

The background of the cover is a photograph of a field of white daisies with yellow centers, set against a warm, golden sunset sky. The sun is low on the horizon, creating a soft, hazy glow. The daisies are in various stages of bloom, with some fully open and others as buds. The overall mood is peaceful and serene.

# In Chambers

The Official Publication of the

Texas Center for the Judiciary

Summer 2022

**The Future of  
Court Technology**

**Understanding  
GeoFence Warrants**

**Using Visual Media in  
Appellate Decisions**

**TCJ Board Nomination Slate**

**Letter from the CEO**

**Judicial Section Board Nomination Slate**

# contents

## Newsworthy

<i>Letter from the CEO</i>	6
<i>Judicial Section Nomination Slate</i>	13
<i>TCJ Board Nomination Slate</i>	28
<i>Contributors</i>	36
<i>New Judges</i>	38
<i>In Memory</i>	39
<i>Upcoming Events</i>	BC



TEXAS CENTER  
FOR THE JUDICIARY

### ***In Chambers***

*The official publication of the Texas Center for the Judiciary*

*The content and opinions included in the articles submitted for our publication are the work and opinions of the author(s) and do not necessarily reflect the position or opinions of the Texas Center for the Judiciary, Inc.*

# features



## The Dinosaurs' Perspective on the Meteor Strike: The Future of Court Technology

*Hon. Roy Ferguson*



## Going Loco Over Location Data: Understanding GeoFence Warrants

*Hon. Jefferson Moore*



## Click, Click, Boom: Things to Think About When Using Visual Media in Appellate Decisions

*Hon. David Newell*

### Summer 2022

This is 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 Steve Geiser via email at [steveg@yourhonor.com](mailto:steveg@yourhonor.com). Articles subject to editing for clarity or space availability. The Texas Center for the Judiciary is located at 1210 San Antonio Street, Suite 800, Austin, TX 78701.

# Contributors



**Mark D. Atkinson**  
*Chief Executive Officer*  
Texas Center for the  
Judiciary

Judge Mark D. Atkinson took the bench in 1987 and served 24 years as a judge in a Harris County, Texas, criminal court. After six terms of office he retired and was named Judicial Resource Liaison under the Texas Center for the Judiciary's Texas Department of Transportation Traffic Safety Grant Program. He served two years in that capacity before being named Executive Director (now Chief Executive Officer) of the Texas Center for the Judiciary. He has been active in state and national judicial leadership and education, serving as Chair of the Texas Section of the State Bar of Texas. Judge Atkinson was first licensed to practice law in 1980, and for seven years developed a practice focused on criminal, family, and civil trial law. He earned his BA from the University of Texas at Austin and his law degree from South Texas College of Law Houston. Judge Atkinson has received recognition and awards, including the National Association of Probation Executives George M. Keiser Excellence in Leadership Award, the Texas Center for the Judiciary's Judicial Excellence in Education Award, the Texas Center for the Judiciary Chair's Award of Excellence, the Houston Police Officers Association's Judge of the Year Award, the Houston Council on Alcoholism and Drug Abuse

Award, the Mexican-American Bar Association of Houston's Amicus Award and the League of United Latin American Citizens' Certificate of Recognition. He also was elected to serve as the president of the Texas Association of County Court at Law Judges. Judge Atkinson is married to Vicki Atkinson. They have raised four sons together.



**Roy Ferguson**  
*Judge*  
394th District Court

Judge Roy Ferguson presides over the 394th District Court - the largest judicial district in Texas. Comprised of Brewster, Culberson, Hudspeth, Jeff Davis, and Presidio Counties, it covers roughly 20,000 square miles of Far West Texas, and includes over 20% of the US-Mexico Border. Ferguson was first elected to the position in 2012, and reelected in 2016 and 2020. Ferguson is an avid proponent of equal access to justice for all Texans, and a frequent educational speaker to lawyers and judges around the world for the National Judicial College, TexasBarCLE, the Texas Center for the Judiciary, the ABA, and ABOTA. An early adopter of technological innovation, Judge Ferguson has conducted over 3,000 virtual hearings including numerous virtual jury proceedings during the pandemic. Judge Ferguson currently serves on the governing boards of the Family Law and Computer & Technology Sections, and previously served on the GPSOLO

and Judicial Sections, Uniform Case Management System Study Group, Judicial Needs Assessment Committee, Remote Proceedings Task Force and Judicial Council Civil Justice Committee's Advisory Council. He is a member of the Texas Supreme Court's Judicial Committee on Information Technology, and a Commissioner on the Texas Children's Commission. He is a sustaining Life Fellow of the Texas Bar Foundation, a member of the Texas Bar College, and a member of the Champions of Justice Society. Ferguson earned his BS in Civil Engineering from the University of Texas at Arlington in 1992, and JD from St. Mary's University School of Law in 1994. He is extremely active on social media, primarily on Twitter (@judgefergusonTX) and YouTube, which he uses to educate the public about the justice system in an uplifting and entertaining way. And yes, this Judge Ferguson is that Judge Ferguson - from the viral LawyerCat video.



**Jefferson Moore**  
*Judge*  
186th District Court

Judge Jefferson Moore presides in the 186th District Court in Bexar County (San Antonio). Starting his legal career as an assistant district attorney in New Orleans, he transitioned to the US Army as a JAG officer a few years later. While in the Army, he worked in Germany, Korea and Egypt. He served as a military magistrate, Deputy Chief for International Law in Europe and Africa, and Chief

for legal centers both in Germany and in the US. The State Bar of Texas awarded him the Military Attorney of the Year award and the American Bar Association presented its worldwide Legal Assistance award to him as well. He is a graduate of the US Army Airborne School (paratrooper) and the US Army Air Assault School. While in private practice for over a decade, the State Bar of Texas appointed him to the Lawyer Grievance Committee for Region 10. He has tried over 150 cases as a lawyer and over 80 (and counting) as a district judge. He is blessed to be married to the former Aida Rojas and lives in San Antonio where they enjoy dining, cooking, traveling, and outdoor activities. An avid reader, he is still trying to learn piano, guitar and Spanish.



**David Newell**  
*Judge*  
Texas Court of Criminal  
Appeals

Judge David Newell was elected to the Texas Court of Criminal Appeals on November 4, 2014. Judge Newell earned his undergraduate degree in English with a concentration in Creative Writing at the University of Houston. He graduated *magna cum laude*, earning university honors and honors in his major. He received his JD from the University of Texas School of Law in 1997, before returning home to work in the Fort Bend County District Attorney's Office. He served as an appellate prosecutor for 16 years, first in Fort Bend

# Staff

**CHIEF EXECUTIVE OFFICER**  
*Judge Mark D. Atkinson*

**CONFERENCE DIRECTOR**  
*Gail Bell*

**TXDOT PROGRAM DIRECTOR**  
*Holly Doran*

**ONLINE EDUCATION MANAGER**  
*Steve Geiser*

**CURRICULUM DIRECTOR**  
*Courtney Gilason, JD*

**REGISTRAR**  
*Aaron Gutierrez*

**EXECUTIVE ASSISTANT**  
*Shirley Irvin*

**DIRECTOR OF FINANCE**  
*Bruce Lawrence*

**SENIOR ACCOUNTANT**  
*Debra Malkiewicz*

**OFFICE ADMINISTRATOR**  
*Abbi Mooreland*

**JUDICIAL RESOURCE LIAISON**  
*Judge Laura Weiser*



County and later in the Harris County District Attorney's Office from 2007 until his election to the Court. Judge Newell has twice served as the Chairman of the Editorial Board for the Texas District and County Attorney's bi-monthly journal, *The Texas Prosecutor*. He also co-authored a regular byline for the journal, "As the Judges Saw It," a column that analyzed and summarized the significant decisions of the Court of Criminal Appeals and the United States Supreme Court. He served repeatedly on the planning committee for the Advanced Criminal Law Course for the State Bar of Texas. And he has presented the Court of Criminal Appeals Update at the Texas Conference on Criminal Appeals, the TDCAA Criminal and Civil Law Update, and the Texas State Bar's Advanced Criminal Law Course. Judge Newell is board certified by the Texas Board of Legal Specialization in both criminal law and criminal appellate law.

He currently serves on the Criminal Appellate Specialization Exam Committee for the Texas Board of Legal Specialization. He is also the co-course director for the Annual Robert Dawson Conference on Criminal Appeals. And he serves as the chair of the Court of Criminal Appeals Rules Advisory Committee. He is also licensed by the State Bar of Texas and admitted to practice before the Fifth Circuit Court of Appeals and the United States Supreme Court. In 2013, Judge Newell received the C. Chris Marshall Award for Distinguished Faculty from the Texas District and County Attorneys' Association. He and his beautiful wife, Shayne, currently live in the Houston area with their two sons.



## Letter from the CEO

Together again. Thankfully, that's how the members of the Texas Center for the Judiciary find themselves as 2022 proceeds. Our educational conferences are full, both in hotel meeting room and sleeping room capacity. The two Spring Regional Conferences together totaled more than 600 attendees. We've seen this circumstance in both our judicial and court personnel conference attendance.

A major change in our operation over the past year was the expansion of our online programming. No doubt, the pandemic forced us into unprecedented use of virtual education. As we began to return to in-person conferences, however, the decision was made to continue online education development and delivery, not to supplant in-person learning, but to add to it.

Our primary funder, the Court of Criminal Appeals, has graciously allowed us to continue using grant funds to use and pay for our

Learning Management System (LMS), Brightspace. We've added a new Online Education Manager (Steve Geiser) to our team, and now produce and maintain for later viewing an ever-increasing number of webinars, some delivered live, as lunchtime learning, and some simply recorded for storing on our LMS library. We are producing these webinars at a brisk pace, some for judges and others for court personnel. All of these are recorded and made accessible for a period of one year from the date of recording.

I don't know if TCJ would ever have achieved this dual, in-person and online, blend of educational products but for our being "forced" into it by the events of the past two years.

Please enjoy the excellent articles in this issue of In Chambers, and we hope to see you all in person as soon as possible.





# The Dinosaurs' Perspective on the Meteor Strike: The Future of Court Technology

**Roy Ferguson**  
*JUDGE*  
394th District Court



Evolution is a gradual, almost imperceptible process, spanning millennia. Well, sometimes it is. Other times it is abrupt and painful, as with the shift to remote court proceedings in Texas. When the Texas Supreme Court locked our courthouses in March 2020, we were forced to evolve overnight. It was a metaphorical meteor strike, at least from the dinosaurs' perspective. We hurriedly implemented emergency changes to the justice system, which we hoped would last only thirty days. Little did we know they would last thirty months, or perhaps thirty years. But in that time, we glimpsed what our system could become, with creative implementation of new technologies. And as we now move into the post-pandemic world, we must use what we learned to make that vision a reality.

During the lockdown, my court coordinator worked from home, caring for and home-schooling her children while coordinating daily Zoom dockets for five counties. It was a Herculean task, and as the pandemic stretched out,

INSERT TEMPLATE

- Nunc Pro Tunc
- Order of Assignment
- Civil Scheduling Orders
- Attorney's Fees
- 2 Affidavit of Indigence and ...
- Expedited Action Civil Sched...
- Attorney Fee Voucher
- Attached
- Affidavit of Indigence and Re...
- Search Warrant Affidavits
- Temporary Restraining Orders
- Lawyer Referrals

Figure 1

it became untenable. She simply couldn't do it all—at least not “the way it's always been done.” Rather than shut down and wait it out, we sought creative alternatives. We set four short- and long-term goals:

1. Improve efficiency by automating repetitive, routine, or formulaic tasks
2. Save time by decreasing failures to appear
3. Streamline remote proceedings by eliminating common Zoom problems
4. Minimize courthouse crowding for jury trials

And we had to do it at little or no net cost, to avoid bureaucratic entanglements.

In the first category, we identified three major areas of inefficiency: answering e-mails, handling applications for court-appointed counsel, and generating forms and orders. Courts receive hundreds of emails a day.

Most fall into only a handful of categories, seeking identical information with little need for personalization. We streamlined this process using email templates and filters.

Gmail permits up to 50 custom templates in a drop-down menu; most email systems have a similar feature. (Figure 1) They can be manually selected or automatically transmitted using the filter feature. For example, in two seconds with two clicks we can reply to an email requesting the court's civil scheduling order form. Or even better, the filter feature can scan the email, identify the information sought, and send it automatically.

