PROJECT UPDATE

THE STORY OF JUDGE YEARY AND THE FORTY WRITS

Towards an empirical driven model of Texas Habeas Rule Making:

An application in improper sentencing enhancement

| Edward Stetson*

Frederick Schauer's reformulation of Bentham's. characterization of the common law suggests a data driven model of judicial reasoning's evolution. The Writs Data Project (WDP) uses empirical methods to model, cluster, judicial decisions so as to identify legal controversies, here applied to a data set of writs of habeas corpus.

Such a model will be helpful to the understanding of past legal developments, but more importantly, useful in opening doors onto maps of judicial fault lines across relevant case materials. These fault lines can then be targeted with practitioner argumentation schemes that are more likely to receive treasured judicial merit. WDP illustrates the application of these methods with a focus on improper enhancement, distill forty writs of importance in the recent record, and validate the conceptualization of the model with an examination of one particular fault line, receiving prominence in Judge Yeary dissents. The latter presents a case study of the model's application to enhancement and summarizes cases and respective issues of note in this area of Texas Habeas Corpus law

CONTENTS

N. b. [1]; * research assistant, criminal defense, edward@legal-prose.net

[1] Our interest here is in what one might call legal fault lines, gaps or uncertainties in evolving rules, that facilitate disruptive, distinguishing, 'systemic arguments', (Ted Wood, 2022), of interest to expert practitioners, see strategic well pled, arguments (Carmen Roe, 2022), (Michael Falkenberg, 2022), (Michael Falkenberg, 2021), also the Toulmin model, (Stetson, 2019)

I. DOG LAW

The Schauer reformulation:

> Jeremy Bentham, history's most famous critic of the common law, notoriously referred to the common law as "dog law": When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way judges make laws for you and me" …
>
> Bentham's suspicions notwithstanding … the common law appears resistant to erroneous results. If a preexisting common-law rule seems to produce a bad result in a particular case, then it must be because the preexisting rule is not yet as "pure" as it could and should be and thus stands in need of modification. And the impetus for this modification will be a court's determination that a result is "bad" in light of the full range of considerations of principle and policy that the court would otherwise use to evaluate the wisdom of outcomes or decisions, or to make decisions under circumstances in which there were no rules at all or in which the particular case was at the fringe and not the center of an existing rule[2].

The Schauer reformulation then consists of an existing rule which we can define as a set of (currently) controlling precedents. A writ of controversy is one where the existing rule is challenged by a case where if the rule were followed it would result in a 'bad' outcome. This case represents a shock to the then current status of the law. The rule is amended by either broadening, which is extending the application of a precedent to more cases, or restriction, removing its application to a greater set of cases. Broadening and restricting may proceed in parallel with regard to sub-arguments of a given case, or across a number of cases in the rule. Changing the rule may invite dissent, or concurrence in the judicial record. This defines such a case as a *writ of controversy*. WDP examines this process using data from the Texas Court of Criminal Appeals.

II. 'OPEN SAYS M'E, POPEYE

When *Popeye the Sailor Meets Ali Baba's Forty Thieves,* frustrated in his inability to employ the password 'Open sesame,' he nevertheless succeeds in using his own 'Open Says Me'[3] to find the strength for battle. A researcher in writs jurisprudence must distill thousands of orders to find the appropriate source of law for a given set of facts. Using the methods of this study, the Writs Data Project (WDP), he may quickly find the most relevant cases and their shared citations.

A. DATA

Our project has begun assembling writ orders from the Texas CCA from 2018 to 2021 which exist online with the court. They are organized by quarter with up to twenty order release dates per quarter. Most of the writ orders are dismissals without comment. Of the 530 writs with relief granted, 176 have been identified as writs of controversy (having a dissenting and/or

---

[2] (Frederick Schauer, 2009)

[2] More formally, the reformulation can be described by a rule as a set of paired citations C and authority information I, $\left\{ \left(C_j, I_j\right)_t \; j = 1,..n \right\}$, which evolves as a (discrete) Markov chain with memory

[3]See the video (YT, 2015),an d etymology (Stack Exchange, 2017)

concurring opinion). The efforts here employ various data and analysis algorithms which we will refer to as *Parse*.[4]

Using these writs of controversy, Parse empirically generated two collections. The first collection is of non-trivial keywords used in writ opinions. The second collection is that of cases cited. Each collection's item has a corresponding frequency (how many times were these items used across all writs of controversy), and breadth (how many writs employed these words or cites.) For this preliminary investigation, we merely truncated the collections using a metric of breadth and frequency.

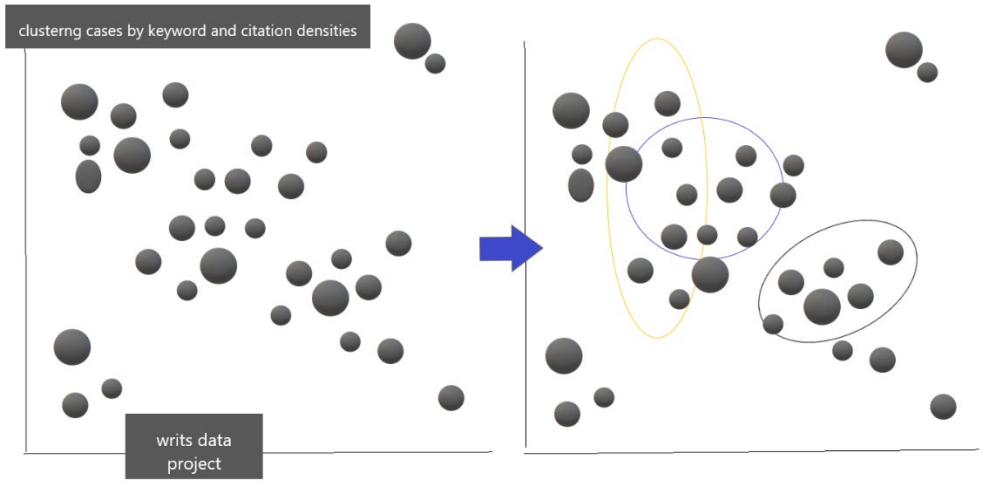


FIGURE 1

Then, for a given writ, Parse calculated if a collection item was used (mentioned) in the writ opinion, and how many times was it used therein; This defines a rectangular data matrix where writs are observations (rows), and keywords and citations are explanatory or dependent variables (columns) subject to some future model specification.

For our exploratory purposes here, Parse merely examines pairs correlations between and amongst keywords and citations in our data matrix, and together with cite or word frequency, examines if the data suggests case clusters without some prior human qualitative sorting. Schematically, **Figure 1**, we are using facts in the case (keywords) and legal authorities *citations) to form groups of similar cases *clusters). note that a case may be an element of more than one cluster; they may overlap.

---

[4] Writs Data Project Parse is currently implemented as an OLE VBA inter Office application using Selenium and other data processing libraries, augmented by. *Ad hoc* methods.

[4] For key word writ frequency vertical vectors stacked horizontally into a matrix W, and a similarly constructed citation matrix C, and possibly augmented by an authority information vector I, our data matrix becomes $[W \mid C \mid I]$, we can construct a correlation matrix, and rank sort the outcomes based on whether the correlation meets some cutoff for significance. This defines pairs correlation between words and citations and amongst themselves. Beyond this exploratory venture, discussed herein, one might posit the estimating of a multinomial logit model for forecasting relevant case material for a given group of facts in a case (keywords). Thus, in a case of settled law, where the facts suggest defeat for the petitioner, it might make sense to identify the relevant fault lines suggested by the data in the writs of controversy, briefing along these fault lines will yield a higher probability of success relative to some frontal assault which sought to bend the facts to the settled law?

B. EXPLORATION

Let us illustrate the use of the writs data project compiled as described above. Suppose we are interested in the keyword 'enhancement,' as representing an improper sentencing resulting in an illegal punishment cognizable under habeas corpus. Of course, the keyword must have sufficient breadth and frequency to be included in the keyword collection.

One can identify writs opinions with a rank sorted high number of occurrences for the keyword, see **appendix A-1.** The cases of Westerman, Pue, and Clay have the highest frequency for this keyword in our writs of controversy set.

Parse then looks for common, shared, cases cited amongst the orders that share high keyword frequency. Again, the cases must be broad and frequent enough for inclusion in our citation collection. In this step, the writ opinions share the citations Rich, Hill, and Mizell in relatively large frequency umbers**. See appendix A-2.** This is a sorting method that approximates correlation, which is confirmatory, **see appendix A-4**, which looks at correlation in pairs across the entire writ sample. Sub-sample correlation is perhaps more salient.

