CHAPTER 38 EVIDENTIARY STATUTES EVERY LAWYER REPRESENTING A JUVENILE CLIENT SHOULD KNOW FOR TRIAL AND APPEAL

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Chapter 38 Evidentiary Statutes Involving Forensic Analysis and Testimony

- **Art. 38.41. Certificate of Analysis**
- **Art. 38.42. Chain of Custody Affidavit**
- *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.E.2d 314 (2009); *Williams v. State*, 585 S.W.3d 478 (Tex. Crim. App. 2019); *Deener v. State*, 214 S.W.3d 522 (Tex. App. – Dallas 2006, pet. ref'd) (art. 38.42).
- **Art. 38.076. Testimony of Forensic Analyst by Video Teleconference**

Chapter 38 Evidentiary Statutes in Sexual Assault and Similar Offenses

Art. 38.37. Evidence of Extraneous Offenses or Acts

(b) Notwithstanding Rules 404 and 405, Texas Rules of Evidence, and subject to Section 2-a, evidence that the defendant has committed a separate offense described by Subsection (a)(1) or (2) may be admitted in the trial of an alleged offense described by Subsection (a)(1) or (2) for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant.

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"Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. . . The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime."

Old Chief v. United States, 519 U.S. 172, 181, 117 S.Ct. 644, 650-51 (1997), quoting, *Michelson v. United States*, 335 U.S. 469, 475-476, 93 L.Ed. 168, 69 S.Ct. 213 (1948) (footnotes omitted)

Chapter 38 Evidentiary Statutes in Sexual Assault and Similar Offenses

38.37 Evidence of Extraneous Offenses or Acts

Sec. 2-a. Before evidence described by Section 2 may be introduced, the trial judge must:

(1) determine that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt; and

(2) conduct a hearing out of the presence of the jury for that purpose.

Sec. 3. The state shall give the defendant notice of the state's intent to introduce in the case in chief evidence described by Section 1 or 2 not later than the 30th day before the date of the defendant's trial.

Sec. 4. This article does not limit the admissibility of evidence of extraneous crimes, wrongs, or acts under any other applicable law.

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Chapter 38 Evidentiary Statutes in Sexual Assault and Similar Offenses

Art. 38.37 Evidence of Extraneous Offenses or Acts

Key cases: *Belcher v. State*, 474, S.W.3d 840 (Tex. App. – Tyler 2015, no pet.); *Robisheaux v. State*, 483 S.W.3d 205 (Tex. App. – Austin 2016, pet. ref'd).

All intermediate courts of appeals have now considered facial and, in some cases, "as applied" due process challenges to Article 2 of Section 38.37. These courts have all held the statute facially constitutional under due process, analogizing it to Federal Rule of Evidence 414. That federal rule provides "the court may admit evidence that the defendant committed any other child molestation" to be considered "on any matter to which it is relevant" in the case on trial. FED. R. EVID. 414(a).

The CCA has not granted PDR on this issue.

Takeaway for defense lawyers: No intermediate COA has considered an "as applied" constitutional due process challenge to this statute in a juvenile trial setting. Be creative. Use the juvenile client's age, the circumstances of the extraneous and charged offense, and the wording of the propensity instruction as a basis for the "as applied" challenge.

Argue that unless rigorous application of the Rule 403 factors is used, the statute loses due process protection. Object to the character/propensity instruction given at the time the evidence is received and at formal charge conference on the same grounds.

Chapter 38 Evidentiary Statutes in Sexual Assault and Similar Offenses

Art. 38.071. Testimony of child who is victim of offense

Key cases: *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed. 666 (1990); *Coronado v. State*, 351 S.W.3d 315 (Tex. Crim. App. 2011).

"Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma."

"Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, i.e., more than 'mere nervousness or excitement or some reluctance to testify,'"

Craig at 855, 110 S.Ct. 3169 (citation omitted) (added emphasis).

Takeaway for prosecutors: Prosecutors will need to have particularized evidence of trauma if the child testifies using the Texas closed circuit television alternative. That testimony needs to include evidence that is tied to the defendant or juvenile-respondent on trial.

Takeaway for defense counsel: Depending on circumstances, consider adding, along with other state and federal constitutional objections, that ordering of closed circuit testimony outside the courtroom is a judicial comment on weight of the evidence under TEX. CODE CRIM. PROC. sec. 38.05.

Chapter 38 Evidentiary Statutes in Sexual Assault and Similar Offenses

Art. 38.072. Hearsay Statement of Certain Abuse Victims

Key case (discernable manner): *Garcia v. State*, 792 SW.2d 88 (Tex. Crim. App. 1990).

Garcia was criticized last year by the Fort Worth Court of Appeals. The Court focused on the burden of identifying the outcry witness and the effect on underdeveloped evidentiary records.