Next, we eliminated roughly seven hours per week of administrative time by automating the appointment of court-appointed criminal counsel. Previously, applications were hand-written on a printed form, scanned or faxed to our office by a jailer, printed, sent to me for review, and either granted or denied by written order, which was given back to the coordinator, scanned, and emailed to the appointed lawyer. This process took an average of 6.7 days from arrest to appointment of counsel. So inefficient! Now—fully automated—it takes less than half a day. Here's how it works. Magistrates log on our online Portal during magistration, and input information about each arrestee. That data drops into a searchable spreadsheet, building a real-time list of every person entering the jail, including their email address and cell phone number. (Figures 2 & 3)

The form contains the following fields and options:

- Your Name | Su Nombre \*
- Birth Date | Fecha de nacimiento \* (mm/dd/yyyy)
- Your E-mail Address | Su correo electrónico
- Are you currently in jail? | ¿Se encuentra actualmente en la cárcel? \*
  - Yes | Sí
  - No | No
- Where did the events of which you are accused happen? | ¿En dónde ocurrieron los eventos por causa de los cuales usted fue acusado? \*
  - Brewster County
  - Culberson County
  - Hudspeth County
  - Jeff Davis County
  - Presidio County
  - Other | Otro
- What is your cell phone number? | ¿Cuál es el número de su celular? \*

Figure 2

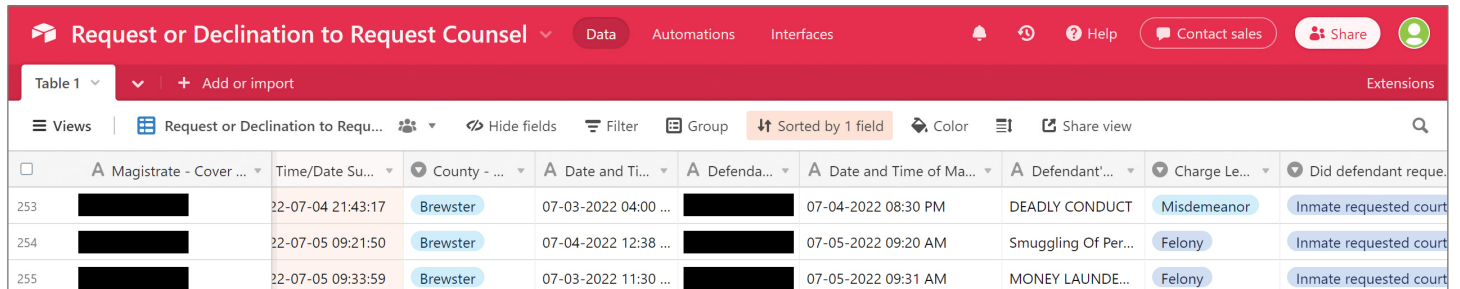
The form is titled "MAGISTRATE'S PORTAL - Certification of Inmate's Right to Request Court-Appointed Counsel at Magistration" and includes the following fields:

- Magistrate's Name \*
- County of Arrest \*
  - Brewster
  - Culberson
  - Hudspeth
  - Presidio
  - Jeff Davis
- Date of Arrest \* (MM-DD-YYYY)
- Time of Arrest \* (HH:MM) PM
- Today's Date (Date of Magistration) \* (MM-DD-YYYY)
- Time of Magistration \* (HH:MM) PM

Figure 3

## The Dinosaurs' Perspective on the Meteor Strike: The Future of Court Technology

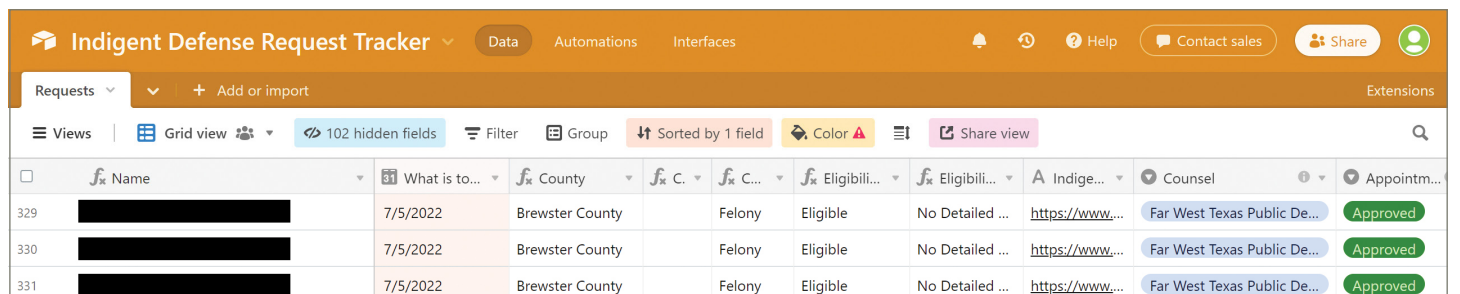
If the person wishes to apply for court-appointed counsel, they do so on the Portal *right then*. The online application is in both English and Spanish, and satisfies the mandates of the TIDC. A spreadsheet automatically applies the court's indigency formula to the provided financial data and instantly determines eligibility for court appointed counsel. (Figures 4 & 5).



	Magistrate - Cover ...	Time/Date Su...	County - ...	Date and Ti...	Defenda...	Date and Time of Ma...	Defendant'...	Charge Le...	Did defendant reque...
253	[REDACTED]	22-07-04 21:43:17	Brewster	07-03-2022 04:00 ...	[REDACTED]	07-04-2022 08:30 PM	DEADLY CONDUCT	Misdemeanor	Inmate requested court
254	[REDACTED]	22-07-05 09:21:50	Brewster	07-04-2022 12:38 ...	[REDACTED]	07-05-2022 09:20 AM	Smuggling Of Per...	Felony	Inmate requested court
255	[REDACTED]	22-07-05 09:33:59	Brewster	07-03-2022 11:30 ...	[REDACTED]	07-05-2022 09:31 AM	MONEY LAUNDE...	Felony	Inmate requested court

Figure 4

The magistrate and arrestee are immediately notified of qualification status, and if approved, an order of appointment is generated and emailed to the PDO (or next attorney on the appointment wheel). All in the blink of an eye, 24 hours a day—without our lifting a finger.



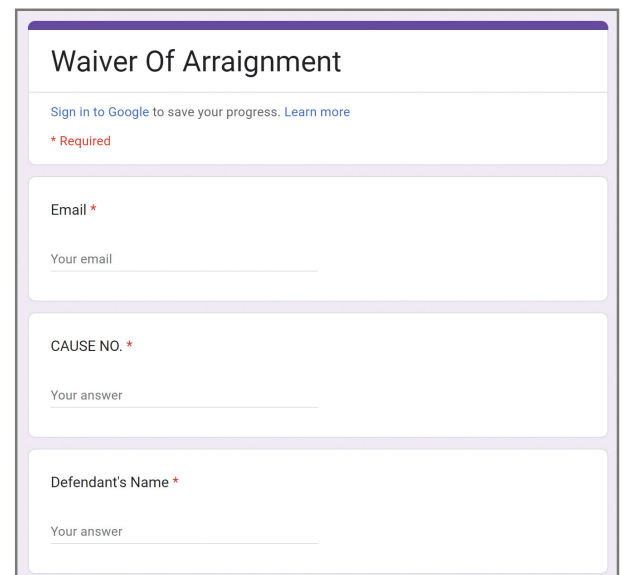
	Name	What is to...	County	C.	C...	Eligibili...	Eligibili...	Indige...	Counsel	Appointm...
329	[REDACTED]	7/5/2022	Brewster County		Felony	Eligible	No Detailed ...	<a href="https://www...">https://www...</a>	Far West Texas Public De...	Approved
330	[REDACTED]	7/5/2022	Brewster County		Felony	Eligible	No Detailed ...	<a href="https://www...">https://www...</a>	Far West Texas Public De...	Approved
331	[REDACTED]	7/5/2022	Brewster County		Felony	Eligible	No Detailed ...	<a href="https://www...">https://www...</a>	Far West Texas Public De...	Approved

Figure 5

Finally, we automated form-generation. For example, criminal defense lawyers typically submit a Waiver of Arraignment, from which we draft a scheduling order. Manually processing these written forms for the roughly 600 felony indictments per year across the district required a significant amount of administrative time and effort.

Instead, lawyers log on to the court's website and complete an online waiver questionnaire (Figure 6). Upon submission, the system automatically generates a written Waiver of Arraignment form (Figure 7) and a Scheduling Order, and e-files it. The same can be done for any standard orders—dismissals, nonsuits, and orders setting hearing—depending on your needs. This process saves countless hours for attorneys and court staff, decreases supply costs, and eliminates filing errors.

Failures to appear generate several hours per week of administrative processing in our courts, by clogging dockets and triggering resets, roll-overs, default judgments, bond forfeitures, NISI warrants, DWOP notices, and dismissals. We discovered that most no-shows were inadvertent, or due to breakdowns in communication.



**Waiver Of Arraignment**

[Sign in to Google to save your progress. Learn more](#)

\* Required

**Email \***  
Your email

**CAUSE NO. \***  
Your answer

**Defendant's Name \***  
Your answer

Figure 6

CAUSE NO. \_\_\_\_\_

STATE OF TEXAS                    §     IN THE DISTRICT COURT  
v.    §     394<sup>TH</sup> JUDICIAL DISTRICT  
    §     \_\_\_\_\_ COUNTY, TEXAS

**WAIVER OF ARRAIGNMENT**

Defendant, \_\_\_\_\_, joined by Defendant's attorney of record, hereby waives formal arraignment, and states the following:

1. I know that I have the right to be formally arraigned in open court. I waive that right for all purposes.
2. I know that I have been charged by Indictment with a felony offense.
3. I reviewed the Indictment with my attorney, and I understand the charges against me.
4. I waive formal reading of the Indictment on the record by the State.
5. I am the person identified as Defendant in the Indictment.
6. My name: [MARK ONLY ONE]
  - is CORRECTLY SPELLED on the Indictment; OR
  - is INCORRECTLY SPELLED on the Indictment. My correct legal name is \_\_\_\_\_ . I authorize the Court to correct my name on the Indictment, and I agree that this case should proceed as if my name were correctly spelled at the time the Indictment was issued.
7. I hereby enter a plea of (circle only one) [NOT GUILTY / NO CONTEST / GUILTY] to the charges against me.
8. I ask the Court to accept this waiver in lieu of formal arraignment, and to waive my appearance at the arraignment hearing.

Figure 7

Our dockets were still sent by snail mail, even though emails and texts are far more effective, because we didn't have litigants' digital contact information. The Magistrate's Portal eliminated that issue for criminal defendants, and a quick modification to the clerk's civil intake forms fixed it for self-represented litigants.

Using that information, we can now automatically send email and text reminders to all SRLs and criminal defendants, describing the penalties for failure to appear and providing the Zoom link for remote hearings. The time spent sending those messages is greatly outweighed by the time saved for court staff. And because more people appear as summoned, cases are resolved quicker, saving time and cutting backlog.

Much has been written about the positive impact of remote proceedings on court efficiency and access to justice. And it's true. But it's not all puppies and rainbows. A recent NCSC study found that remote hearings during 2021 took 34% longer than similar in-person hearings, due largely to technical issues.<sup>1</sup> We identified three common causes of delay in our virtual hearings:

1. Unidentified participants ("iPhone," "GalaxyS," or "BabyDaddy420")
2. Difficulty associating waiting room occupants with particular cases
3. Confusion over Zoom codes.

These problems were eliminated by zConnect, a free add-on for Zoom.

zConnect provides a uniform website interface for Zoom hearings. Although the Zoom code changes periodically, the website address used by participants remains the same, so no one ever inputs the wrong code. At their scheduled time, participants load the court's zConnect website and register for their hearing by name, cause number, and role (i.e. plaintiff, attorney for defendant, CASA, witness, GAL, or court staff). They are then automatically moved into the waiting room. Courts click each cause number in turn, which automatically admits all participants associated with the case and moves others out. Eliminating these three problems yielded a streamlined and efficient remote docket. Our remote hearings are now much shorter—not 34% longer—than similar pre-pandemic in-person proceedings.