Remark: The histogram of keyword and citation frequency show that zero is the most common count for all items in the collections. Typical cases show one citation, perhaps two, in a given opinion. Only top keywords show a fatter tailed distribution with occurrences of three or more cites. These atypical citations may not be more authoritative. Indeed, they are likely to be less authoritative and warranting further discussion in attempts to broaden or restrict the rule's application. This is indicative of judicial evolution along some dimension of the law. **See appendix A-3.**

C. 40 WRITS

Out of the five hundred plus successful writs in our sample, Parse has examined a subset of those with dissent or concurrence. Of these 176 writs of controversy, roughly forty have sufficient keyword and case citation density to identify them as particularly rich in the discussion of relevant case law, at least with regard to those legal fault lines where doors are opened to petitioners for the argument of rules in transition. Our hypothesis is that these cases represent unsettled common law rules that create openings for writ practitioners. **See appendix A-5.**

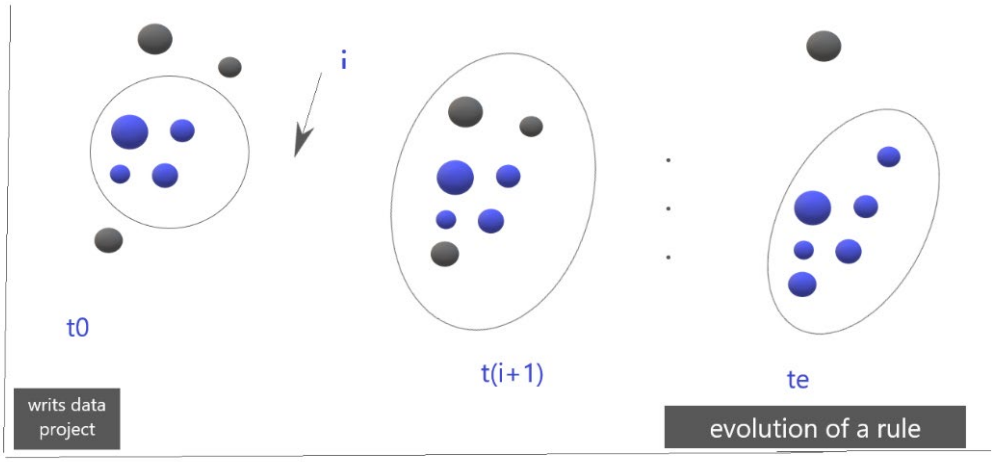
D. THE CASE DISTILLERY

Summary:

- From the data analysis, using rank sorted keyword frequency (A-1), there are clusters of keyword intense writs of controversy opinions. We initialized this with the keyword 'enhancement.'
- Amongst the keyword clusters, there are sub clusters with shared case citations(A-2)
- The clustering may distill the set further with an examination of the histograms of case or keyword frequency (A-3)
- Finally, the cluster validity can be confirmed by case and keyword pair correlation(A-4)

In this model, Schauer's narrative about the common law is one of changes in clustering. A Rule is a set of cases that are relevant through some authority assigned to them, for a given fact pattern. Cases irrelevant to the Rule's application are outside the cluster. In Figure 2 this is depicted as an initial state, t^0 with a Rule cluster, and grey citations outside the cluster as irrelevant to the rule. A 'Bad Case' acts as the impetus i. The impetus creates the need to include in the cluster the heretofore irrelevant case $\mathbf{t^{(i+1)}}$. But through further iterations of inclusion and

exclusion, broadening and narrowing of Rule application to cases, a final new Rule has evolved. The blue cases are now stable within the cluster and the previously included grey case application has been excluded.



s

FIGURE 2

III. ITS NOT A BOOK! ITS A WEAPON [5]

As above, given the algorithms examination of the keyword 'enhancement,' it identifies the triad *Clay*, *Pue*, and *Westerman* (as important writ observations) forming a cluster that share the citation cluster of *Hill*, *Rich*, and *Mizell*, (explanatory correlates). Now an experienced Texas writs attorney might actually know the important cases for this keyword off the top of her head, and the top citations associated with this topic. But not all attorneys are specialists in the law of interest for a given case, and of course with a full implementation, the result would be instantaneous. Moreover, the Parse procedure with specified time windows, may be used for historical research, showing where the common law entered into periods of evolution.

These applications WDP has, so far, but to further validate the model, we have to understand the actual details at the micro level of the evolutionary change described at the macro level in **Figure 2.** Therefore, this study will examine the patterns of citations in the triad. These represent a dialog of authorities, a conversation amongst Judges of the Court of Criminal Appeals, and in this cluster, they often involve a dialog between Judge Yeary and his colleagues. And while many of the opinions are taciturn about changing interpretations of the law, the concurring and dissenting opinions often provide great detail. WDP has summarized these details in the rebuttal tables for each case exhibit below. It suffices to say that these tables are not mere dry, collated authorities / They are weapons in argumentative duals that have real world grave consequences for prison inmates and their families. The tactics of how these

---

5 **REDRIDGE**

And what if this book don't work? What if it don't say what you want it to say?

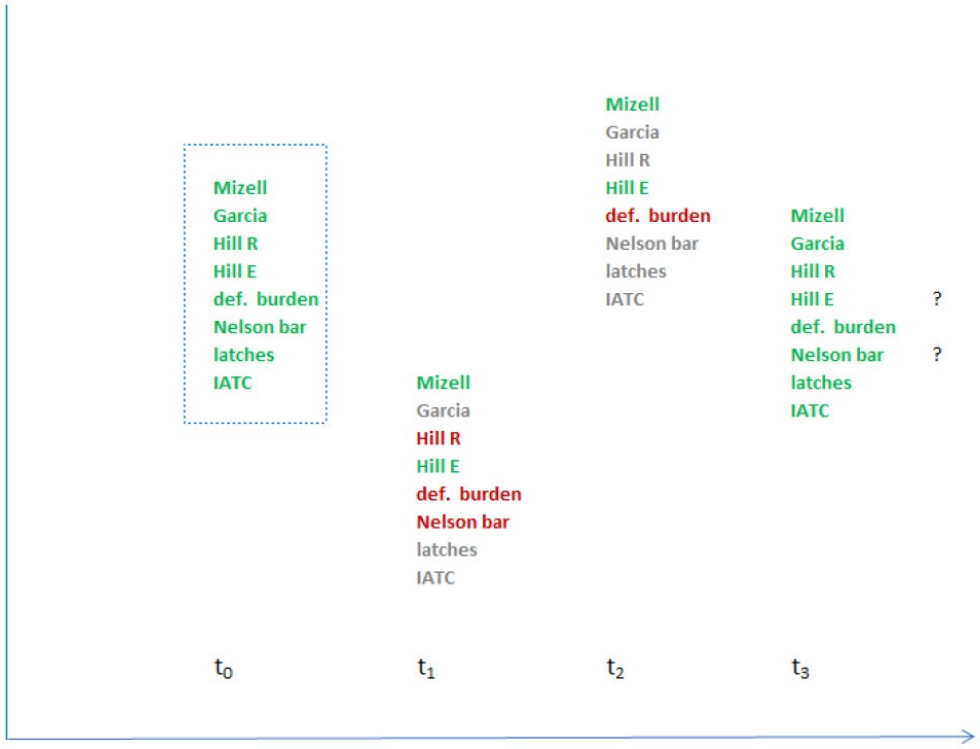
CARNEGIE

Oh, it'll say what I want, I can promise you that. Because I'm going to rewrite it. I'll keep the parts that work for me and make the rest whatever I need it to be.

Script, **THE BOOK OF ELI**, (Whitta, Gary, 2007)

weapons work will be explored further below. Figure 3 shows a timeline of weapons deployment in the enhancement duals.

Chart-dynamic rule evolution



Click to enlarge-Figure 3 –*Legend*-Mizell--illegal sentences never barred, Garcia--improper enhancement -not HC right, Hill R (Bagley)-trial objection required, Hill E-- exceptions for trial objection, def. burden, Diremiggio-burden to defendant, Nelson bar-procedural bar for HC, Perez-latches, Lilly-IATC[6]., see table T1 citation rules

A. STYLIZED RULE EVOLUTION [7]

- **t_0**-In Figure 3, the small blue cluster represents the status of the rule before the Schauer 'Bad Case' impetus, in this case a man serving a forty-year sentence for possessing a firearm. This is the stuff of science fiction: pre-crime punishment.[8] It represents the Bad case in Schauer's description of common law change. It is its impetus. The rules are all operative (green).
- **t_1**-Initial Reaction Clay)—The burden on the defense to police improper enhancement is removed, as is the requirement of an in trial contemporaneous objection. A procedural bar to HC claims that could have been brought on appeal is nullified. The Hill Rule is vitiated (Red light). Latches and IATC become beside the point(grey) Improper

[6] Ineffective Assistance of Trial Counsel, for ethics see (IATC, 2022)

[7] These are meant to be illustrative only, i.e., Stylized, though the opinions and concurrences seem to imply as much to some readers, also note 2, a discrete Markov chain matrix with memory (mean reversion)?

