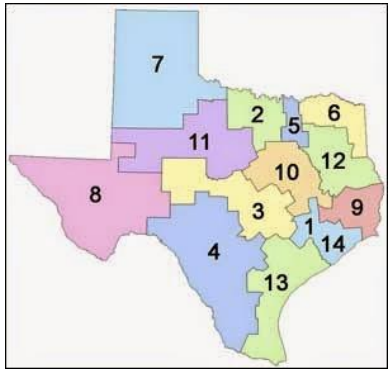
US Supreme Court

Texas Supreme Court and
Court of Criminal Appeals

5th Circuit Court of Appeals

14 State Appellate
Courts



State County Court / District Court

Federal District Court

US Legal System

- Common law versus civil law
- *Stare decisis* – "stand by things decided," determining litigation based on precedent
- What does a legal argument look like?

II. Indictment Fails to Establish a Legal Duty to Act

John Doe moves to quash the instant indictment on the ground that it does not allege a relationship that establishes a legal duty to act. *Florio v. State*, 784 S.W.2d 415, 417 (Tex. Crim. App. 1990); *Billingslea v. State*, 780 S.W.2d 271, 276 (Tex. Crim. App. 1989); *Ronk v. State*, 544 S.W.2d 123, 125 (Tex. Crim. App. 1976). Without establishing a legal duty to act, the indictment fails to state everything that is necessary to be proved, and therefore does not charge an offense at all. Tex. Code Crim. Proc. art. 21.03; *State v. Rodden*, 05-07-00031-CR, 2007 WL 3203135, at *2 (Tex. App.—Dallas Nov. 1, 2007, no pet.); *State v. Miller*, 05-07-00032-CR, 2007 WL 3204075, at *2 (Tex. App.—Dallas Nov. 1, 2007, no pet.); *Ballard v. State*, 149 S.W.3d 693, 699 (Tex. App.—Austin 2004, pet. ref'd), Smith *v. State*, 603 S.W.2d 846, 847 (Tex. Crim. App. 1980); *Lang v. State*, 586 S.W.2d 532, 533 (Tex. Crim. App. 1979); *Ronk*, 544 S.W.2d at 125; *cf. Rocha v. State*, 14-02-00653-CR, 2003 WL 297811, at *2 (Tex. App.—Houston [14th Dist.] Feb. 13, 2003, pet. ref'd) (emphasizing that indictment did not cause harm to defendant's preparation for defense only because the indictment explicitly mentioned Tex. Fam. Code § 151.003, which states a parent has a duty to the upbringing of their child). An indictment that fails to charge an offense is fundamentally defective. Tex. Code Crim. Proc. art 21.01; *Rodden*, 2007 WL 3203135, at *2; *Miller*, 2007 WL 3204075, at *2; *Billingslea*, 780 S.W.2d at 276, *Smith*, 603 S.W.2d at 847; *Lang*, 586 S.W.2d at 533; *Ronk*, 544 S.W.2d at 124.

Rules of Evidence

- Common law standards codified
- Federal Rules of Evidence
- Texas Rules of Evidence
- Evidence must always be relevant – probative of a material issue; the person offering the testimony must always be competent
- Experts can offer opinion testimony
- First – **show the witness has the knowledge, skill, experience, training, or education to testify as an expert**

Judge Decides Reliability

- Experts are allowed to offer opinions about which they have no personal knowledge
- Old rule: *Frye* test. Expert opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community.
- New rule: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*
  - Court held that passage of Federal Rules of Evidence overruled *Frye*.
  - R. 701 – "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified by an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

Judge Decides Reliability (cont'd)

- Trial judge must determine whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.
  - Entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is *scientifically valid*, and [RELIABLE]
  - Whether that reasoning or methodology properly can be applied to the facts in issue. [RELEVANT]

Factors for Reliability

- The extent to which the theory has been or can be tested
- The extent to which the technique relies upon the subjective interpretation of the expert
- Whether the theory has been subjected to peer review and/or publication
- The technique's potential rate of error
- Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community
- The non-judicial uses which have been made of the theory or technique
- PER *KUMHO TIRE COMPANY V. CARMICHAEL*, APPLIES TO TECHNICAL AND OTHER SPECIALIZED KNOWLEDGE, NOT JUST SCIENTIFIC EXPERTS.

Houston Police Department Crime Lab

- Scandal-plagued in the late 1990's and 2000's
- 2002 – DNA testing temporarily suspended after audit revealed unqualified personnel, lax protocols, roof leaking on evidence
- Audited a second time from 2005-2007
- 2012 – Closed and re-branded as the **Houston Forensic Science Center**, took over from HPD
- 2013 – Cleared a backlog of rape-kits numbering over 6,600
- Current fight over control between Forensic Science Center and HPD

2002

The DNA evidence became the primary testimony against Sutton. The laboratory claimed that the semen sample from the backseat of the car contained two profiles – Sutton's and that of another, unidentified man. Moreover, a crime lab employee testified at trial that the DNA found on the victim was an exact match with Sutton, meaning that only about 1 person in 694,000 could have deposited the material whereas in reality, 1 in 16 black men share this profile.