COVID-19 has killed more than one million people in the United States, including more than 86,000 Texans.<sup>2</sup> Pre-pandemic, roughly 1% of Texans entered a courthouse every day. While remote proceedings limited the risk of exposure for certain hearings, jury trials are a different breed of cat. Most lawyers and judges oppose fully remote jury trials. But in-person jury trials bring hundreds of people together in enclosed spaces—many of whom don't actually need to be there at all—and put them all at risk.

**394th Judicial District Court - Registration**

To be part of the virtual hearing please register with your information

First Name

Last Name

Role

Figure 8

# The Dinosaurs' Perspective on the Meteor Strike: The Future of Court Technology

IF UNDELIVERABLE, RETURN TO:  
FLOR ZUBIA, DISTRICT CLERK  
P. O. BOX 789  
MARFA, TX 79843

**JURY SUMMONS**  
SAVE THIS FORM AND KEEP IT IN A SAFE PLACE.

**JUROR NO.:**

[REDACTED]

POSTMASTER DELIVER TO:

Dear Prospective Juror:  
You are hereby summoned  
for jury service at:

TIME : 9:00 A.M.  
DATE: August 1, 2022  
PLACE: 394<sup>th</sup> DISTRICT COURT  
<http://www.Texas394th.com>

YOU MUST ANSWER THIS JURY SUMMONS **ONLINE**, BY JULY 26, 2022, AT:  
<http://www.Texas394th.com>

When prompted, enter the following password: 082234078

Si no puede hablar, leer o escribir en Inglés, llame al 432-729-8178.

You are required to check-in online if you are able. If you do not have Internet access or experience technical difficulties, you must immediately contact the Court Coordinator at 432-729-8178. Failure to timely complete the Jury Questionnaire will constitute failure to answer your jury summons, and result in a fine of up to \$500. [Tex.Code Crim.Proc. 19A.054]

Figure 9

As we emerge from the pandemic, we are searching for the “new normal.” It’s time to rethink “the way it’s always been done.” Fear of the unknown must give way to the desire to advance. We can no longer deny that we need to move forward, and that the system will be better for it. These are just some of the changes we’ve made, tailored to our needs. And while your specific needs may differ, one thing is true for us all: We must evolve.

1. Final Report, National Center for State Courts, The Use of Remote Hearings in Texas State Courts: The Impact on Judicial Workload (Dec. 2021), [https://www.ncsc.org/\\_media/ncsc/files/pdf/newsroom/TX-Remote-Hearing-Assessment-Report.pdf](https://www.ncsc.org/_media/ncsc/files/pdf/newsroom/TX-Remote-Hearing-Assessment-Report.pdf)
2. <https://coronavirus.jhu.edu/>

In my area, roughly one-third of people who show up for jury duty are either not qualified or exempt. We realized that excusing them ahead of time would dramatically decrease population density in the courthouse. So, we moved jury check-in *online*. Potential jurors are no longer summoned to the courthouse. They are directed to our website, to complete an online jury questionnaire. (Image #) This can be done on their smart phones, in minutes. The system automatically emails all respondents, releasing disqualified, exempt, and COVID19-susceptible people from their summons, and directing the rest to appear at the courthouse for trial. This process dramatically decreases the number of attendees and shaves an hour off the jury selection process. As a result, our juries are usually now seated before lunch, and state’s evidence commences that afternoon rather than the next day. And we were surprised to find that online jury check-in doubled our response rates and resulted in more diverse panels in both age and ethnicity. The lawyers and jurors love it.

# Judicial Section Nomination Slate



**Brett Busby**  
*JUSTICE | SUPREME COURT  
OF TEXAS*  
Austin, TX

Brett Busby was appointed to the Court by Governor Greg Abbott in February 2019, confirmed unanimously by the Texas Senate, and elected to a full term in November 2020. An experienced appellate litigator, Justice Busby was a partner at the Bracewell firm in Houston and served on the Fourteenth Court of Appeals for six years before joining the Supreme Court. Justice Busby is a seventh-generation Texan, third-generation Eagle Scout, and life-long violinist who grew up in Amarillo and Austin. After graduating with high honors from Duke University and Columbia Law School, he served as a law clerk to Justices Byron R. White (Ret.) and John Paul Stevens, U.S. Supreme Court, and to Judge Gerald Bard Tjoflat, U.S. Court of Appeals, Eleventh Circuit. While in private practice, Super Lawyers Magazine named him one of the top 100 lawyers in Texas in 2012, and Chambers and

Partners recognized him as a leading Texas appellate lawyer. He is Board Certified in Civil Appellate Law and is a former adjunct professor at the University of Texas Law School, where he helped teach the U.S. Supreme Court Litigation Clinic. Justice Busby is dedicated to improving the justice system and the legal profession. In 2018, his fellow Texas appellate lawyers elected him as Chair of the State Bar of Texas Appellate Section, and the Texas Association of Civil Trial and Appellate Specialists named him their Appellate Judge of the Year. He is the Court's liaison to the Texas Access to Justice Commission and Foundation, which help assure that Texans with limited means have access to basic civil legal services. Justice Busby and his wife, Erin, met as clerks at the U.S. Supreme Court. They have two children.



**Kirsten B. Cohoon**  
*JUDGE | 451ST DISTRICT  
COURT*  
Boerne, Texas

Judge Kirsten B. Cohoon is the first elected District Judge for Kendall County's 451st Judicial District Court. She previously served her community as its first City Attorney for the City of Boerne where she twice earned the accolade of the State's best solo General Counsel; once in 2013 and again in 2016. She also served as a litigator for the international law firm of Bracewell, LLP. Since Judge Cohoon returned to Kendall County, the area her great-great grandparents (Friedrich and Charlotte Haag) helped to found, she and her husband, Patrick Cohoon, actively serve their community. She created and implemented both the 9/11 Wills for Heroes program and Boerne Lemonade Day. Her husband, also a lawyer, serves as a small business owner, Volunteer Firefighter for the Boerne Fire Department, City of Boerne Planning and Zoning Committee Member and past Chairman of the Boerne Chamber of Commerce. Judge Cohoon continued operating the 451st Judicial District Court during the global pandemic and has consistently been recognized for clearance rates of over 100% in her civil, family, criminal and juvenile dockets. She was the first in the judicial region to hold a jury trial upon re-opening and has tried in excess of 30 cases to a jury since the Court's reopening in August of 2020. Judge Cohoon is the proud mother of two – one in 12th grade and another in 10th. She is an avid runner having completed the Boston, New York, Big Sur, Chicago and numerous Houston Marathons. She has three labs – Dos, Drei, and Delta—who also love running in the Hill Country.

# Judicial Section Board Nomination Slate



**Timothy S. Linden**  
*JUDGE | HUNT COUNTY  
COURT AT LAW NO. 1*  
Greenville, Texas

Judge Timothy S. Linden is the Judge of the Hunt County Court at Law No. 1. He was elected in 2014 as Judge and was re-elected to a second term in 2018. Judge Linden will be unopposed on the November, 2022, ballot for a third term that will begin January 1, 2023. As Judge of one of the two Hunt County Courts at Law, he hears Class A and B misdemeanors, Class C and other appeals from Hunt County Justice of the Peace Courts, mental health commitments filed by the County Attorney, protective orders filed by the County Attorney, all juvenile criminal matters, probate and guardianship cases in the county, and civil matters with the amount in controversy under \$200,000. Judge Linden serves as Chairman of the Juvenile Board of Hunt County. Before taking the bench, Judge Linden was a partner in the law firm of Linden and Willeford for ten years. Prior to that he was a felony prosecutor for the 8th Judicial District Attorney Office for ten years where he was Senior Felony

Prosecutor for eight years. Judge Linden attended Texas Tech School of Law where he graduated with a doctorate in juris prudence in 1994. He attended East Texas State University in Commerce, Texas, where he received a Bachelor of Arts in Political Science. Judge Linden currently lives in Greenville, Texas, with his wife, Sheila. Sheila is the current Justice of the Peace for Hunt County Precinct 1, Place 2 who is currently unopposed for her fourth term. They have two sons: Jacob, 19, who is a Sophomore at the University of North Texas and Jason, 17, who is a senior at Greenville High School.



**Rebeca C. Martinez**  
*CHIEF JUSTICE | 4TH  
COURT OF APPEALS*  
San Antonio, Texas

Chief Justice Rebeca C. Martinez is the proud daughter of a Vietnam War Veteran and his wife of over 60 years. She was raised on military bases all around the country for most of her childhood. She graduated high school with honors from Incarnate Word Academy in Corpus Christi, Texas, as a University Scholar

with dual degrees from Southern Methodist University in Dallas and was the recipient of the prestigious Faculty Award from Boston University School of Law in Boston, Massachusetts where she currently serves on the Dean's Advisory Board. Chief Justice Martinez clerked at Mintz, Levin Cohn, Ferris, Glovsky and Popeo in Boston, MA, and served with U.S. Magistrate Judge Eduardo de Ases in the Southern District of Texas, and later with Justice Federico G. Hinojosa on the Texas 13th Court of Appeals. She enjoyed a 20-year litigation practice, first with two prestigious law firms, then as President of her own law practice, handling complex multi-party litigation in federal and state courts across Texas. In 2012, she was elected to the Texas Fourth Court of Appeals, reelected in 2018, and elected Chief Justice in 2020. The 4th Court of Appeals is currently the only all-female appellate court in the country, where six of the seven-member court are women of color. Among numerous positions held at the local, state and national level, Chief Justice Martinez has served on the Board of Directors for the Texas Young Lawyers Association, the State Bar of Texas, and the National Association of Women Judges. She has served on the Curriculum Committee of the Texas Center for the Judiciary and has served as author and speaker at numerous CLEs. She currently serves on the SBOT Judicial Section, the Pattern Jury Charge Subcommittee, as Latina Commissioner of the Hispanic National Bar Association, and on the Advisory Board of the University of Texas - LBJ School of Public Policy's Women Campaign School and the Purple Campaign. She is a past recipient of "Judge of the Year" by the State Bar of Texas Hispanic Issues Section. Chief Justice Martinez lives in San Antonio, Texas with her husband and family.

# Judicial Section Board Nomination Slate



**Bert Richardson**  
*JUDGE | TEXAS COURT OF  
CRIMINAL APPEALS*  
Austin, TX

Judge Bert Richardson was elected to the Texas Court of Criminal Appeals in 2014, and he began his term on January 1, 2015. He was reelected in 2020. He was a trial and appellate lawyer while serving as an Assistant District Attorney for Bexar County and as an Assistant U. S. Attorney for the Western District of Texas. He was appointed to the 379th District Court of Bexar County in 1999 by Gov. Bush. From 2009-2014, he served as a Senior Visiting Judge in over 50 counties across the State. He was an adjunct professor at San Antonio College, St. Mary's University School of Law for over 20 years prior to being elected to the TCCA, was previously the Court liaison to the State Bar and is a frequent speaker at State Bar conferences across the State. He is a graduate of Brigham Young University and St. Mary's University School of Law, and he is Board Certified in Criminal Law. St. Mary's School of Law named him a Distinguished Law Graduate in 2015 and in 2022 he was the recipient of their annual Rosewood

Gavel Award awarded to an outstanding St. Mary's judge for their contribution to our system of constitutional democracy. An avid photographer, he was an assistant photo editor of his university yearbook and is a frequently published in state and national running publications, as well as the State Bar Journal and other legal publications. He was raised in a military family, has lived in Europe and South America for 10 years and is fluent in Spanish.



**David Sanchez**  
*JUDGE | 444TH DISTRICT  
COURT*  
Brownsville, Texas

David Sanchez has served as Judge of the 444th State District Court in Cameron County, Texas for over 14 years. The 444th District Court is a general jurisdiction court with a docket that is primarily comprised of family law matters. Judge Sanchez finds his work very rewarding as he helps divorcing families in custody issues associated with divorce.

He has resolved thousands of cases since taking the bench. Judge Sanchez earned a Bachelor of Arts Degree from St. Mary's University. He then attended the University of Texas School Of Law. The first area of practice for him was in the area of worker's compensation litigation. He simultaneously enrolled at St. Mary's University and completed a Masters in Business Administration degree while practicing law during the day. Part of his legal career included working as an assistant District Attorney in both Cameron and Bexar County. Judge Sanchez has also worked in the area of civil litigation including products liability, trucking litigation and medical malpractice. In January 2014, Judge Sanchez helped create the Cameron County Veterans Court, which he also presides over. He finds his role presiding over the Veterans Court as one of the most rewarding components of his role as Judge. Judge Sanchez served on the Texas Center for the Judiciary's Curriculum Committee from 2010-2012, Board of Directors from 2012-2015, then as Chair in 2016-2017. He currently serves on the Board of Directors for the Judicial Section of the State Bar of Texas.