[8] (Minority Report, 2015), see (*NACDL - Excessive Sentencing Project - Texas*, 2013)

enhancement has become equivalent to an illegal sentence violating statutory provisions (Mizell).

- **t_2**- The reaction, Pue; implications of extending Mizell to enhancement are clarified, the Court equivocates. Nullifications are relaxed to uncertain (grey). But the opportunity to proceed to appeal without an in trial objection is retained.
- **t_3**- In Westerman, the doctrine of latches can be used to constrain the implications of Clay. Yearly's dissents have 'bite'[9], IATC may reach the same result without Mizell. Petitioners now face uncertain prospects. The Hill Rule may apply, and if the exception does, it can be constrained via latches. The legal fault line suggests invoking Mizell in the context of IATC, although it is uncertain why improper enhancement does not rise to prosecutor misconduct or breach of a trial court's duty.[10]

It may then seem to some that, at least in a stylized universe, if not the actual one, the 'Book,' the cases utilized to deny or grant relief not actually fixed authoritative 'paper rules,' but a weapon employed to legitimize what Schauer calls the 'real rules.[11]

B. YEARY'S POLYSYLLOGISM

A legal syllogism is basically a statement of a prerequisite rule, an assertion that a factual situation satisfies the conditions of the prerequisite rule, and the logical conclusion from the above that certain consequences follow [12].Judge Yeary to our reading employs sequential

---

[9] As in (Pettinga, 1987)

[10] 'The nature of the right Grado seeks to vindicate leads us to conclude that it is one that is a significant feature of our judicial system and should be classified as a Marin category-two right. In the absence of a defendant's effective waiver, a judge has an independent duty both to identify the correct statute under which a defendant is to be sentenced and the range of punishment it carries and to consider the entire range of punishment in sentencing a defendant irrespective of a defendant's request that he do so. And as we have made clear, a defendant "need make no request at trial for the implementation of such rights, as the judge has an independent duty to implement them."[28]', (*Grado v. State*, 2014)

[11] 'This is what Schauer calls untamed realism:
'What makes hard cases hard, and what makes easy cases easy? A common response to H.L.A. Hart's (mis)reading of Legal Realist Is that the Realists offered their arguments solely in the context of the hard or indeterminate cases likely to find their way into appellate courts. If, as Llewellyn and others argued, factors other than the standard (or literal) reading of standard legal sources determine the outcome even when the standard legal sources are clear, then the existence of such non-standard sources will make cases that are not doubtful under the traditional picture doubtful – and thus worth litigating. And if this is so, then the divergence between real rule and paper rule will be relevant not only in doubtful cases, but also in determining which cases are doubtful and which not. Realism would then be a claim not merely about doubtful cases, but a claim pervading the entire operation of a system of legal rules.' (Schauer, 2012)

[12] 'A legal rule typically states that whenever a generally described prerequisite (P) exists, a certain consequence (C) applies. The rule thus takes the form of a syllogism: Whenever the rule's prerequisite (P) is realized in a factual situation (F'), then the consequence (C) applies. This is the major premise. The minor premise is that this factual situation (F) fulfills the prerequisite (P), that is, F is a case of P." The conclusion then logically follows that for the factual situation F, consequence C applies…' Typically a rule's prerequisite consists of more than one element. Each element may itself require application of other rules to determine if the prerequisite is satisfied. Only if all elements are present in a particular case does the rule apply (Maxeiner, 2011) in (Legal Syllogism, 2021) This a set theoretic logical argument

Major premise: whenever prerequisite P exists, consequence C applies. $P \rightarrow C\ (\forall P, P \in C)$

*Minor premise: i*f the factual (or legal status) situation F fulfills the prerequisite P, it is an example of P, (an element

syllogisms in his arguments, a chain of such being a *polysyllogism*., The Court is striving to answer the question of whether the facts of the case fulfill the conditions of the perquisite rule(s), that is in our model, turning on or off elements of the citation cluster (Figure 3):

IN *CLAY*

I. [13]

A. Old Law-Improper-to use the same prior felony both to establish that element of the offense and to enhance the punishment under separate enhancement provisions, and is Eligible for relief Even when brought for the first time on appeal, in the absence of any trial objection (*Garcia/Ramirez*)

B. *Clay* as HC without prior appeal does not satisfy (I), o it is new law, unless Mizell is applied,

II. [14]

A. Also, *Clay* falls *into Rich v. State* rule, and reinforced for HC, *Ridley*, *Cashman*

B. 'The principle that an "illegal sentence" may be raised "at any time," regardless of whether there was a contemporaneous objection lodged at trial, does not apply with respect to improper-enhancement claims

III. [15]

A. But the *Hill* Rule has *Hill* exceptions

1. *Duplechin*- fundamentally defective indictment

2. *Ex parte White*- fundamentally defective charging instrument

3. *Ex parte Todd*- void indictment

B. Double element improper enhancement is not yet a *Hill* exception

C. *Clay* does not qualify under these exceptions

IV.

A. The improper enhancement claim could have been raised on appeal, *Ex parte Rich*, *Ex parte Nelson*, *Ex parte Townsend,*

B. Claims not raised on appeal are procedurally barred for HC*, Ex parte Carter*, *Ex parte Marascio*

---

of the set P,). $F \equiv P \rightarrow C\ (F \in P)$

Conclusion: then the factual situation receives the consequence C. $F \rightarrow C\ (F \in C)$

[13] (*Syllogistic Terminology*, 2022), (*Sorites | Logic | Britannica*, 2022), Yeary often omits a term in the syllogism, see (*Enthymeme | Logic | Britannica*, 2022)

[14] The *Camestres* syllogism: All P is m; No S is M: No S is P

[15] The *Barbara* syllogism: All M is P; All S is M: All S is P; Or *Celarent*: No M is P; All S is M: No S is P

V. Accordingly, *Clay* is barred from prevailing in because of the above, The Court makes new law by extending *Garcia* relief to improper enhancement in HC: the appropriate means of obtaining relief is through IATC

IN *PUE*

VI. *Clay* logic is reiterated

A. Illegal sentences warrant relief

1. *Proenza v. State*- a claim of an illegal enhancement is not forfeitable for appeal
2. *Grado v. State*, - a fundamental right it is Not extinguished by mere silence or inaction

B. an improper-enhancement claim is derivative of an ancillary error in fact and not an illegal sentence per se

C. *Mizell* does not apply

The writ petitioner's task is then simply to elucidate why elements of the citation cluster should be operative, and why others should not. This is the factually well pled, strategic systemic argument scheme of Roe, Wood, ad Falkenberg.[16]

IV.FUTURE WORK

The WDP will

- Continue to gather writs data to include writ petitions rather than just opinions. This will yield better factual development and provide examples for *pro se* litigants of successful writs, perhaps helping to reduce the Court's burden of spurious writ applications,
- Extend our application of various keyword empirical methods and mathematical specifications intimated here,
- If warranted, develop a more robust online Parse application for use by public defenders in legal research,
- Seek to receive more academic and practitioner guidance that will guide subsequent technical developments.