2005

James Bolding sometimes boasted of holding a doctorate, but the investigator found that he had none, nor any training in serology when, years earlier, he had come to work in the serology department. Within Bolding's first year, his supervisor died, leaving Bolding in charge. Over the many years that Bolding remained in charge, the serology department became marked, according to Bromwich, by a "disregard for scientific integrity." Analysts beneath Bolding often neglected to test evidence that was presented to them; the tests they did perform were "generally unreliable." They misinterpreted, misrecorded, misreported the results. The investigator even found a case in which Bolding seemed to have committed "outright scientific fraud and perjury."

2006

Analysts in two divisions of the Houston crime lab failed to report evidence that might have helped criminal suspects, and they made errors in almost one-third of the cases reviewed in a test sample, an independent investigator reported Wednesday.

The problems in the **Houston Police Department** lab amounted to "a near-total breakdown" in the DNA and serology divisions over a 15-year period, **Michael Bromwich** said.

2014

Scores of cases affected after HPD crime lab analyst ousted

Investigation finds evidence of lying, tampering by tech

Former DNA lab technician Peter Lentz worked on 185 criminal cases, including 51 murders or capital murders, according to letters sent out by the Harris County District Attorney's Office and obtained by the Houston Chronicle through an open records request.

2013

Salvador, who could not be reached for comment, was suspended from his duties as a forensic scientist with DPS in February 2012, when the department discovered problems with his work, including the falsification of results in numerous cases involving marijuana, cocaine, heroine, pharmaceuticals and other controlled substances. Salvador had worked on 4,900 drug cases in 30 counties since he took the job in 2006, DPS spokesman Tom Vinger said.

Harris County Institute of Forensic Sciences

- Better reputation than city crime lab, but facing backlog issues with DNA recently (4,600 cases)
- Scandal over drug testing
  - People were pleading guilty to controlled substances offenses in order to get time served and get out of jail RATHER than wait in jail for trial
  - The controlled substance would be tested and come back negative!
  - 73 people were cleared post-conviction from 2014-2015 of drug charges where the test results were negative
  - DA Devon Anderson made a policy in 2015 where prosecutors cannot offer plea deals until results are back from the lab (how long??)

How Does a Defense Attorney Deal with Scientific Evidence Against their Client?

When evidence comes into the trial, in front of the jury, how do you counteract the effect of that testimony on the jury?

- Discovery / subpoena reports
- Cross-examination
  - Question chain-of-custody, etc.
- Right to confrontation
- Bring your own experts

Sample Subpoena Duces Tecum

- Any and all documents related to Laboratory Case Number L-422866 Forensic Biology Laboratory Report or Supplemental DNA Laboratory Report or any other report made in relation to Laboratory Case Number L-422866.
- Chain of custody forms detailing the transport and storage of all samples related to Laboratory Case Number L-422866 Forensic Biology Laboratory Report or Supplemental DNA Laboratory Report.
- All documentation of the method of DNA extraction including, but not limited to, instruments used for extraction, standards adhered to for extraction, and all information about the samples used for DNA extraction related to Laboratory Case Number L-422866 Forensic Biology Laboratory Report or Supplemental DNA Laboratory Report.
- All worksheets used in the preparation of reports related to Laboratory Case Number L-422866 Forensic Biology Laboratory Report or Supplemental DNA Laboratory Report, but not limited to handwritten notes by laboratory staff.
- Any and all information on each instrument used any testing related to Laboratory Case Number L-422866 Forensic Biology Laboratory Report or Supplemental DNA Laboratory Report, including but not limited to the manufacturer, model, and serial number of the instrument(s), the quality control records of the instrument(s), the manufacturer's recommended quality control standards for the instrument(s), the Texas Department of Public Safety Crime Laboratory recommended quality control standards for the instrument(s), maintenance records of the instrument(s), the manufacturer's recommended maintenance standards for the instrument(s), the Texas Department of Public Safety Crime Laboratory recommended maintenance standards for the instrument(s), and the Texas Department of Public Safety Crime Laboratory personnel training or certification requirements for the instrument(s).

Sample Subpoena Duces Tecum (cont'd)

- All charts and graphs derived from any test related to Laboratory Case Number L-422866 Forensic Biology Laboratory Report or Supplemental DNA Laboratory Report.
- Documents sufficient to establish the identities and technical qualifications of all persons who performed any test related to Laboratory Case Number L-422866 Forensic Biology Laboratory Report or Supplemental DNA Laboratory Report.
- Records of certification of laboratory personnel to show competence to operate each instrument used in any tests performed in relation to Laboratory Case Number L-422866 Forensic Biology Laboratory Report or Supplemental DNA Laboratory Report.
- The standards of analysis of all tests performed in relation to Laboratory Case Number L-422866 Forensic Biology Laboratory Report or Supplemental DNA Laboratory Report.