# Going Loco Over Location Data: Understanding GeoFence Warrants

**Jefferson Moore**  
*JUDGE*  
186th District Court



**Meet SensorVault! Google's 100 million device database with over ten years of data and counting...**

**E**ver wonder how Google Maps knows that a traffic jam is up ahead? If you have ever used the Google Map app to scout out a route for travel or for your daily commute, you have seen where Google marks heavy traffic areas in red along your route. How does Google know this information? It uses the cell signals of its Android devices to calculate the number of automobiles on the roadways giving you an insight for upcoming traffic.

And it is not only Android devices that assist Google's traffic jam crystal ball. Google based apps that are downloaded on any mobile smart device (iPhone, Nokia, Motorola, Samsung and a few others) report back to Google the real time location data for the device. Google adds this information to SensorVault as well.

Starting in 2009, SensorVault began storing millions of digital records for cellular devices, either Android phones or other phones with a Google based app downloaded on them. Snap a photo using an Android phone? The location of your photo is likely in SensorVault. Use Google on your iPhone to search for the name of the band that plays your favorite song? Your Google search history is in SensorVault and so is your location when you accessed Google for your search.

If you are using an Android phone, you are stuck in Google's information tentacles. If you are using a non-Android phone, you may be free from Google's all-encompassing information vacuum, but maybe not. If you think you can simply turn off the Google-based apps on your phone, think again. Once those apps are downloaded, they continue to report surreptitiously back to Google headquarters

feature

whether they are active or not on your phone. For instance, I have an iPhone, but I have my Gmail account linked to the phone so I can send and receive email on the go. The likelihood that Google will let that information boondoggle slip by is low. Even if I swipe the email app to close it, that does not mean I have disengaged the reporting aspect of the app. Welcome to the 21st Century digital surveillance frontier!

### Meet the Google App to Solve Cold Case Murders: Google's Location History

Well, not just murders that need to be solved, but any case that stumps law enforcement. Google's Location History service tracks Android users and Google based app users wherever they go. Ever take a frolic to the local ice cream store and then notice that Baskin-Robbins advertisements appear in your news articles? Google hawks to advertisers the ability to pinpoint ads to an exact market of consumers. They track where you have been and surmise your consumer tastes based on the stores you visit. They turn to advertisers and ask, "Wanna know precisely who to target for your ads? We have the data!" Of course, anytime you visit a website, Google tries to figure that out and sell that information to advertisers, but Google also lets the advertisers know what stores you have physically visited and sells that information as well.

But Location History is not a fancy name for GPS historical data. It is much more precise and robust than a GPS locator. Location History, or LH for short, is a subset of SensorVault that combines the data from GPS, Wifi connections, Bluetooth signals, and Cell Site Location Information (CLSI) to trace you. Google is on record that Google "pings" an LH user nearly 240 times a day.

As you move from one location to another your cell device is probing cell towers, digital networks, and even other cell phones seeking permission to connect. Even if you do not connect, the fact that your cell device

sought permission to connect to a specific tower or network is collected and stored in SensorVault. Google boasts that LH is accurate enough to detect what floor of a skyscraper you are visiting.

LH can potentially track you when you get out of bed in the morning and go to the kitchen (assuming you have your cell phone with you as most of us do). LH is using GPS signals on your map app, but LH also notes that you walked from one end of your house's WiFi network to the other end of the network based on the signal strength. If you connected to any WiFi boosters you placed in the house, LH likely has that tracked as well. Have a Bluetooth enabled device along your route to the kitchen like a television or your computer? Theoretically, LH can figure out that you passed by those appliances and can "see" you shuffling along to the coffee maker. This is all true if you have an Android cell phone, but, again, some of the Google based apps may be able to track you accurately as well, even if you are not an Android user.

As an aside from cell phones, if you have any smart home devices throughout your house to control your thermostat, lights, garage door, etc., those too know when you enter a room even if you do not give the device a command. Google's version is called Nest or Google Assistant and it likely dumps information to SensorVault as well. Amazon's Alexa and Apple's Siri are similar services/devices.

Along the way to work in the morning, LH is noting that you stopped at a certain gas station and can likely figure out if you went into the store to buy a cup of coffee for the road. How is that? If the store has a WiFi network, your phone may have tried to access it when you walked into the store. LH can be that precise. As with any system, there are exceptions and mistakes, but LH is not a simple GPS locator. It spots all the digital breadcrumbs you drop along your way to anywhere and everywhere.

## Going Loco Over Location Data: Understanding GeoFence Warrants

### Can a User Opt Out of Location History?

Significantly, it will become important to know that Google says the users must opt in to using LH and can opt out at any time. But the opt in screen pops up constantly if you use Google Maps app and it does not make very clear what you are providing to Google for free. I suspect that the average LH user does not realize the extent of LH. And if the LH user wants to opt out, Google smokescreens the opt out choice through a muddled and foggy series of steps. Google wends the user through seven steps before the user sees a screen with the opt out directions.

Think you can defeat Location History by turning off the app? Nope. Even deleting the app does not turn off Location History because LH is tied to your Google account and not to an app itself. Toss your cell phone away? Eh, Google tracks all your devices associated with your account. Your best bet is to delete any and all Google accounts you have. And remember, Google tracks the users of its other apps as well. Likely, most Google app users' have a murky understanding of the app's tracking abilities.

### Geofence Warrants

Of course, sooner than later, government law enforcement agencies began to knock on SensorVault's door with search warrants to seize this motherlode of digital clues to reconstruct who loitered at crime scenes. Called Geofence warrants, law enforcement constructs a digital fence around the crime scene using GPS data points to delineate the fence. It then asks Google to provide information on the cell users within the fenced area for a specific date and time.

This retroactive surveillance has been a boon for solving cold cases. It allows law enforcement to digitally peer into the crime scene at the time of the crime. The number of Geofence warrants from law enforcement to Google has skyrocketed 1500% from 2017 to 2018 and another 500% in 2018-2019.

You could view the law enforcement use of SensorVault's data as retroactive checkpoints. Essentially, law enforcement is stopping innocent people who happened to be in the Geofence area and inquiring who you are and what are you doing there. Checkpoints are not favored in America and the use of SensorVault raises a question of whether the use of SensorVault is a retroactive checkpoint.

Yet, in other ways, what is there not to like? The bad guys have nowhere to hide if they happened to have a Google enabled cell phone or app with them at the time of the crime. What could be bad about that? Plus, there is no actual stop of innocent people, just a review of their data. Let's delve a little more into how LH works and the procedures Google uses to process a Geofence Warrant to uncover the 4<sup>th</sup> Amendment issues that abound.

### How does LH Work?

As we know, LH is stored in SensorVault. But according to Google, the LH users have (alleged) control over their information, not Google. Google describes LH users information as a journal where the LH users can review, edit and delete their journal entries. Google contends that because the users have control, then LH is not a Google business record. It is the personal journal of the LH user and Google is merely the storage facility.

Google says that to comply with a search warrant, it must scour the entire cavernous SensorVault to leech out who was where and when. SensorVault is not an ordered spreadsheet of data, but a jumbled juggernaut of bits and bytes. Google must comb through all LH users' entries to determine if any of it is subject to the warrant.

This means that innocent people's location histories are studied by Google on behalf of law enforcement. Using the crime scene area provided to Google by law enforcement via the search warrant, Google extracts from SensorVault the cell devices that were in the digitally fenced area for the requested date and time. Depending on the nature

of the crime scene whether it is urban or rural, Google may find hundreds of devices in the area at the time of the crime.

Google then examines whether the cell device was in the area for an extended amount of time or just passing through. But Google does not know if law enforcement is investigating a drive-by shooting or a crime of more protracted time. Google, by its own policy, hands over to law enforcement anonymized device information; meaning Google assigns a unique identifier to the device instead of giving law enforcement the telephone number, username and subscriber information.

Remember how Google's Location History obtains information from a plethora of items? Google rates the accuracy of its location information based on the number of datapoints that triangulate to the device. The obvious issue is that not all perpetrators carry cell phones at the time of their dastardly deeds. But cell phones have become omnipresent in the United States. There are more cell phones in the US (about 396 million phones) than people (about 326 million citizens). The likelihood of cell phone's presence at a crime scene is high. Despite this high likelihood, SensorVault may not even have the perpetrator's information for one reason or another, yet Google is reviewing innocent people's information and handing over this information to law enforcement.

After Google hands over the anonymized information, law enforcement scrutinizes the location and movement of the phones to narrow down a list of suspects. For instance, if a store was robbed and there were only two store clerks, the fact that three phones were in the Geofence at the time of the robbery is a serious clue as to who the robber may be. When law enforcement goes back to Google with this narrowed down list, Google provides the names of the subscribers, and their cell phone numbers.

But it is not that easy. It seems that instead of just three "hits" there are going to be others placed in the store's Geofence. For instance, if someone who was nearby has

a weak accuracy rating by LH, he may be placed in the Geofence even if he was not actually in the Geofence area. LH can't place him accurately and may believe that he was in the Geofence area when he is actually on the opposite block. Or an innocent person pumping gasoline outside may have her cell phone listed as being inside the store at the time. And remember, the perpetrator may not have a cell phone on his person at the time of the crime and will have no location history within SensorVault. Geofence warrants are an investigatory tool, but they are not magic crime solvers.

### Compare Tower Dumps to CSLI to LH

At this time, it is a good idea to briefly talk about Tower Dumps and Cell Site Location Information (CSLI) to explain the differences between the two and between Location History. Here is a breakdown of differences.

### Tower Dumps

When law enforcement does not know the identity of the subject, there is still a likelihood the subject had a cell phone connect to an adjacent cell tower. Law enforcement can request the cell phone company to provide all the cell numbers for the phones that connected to the tower at or near the time of the crime. The cell phone company dumps all this data onto law enforcement.

“

Welcome to the 21st Century digital surveillance frontier!

”



unfettered snooping around on behalf of the Crown helped transform the beleaguered Colonialists into the Continental Army that eventually routed the Redcoats from their former overseas realm. Enter the United States of America.

## 4th Amendment

After winning the War for Independence and fumbling for a few years for a framework to establish a working government, Congress called for a Constitutional convention. Having seen the downside of government search overreach with King George's henchmen, Congress enacted the Bill of Rights. Recognizing that Americans are not fond of Government nosiness from either the British or the American governments, Congress added the Fourth Amendment. It reads:

“

**The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause...and particularly describing the place to be searched, and the persons or things to be seized.**

”

## Search Warrant Evolution – Understanding How We Got Here

To grasp how current case law analyzes Geofence warrants, it's helpful to review how the judiciary has regarded search warrants over the course of American jurisprudence.

We are going to briefly cover principles of:

- Common law trespass
- Content versus basic subscriber data
- Reasonable expectation of privacy
- The third party doctrine
- Business records
- “Mere Proximity” to a crime scene

All these aspects of law merge when discussing Geofence warrants. It may sound complicated, but once you learn Geofence warrant basics you'll recognize how warrants are required even if a statute authorizes a court order or even if you think the information is a business record subject to a subpoena. At the end, you should recognize how information captured by a Geofence warrant is an electronic communication that requires a warrant and not a subpoena or court order.

## Going Loco Over Location Data: Understanding GeoFence Warrants

### Common Law Trespass

Early jurisprudence for 4th Amendment cases focused on whether the Government committed a common law trespass when it searched a person, house, papers or effects. In other words, the courts had a property-based approach to analyze search and seizure cases. If the Government touched your person, house, papers, or effects without authority, the fruits of that illegal search would be suppressed. Simple enough.

I'll skip the long history of scientific innovations that changed communications from paper to the intangible digital communications, but the case that enriched the meaning of the 4<sup>th</sup> Amendment to include the non-paper communication is *Katz v. United States*.