---

[16] supra note 1

V. REFERENCES

Ashley v. State, 527 SW 2d 302 (Court of Criminal Appeals 1975). https://sc

Carmen Roe. (2022). *Advanced Appellate Tips*. UT 2022 ROBERT 0. DAWSON CONFERENCE ON CRIMINAL APPEALS, Carmen Roe Law Firm, PLLC - Houston, TX. https://ca

Cobb v. US, . 5:10-CR-00040-F-1, 5:13-CV-00719-F (Dist. Court February 10, 2017). https://sc

Diremiggio v. State, 637 SW 2d 926 (Court of Criminal Appeals 1982). https://sc

Duplechin v. State, 652 SW 2d 957 (Court of Criminal Appeals 1983). https://sc

Enthymeme | logic | Britannica. (2022, September 3). https://ww

Ex parte Bagley, 509 SW 2d 332 (Court of Criminal Appeals 1974). https://sc

Ex Parte Bowman, 483 SW 3d 726 (Court of Appeals 2016). https://sc

Ex parte Brown, 205 SW 3d 538 (Court of Criminal Appeals 2006). https://sc

Ex parte Carrio, 992 SW 2d 486 (Court of Criminal Appeals 1999). https://sc

Ex parte Carter, 521 SW 3d 344 (Court of Criminal Appeals 2017). https://sc

Ex parte Cashman, 671 SW 2d 510 (Court of Criminal Appeals 1983). https://sc

Ex parte Clay, 539 SW 3d 285 (Court of Criminal Appeals 2018). https://sc

Ex Parte Clay (opinion), WR-WR-87,763-01 (Court of Criminal Appeals January 31, 2018). https://sc

Ex Parte Contreras, 640 SW 3d 279 (Court of Appeals 2021). Ex Parte Contreras, 640 SW 3d 279

Ex parte Fournier, 473 SW 3d 789 (Court of Criminal Appeals 2015). Ex parte Fournier, 473 SW 3d 789

Ex parte Hill, 632 SW 3d 547 (Court of Criminal Appeals 2021). https://sc

Ex parte Jimenez, 364 SW 3d 866 (Court of Criminal Appeals 2012). https://sc

Ex parte Langley, 833 SW 2d 141 (Court of Criminal Appeals 1992). https://sc

Ex parte Lilly, 656 SW 2d 490 (Court of Criminal Appeals 1983). https://sc

Ex parte Lo, 424 SW 3d 10 (Court of Criminal Appeals 2013).

Ex parte Mable, 443 SW 3d 129 (Court of Criminal Appeals 2014). https://sc

Ex parte Marascio, 471 SW 3d 832 (Court of Criminal Appeals 2015). https://sc

Ex parte Nelson, 137 SW 3d 666 (Court of Criminal Appeals 2004). https://sc

Ex Parte Noble, 02-21-00008-CR (Court of Appeals, 2nd Dist. April 8, 2021). https://sc

Ex parte Parrott, 396 SW 3d 531 (Court of Criminal Appeals 2013). https://sc

Ex parte Perez, 398 SW 3d 206 (Court of Criminal Appeals 2013). https://sc

Ex parte Pointer, 492 SW 3d 318 (Court of Criminal Appeals 2016). https://sc

Ex Parte Pointer, WR-84,786-01, WR-84,786-02 (Court of Criminal Appeals December 11, 2019). https://sc

Ex parte Pue, 552 SW 3d 226 (Court of Criminal Appeals 2018). https://sc

Ex parte Pue (opinion, concurrence, Yeary dissent), 552 SW 3d 226 (Court of Criminal Appeals 2018). https://sc

Ex Parte Pue, WR-85,447-01 (Court of Criminal Appeals October 12, 2016). https://sc

Ex parte Ridley, 658 SW 2d 177 (Court of Criminal Appeals 1983). https://sc

Ex parte Saenz, 491 SW 3d 819 (Court of Criminal Appeals 2016). https://sc

Ex parte Saucedo, 576 SW 3d 712 (Court of Criminal Appeals 2019).

Ex parte Smith, 444 SW 3d 661 (Court of Criminal Appeals 2014). https://sc

Ex parte Todd, 669 SW 2d 738 (Court of Criminal Appeals 1984). https://sc

Ex parte Townsend, 137 SW 3d 79 (Court of Criminal Appeals 2004). https://sc

Ex parte Warfield, 618 SW 3d 69 (Court of Criminal Appeals 2021). https://sc

Ex Parte Westerman (Walker concurrence), 592 SW 3d 441 (Court of Criminal Appeals 2019). https://sc

Ex parte Westerman (Yeary dissent), 570 SW 3d 731 (Court of Criminal Appeals 2019). https://sc

Ex Parte Westerman(order), NP S.W.3d ___ (court. criminal. appeals 2018). https://sc

Ex parte White, 659 SW 2d 434 (Court of Criminal Appeals 1983). https://sc

Frederick Schauer. (2009). *Thinking like a lawyer: A new introduction to legal reasoning*. Harvard University Press, https://ww

Garcia v. State, 335 SW 2d 381 (Court of Criminal Appeals 1960). https://sc

Gonzalez v. State, 8 SW 3d 640 (Court of Criminal Appeals 2000). https://sc

Gonzalez v. State, 11-12-00027-CR (Court of Appeals, 11th Dist. 2014). https://sc

Grado v. State, 445 SW 3d 736 (Court of Criminal Appeals 2014). https://sc

Hill v. State, 633 SW 2d 520 (Court of Criminal Appeals 1981). https://sc

IATC. (2022). *Texas Center for Legal Ethics—-Opinion 571*. https://ww

Johnson v. US, 135 S. Ct. 939 (Supreme Court 2015). https://sc

Kinney v. State, 79 SW 817 ___ (court. criminal. appeals 1903). https://sc

Legal Syllogism. (2021). Legal syllogism. In *Wikipedia*. https://en

Long v. State, 34 Tex. 566 ___ (Supreme Court of Texas 1871). https://ci

Marin v. State, 851 SW 2d 275 (Court of Criminal Appeals 1993). https://sc

Maxeiner, J. R. (2011). *Failures of American Civil Justice in International Perspective*. Cambridge University Press. https://ww

Michael Falkenberg. (2021). *Article 11.07 Writs of Habeas Corpus*. UT 2021 Robert O. Dawson Conference on Criminal Appeals. https://ut

Michael Falkenberg. (2022). *Article 11.07 Habeas Corpus*. UT 2022 ROBERT 0. DAWSON CONFERENCE ON CRIMINAL APPEALS, Harris County Public Defender's Office. https://ut

Minority Report. (2015). *Minority report Pre-Crime Mr Marks intro*. youtube. https://ww

Mizell v. State, 119 SW 3d 804 (Court of Criminal Appeals 2003). https://sc

NACDL - Excessive Sentencing Project—Texas. (2013). NACDL - National Association of Criminal Defense Lawyers. https://ww

Penal Code Offenses by Punishment Range. (n.d.). https://ww

Pettinga, G. (1987). Rational Basis with Bite: Intermediate Scrutiny by Any Other Name. *62 Indiana Law Journal 779 (1987)*, *62*(3). https://ww

Proenza v. State, 541 SW 3d 786 (Court of Criminal Appeals 2017). https://sc

Ramirez v. State, 527 SW 2d 542 (Court of Criminal Appeals 1975). https://sc

Schauer, F. (2012). *Legal Realism Untamed* (SSRN Scholarly Paper ID 2064837). https://do

Section 12.34—Third Degree Felony Punishment, Tex. Pen. Code § 12.34 | Casetext Search + Citator. (n.d.). Retrieved August 30, 2022, from https://ca

Section 12.42—Penalties for Repeat and Habitual Felony Offenders on Trial for First-, Second-, Or Third-Degree Felony, Tex. Pen. Code § 12.42 | Casetext Search + Citator. (n.d.). Retrieved August 30, 2022, from https://ca

Section 46.04—Unlawful Possession of Firearm, Tex. Pen. Code § 46.04 | Casetext Search + Citator. (n.d.). Retrieved August 30, 2022, from https://ca

Sorites | logic | Britannica. (2022, September 3). https://ww

Stack Exchange. (2017). *arabic literature—Origin of the phrase "Open Sesame."* Literature Stack Exchange. https://li

Stetson. (2019). *Jailhouse Logic Notes on Legal Reasoning and Argument eBook*. http://legal-prose.org/jailhouse-logic-2019/toc.html

Stetson. (2021). *Jailhouse Stylistics Notes on Legal Style and Rhetoric eBook*. http://legal-prose.org/jailhouse-stylistics-2021/toc.html

Stetson. (2022). *THE STORY OF JUDGE YEARY AND THE FORTY WRITS*. http://legal-prose.org/excerpts/stetson/The-Story-of-Judge-Yeary-and-the-40-writs-edward-stetson-09062022.pdf

Strickland v. Washington, 466 US 668 (Supreme Court 1984).

Syllogistic Terminology. (2022, September 3). https://ph

Taylor v. State, 10 SW 3d 673 (Court of Criminal Appeals 2000). https://sc

Ted Wood. (2022). *Four Systemic Arguments (that may work outside of Houston)*. APPELLATE SEMINAR – RAISING THE BAR, TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION. https://ww

Thomas v. State, 07-07-0067-CR (Court of Appeals, 7th Dist. January 8, 2008).

Thompson v. State, 9 SW 3d 808 (Court of Criminal Appeals 1999).