"Under *Garcia* and in the absence of any such clarification, we are forced to conclude that the record fails to establish any clear abuse of discretion in the trial court's determination that [CAC forensic interviewer] was the appropriate outcry witness."

Espinoza v. State, 571 S.W.3d 427, 433 (Tex. App. – Ft. Worth 2019, pet. ref'd).

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Preservation of error takeaway: Defense counsel has the practical burden to develop evidence that someone other than the designated outcry witness is the proper witness for this category of essentially hearsay testimony in order to preserve appellate review.

Chapter 38 Evidentiary Statutes in Sexual Assault and Similar Offenses

Art. 38.072. Hearsay Statement of Certain Abuse Victims

Key case (Multiple outcry evidence): *Broderick v. State*, 35 S.W.3d 67, 73 (Tex. App. – Texarkana 2000, pet. ref'd).

"Event-specific, not person-specific."

"We conclude that there may be two proper outcry witnesses if they each testify about different events, but there may be only one outcry witness to the victim's statement about a single event" *Id.* at 73

Chapter 38 Evidentiary Statutes in Sexual Assault and Similar Offenses

Art. 38.074. Testimony of child in prosecution of offense

Key cases: *In the Matter of D.T.C.*, 30 S.W.3d 43 (Tex. App. – Houston [14th Dist.] 2000, no pet.) (Adult volunteer in courtroom during child complainant's testimony); *Lambeth v. State*, 523 S.W.3d 244 (Tex. App. – Beaumont 2017, no pet.) (service dog with child-complainant during testimony).

Chapter 38 Family Violence Evidentiary Statutes

Art. 38.371. Evidence in Prosecution of Offense Committed Against Member of Defendant's Family or Household or Person in Dating Relationship with Defendant

(a) This article applies to a proceeding in the prosecution of a defendant for an offense, or for an attempt or conspiracy to commit an offense, for which the alleged victim is a person whose relationship to or association with the defendant is described by Section 71.0021(b), 71.003, or 71.005, Family Code.

(b) In the prosecution of an offense described by Subsection (a), subject to the Texas Rules of Evidence or other applicable law, each party may offer testimony or other evidence of all relevant facts and circumstances that would assist the trier of fact in determining whether the actor committed the offense described by Subsection (a), including testimony or evidence regarding the nature of the relationship between the actor and the alleged victim.

(c) This article does not permit the presentation of character evidence that would otherwise be inadmissible under the Texas Rules of Evidence or other applicable law.

Key case: *Gonzales v. State*, 541 S.W.3d 306 (Tex. App. – Houston [14th Dist.] 2017, no pet.). – enhanced AFV prosecution.

"At trial and appeal, the defendant did not object to admission of the prior AFV judgment, but objected to the complaint because it named Patty as the complainant. The defendant argued that admitting the complaint was unnecessary because only the judgment of conviction was needed to enhance the charge to a felony. The defendant contended the prior complaint served no purpose other than to show '[T]hat if he did it once before, he probably did it again.'"

Id. at 310-11.

The COA held the evidence was necessary to rebut the defensive theory that Patty fabricated the assault or that no assault really happened. This, according to the Court "[Opened the door for the State to prove that the assault happened as Patty initially alleged, but that Patty recanted her allegations out of fear of, or love for, [defendant]." 541 S.W.3d at 312. No Rule 403 analysis appears in the opinion.

Chapter 38 and the Texas Exclusionary Rule – Article 38.23 of the Texas Code of Criminal Procedure

Art. 38.23. Evidence not to be used

Key Juvenile case: *Gonzales v. State*, 67 S.W.3d 910 (Tex. Crim. App. 2002).

Gonzales involved a fifteen-year old juvenile, who, following discretionary transfer to district court, was indicted for capital murder. Following his arrest law enforcement transported him to a designated juvenile processing center as required by Section 52.02(a) of the Juvenile Justice Code.

The juvenile defendant filed a motion to suppress the written statement based on law enforcement's failure to timely notify his parents of his detention, contending a violation of Section 52.02(b). COA reversed.

The CCA reversed the COA finding Art. 38.23 requires a causal connection between the violation and the making of the statement. *Gonzales* 67 S.W.3d at 913. The holding was based on longstanding law requiring a cause and effect between the law violated and the evidence sought to be suppressed citing *Roquemore v. State*, 60 S.W.3d 862 (Tex. Crim. App. 2001);

Takeaway for defense lawyers: Section 52.02(b) and Art. 38.23(a) can be legitimately used to exclude juvenile statements otherwise complying with Section 51.095 of the Juvenile Justice Code, but juvenile defense counsel must establish causation.

Example of sufficient evidence: *State v. Simpson*, 105 S.W.3d 238, 242-43 (Tex. App. – Tyler 2013, no pet.);

Example of insufficient evidence: *In re C.M.*, No. 10-10-00421-CV, 2012 WL 57940 (Tex. App. – Waco February 22, 2012, no pet.) (not designated for publication)

Takeaway for prosecutors: Teach (preach) to law enforcement: Just contact the parents.