### Content versus Basic Subscriber Information

And, before we discuss *Katz*, I need to point out that the reason we focus on communication is that, ultimately, LH is communication from the user to Google. Refining further the idea that LH is communication, we must differentiate between the content of the communication and basic subscriber information of the communication. Using email as an example, the Government can subpoena an email provider for the basic subscriber information of an email user. Basic subscriber information is business record information. To obtain business records, the Government can issue a subpoena, no probable cause needed. Under a subpoena, the email company limits its response to when an email was sent and to whom; it won't reveal the contents of the email exchange. Content necessitates a warrant showing probable cause.

As we will see when we talk about *Katz* and *Carpenter*, Google's LH data is content. And because LH data is content, the Government needs a warrant to obtain it.

### Katz and the Reasonable Expectation of Privacy


The *Katz* case changed the legal landscape for search warrants from a property based analysis using common law trespass principles to the idea that people have a reasonable expectation of privacy for their intangible things. The Government may not have physically intruded on a person's property, but the Government's intrusion of a person's private affairs, even in a public realm, offends society's understanding of privacy.

Charles Katz used a public telephone booth to run his bookie operation. The Government listened in by attaching a recording device on the outside of the booth. At trial and on appeal, the Government contended that its device did not physically intrude upon the inside of the phone booth where the conversation took place.

The United States Supreme Court analysis of the 4<sup>th</sup> Amendment concluded that the Amendment protects people just as much as it protects places. The Government's capture of Katz's oral statements was a "search and seizure" of the intangible. Even though there was no physical intrusion by the Government, the Court suppressed the evidence.

The Court ruled that Katz justifiably relied on the phone booth to make his conversation private. From the opinion, "...what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

The question to ask is if the average person using LH intends it to be private. Definitely. Consider that access to LH is password protected and that alone should cross the *Katz* expectation of privacy bar. The concurrence in *Katz* by Justice Harlan contains a phrase that succeeding opinions



use to draw the expectation of privacy line. The expectation is “one that society is prepared to recognize as ‘reasonable.’”

So, the next question is whether society would reasonably find that LH data should be private. Without establishing a nation-wide poll to determine this finding, the Supreme Court gave us a hint with its opinion on cell phone searches in *Riley v. California*.

### Riley and the Reasonable Expectation of Privacy

This is the cell phone case that applied the expectation of privacy as “one that society is prepared to recognize as ‘reasonable’”. A cell phone is not just a container of contacts and numbers, it has files, photos, apps, and more. In a search incident to arrest, a police officer can look for incriminating evidence, but does not include thumbing through an arrestee’s cell phone? No, a warrant is required.

The Court went on at length about the immense storage capacity that an average cell phone embraces to show how every aspect of a person’s life can be squeezed into a pocket-sized minicomputer. (The Court’s description of the cell phone’s mighty storage volume is puny compared to SensorVault’s by the way.) After noting that 90% of American adults own cell phones, the Court directed that law enforcement will need warrants to peer into cell phones.

Although the Court did not directly use the Justice Harlan’s *Katz* phrase, the evidence that society in general would reasonably expect their cell phones to be private abounded. Chief Justice Roberts practically viewed cell phones as a part of the modern human anatomy.

“

After noting that 90% of American adults own cell phones, the Court directed that law enforcement will need warrants to peer into cell phones.

”

### Carpenter: Reasonable Expectation of Privacy for “Movement” Data, the Third Party Doctrine and Business Records

We have freedom of movement in the United States and unlike many other countries, we’ve never allowed the Government to pre-clear our movements.

The line from many movies depicting repressive Government officials is, “Your papers, please.”

The question is whether it is your private business for something that you publicly do—in this case your movement from place to place? And in the age where cell phone companies can track your movement based on the pings to their cell towers, how does the Third Party Doctrine intersect with that privacy expectation?

Timothy Carpenter and his small gang robbed a series of (ironically) cell phone stores in the Detroit area. Using old-fashioned investigative techniques, the police arrested one of the

collaborators who spilled the beans and gave up cell numbers of his robber ring.

To prove that the others were involved, police requested via a court order, but not a warrant, the Cell Site Location Information (CLSI) of the other suspects. They tracked 12,898 locations points for Carpenter showing his whereabouts for around three months’ time and implicating him in the robberies. Carpenter lost his motion to suppress complaining of a warrantless search of his CSLI. The trial court sentenced him to over 100 years in prison.

The appellate court held that Carpenter lacked a reasonable expectation of privacy in his location information because he shared that information with the wireless carriers. The resulting business records were not protected by the 4<sup>th</sup> Amendment. The United States Supreme Court took jurisdiction.

First, the Court found that CSLI is subject to a search warrant; a court order is insufficient. The two-part 4<sup>th</sup> Amendment test they used was 1.) did the person seek to preserve something as private, and 2.) is his expectation of privacy one that society is prepared to recognize as reasonable. The Court answered the affirmative for both prongs.

The *Carpenter* court also nullified the Government’s argument for the Third Party Doctrine. Normally, a person has no expectation of privacy for what he voluntarily shares with others. A person assumes that risk that this information will be divulged to police. But cell phones chronicle people’s locations and movements effortlessly and with encyclopedic details. Business records of the digital age are a seismic shift from business records a few decades ago. The Government can now conduct a retroactive surveillance of people for years in the past.

After *Carpenter*, the Third Party Doctrine regarding such cell phone business records no longer applies. “[W]e hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI.”

Applying the demise of the Third Party Doctrine to LH which is much more comprehensive than CSLI, it is clear that law enforcement must seek a warrant for LH information and not rely on a statute that allows for a court order.

But remember that LH is a service where the user has to opt in. LH is not automatic as it is for CSLI records. But it is unclear when a person opts into LH that he or she understands the implications and assumes the risk of triggering the Third Party Doctrine. It's an unanswered question at this time, but the *Chatrie* case (noted below) offers insights.

### **Mere Propinquity to a Crime Scene: *Ybarra v Illinois***

Recall how a Geofence warrant seeks to find all the cell phones users within a specified "fence" delineated by GPS points as well as date and time. This results in the Government finding the location data of innocent people who happened to be near the crime scene.

Years ago, one Ventura Ybarra found himself at a crime scene when agents of the law came tumbling into Ybarra's favorite watering hole under the authority of a search warrant. They were looking for "Greg" the bartender and any drugs and paraphernalia in the establishment. The agents frisked everyone in the bar for weapons and found none but went back to search Ybarra again because his cigarette pack seemed suspicious. They discovered heroin on him.

First, the Court did not buy the argument that the *Terry* search and the protective sweep provided probable cause to search Ybarra a second time (it is not relevant here to go into a discussion about that). Second, the Court did not buy the argument that Illinois law provided law enforcement the ability to search anyone during the course of a search via a warrant (not relevant to delve into that aspect of the case either).

The sound bite line from *Ybarra v. Illinois* is, "[A] person's mere propinquity to a crime scene to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."

When you apply the mere propinquity characteristic to Geofence warrants, the Geofence warrants become troublesome. The Government is seeking information on people who were at the crime scene, but many people within the Geofence have no connection to the criminal activity. Where is the probable cause to search the location data of folks who happened to be near a crime scene?

The glare from the 4<sup>th</sup> Amendment on the issue is almost blinding. Probable cause must describe with particularity the place to be searched or the person or thing seized. Geofence warrants are in effect "searching and seizing" people via their LH data whose only connection to the crime was their "mere propinquity" to the site.

Granted, the Government faced the mere propinquity issue somewhat when Tower Dumps were popular, but LH is much more comprehensive than a Tower Dump is. Remember, a Tower Dump does not necessarily provide location data; it provides connection data. Can we formulate a legal theory to allow law enforcement to collect innocent people's location data without probable cause? An important case that is in the works now about Geofence warrants says "No."

### ***United States v Chatrie*: Geofence Warrants Are Too Broad**

So, police in Midlothian, Virginia, are stumped. Someone with a mask and a gun robbed a bank on May 20, 2019. All usual investigative techniques have turned into dead ends. The surveillance camera showed the suspect use a cell phone prior to entering the bank. The detective uses that

## Going Loco Over Location Data: Understanding GeoFence Warrants

tidbit of information to apply for a Geofence warrant which is granted. After culling through many innocent people's movement data, law enforcement determine that Okello Chatrie must be their man and arrest him.

The district court holds hearings on the motion to suppress and accepts an amicus brief from Google itself. In a comprehensive opinion (which I recommend you read if you are interested in more about Geofence warrants), the trial court points out all the issues with Geofence warrants.

The trial judge, M. Hannah Lauck, firmly declares that the Government must show probable cause for each person in the Geofence before a warrant may issue. She would suppress the evidence obtained from SensorVault's LH data under her reasoning and review of the case law. Yet, in the end, she gives the Government a pass citing the good faith exception.

Notably, in her memorandum opinion Judge Lauck struggles with a solution for the issue of establishing probable cause for each person inside the Geofence. She favors an approach that requires the law enforcement to obtain a series of warrants by presenting to the court reasons to proceed with investigating the possible suspects. Meaning, after Google sends law enforcement the anonymized location information, law enforcement has to obtain a second warrant from the court explaining why probable cause exists to obtain the name and cell numbers of the narrowed down list. In regards to *Chatrie*, all we can say now is stay tuned...

### The Volokh Conspiracy

Is Judge Lauck's solution impractical? Requiring probable cause for each person inside of the Geofence? Eugene Volokh, a UCLA Law professor, who blogs at the Volokh Conspiracy sees the issue differently. He uses an analogy to a search warrant for a house.

If the Government obtains a search warrant where four people live in a house, the Government does not have to provide probable cause for each person who lives there. When the officers arrive, they search the house without regard to who owns the items in the house.

We don't declare the house search warrant too broad and suppress evidence in those instances. Volokh indicates that searching SensorVault is similar. Law enforcement may search SensorVault for evidence of a crime just as it does for a house. It does not matter how many people are in the house or whose property is searched, nor does it matter how many peoples' LH data is searched to find the evidence of crime in SensorVault.

Volokh also indicates that the "mere propinquity" standard in *Ybarra* does not apply to Geofence warrants. The *Ybarra* decision was the search of the person. Geofence warrants are the search of records. The intrusion issues are different.

### Another Analogy

Knowing that all analogies are inadequate in one regard or another, here's a way to visualize Geofence warrants. Law enforcement comes to you with a search warrant establishing probable cause that the evidence of crime is located at a mini storage. Let's pretend that the affidavit claims that a witness knows that the knife is blue and that it is in the mini storage, but the witness does not know which exact unit.

The mini-storage owner/manager is helpful and will, once a warrant is signed, go into each unit and look for a blue knife on behalf of law enforcement. The individual unit owners are not informed of this generalized search of the site. If the mini-storage manager finds any blue knives, he will then let law enforcement know which unit owners have blue knives in their units. Law enforcement can start the process of narrowing down the likely perpetrators through the process of elimination. I don't think any of us would sign a warrant like that, but Google's search of its SensorVault is essentially the same thing.

## Texas Law

The Texas statute authorizing Geofence warrants is CCP Art. 18B.354. I am not familiar with any Texas case law on the matter, but I don't think there are that many Texas Geofence warrants yet. That may change soon.

For the few Geofence warrants that I have signed, I have noticed recently that the newer ones have in the order that a series of warrants will issue as more information is obtained (similar to Judge Lauck's solution). That is a good sign but be aware that many law enforcement agencies and prosecutors are not familiar with the legal issues connected with Geofence warrants. They may rely on the statute alone to seek authorization. I would modify orders to require law enforcement return to the court to obtain further authorization to continue the search as the opinion in *Chatrie* suggests.

## Conclusion

Time will tell how the case law will develop. This is not a settled area of law, but now you have the basics of the issue that face you when a police officer comes in looking to obtain LH data via a Geofence warrant. Forewarned is forearmed and asking the right questions may keep your warrants on solid ground when the motions to suppress are filed.

1 These functions are part of Google's Web and Application Activity (WAA) and Google Location Service (GLS) which both send data to SensorVault in addition to Location History (LH).

2 *United States v Chatrie*, 3:19-CR-130-MHL (E.D. Va., March 3, 2022)

3 At the same time, Google says that LH's "confidence interval" is 68%. See *United States v Chatrie*, 3:19-CR-130-MHL (E.D. Va., March 3, 2022)

4 Here are the opt out steps for an Android device from the Google Support website: 1. Open the Google Maps app. 2. Tap your profile photo or initial your Timeline. 3. Tap More. 4. Go to Settings and Privacy. 5. Go to Location settings. 6. Delete all Location history. 7. Follow the on-screen instructions.