Tinney v. State, 578 SW 2d 137 (Court of Criminal Appeals 1979).

Tomlin v. State, 722 SW 2d 702 (Court of Criminal Appeals 1987).

Walters v. Scott, 21 F. 3d 683 (Court of Appeals, 5th Circuit 1994).

Whitta, Gary. (2007). *Script- The Book of Eli*. IMSDb. https://im

YT. (2015, June 3). *Popeye the Sailor Meets Ali Baba's Forty Thieves*. https://ww

VI. DATA APPENDICES

T1-TABLE OF IMPROPER ENHANCEMENT CITATIONS

*, USED IN **FIGURE 3***

prior	Mizell v. State,	defining an illegal sentence can be corrected at any time
	Garcia v. State	improper double element enhancement, 1st time brought on appeal absent a trial objection (not HC)
	Ramirez v. State	
Clay	Hill v. State	This Court has consistently held that in order to complain about the admissibility of a [evidence], even in regard to a violation of...federally guaranteed constitutional rights, there must be an objection in the trial court, exception-fundamentally defective indictments
	Ex parte Bagley	
		exception-fundamentally defective indictments
	Hill Rule	
	Duplechin v. State	fundamentally defective indictment
	Ex parte White	charging instrument
	Ex parte Todd	void indictment
	Hill exception	
	Ex parte Cashman	denies Hill exception, affirms Hill Rule, TEAGUE dissent IATC
	Ex parte Ridley	Hill rule, failure to object at trial
Pue	not raised on appeal, procedurally barred	
	Ex parte Nelson	We have said countless times that habeas corpus cannot be used as a substitute for appeal, and that it may not be used to bring claims that could have been brought on appeal.
	Ex parte Gardner	
	Ex parte Garza, 2021	
	Ex parte Townsend	To the extent that *Barley* holds that an improper stacking [cumulative sentence] order claim may be brought for the first time in an application for a writ of habeas corpus, it is overruled.
	Ex parte Rich	illegal sentence in a plea, no bar to HC
	Ex parte Carter	improper cumulative claim procedurally barred
	Ex parte Marascio	double jeopardy: if a particular right is not subject to procedural default, then the claim asserting a violation of that right can normally be raised in a direct appeal regardless of a contemporaneous objection not, in Marin's framework, subject to forfeiture by inaction
	Marin v. State	
	Proenza v. State	
	Arroyo v. State, 2021	There "is no common-law `fundamental error 'exception to the rules of error preservation established by Marin
	Grado v. State	substantive rights are not waived by silence

Table of Improper Enhancement Citations- continued

Weste.	IATC	
	Ex parte Lilly	an attorney must have a firm command of the facts of the case as well as the law
	Finality	
	Ex parte Langley	no finality of a conviction (probation)
	Diremiggio v. State,	The burden is on the State to make a prima facie showing that any prior conviction alleged for enhancement became final before the commission of the primary offense; once such a showing is made, the burden shifts to the defendant to prove otherwise
	Latches and HC	
	Ex parte Perez	prejudice to the state in response to HC
	Ex parte Carrio	cited in Perez
	Ex parte Saenz	latches depend on the facts
After		
	Ex parte Warfield, 2021	relief granted, sentencing error, involuntary guilty pleas under Mable
	Schlup v. Delo,	procedural innocence
	Ex parte Mable	unknowing guilty plea where evidence was invalid
	EX PARTE POINTER 2019	denied, Pue is not retroactive, illegal sentence must be claimed, and latches
	EX PARTE NOBLE2021	denied, latches apply to HC IATC, citing Westerman, Perez

A1-A5 CORRELATION, DENSITIES

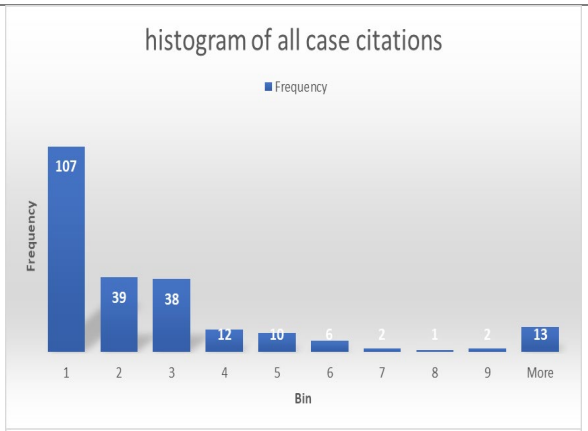
A-1 KEYWORD 'ENHANCEMENT'

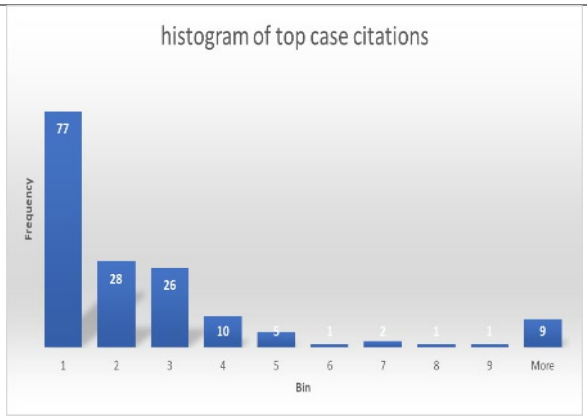
file name	#
237_WR-89_032-01_WESTERMAN-JOH-2019-Apr-Jun_04_10_2019-DISS-2	26
005_WR-85_447-01_PUE-JEREMY-WA-2018-Jan-Mar_02_28_2018-DISS-2	25
004_WR-87_763-01_CLAY-JOHN-BEE-2018-Jan-Mar_01_31_2018-DISS-1	17
014_WR-88_046-01_LEVELS-JOSEPH-2018-Jan-Mar_02_28_2018-DISS-1	6
005_WR-85_447-01_PUE-JEREMY-WA-2018-Jan-Mar_02_28_2018-CONC-1	4
237_WR-89_032-01_WESTERMAN-JOH-2019-Apr-Jun_04_10_2019	4

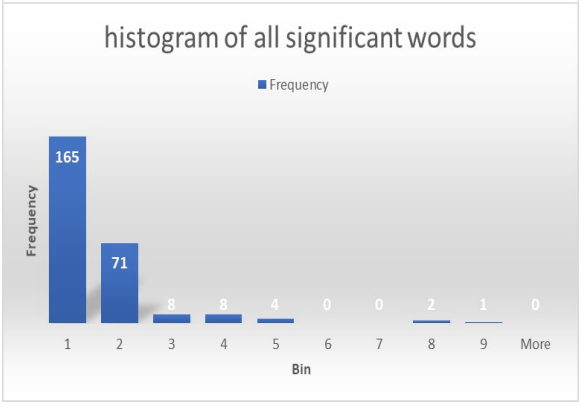
A-2 RANK CASE FREQUENCIES

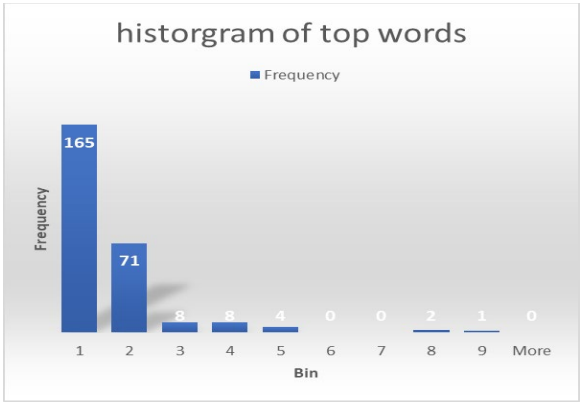
Writ case	Ex parte Rich	Hill v. State	Mizell v. State
005_WR-85_447-01_PUE-JEREMY-WA-2018-Jan-Mar_02_28_2018-DISS-2	5	17	11
005_WR-85_447-01_PUE-JEREMY-WA-2018-Jan-Mar_02_28_2018-CONC-1	0	2	6
004_WR-87_763-01_CLAY-JOHN-BEE-2018-Jan-Mar_01_31_2018-DISS-1	1	14	1
005_WR-85_447-01_PUE-JEREMY-WA-2018-Jan-Mar_02_28_2018	2	0	0
219_WR-87_190-02_SAUCEDO-ANDRE-2019-Apr-Jun_06_26_2019-CONC-1	1	0	0
004_WR-87_763-01_CLAY-JOHN-BEE-2018-Jan-Mar_01_31_2018	0	0	0

