and even as that proverbial “village,” our children need to have exposure to positive influences inside and outside of the home. Extracurricular activities are a good source of physical, mental and social development.

The children of this generation, are literally being **sacrificed** daily on the altar of selfishness. When you have children, it is no longer just about you, it is about their welfare. Everything you do now as a parent or guardian, is about their wellbeing and in their best interest.

As a parent or guardian, we need to train up our children. In the military, the officers are responsible for training the incoming soldiers. In the same way, parents are to train their children to help shape, mold and develop them into responsible adults. Parental training should help children to develop an ambition for making good decisions that will have a positive impact on their

lives. Effective parenting skills emphasizes a balance of instruction and discipline. Our children need a parent/guardian who will have a balance of love and respect. This combination should involve instruction and discipline. As a Judge, I must demonstrate that same love from the bench, this is a balance of instruction and discipline, or to put it another way, a balance between mercy and justice. Our children need instruction, but we must be careful not to be overly permissive. Discipline is a must, but we mustn't be overly authoritarian as not to “provoke” our children to rebellion. That is my goal, to have that balance every day with every individual case. I seek to have balance, Mercy vs. Justice and Instruction vs. Discipline.

I come across children who have continued to defy the odds and overcome unfortunate events. I am encouraged when a child comes to court who has turned their situation and their life around. If I can say one word or make a decision that inspires them to make wiser choices, I am hopeful. It's my heart's desire to make a difference in their situation that will result in them choosing to become a better person. I intend to be the person that helps them to make a decision to turn their situation and their life around. To let them know that they can do better and become an adult who brings about change within their home, school and community. If that happens, I know that I am part of the solution.

(Endnotes)

1. Judge Derrick John Morrison has worked as an Assistant Public Defender for over Nineteen (19) years. Fifteen (15) of those years were spent handling Juvenile cases. He was a Facilitator with the International Association of Chiefs of Police (IACP) in collaboration with the U.S. Department of Justice (DOJ), Office of Justice Programs, and Office of Juvenile Justice and Delinquency Prevention (OJJDP). He assisted in the education of law enforcement and others on pertinent juvenile justice issues. He now serves as Associate Judge of the 305th District Court conducting Juvenile Delinquency and CPS hearings.

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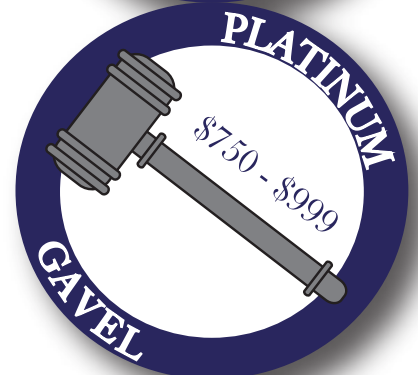


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