5 *United State v. Chatrie*, 3:19-CR-130-MHL (E.D. Va. March 3, 2022) Page 6.

6 *United States v Chatrie*, 3:19-CR-130-MHL (E.D. Va., March 3, 2022)

7 *Carpenter v United States*, 585 US \_\_\_, 138 S.Ct. 2206 (2018)

8 *Riley v. California*, 573 U.S. 373 (2014)

9 *Katz v United States*, 389 U.S. 347 (1967)

10 8 USC Sect. 2703(a) and Texas Code of Criminal Procedure Art. 18B.354

11 *Riley v. California*, 573 U.S. 373 (2014)

12 The FBI sought a court order under the Stored Communications Act 18 USC Sect. 2703(d) that does not require probable cause. Texas has a similar statute at CCP Article 18B.352

13 *Ybarra v. Illinois*, 444 U.S. 85 (1979)

14 As an important aside, what about video cameras? Video cameras are ubiquitous nowadays. Police seek out and search for video cameras whenever a crime occurs. There are plenty of innocent people whose faces and vehicles are depicted on the videos. Do we require law enforcement to establish probable cause on everyone in the video before we let law enforcement proceed to view or use the surveillance video? No, we don't and probably won't be able to make that analogous jump. *Carpenter* specifically mentioned that video cameras do not offend the expectation of privacy and that information obtained by law enforcement from those are not subject to warrant requirements.

15 *United States v Chatrie*, 3:19-CR-130-MHL (E.D. Va., March 3, 2022)

“

...be aware that many law enforcement agencies and prosecutors are not familiar with the legal issues connected with Geofence warrants.

”

# TCJ Board Nomination Slate



## CHAIR-ELECT

### Steve Smith

*JUSTICE, 10TH COURT OF APPEALS*  
Waco, TX

Justice Smith was appointed to the Tenth Court of Appeals by Governor Greg Abbott effective August 6, 2021. Prior to joining the Court, Justice Smith served as Judge of the 361st District Court for Brazos County for more than 22 years, and as Judge of Brazos County Court at Law No. 1 from 1995-1998.

Justice Smith is a graduate of Abilene Christian University and the University of Texas School of Law. Following his law school graduation in 1977, Justice Smith engaged in private practice in the Bryan/College station area with Dillon & Giesenschlag; Dillon, Lewis, Elmore & Smith; and Hoelscher, Lipsey, Elmore and Smith. He also served as Municipal Judge for the City of College Station from 1988 through 1994.

Justice Smith is a Sustaining Life Fellow of both the State Bar of Texas and the American Bar Association. He holds a Certificate in General Jurisdiction Trial Skills from the National Judicial College, where he has served as a faculty member since 2002. He has also taught judicial education courses for the Texas Center for the Judiciary and judicial education entities in 13 states. During 2010-2011, Justice Smith was Chair of the Judicial Section of the State Bar of Texas, and received a Presidential Commendation from the Bar.

Justice Smith has a long record of volunteer service in the Bryan/College Station community. He presently serves on the Board of Directors of Foster's Home for Children in Stephenville, and was a Trustee for Abilene Christian University from 2001-2017, and is now a Trustee Emeritus of ACU. He and his late wife, Becky, are the parents of Christopher, president of a technology firm in Abilene and Laura, an attorney in Washington, DC.



## PLACE 2

### Darlene Byrne

*CHIEF JUSTICE, 3RD COURT OF APPEALS*  
Austin, TX

The Honorable Darlene Byrne is the Chief Justice of the Third Court of Appeals of Texas since January 2021. Prior to that she served for 20 years as the presiding judge of the 126th Judicial District Court in Travis County beginning in January 2001. Prior to her election in 2000, she practiced for 13 years in the areas of employment, commercial and governmental entity litigation. She is a Commissioner on the Texas Children's Commission. She is a past President of the National Council for Juvenile and Family Court Judges and a past Judge of the Year of National CASA, Texas CASA and CASA of Travis County. She is a past recipient of many local, statewide, and national awards due to her work concerning child welfare. She currently serves as co-chair of the Judicial Council for National CASA, is a board member for the Texas Center for the Judiciary, TexProtects and Travis County Women Lawyer's Foundation, is an Advisory Council member for Partnerships for Children, Carrying Hope, and the Seedling Foundation, was the initial Chair of the Texas Statewide Collaborative for Trauma Informed Care, is on the Editorial Review Board for NCJFCJ's Juvenile and Family Court Journal, and on the Advisory Committee for the #WeToo project for Courts. She serves as a council member of the State Bar of Texas' Administrative and Public Law Section. She is a member of the Calvert Inn Inns of Court. Judge Byrne is the founding judge of the Travis County Family Drug Treatment Court, the Travis County Model Court of Children, Youth and Families and the Travis County Dual Status Youth Court. She has served on many boards, committees, and speaking panels related to law and child welfare. Justice Byrne is the proud mom of 3 amazing adult children and the adoring wife of Dan Byrne. She loves to read, workout, play pickle ball, kayak, golf, and backpack.

# TCJ Board Nomination Slate



**PLACE 6**  
**Courtney Arkeen**  
*JUDGE, 128TH DISTRICT COURT*  
Orange, TX

Appointed by Governor Rick Perry on April 13, 2011 and re-elected in 2012, 2016, and 2020, Judge Courtney Arkeen is the first female and first Republican District Judge in Orange County, Texas and surrounding counties. She is also the Administrative Judge for Orange County.

Judge Arkeen was raised in Orangefield, Texas and graduated from Orangefield High School in 1994 in the top 10% of her class. She then graduated from the University of Texas at Austin with a dual degree in government and sociology with high honors in 1997, completing her undergraduate work in 3 years. Courtney then attended the University of Houston Law Center and graduated with her juris-doctorate law degree in 1999, completing her graduate work in 2 years.

Before being appointed to the bench, Judge Arkeen practiced law in Vidor, Texas for 11 years primarily in the areas of family, criminal, and civil law, which is the jurisdiction she now presides over in the 128th District Court.

Judge Arkeen is also very active in various professional and civic groups and volunteers for many non-profit organizations. She is the Chairman of the Lamar State College-Orange Foundation, Secretary of the Foundation for Southeast Texas, past president of the Orange County Bar, Jefferson County Bar and the Jefferson County Young Lawyers Associations, and a Board Member for Meals on Wheels Orange. Judge Arkeen served as the chairman of the Cattle Barron's Ball for the American Cancer Society, was a member of the Jefferson County Pro Bono Board and past President of the Jefferson County Bar Foundation. She is a member of the State Bar of Texas (Judicial and Family Law Sections), American Bar Association, American Judges Association, Orange Chamber of Commerce, and the Bridge City/Orangefield Rotary Club. She serves on the Curriculum

Committee for the Texas Center for the Judiciary, the Legislative Sub-Committee on Family Law for the Judicial Section of the State Bar of Texas, is a Life Fellow of the Texas Bar Foundation, and serves as the Texas Bar Foundation's Nominating Chair for District 3.

She has received numerous awards including the Athena Award in 2015, Outstanding Young Lawyer Award in Jefferson County, and was named as a "Rising Star" in Texas Monthly Magazine in the area of family law from 2006-2010. She is also featured on KBMT Channel 12 News' "Ask the Judge" segment. Judge Arkeen is a frequent motivational and commencement speaker at local events and ceremonies.

Courtney and her husband, Cody, love to travel and spend time at the lake with their children, Paxton (12), Channing and Chaplin (8).



**PLACE 9**  
**Matt Hand**  
*JUDGE, POTTER COUNTY COURT AT LAW NO. 2*  
Amarillo, TX

Matt Hand received his law degree from Washburn University, Topeka Kansas-the home of the Fighting Ichabods, not a mascot that instills fear in the hearts of opponents. Matt started his legal career with Phillips Petroleum Company in the litigation group. He later joined Brown & Fortunato, PC and practiced there for 22 years. As firm shareholder he handled a broad range of litigation matters including: Personal injury, oil and gas, employment, and commercial. Matt is Board Certified in Personal Injury Trial Law, a member of the Texas Bar College, and a Texas Bar Foundation Fellow. Matt was elected to the bench in 2018 and presides over Potter County Court at Law #2. The court's jurisdiction includes, criminal, civil, probate, family and juvenile. He also presides over the regional mental health court. Matt is married to Stacy Hand, a career prosecutor and Assistant District Attorney in Randall County, Texas. They have two adult children and a spoiled Boxer. Matt is a Eagle Scout, enjoys the outdoors, and is a Texas Master Naturalist.

# Click, Click, Boom: Things to Think About When Using Visual Media in Appellate Decisions

**David Newell**  
*JUDGE*  
Texas Court of  
Criminal Appeals



**A**t a recent appellate conference I attended, several speakers talked about using visual media to enhance pleadings in appellate courts. The presentations, however, understandably focused how advocates could plus up their pleadings through the use of visual media. It occurred to me that at some point, someone will have to set down some comprehensive guidelines on the use of such materials in appellate decisions. Oh no, don't look at me, I'm not that guy. But I do think judges, justices, and practitioners might find it helpful to take a look at some cases in which appellate courts have used visual media to see if some patterns emerge. Looking back at some of the cases with which I am familiar, I think I see a few questions that might be worth asking.

## Could You Wanna Take My Picture?!

One of the easiest ways to use visual media in an appellate opinion, and by no means is this earthshattering news, is to simply embed a picture. I know what you are thinking. Exhibits. Everyone naturally thinks of exhibits when they consider putting a picture into an opinion. And, if a particular exhibit helps the reader more easily understand the case, it can be very helpful for the opinion as a whole. But courts shouldn't limit themselves to exhibits. For example, in [State v. Zuniga](#), the Court of Criminal Appeals took a screenshot of the indictment to explain how the indictment had been amended so that the description of the indictment in the opinion was easier for readers to understand.<sup>2</sup>

This .jpg file is fairly innocuous. There's no sensitive information in it. It's also something that was already part of the public domain as part of the clerk's file and the clerk's record on appeal. And the facts surrounding the amendment of the indictment were not really in dispute even if they were important to the case.

feature

The duly organized Grand Jury of Nueces County, Texas, presents in the District Court of Nueces County, Texas, that

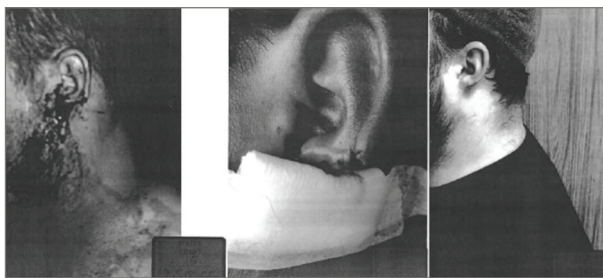
**COUNT 1**

**MARY ZUNIGA**, defendant,

on or about, **DECEMBER 29, 2013**, in Nueces County, Texas, did then and there, while knowing that an investigation was in progress, to wit: A DRUG INVESTIGATION, intentionally and knowingly ALTER, OR DESTROY, OR CONCEAL, with intent to impair its verity or availability as evidence in any subsequent investigation or official proceeding related to the offense,

Why point out these things? Well, consider whether the calculus on including the picture would change if the indictment included details of a particular heinous crime and the name of the victim were listed in it. What if the image used only told part of the story? Say the image depicted a contested issue, would fairness of both parties require inclusion of a competing picture?

Take for example, the more recent case of [Wade v. State](#).<sup>3</sup> The case involved an aggravated assault in which the defendant bit the victim's earlobe off, and the Court included pictures of the injury at the time of the offense, at the hospital, and after the injury had healed. (Warning: Unless you are a fan of The Boys on Amazon Prime these images may be a little disturbing.)



The one on the left is pretty gruesome, right? But this wasn't a sufficiency case. Gruesome pictures can certainly support the question of whether the State has proven its case. But in this case, the issue was whether the defendant

was entitled to a jury instruction on the lesser-included offense of bodily injury. Under that analysis, reviewing courts must view the evidence in light most favorable to the requested instruction. And it doesn't matter if that evidence supporting the instruction is weak or contradicted. The only evidence that matters is the evidence supporting the instruction. Given that standard, could the Court have simply posted this single image?