A-3WORD CASE CITATION FREQUENCY HISTOGRAMS









A-4 SOME CORRELATIONS

pair	**correlation**
enhancement, aggravated	51.9%
enhancement, assistance	45.1%
enhancement, convictions	42.6%
enhancement, ineffective	37.4%
enhancement, punishment	60.4%
Hill v. State, Ex parte Rich	80.0%
Ex parte Pue, Mizell v. State	42.1%

A-5 40 WRITS

#Rank	*Writ*	*Sum word freq.*	*Sum cites freq.*
1	219_WR-87_190-02_SAUCEDO-ANDRE-2019-Apr-Jun_06_26_2019-CONC-1 [1]	31	97
2	304_WR-87_470-01_KELLEY-GREGOR-2019-Oct-Dec_11_06_2019-CONC-1 [2]	61	41
3	005_**WR-85_447-01_PUE-JEREMY-WA-2018**-Jan-Mar_02_28_2018-DISS-2 [3]	91	34
4	219_WR-87_190-02_SAUCEDO-ANDRE-2019-Apr-Jun_06_26_2019-CONC-3	26	29
5	436_WR-91_289-01_WARFIELD-ROLL-2021-Jan-Mar_02_24_2021-CONC-2	19	27
6	044_WR-87_738-01_MITCHAM-WYLIE-2018-Jan-Mar_02_14_2018-CONC-1	33	26
7	314_WR-89_601-01_THOMPSON-CHAR-2019-Oct-Dec_10_02_2019-DISS-1	0	21
8	152_WR-84_091-01_CHANEY-STEVEN-2018-Oct-Dec_12_19_2018-CONC-3	0	21
9	152_WR-84_091-01_CHANEY-STEVEN-2018-Oct-Dec_12_19_2018	32	20
10	004_**WR-87_763-01_CLAY-JOHN-BEE-2018**-Jan-Mar_01_31_2018-DISS-1	50	17

(40 WRITS CONTINUED)

11	*009_WR-87_785-01_CHAVEZ-JOE-BA-2018-Jan-Mar_02_28_2018-DISS-1*	*2*	*17*
12	173_WR-87_881-01_SKINNER-GREGO-2018-Oct-Dec_11_07_2018-DISS-1	13	13
13	086_WR-88_227-01_LESTER-COLTON-2018-Apr-Jun_04_11_2018-CONC-1	6	12
14	005_**WR-85_447-01_PUE-JEREMY-WA-2018**-Jan-Mar_02_28_2018-CONC-1	18	11
15	509_WR-92_944-01_THOMAS-DAYVEO-2021-Oct-Dec_10_20_2021-DISS-1	16	11
16	510_WR-92_944-02_THOMAS-DAYVEO-2021-Oct-Dec_10_20_2021-DISS-1	16	10
17	511_WR-92_964-01_TURNER-LAMARC-2021-Oct-Dec_12_15_2021-DISS-1	22	9
18	436_WR-91_289-01_WARFIELD-ROLL-2021-Jan-Mar_02_24_2021-CONC-1	20	9
19	462_WR-91_755-02_GARCIA-LOUIE-2021-Apr-Jun_06_30_2021-DISS-1	12	9
20	461_WR-91_755-01_GARCIA-LOUIE-2021-Apr-Jun_06_30_2021-DISS-1	12	9
21	459_WR-50_358-02_CAPE-JOHN-GAB-2021-Apr-Jun_06_30_2021-DISS-1	12	9
22	005_WR-85_447-01_PUE-JEREMY-WA-2018-Jan-Mar_02_28_2018	98	8
23	517_WR-92_799-01_NICHOLSON-MAL-2021-Oct-Dec_11_10_2021-DISS-1	19	8
24	391_WR-90_980-02_MALLET-OTIS-J-2020-Jul-Sep_07_01_2020-CONC-2	5	7

25	390_WR-90_980-01_MALLET-OTIS-J-2020-Jul-Sep_07_01_2020-CONC-2	5	7
26	152_WR-84_091-01_CHANEY-STEVEN-2018-Oct-Dec_12_19_2018-CONC-4	12	6
27	086_WR-88_227-01_LESTER-COLTON-2018-Apr-Jun_04_11_2018	9	6
28	237_**WR-89_032-01_WESTERMAN-JOH-2019-**Apr-Jun_04_10_2019-DISS-2	101	5
29	024_WR-59_823-07_JONES-JAMES-D-2018-Jan-Mar_01_24_2018	35	5
30	152_WR-84_091-01_CHANEY-STEVEN-2018-Oct-Dec_12_19_2018-CONC-1	29	5
31	137_WR-88_707-01_STEWART-CYNTH-2018-Jul-Sep_09_12_2018	12	5
32	482_WR-92_488-01_RICE-KENNETH-2021-Apr-Jun_04_14_2021	10	5
33	196_WR-89_524-01_BENEDICT-DARR-2019-Jan-Mar_02_27_2019	10	5
34	046_WR-87_990-01_MATA-JESSE-AN-2018-Jan-Mar_02_14_2018	9	5
35	044_WR-87_738-01_MITCHAM-WYLIE-2018-Jan-Mar_02_14_2018	9	5
36	152_WR-84_091-01_CHANEY-STEVEN-2018-Oct-Dec_12_19_2018-CONC-2	8	5
37	196_WR-89_524-01_BENEDICT-DARR-2019-Jan-Mar_02_27_2019-DISS-1	7	5
38	047_WR-88_020-01_SHELTON-AARON-2018-Jan-Mar_02_14_2018	6	5
39	459_WR-50_358-02_CAPE-JOHN-GAB-2021-Apr-Jun_06_30_2021	17	4
40	427_WR-90_442-02_CASEY-DEREK-L-2021-Jan-Mar_01_27_2021-CONC-1	14	4

---

[1] This concurrence had almost 6000 words ,23 pages, The automatic procedure for counting cites does not count unique cites, so there may be expansive discussions of a single case within. Perhaps a better metric would be to count unique citation counts as well, or to adjust, normalize for word count.

[2] This writ has 90-page concurrence with ~24,000 words, 107 footnotes and like the Saucedo concurrence is a statistical outlier.

[3] This is a Pue writ discussed here in the exhibits along with Westerman and Clay.

A-6 REFERENCES-THE YEARY DEBATE ON ENHANCEMENT

opinion	**Concurrence**	**dissent**
WR-87_763-01_CLAY-JOHN-BEE-2018-Jan-Mar_01_31_2018		WR-87_763-01_CLAY-JOHN-BEE-2018-Jan-Mar_01_31_2018-DISS-1
WR-85_447-01_PUE-JEREMY-WA-2018-Jan-Mar_02_28_2018	WR-85_447-01_PUE-JEREMY-WA-2018-Jan-Mar_02_28_2018-CONC-1	WR-85_447-01_PUE-JEREMY-WA-2018-Jan-Mar_02_28_2018-DISS-2
WR-89_032-01_WESTERMAN-JOH-2019-Apr-Jun_04_10_2019	WR-89_032-01_WESTERMAN-JOH-2019-Apr-Jun_04_10_2019-CONC-1	WR-89_032-01_WESTERMAN-JOH-2019-Apr-Jun_04_10_2019-DISS-2

VII. SUPPLEMENTARY CASE NOTES

CLAY, PUE, WESTERMAN

PRIOR TO IMPETUS

(*Mizell v. State*, 2003)-can always correct an illegal sentence

(*Ramirez v. State*, 1975),(*Garcia v. State*, 1960) even absent objection, 'a prior conviction may not be used to prove both an element of an offense and an enhancement allegation', requires fundamental defect, or substantial right (*Thomas v. State*, 2008), not published, , (*Gonzalez v. State*, 2014)

REBUTTALS-CLAY (*Ex parte Clay*, 2018)**,** (*Ex Parte Clay (opinion)*, 2018)

(*Hill v. State*, 1981)-failure to object at trial[4], Hill Rule and Hill exception

(*Duplechin v. State*, 1983), fundamentally defective indictment, Hill exception

(*Ex parte Cashman*, 1983), refused, Hill rule, no contemporaneous objection, void conviction

(*Ex parte Ridley*, 1983)-failure to object, infirm prior conviction

(*Ex parte White*, 1983), fundamentally defective charging instrument, Hill exception