Key cases in search and seizure by school officials: *New Jersey v. T.L.O.*, 469 U.S. 325, 327, 105 S.Ct. 733, 735, 83 L.Ed.2d 720 (1985); *State v. Coronado*, 835 S.W.2d 636 (Tex. Crim. App. 1992)

"A search of a student by a teacher or school official is justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated, or is violating, either the law or the rules of the school. Second, a court must determine whether the search, as actually conducted, was reasonably related in scope to the circumstances which justified the interference in the first place."

T.L.O., 105 S.Ct. 742-43. (added emphasis).

Chapter 38 and Juvenile Custodial Statements – Section 51.095 of the Juvenile Justice Code and Article 38.22 of the Texas Code of Criminal Procedure

Section 51.095. Admissibility of a Statement of a Child

Art. 38.22 of the Texas Code of Criminal Procedure

Key cases, juvenile custody issue: *J.D.B. v. North Carolina*, 564 U.S. 261, 277, 131 S.Ct. 2394, 2406, 180 L.Ed.2d 310 (2011); *In re L.M.*, 993 S.W.2d 276, 289 (Tex. App. – Austin 1999, pet. den'd); *In re D.A.R.*, 73 S.W.3d 505, 510 (Tex. App. – El Paso 2002, no pet.)

"Reviewing the question *de novo* today, we hold that so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child's age will be a determinative, or even a significant, factor in every case It is, however, a reality that courts cannot simply ignore."

"A child's age is far 'more than a chronological fact. It is a fact that 'generates commonsense conclusions about behavior and perception.' Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge." *J.D.B.* 564 U.S. at 271-272, 131 S.Ct. at 2402-04

Justices Alito (opinion) Scalia, Thomas, and Chief Justice Roberts dissented

Custody for purposes the requirements of warnings and waivers under sec. 51.095 and art. 38.22 in juvenile cases, as in adult cases, is highly fact specific, and arguably more difficult when a juvenile is involved. Application has varied widely depending on circumstances.

Example, No custody: *In re J.W.*, 196 S.W.3d 327 (Tex. App. – Dallas 2006, no pet.). Three uniformed and armed LE officers surround a 16 yoa at a football game. Never handcuffed or restrained, or taken to police station. The juvenile never asked to go home "or asked for his mother or an attorney." *Id.* 33

Example: Custody: *In re M.G.*, No. 10-09-00037-CV, 2010 WL 3292711 (Tex. App. – Waco August 11, 2010, no pet.). Station house questioning of 11 yoa, mother left in waiting room while juvenile and LE alone in interview room. "[The detective] also stressed to [the juvenile] several times that they had found a shirt in his bedroom with potential DNA evidence on it and brought his mother into the interview room, not for M.G.'s benefit, but only to allow [the] Detective to take DNA cheek swabs from him." *Id.* at *5-6

Chapter 38 and Juvenile Custodial Statements – Section 51.095 of the Juvenile Justice Code and Article 38.22 of the Texas Code of Criminal Procedure

Key cases, voluntariness of confession: *Gallegos v. Colorado*, 370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962); *In re R.J.H.*, 79 S.W.3d 1 (Tex. 2002)

"[the] crucial evidence introduced at the trial being a formal confession which he signed on January 7, 1959, after he had been held for five days during which time he saw no lawyer, parent or other friendly adult. [After] petitioner's arrest on January 1, the following events took place. His mother tried to see him on Friday, January 2, but permission was denied, the reason given being that visiting hours were from 7 p.m. to 8 p.m. on Monday and Thursday. From January 1 through January 7, petitioner was in Junvenile [*sic*] Hall, where he was kept in security, though he was allowed to eat with the other inmates. He was examined by the police in Juvenile Hall January 2, and made a confession which an officer recorded in longhand. On January 3, 1959, a complaint was filed against him in the Juvenile Court by the investigating detectives." *Gallegos*, 370 U.S. at 50, 82 S.Ct. at 1210.

Takeaway for defense counsel: If defense counsel has a statement complying with Sec. 51.095, but an issue exists, for example, of prompt parental notice of the juvenile being taken into custody, consider Art. 38.23 and federalizing your objection on due process grounds.

When the statement does not comply with sec. 51.095, still federalize with a voluntariness claim. They work hand in hand. There are many variables with juveniles when law enforcement is anxious to secure a statement. Voluntariness of any such a statement should be a threshold consideration. Ask for findings and conclusion on voluntariness required by Art. 38.22 but not by Sec. 51.095. Same for a jury instruction.

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Dedicated to the memory of

Jeffery Doan Wagnon
January 17, 1964 — August 27, 2019

and

Clyde Daniel Jones, III
December 3, 1964 — January 17, 2020