Perhaps more importantly though, how does the inclusion of these pictures affect the precedential value of the opinion? By using an exhibit as part of the analysis, the Court necessarily makes the opinion easier to distinguish. Put another

way, the use of the picture ties the holding to the facts of the case more tightly than if the Court had relied upon a more general description of the injury.

And does simple decency factor in at all? In the recent case of [Ex parte Lucio](#), the Court considered whether to remand an application for a writ of habeas corpus in a death penalty case involving the death of a small child.<sup>5</sup> But in its pleadings, the State embedded a picture of the deceased victim to show the many injuries the child suffered. Given that pleadings are routinely posted to the Court's website, should courts consider redacting similar images from the pleadings of the party even if there is no legal requirement to do so?<sup>6</sup>

I am not suggesting that there is a right or wrong answer. I just point this out as an extension of what the Wade case seems to illustrate. The more contested the issue and the more graphic the image, the more likely a court will face pushback on the use of visual media in an opinion.

### [Video Killed the Radio Star](#)<sup>7</sup>

What about video clips? Back in 2007, the United States Supreme Court considered, [Scott v. Harris](#), a case in which a police officer in a high-speed chase bumped the rear of the suspect's car and forced the suspect off the road.<sup>8</sup> One aspect that made the case novel was the Court's creation of a media page specifically so that the Court could rely upon a video to undercut the factual assertions relied upon by the court of appeals. If you are reading this online rather than in print, you can view the video [here](#).<sup>9</sup>

Notably, there was some disagreement between the dissent and the Court regarding the Court's characterization of the video as something that "more closely resembles a Hollywood-style car chase."<sup>10</sup> Isn't it ironic that the inclusion of the video, which is meant to provide "objective" perspective on the claims, resulted in an argument over how different authors characterized the video?<sup>11</sup> Moreover, if everyone is arguing about how to characterize the video, why include the video at all? I mean, isn't the video supposed to solve those type of disputes? This is

just another example of how using media to help explain hotly-contested issues has the potential to incite new controversies.

Relatively recently the Court of Criminal Appeals took a cue from the United States Supreme Court and created its own "media" page on its website to support viewing of a video file at the center of the controversy of the case. In [Milton v. State](#), the Court considered a viral video that the State used during punishment arguments to illustrate its closing argument theme in an otherwise non-violent robbery.<sup>12</sup> It was a video of a lioness trying to eat a baby through protective glass. If my description does not do this video justice and you are reading this online rather than in print, you can view the video [here](#).<sup>13</sup> But the Court of Criminal Appeals also included hyperlinks to the video in the opinion itself so that the public reading the opinion on the Court's website can click on a link and pull up the video as if they were reading an article on BuzzFeed.

A few things set the use of a video in *Milton* apart from the video in *Harris*. *Milton*, for example, dealt with a demonstrative exhibit that had no factual ties to the case itself. Further, as a viral video, it was something everyone had already seen. Seriously, if you go on Google for a "gif" of a "lion eating a baby" you will find a short clip of this video without a reference to the case.<sup>14</sup> And everyone who looked at the video seems to agree that that was

---

1 "Take a Picture" Title of Record, Filter (Reprise Records 2000).

2 *State v. Zuniga*, 512 S.W.3d 902 (Tex. Crim. App. 2017).

3 *Wade v. State*, 2002 WL 1021056 (Tex. Crim. App. 2022).

4 The Court included both pictures of the injury at the time and the evidence the jury saw regarding the victim's injury. *Wade*, 2022 WL 1021056 at \*2. This, of course, raises the question of it damage the credibility of the Court to not include all the pictures even if a proper application of the standard of review only requires viewing of one of them?

5 *Ex parte Lucio*, 2022 WL 1211313 (Tex. Crim. App. Apr. 25, 2022) (not designated for publication). Don't worry, I'm not going to post any of those pictures here.

6 Obviously, there are prohibitions against publishing of sensitive information that judges should keep in mind. See, e.g., Tex. R. App. P. 9.8 (Protection of Minor's Identity in Parental-Rights Termination Cases and Juvenile Cases); Tex. R. App. P. 9.9 (Privacy Protection for Documents Filed in Civil Cases); Tex. R. App. P. 9.10 (Privacy Protection for Documents Filed in Criminal Cases). Arguably, the pictures at issue

“too much” even though the underlying argument the prosecutor was making was legitimate.

But both cases, along with *Wade* mentioned above, also highlight how people working in areas of law involving extreme behavior can become desensitized to the subject matter under review. Is the majority in *Wade* insensitive to the injury suffered by the victim, or are the dissenters too tender? Justice Scalia can compare the hot pursuit in *Harris* to something out of Hollywood, but is the dissent correct that he’s overselling it? And did the prosecutor in *Milton* simply lose perspective when he was thinking of a clever way to enhance his punishment argument in an otherwise non-violent robbery?

Which brings me to a more recent case in which the Court of Criminal Appeals included a link to the video of an aggravated robbery as support for opinion regarding the sufficiency of the evidence supporting a deadly weapon finding. In *Flores v. State*, the defendant disguised a power drill to look like a gun so he could rob a convenience store.<sup>15</sup> This issue was hotly contested, and the Court relied on the video in its analysis (with a link to the video on its media page [here](#))<sup>16</sup>. It was undisputed that the drill was not a gun and was not apparently capable of being used to ... drill... during the robbery. But the video helped illustrate for the Court that the defendant never made a motion with the drill that he might hit the victim with the heavy object.

The visual media in *Flores* raises similar questions to those raised by *Harris* and *Wade*, and it also points to another potential issue. Given that *Flores* was really about sufficiency, does an appellate court’s reliance upon video evidence of a crime support that sufficiency analysis encourage reviewing courts to act as a thirteenth juror? Or is this just like any other case in which the reviewing court simply reviews the evidence presented? I leave the answer to smarter people than me.

### Goodbye<sup>17</sup>

At the risk of sounding like Jason Priestley on a very special episode of 90210, if you’d like to know more about this area, check out “Legal Writing for the Rewired Brain: Persuading Readers in a Paperless World” by Robert Dubose. It visual media in much greater dept than my crude attempt in this article as well as much more about how to reach current audiences. But as far as my thoughts, using visual media to illustrate rather than drive analysis is less likely to be stir controversy even if either use is legally acceptable. Further, being sensitive to when material is too graphic by adopting a “prime-time TV” lens is another good way to avoid distracting the reader from the analysis. After all, these are judicial decisions, not clickbait.

---

in *Lucio* did not run afoul of these prohibitions, but judges should keep them in mind when considering whether to post or allow posting of visual media.

7 “Video Killed The Radio Star” *The Age of Plastic*, *The Buggles* (Island Records 1979).

8 *Scott v. Harris*, 550 U.S. 372 (2007).

9 In case the hyperlink does not work, here’s the web site address: [https://www.supremecourt.gov/media/video/mp4files/scott\\_v\\_harris.mp4](https://www.supremecourt.gov/media/video/mp4files/scott_v_harris.mp4). Note that the opinion itself lists the address as

[http://www.supremecourt.us.gov/opinions/video/scott\\_v\\_harris.html](http://www.supremecourt.us.gov/opinions/video/scott_v_harris.html) which, if you type it into your browser, will not get you directly to the file. *Harris*, 550 U. S. at 378 n.5. This highlights a technical issue that courts wishing to use links to videos should also consider. Link rot. Is the hyperlink to the video and the citation to the web address ALWAYS going to work. Or will it, as appears to be the case in *Harris*, change over time? What does it mean for the durability of the opinion if a portion of it cannot be accessed in the future?

*Citations continued on next page*

## Click, Click, Boom: Things to Think About When Using Visual Media in Appellate Decisions

Compare Harris 550 U.S. at 380 (“Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.”) with Harris, 550 U.S. at 390 (Stevens, J. dissenting) (“Rather than supporting the conclusion that what we see on the video ‘resembles a Hollywood-style car chase of the most frightening sort,’ . . . the tape actually confirms, rather than contradicts, the lower courts’ appraisal of the factual questions at issue.”).

10 Compare Harris 550 U.S. at 380 (“Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.”) with Harris, 550 U.S. at 390 (Stevens, J. dissenting) (“Rather than supporting the conclusion that what we see on the video ‘resembles a Hollywood-style car chase of the most frightening sort,’ . . . the tape actually confirms, rather than contradicts, the lower courts’ appraisal of the factual questions at issue.”).

11 At the risk of going off on a tangent, one of the more self-consciously meta versions of this can be found in the United States Supreme Court decision in *Kisor v. Wilke*, 139 S.Ct. 2400 (2019). There, in a concurring opinion, Justice Gorsuch went out of his way to post a six-second clip of his new colleague, Justice Kavanaugh, speaking at a law school and voicing his criticism of relevant precedent. See *Kisor*, 139 S.Ct. at 2430 n. 37. Appellate judges routinely cite to opinions authored by their colleagues to persuade them in their individual votes, but would this have been effective had Gorsuch and Kavanaugh been on opposite

sides of the issue? I mean, one clap for technology, but I still feel like this is the appellate equivalent of my parents figuring out Zoom.

- 12 *Milton v. State*, 572 S.W.3d 234 (Tex. Crim. App. 2019). Notably, the robbery the defendant was accused of occurred at a CVS pharmacy, and the surveillance video of the crime showed several patrons of the store getting impatient standing in line behind the defendant because he was taking too long to “check out.” Of course, the Court did not include the surveillance video in its opinion because the issue was not the crime, but the use of the demonstrative exhibit.
- 13 If you would like to see the exhibits, the web address for the Court’s media page is: <https://www.txcourts.gov/cca/media/>. Note how the Court cleverly cited to its media page so that readers who were looking at paper copies of the opinion would find it easier to remember/enter as well as lessening the risk of link rot. And in defense of the lioness in the video, the parents made the child wear a zebra coat, so who’s the real monster here?
- 14 Of course, if you Google “lion eating baby texas” you will find links to articles about the case as well. See, e.g., “Texas Court to Prosecutors: Don’t Use Lion-Eats-Baby Video to Push for Sentence” <https://www.yahoo.com/news/texas-court-prosecutors-dont-lion-114659086.html>. Texas forever.
- 15 *Flores v. State*, 620 S.W.3d 154 (Tex. Crim. App. 2021).
- 16 *Flores*, 620 S.W.3d at 157 n. 3 (“Because the evidence is crucial to our analysis, we have made the video available for viewing on the Court’s website at the following address: <https://www.txcourts.gov/cca/media/>.”).
- 17 “Goodbye” Inside (The Songs) Bo Burnham (Imperial Records 2021).



## Texas Department of Motor Vehicles

HELPING TEXANS GO. HELPING TEXAS GROW.

May 31, 2022

Office of Court Administration  
205 West 14<sup>th</sup> Street  
Austin, TX 78701

Effective June 1, 2022, the Texas Department of Motor Vehicles (TxDMV) is providing county, state, and federal judges the option to indicate a County Judge, State Judge, or U.S. Judge remark on the motor vehicle record.

Judges who have general issue license plates or with judicial license plates who wish to obtain general issue license plates may have a remark placed on their vehicle record indicating their status as a judge by emailing [VTR\\_StateOfficialPlates@txdmv.gov](mailto:VTR_StateOfficialPlates@txdmv.gov). TxDMV staff will add a remark to the judge's motor vehicle record reflecting the appropriate position of County Judge, State Judge, or U.S. Judge upon verification of the judge's position. General issue license plates are obtained at county tax offices. Judges can email [VTR\\_StateOfficialPlates@txdmv.gov](mailto:VTR_StateOfficialPlates@txdmv.gov) to request the remark be indicated on the motor vehicle record and to obtain information on how to exchange judicial license plates for general issue plates to facilitate the addition of the appropriate remark on the motor vehicle record. If a judge wishes to obtain judicial plates, the judge may email a notification of intent to [VTR\\_StateOfficialPlates@txdmv.gov](mailto:VTR_StateOfficialPlates@txdmv.gov).

Please review and distribute to judges as applicable in the Judicial Directory. If you have questions regarding this notice, contact the Vehicle Titles and Registration Division Special Plates Unit of the TxDMV at (512) 374-5010 or via email at [VTR\\_StateOfficialPlates@txdmv.gov](mailto:VTR_StateOfficialPlates@txdmv.gov).