(*Ex parte Todd*, 1984), Hill exception, void indictment

- Sentencing statutes.[5] [6]
- **The Impetus is the injustice of inconsistency-** 'Even assuming that the dissent would grant relief to the non-enhanced third-degree felon sentenced to life, it would not grant relief to a third-degree felon sentenced to life because of an improper enhancement. *Id.* at 238-39. It is inconsistent to grant relief in one circumstance but not the other. If a non-enhanced sentence that is outside the applicable range is intolerable, then so is an improperly enhanced sentence that is outside the applicable range.', concurrence, (*Ex parte Pue*, 2018)

REBUTTALS-PUE (*EX PARTE PUE (OPINION, CONCURRENCE, YEARY DISSENT)*, 2018),(*EX PARTE PUE*, 2016)

(*Ex parte Nelson*, 2004), (*Ex parte Townsend*, 2004)-- procedural default, limits claims on habeas corpus that they could have raised on direct appeal,[7]

(*Ex parte Carter*, 2017), improper-cumulation claims, not raised on appeal defaulted, ,also (*Ex parte Townsend*, 2004)[8]

(*Ex parte Marascio*, 2015), procedural default for Habeas if not raised on appeal, The Gonzalez rule[9]

(*Proenza v. State*, 2017), (*Grado v. State*, 2014)- The Judge has a responsibility to identify the correct statute and respective sentence, but not enhancement?, also (*Mizell v. State*, 2003)

REBUTTALS WESTERMAN- *(*Ex Parte Westerman (Walker concurrence)*, 2019),(*Ex parte Westerman (Yeary dissent)*, 2019), (*Ex Parte Westerman(order)*, 2018)*

(*Ex parte Lilly*, 1983) It is IATC to fail to recognize an improper enhancement[10]	(*Ex parte Saenz*, 2016)IATC and latches, prejudice to the prosecutor's ability to respond to a writ of Habeas Corpus., and (*Ex parte Perez*, 2013)revised doctrine of latches, prejudice to the State,[11], , citing (*Ex parte Carrio*, 1999)[12] and preponderance of the evidence[13]
(*Ex parte Langley*, 1992), -the conviction is not final unless the probation is revoked	(*Ex parte Smith*, 2014)- courts may *sua sponte* consider whether laches should bar an application for the writ of habeas corpus
(*Diremiggio v. State*, 1982), it is the state's burden to show a final conviction (*Ashley v. State*, 1975),- 12.42(d) habitual offender enhancement v. repeat offender 12.42(c).[14]	(*Long v. State*, 1871),, (*Kinney v. State*, 1903),, the requirement that a prior conviction become final before the *commission* of the offense to be enhanced (*Tinney v. State*, 1979), (*Tomlin v. State*, 1987)- from *Diremiggio,* -a requirement that the felony on trial must have been committed after the second enhancing felony became final[15]

- **IATC-**'To prevail on a claim of ineffective assistance of counsel, a petitioner must show that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced his defense,'.[16](*Strickland v. Washington*, 1984), also [17]
- **Enhancement requires a previous felony conviction that is final-'**In *Tomlin,* this Court prescribed the procedure to follow in the habitual offender context under Section 12.42(d): "The sequence of events must be proved as follows: (1) the first conviction becomes final; (2) the offense leading to a later conviction is committed; (3) the later conviction becomes final; (4) the offense for which defendant presently stands accused is committed." *Id.* Then, more recently, we reaffirmed this sequence in *Jordan v. State,.*. 2008). Therefore, this construction is this Court's prevailing interpretation of Section 12.42(d).,'

AFTERMATH, FAULT LINES

Ex Parte Pointer-Is Pue retroactive? Is prosecutor illegal enhancement misconduct? (*Ex Parte Pointer*, 2019), colorable ineffective-assistance-of-counsel claims should have appointed counsel.(*Ex parte Pointer*, 2016), (*Ex Parte Pointer*, 2019)

Ex Parte Hill-Improper enhancement or an illegal sentence must cause Parrot Harm- 'We recognized in *Parrott* that an applicant is not harmed by an illegal sentence if his actual criminal history supports the range of punishment in which he was sentenced. *Parrott,* 396 S.W.3d at 537…. We conclude that *Parrott* controls. The harm associated with an illegal sentence turns on only whether an applicant's sentence is within the range set by law, and here, Applicant cannot show that he was harmed by his illegal sentence'(*Ex parte Hill*, 2021), (*Ex parte Parrott*, 2013)

Ex parte Noble-Latches increasingly have traction in IATC Habeas- 'Noble provided no explanation for her four-year delay in claiming Rowley's ineffective assistance resulted in her involuntary plea. The trial court was entitled to conclude that her delay was unreasonable, and her claims were precipitated by her facing a possible life sentence upon adjudication. Additionally, the trial court found that the State was prejudiced by her unreasonable delay in asserting an ineffective assistance claim against Rowley because his death meant he could not respond to her claims. Rowley's death is uncontroverted, and the death of a trial participant is considered an important factor in the application of laches. *See Ex parte Westerman,* 570 S.W.3d 731, 734 (Tex. Crim. App. 2019) (mem. op.) (Yeary, J., dissenting); *Perez,* 398 S.W.3d at 211. This is particularly true where, as here, the applicant has failed to show any nexus between counsel's supposedly bad advice and her guilty plea over a year later with different counsel. *See Moody,* 991 S.W.2d at 858. Considering the totality of the circumstances, the trial court was justified in applying laches to bar Noble's claim against Rowley.**'**(*Ex Parte Noble*, 2021)

Ex parte Warfield-Actual Innocence precludes use of the conditions of *Elizondo, Brown in considering improper enhancement of illegal sentences.*

'On the other hand, in my view, any applicant who can demonstrate that he is "actually innocent" in the absolute sense should not be bound by *Elizondo*'s requirement of new facts. If the penal provision under which an applicant is convicted is later construed for the first time in such a way that it manifestly could *not* support a conviction based upon the undisputed facts of the case, we should be able to declare the applicant "actually innocent" of that offense—even for the first time in post-conviction proceedings. *Cf. In re Lester,* 2020) ("Lester is actually innocent because his wrongful conviction is based on conduct that was not a crime.").[1] Granting an applicant relief 75*75 under these circumstances would not require a retroactive application of new law: "A first time interpretation" of a statute, we have said, "even if unanticipated by the parties in the case, cannot be considered a new rule because, presumably," it meant what the Court found it to mean at the time when it was enacted. *See Taylor v. State,* ..2000).(*Ex parte Warfield*, 2021)', (*Taylor v. State*, 2000), (*Ex parte Brown*, 2006)

Interrelatedness 'even *Wilson* noted the interrelatedness of "guilty only of" claims and claims of actual innocence.[74]'(*Ex parte Saucedo*, 2019) in (*Ex parte Warfield*, 2021), Mable is bad law (involuntary pleas),(*Ex parte Mable*, 2014), also unconstitutionality of the offense, (*Ex parte Fournier*, 2015), (*Ex parte Lo*, 2013)

* Independent research assistant, criminal defense, edward@legal-prose.net, (Stetson, 2019), (Stetson, 2019), (Stetson, 2021), (Stetson, 2022)

NOTES

---

[4] 'It has long been held that a failure to lodge a timely objection to evidence offered during trial precludes a defendant from later complaining, even if the alleged error were of constitutional dimension. See *Gibson v. State,* 516 S.W.2d 406 (Tex.Cr.App. 1974), and the cases cited there. See also *Shumake v. State,* 502 S.W.2d 758 (Tex.Cr. App.1973); *Ex parte Bagley,* 509 S.W.2d 332 (Tex.Cr.App.1974).',(*Hill v. State*, 1981), (*Ex parte Bagley*, 1974)

[5] See (*Section 12.34 - Third Degree Felony Punishment, Tex. Pen. Code § 12.34 | Casetext Search + Citator*, n.d.), (*Section 12.42 - Penalties For Repeat And Habitual Felony Offenders On Trial For First, Second, Or Third Degree Felony, Tex. Pen. Code § 12.42 | Casetext Search + Citator*, n.d.), (*Section 46.04 - Unlawful Possession Of Firearm, Tex. Pen. Code § 46.04 | Casetext Search + Citator*, n.d.)

[6] (*Ex parte Clay*, 2018)

[7] 'We have said countless times that habeas corpus cannot be used as a substitute for appeal, and that it may not be used to bring claims that could have been brought on appeal', (*Ex parte Jimenez*, 2012)

[8] Footnote: '[14] *See generally Ex parte Wilcox, …. 1935)* ("Habeas corpus is an extraordinary writ, and the general rule is that it does not lie where relief may be had, or could have been, procured by resort to another remedy. It is also settled that use of the writ will not be permitted as a substitute for appeal.") (citations omitted); *Ex parte Groves, … 1978)* ("It is well-settled `that the writ of habeas corpus should not be used to litigate matters which should have been raised on direct appeal.'"); *Ex parte Gardner, …. 1996)*; 2 THOMAS CARL SPELLING, A TREATISE ON EXTRAORDINARY RELIEF IN EQUITY AND AT LAW, § 1151 (Boston, Little, Brown & Co. 1893); 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 49 (Boston, Little, Brown & Co. 1918)., (*Ex parte Carter*, 2017)'

[9] 'n general, a constitutional claim is forfeited on collateral review if an applicant had the opportunity to raise that claim on direct appeal but failed to do so. *See Ex parte Townsend, …. 2004)*. However, due to its fundamental importance, under *Gonzalez,* an applicant may raise a double-jeopardy claim for the first time on collateral attack if (1) the undisputed facts show the double-jeopardy violation is clearly apparent from the face of the record, and (2) enforcement of usual rules of procedural default serves no legitimate', in (*Ex parte Marascio*, 2015), referring to (*Gonzalez v. State*, 2000), double jeopardy: ' ' The nature of double-jeopardy protections leads me to conclude that they are best suited as category-two Marin rights. Although Gonzalez's use of the term fundamental in describing double jeopardy was overly broad, it correctly recognized double-jeopardy protections as substantively different from other rights extinguished by mere inaction., see (*Marin v. State*, 1993)

[10] 'The Sixth Amendment guarantees an accused effective assistance of counsel. *See* U.S. Const. amend. VI; *Ex parte Bryant,… 2014)*. To support a claim of ineffective assistance, a criminal defendant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *See Strickland … (1984)*; *Ex parte Andrus, … 2021)*... *see also Ex parte Lilly, …1983) (en banc)* (concluding that the defendant was denied effective assistance, the court found that "[t]he record in this case shows that at the time of the trial, [defense counsel] knew nothing of the facts of the case, had not consulted with [the defendant] about the case, did not review the prosecuting attorney's file, and had done no independent investigation nor preparation for trial").' (*Ex Parte Contreras*, 2021),

[11] 'In this case, we alter the parameters of the equitable doctrine of laches as it applies to bar a long-delayed application for a writ of habeas corpus. Recognizing that our current approach to laches in the habeas corpus context has imposed an unreasonably heavy burden upon the State, we now adopt a revised approach that is consistent with the Texas common-law definition of that doctrine. In doing so, we expand the definition of prejudice under the existing laches standard to incorporate all forms of prejudice so that a court may consider the totality of the circumstances in deciding whether to hold an application barred by laches. Our revised approach is motivated by our recognition that the current laches standard is too rigid and, as a result, some applicants have been permitted to seek post-conviction relief despite excessive and unjustified delays that have prejudiced the State's ability to defend long-standing convictions. This approach has failed to account for the State's interest in finality and is incompatible with fundamental principles of fairness and equity, which must underlie any grant of habeas corpus relief,' (*Ex parte Perez*, 2013)

[12] 'The Fifth Circuit has acknowledged that the application of Rule 9(a) "must be carefully limited to avoid abrogating the purpose of the writ of habeas corpus." *Walters v. Scott … (5th Cir. 1994)*. It is the burden of the State "to (1) make a *particularized* showing of prejudice, (2) show that the prejudice was *caused* by the petitioner having filed a late petition, and (3) show that the petitioner has not acted with reasonable diligence as a matter of law." *Id.* at 686-87 (emphasis in original). The court explained that the type of prejudice the State must show is prejudice in its ability to respond to the allegations in the petition. *Id.* at 687.'(*Ex parte Carrio*, 1999), (*Walters v. Scott*, 1994)

---

[13] 'An applicant seeking post-conviction habeas corpus relief must prove his claims by a preponderance of the evidence. *Ex parte Richardson,* 2002). In reviewing a trial court's decision to deny habeas relief, we view the facts in the light most favorable to the trial court's ruling. *Ex parte Peterson, …. 2003), overruled in part on other grounds by Ex parte Lewis, ….2007).* We afford almost total deference to the trial court's findings of fact that are supported by the record, especially when the trial court's fact findings are based on an evaluation of credibility and demeanor. *Ex parte Amezquita,*2006) (quoting *Ex parte White, ...2004)*). We afford the same deference to the trial court's rulings on "application of law to fact questions" if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. *Ex parte Peterson, ...*. In such instances, we use an abuse-of-discretion standard. *See Ex parte Garcia, ...2011).* However, if the resolution of those ultimate questions turns on an application of legal standards absent any credibility issue, we review the determination de novo. *Ex parte Peterson, .* We will affirm the trial court's decision if it is correct on any theory of law applicable to the case. *Ex parte Primrose, ...* (Tex.App. — Fort Worth 1997, pet. ref'd), also on habeas latches, and IATC 'To establish ineffective assistance of counsel, appellant must show that his trial counsel's performance fell below an objective standard of reasonableness and, but for counsel's deficiency, the result of the proceeding would have been different. *Strickland v. Washington, ...* (1984); *Salinas v. State, ...2005).* A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Strickland,* 4. In reviewing counsel's performance, we look to the totality of the representation to determine counsel's effectiveness, indulging a strong presumption counsel's performance falls within the wide range of reasonable professional assistance or trial strategy. *Id.* at 689, 104 S.Ct. at 2065; *see Ex parte Jimenez, ...2012); Thompson v. State, ..1999).*' (*Ex Parte Bowman*, 2016)', citing (*Thompson v. State*, 1999)

[14] Chapter PENALTIES FOR REPEAT AND HABITUAL OFFENDERS , PENAL CODE OFFENSES, TX Office of the attorney general, pdf(*Texas Attorney General*, n.d.), (*Section 12.42 - Penalties For Repeat And Habitual Felony Offenders On Trial For First, Second, Or Third Degree Felony, Tex. Pen. Code § 12.42 | Casetext Search + Citator*, n.d.)

[15] Footnote '[6] The requirement that a conviction must become *final* before it may be used as an enhancing conviction was not conceived through legislative enactment until 1974 for Section 12.42(d) (the habitual enhancement provision), and not until 2011 for Section 12.42(c) (the repeat-offender enhancement provision). *See* Act of May 24, 1973, 63rd Leg., R.S., ch. 399 § 1, sec. 12.42(d), 1973 Tex. Gen. Laws 883, 908 (showing enactment of the 1974 Penal Code); Act of May 25, 2011, 82nd Leg., R.S., ch. 834 § 3, sec. 12.42(c)(1), 2011 Tex. Gen. Laws 2104, 2105 (showing the 2011 amendment ad(*Ex Parte Westerman(order)*, 2018)ding the finality of conviction language to Section 12.42(c)). Nonetheless, this Court has read—despite the former absence of such language in the statute indicating this was the Legislature's intent—a finality requirement, through the statute's use of the word "conviction," for enhancement purposes. *See Arbuckle v. State,* 1937) ("Before a prior conviction may be relied on to enhance the punishment in a subsequent case such prior conviction must be final.") (citing *Brittian v. State, .. 1919)* (holding that convictions used to enhance "must be legal [,] and finally dispose of the case under which such convictions were secured").',

[16] See (*Cobb v. US*, 2017),federal enhancement citing (*Johnson v. US*, 2015), 'This being the case, if we were to read Section 12.42(c) according to its plain language, the State would be able to once again enhance Applicant's punishment because the 1984 burglary charge became final on May 22, 1990. As a result, even if Applicant's trial counsel was ineffective for failing to object to the enhancement paragraph during the 1990 plea negotiations, Applicant would be unable to show that he was prejudiced by the ineffective representation, because Applicant would now be in the same position that he was in when his counsel did not object during the plea proceedings. *See Strickland..(1984)* ("[T]he defendant must show that [counsel's] deficient performance prejudiced the defense.").'(*Ex parte Westerman (Yeary dissent)*, 2019)

[17] footnote '[1] *See Ex parte Miller, ..2009)* ("Courts `must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' and that `the challenged action "might be considered sound trial strategy."'... When the record contains no evidence of the reasoning behind counsel's actions, a court normally cannot conclude that counsel's performance was deficient.") (quoting *Strickland..*); *see also Garcia v. State, ..)*("[I]n the absence of evidence of counsel's reasons for the challenged conduct, an appellate court `commonly will assume a strategic motivation if any can possibly be imagined,' and will not conclude the challenged conduct constituted deficient performance unless the conduct was so outrageous that no competent attorney would have engaged in it.")(*Ex parte Westerman (Yeary dissent)*, 2019) '