Thank you,

A handwritten signature in blue ink, appearing to read "Roland D. Luna, Sr.".

Roland D. Luna, Sr., Director  
Vehicle Titles and Registration Division  
Texas Department of Motor Vehicles

# contributors

As of 7/15/2022

## LIFETIME DONOR

Hon. Amado Abascal  
Hon. Marilyn Aboussie  
Hon. Leonel Alejandro  
Hon. J. Manuel Banales  
Hon. Nancy Berger  
Hon. John Board  
Hon. Jim Bobo  
Hon. David Canales  
Hon. Linda Chew  
Hon. Bud Childers  
Hon. Randy Clapp  
Hon. Lonnie Cox  
Hon. Tom Culver  
Hon. Vickers Cunningham  
Hon. Paul Davis  
Hon. Rudy Delgado  
Hon. Travis Ernst  
Hon. David Evans  
Hon. Drue Farmer  
Hon. Paul Ferguson  
Hon. Bobby Flores  
Hon. Molly Francis  
Hon. Tom Fuller  
Hon. Balde Garza  
Hon. Tiffany Haertling  
Hon. Mackey Hancock  
Hon. Rob Hofmann

Hon. Robert Kern  
Hon. Lamar McCorkle  
Hon. Randy McDonald  
Hon. Margaret Mirabal  
Hon. Audrey Moorehead  
Hon. Cynthia Muniz  
Hon. Kerry Neves  
Hon. Gladys Oakley  
Hon. Lauren Parish  
Hon. Bob Perkins  
Hon. Bob Pfeuffer  
Hon. Larry Phillips  
Hon. Sherry Radack  
Hon. Mario Ramirez  
Hon. Robert Ramirez  
Hon. Israel Ramon  
Hon. Bonnie Robison  
Hon. Doug Robison  
Hon. Peter Sakai  
Hon. David Sanchez  
Hon. Mike Schneider  
Hon. Steve Smith  
Hon. Bill Squires  
Hon. Kathleen Stone  
Hon. Ralph Strother  
Hon. Stephani Walsh  
Hon. Mike Willson  
Hon. Bob Wortham

## DIAMOND

Hon. Rosie Alvarado  
Hon. Robert Cadena  
Hon. Rabeea Collier  
Hon. Alex Gonzalez  
Hon. Tad Halbach  
Hon. Susan Harris  
Hon. Scott Stevens  
Hon. Craig Stoddart  
Hon. Raul Vasquez  
Hon. Barbara Walther

## PLATINUM

Hon. Steve Ables  
Hon. James Anderson  
Hon. Todd Blomerth  
Hon. Gary Harger

## GOLD

Hon. Mark Atkinson  
Hon. Richard Barajas  
Hon. Tena Callahan  
Hon. Julie Countiss  
Hon. John Gauntt  
Hon. O.J. Hale, Jr.  
Hon. Kathy Hamilton  
Hon. Sid Harle  
Hon. Fred Hinojosa  
Hon. Gracie Lewis  
Hon. David Lindemood  
Hon. Aurora Martinez Jones  
Hon. Sylvia Matthews  
Hon. Lisa Michalk  
Hon. Eric Moyé  
Hon. Mary Murphy  
Hon. Antonio Rodriguez  
Hon. Barbie Scharf-Zeldes  
Hon. Pamela Sirmon  
Hon. Billy Ray Stubblefield  
Hon. Mitch Templeton  
Hon. Phil Vanderpool  
Hon. Judy Warne  
Hon. Mark Woerner  
Hon. Mike Wood  
Hon. Leslie Yates

## SILVER

Hon. Charlie Barnard  
Hon. Lee Ann Breeding  
Hon. Bob Brotherton  
Hon. Ralph Burgess  
Hon. Darlene Byrne  
Hon. Brad Cates  
Hon. Alfonso Charles  
Hon. Patricia Chew  
Hon. Reagan Clark  
Hon. Vik Deivanayagam  
Hon. Sheila Garcia Bence  
Hon. Dan Gilliam  
Hon. Michael Gomez  
Hon. Lee Hamilton  
Hon. Matt Hand  
Hon. Belinda Hill  
Hon. Don Jones  
Hon. Jack Jones  
Hon. Buddy McCaig  
Hon. Ken Molberg  
Hon. Rick Morris  
Hon. Chris Morton  
Hon. Greg Neeley  
Hon. Judy Parker  
Hon. Jim Parsons  
Hon. Cecil Puryear  
Hon. Lorraine Raggio  
Hon. Dean Rucker  
Hon. Jennifer Rymell  
Hon. Rodney Satterwhite  
Hon. Kitty Schild  
Hon. Bill Smith  
Hon. Tracy Sorensen  
Hon. Tom Stansbury  
Hon. Charles Stephens  
Hon. Laura Weiser  
Hon. Janna Whatley  
Hon. Sharolyn Wood

## BRONZE

Hon. Gordon Adams  
Hon. Karen Angelini  
Hon. Tamera Arrington  
Hon. Thomas Baker  
Hon. Laura Barker  
Hon. Jeannine Barr  
Hon. Jennifer Bennett  
Hon. Max Bennett  
Hon. Ron Blann  
Hon. Bob Brendel  
Hon. Don Burgess  
Hon. Paul Canales  
Hon. Randy Catterton  
Hon. Brenda Chapman  
Hon. Martin Chiuminatto  
Hon. Os Chrisman  
Hon. Sarah Tunnell Clark  
Hon. Joe Clayton  
Hon. Kirsten Cohoon  
Hon. Richard Dambold  
Hon. Rex Davis  
Hon. Trey Didway  
Hon. Christopher Duggan  
Hon. Steve Duskie  
Hon. James Eidson  
Hon. Patrick Flanigan  
Hon. Jim Fry  
Hon. Gonzalo Garcia  
Hon. Jay Gibson  
Hon. Tracy Gilbert  
Hon. Sam Griffith  
Hon. Joe Grubbs  
Hon. Harriett Haag  
Hon. Aleta Hacker  
Hon. David Hall  
Hon. Shelly Hancock  
Hon. Les Hatch  
Hon. Nathan Hecht

Hon. Bonnie Hellums  
Hon. Marc Holder  
Hon. Scott Jenkins  
Hon. Joel Johnson  
Hon. Tim Johnson  
Hon. Mike Keasler  
Hon. Sharon Keller  
Hon. Pat Kelly  
Hon. Greg King  
Hon. Andy Kupper  
Hon. Janice Law  
Hon. Jose Longoria  
Hon. Bob McGregor  
Hon. Don Metcalfe  
Hon. Bill Miller  
Hon. Sally Montgomery  
Hon. Marvin Moore  
Hon. James Morgan  
Hon. Daniel O'Brien  
Hon. Bill Old  
Hon. Joe Parnell  
Hon. Sandra Peake  
Hon. David Peebles  
Hon. Kent Phillips  
Hon. Stephen Phillips  
Hon. Don Pierson  
Hon. Margaret Poissant  
Hon. Jeff Propst  
Hon. Roy Quintanilla  
Hon. Charles Ramsay  
Hon. Donna Rayes  
Hon. Hal Ridley  
Hon. Jesus Rodriguez  
Hon. James Rush  
Hon. Kerry Russell  
Hon. Dan Schaap  
Hon. Ed Self  
Hon. Pat Simmons  
Hon. Michael Snipes  
Hon. Cari Starritt-Burnett  
Hon. Jeff Steinhauser

Hon. Janice Stone  
Hon. Tim Sulak  
Hon. Duncan Thomas  
Hon. Alma Trejo  
Hon. Mary Ann Turner  
Hon. Olen Underwood  
Hon. Sandra Watts  
Hon. Jay Weatherby  
Hon. Judith Wells  
Hon. Thomas Wheeler  
Hon. Jon Wissner  
Hon. Jim Worthen  
Hon. Genie Wright  
Hon. Jim Wright  
Hon. Tim Yeats

# new judges

**Hon. Taniya Al-Amin**

458th District Court  
ASSOCIATE JUDGE

**Hon. Kimberly Lemons Allen**

69th District Court  
JUDGE

**Hon. Stacy Allen**

Harris County District Courts  
ASSOCIATE JUDGE

**Hon. Maritza Antu**

482nd District Court  
JUDGE

**Hon. Miryea Ayala**

Harris County Civil Court at Law No. 4  
JUDGE

**Hon. Jennifer Baker**

Title IV-D Court #8  
ASSOCIATE JUDGE

**Hon. Inger Chandler**

Harris County District Courts  
ASSOCIATE JUDGE

**Hon. Dana Cooley**

132nd District Court  
JUDGE

**Hon. Gregory Donnell**

461st District Court  
ASSOCIATE JUDGE

**Hon. Cleve Doty**

455th District Court  
JUDGE

**Hon. Crystal Edmonson Levonius**

481st District Court  
JUDGE

**Hon. Ashley Guice**

Harris County Criminal Court at Law No. 3  
JUDGE

**Hon. Kathryn Gurley**

287th District Court  
JUDGE

**Hon. David Hilburn**

361st District Court  
JUDGE

**Hon. Ryan Hill**

371st District Court  
JUDGE

**Hon. Tiffany Hill**

Harris County Criminal District Courts  
FELONY ASSOCIATE JUDGE

**Hon. Kriselda Hinojosa**

Title IV-D Court #26  
ASSOCIATE JUDGE

**Hon. Ronald Hurdle**

Dallas County Civil District Courts  
ASSOCIATE JUDGE

**Hon. Brenda Jarden-Holter**

Hays County  
ASSOCIATE JUDGE

**Hon. Trent Loftin**

Tarrant County Criminal Court No. 10  
JUDGE

**Hon. Dana Manoushagian**

Wise County Court at Law No. 2  
JUDGE

**Hon. Tahira Merritt**

Dallas County Civil District Courts  
ASSOCIATE JUDGE

**Hon. Edward Nolter**  
Denton County Probate Court No. 1  
*ASSOCIATE JUDGE*

**Hon. Raul Perales**  
Bexar County Children's Court  
*ASSOCIATE JUDGE*

**Hon. Robin Ramsay**  
Denton County Magistrate Court  
*ASSOCIATE CRIMINAL JUDGE*

**Hon. Barbie Scharf-Zeldes**  
Bexar County Probate Court No. 1  
*ASSOCIATE JUDGE*

**Hon. Andrew Smith**  
Harris County District Courts  
*ASSOCIATE JUDGE*

**Hon. Christopher Taylor**  
48th District Court  
*JUDGE*

**Hon. Charles van Cleef**  
6th Court of Appeals  
*JUSTICE*

**Hon. Elizabeth Watkins**  
Child Protection Court of the Concho Valley  
*ASSOCIATE JUDGE*

**Hon. Evan Young**  
Supreme Court of Texas  
*JUSTICE*

## *In Memory*

**HON. JOHN T. BOYD**

316th District Court  
*Amarillo*

**HON. DONALD L. KRAEMER**

12th District Court  
*Huntsville*

**HON. JOHN LAGRONE**

361st District Court  
*Stinnett*

**HON. DEBRA IBARRA MAYFIELD**

190th District Court, 165th District Court  
Harris County Civil Court at Law #1  
*Houston*

**HON. JAMES MEHAFFY**

58th District Court  
*Beaumont*

# upcoming events

## 2022 Annual Judicial Education Conference

GRAPEVINE, TX  
September 7-9, 2022

## 2022 Child Welfare Judges Conference

Georgetown, TX  
October 24-26, 2022

## 2022 College for New Judges

Georgetown, TX  
December 4-8, 2022

## 2023 Family Justice Conference

Georgetown, TX  
January 12-13, 2023

## 2023 Criminal Justice Conference

Austin, TX  
February 13-14, 2023

## 2023 DWI Court Team Basic Training and Advanced Conference

San Marcos, TX  
February 27-March 3, 2023

## 2023 College for New Court Professionals

Pflugerville, TX  
March 27-29, 2023

## 2023 Regional A Conference Regions 2, 5, 6, 7, 9 and 11

Irving, TX  
April 17-18, 2023

## 2023 Regional B Conference Regions 1, 3, 4, 8 and 10

Irving, TX  
May 22-23, 2023

## Court Professionals Conference

Dallas, TX  
July 17-19, 2023

## Impaired Driving Symposium

Odessa, TX  
July 31-August 1, 2023