Examination of a Witness

- Direct Examination (non-leading questions)
- Cross Examination (leading questions)
- Redirect Examination (non-leading)
- Recross Examination (leading)

Example: https://www.youtube.com/watch?v=6oXJCqMe918

(start at 1:24:30)

What is “Junk Science”?

(b) A court may grant a convicted person relief on an application for a ***writ of habeas corpus*** if:

…

(A) relevant scientific evidence is currently available and **was not available at the time of the convicted person’s trial** because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person’s trial; and

(B) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and(2) the court makes the findings described by Subdivisions (1)(A) and (B) and also finds that**, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted**.

Texas Code of Criminal Procedure art. 11.073. Enacted in 2015.

Todd Willingham

Testimony from the Willingham Trial

*"The first incendiary indicator is **the auto ventilation.** The inconsistency of the fire going out of this window and the fire going out of the door and this window where that's inconsistent with fire behavior. That's an indicator it's a possible incendiary fire."*

-Manuel Vasquez, page 255

ARC Report, page 12

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Actually,

Window breakage is a common example of "auto-ventilation" and is consistent with un-accelerated compartment fires. A classic example of window breakage in an un-accelerated compartment fire is shown in the NFPA video Fire Power, which was produced in 1985.

ARC Report, page 12

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Todd Willingham

Testimony from the Willingham Trial

"All fire goes up. All water goes down. Or any liquid goes down unless man changes the course."

-Manuel Vasquez, page 232

ARC Report, page 7

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Actually,

In a confined fire, like any fire inside a structure, the fire only goes up until it is obstructed by the ceiling. Then it begins to behave in a manner that is beyond the experience of most people.

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Todd Willingham

Testimony from the Willingham Trial

Q: And how many fires have you investigated since becoming a Certified Fire/Arson Investigator?

A: Perhaps in the range of 1,200 to 1,500 fires.

Q: Of these 1,200 to 1,500 fires, how many turned out to be arson in your opinion?

A: With the exception of a few, most all of them. *-Manuel Vasquez , page 228*

ARC Report, page 7

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TX SFMO Investigations, 1990-2004

YEAR	SET FIRES / INVESTIGATIONS	PERCENT
2004	229 of 507	45%
2003	274 of 550	50%
2002	343 of 678	51%
2001	217 of 487	45%
2000	241 of 556	43%
1999	216 of 481	45%
1998	219 of 531	41%
1997	209 of 433	48%
1996	352 of 754	47%
1995	333 of 624	53%
1994	311 of 552	56%
1993	276 of 524	53%
1992	269 of 486	55%
1991	247 of 415	60%
1990	227 of 428	53%

ARC Report, page 6

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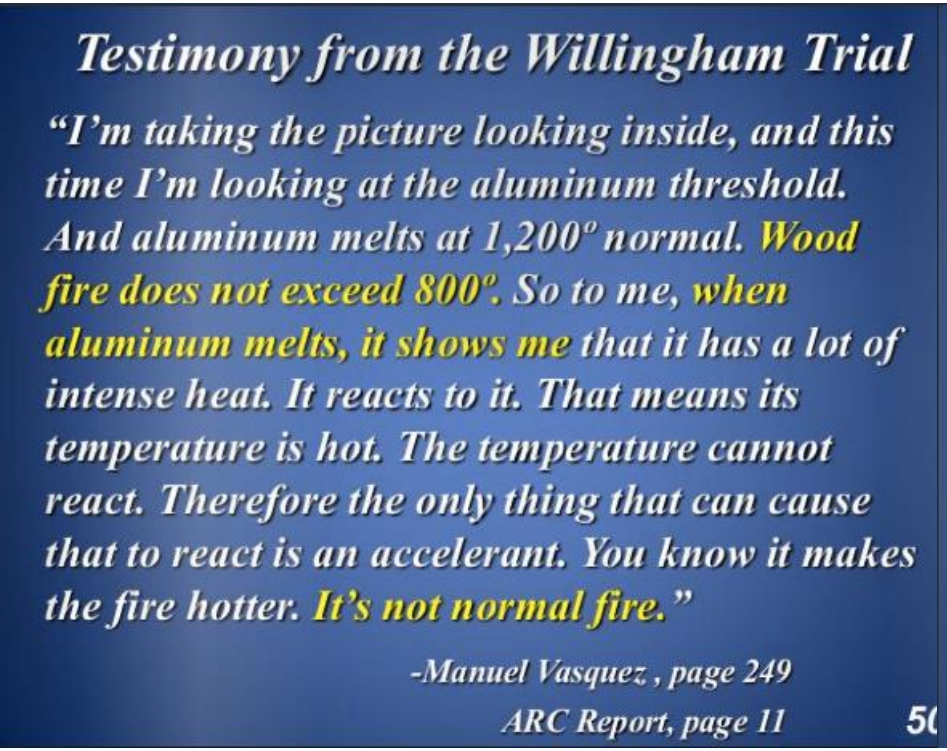
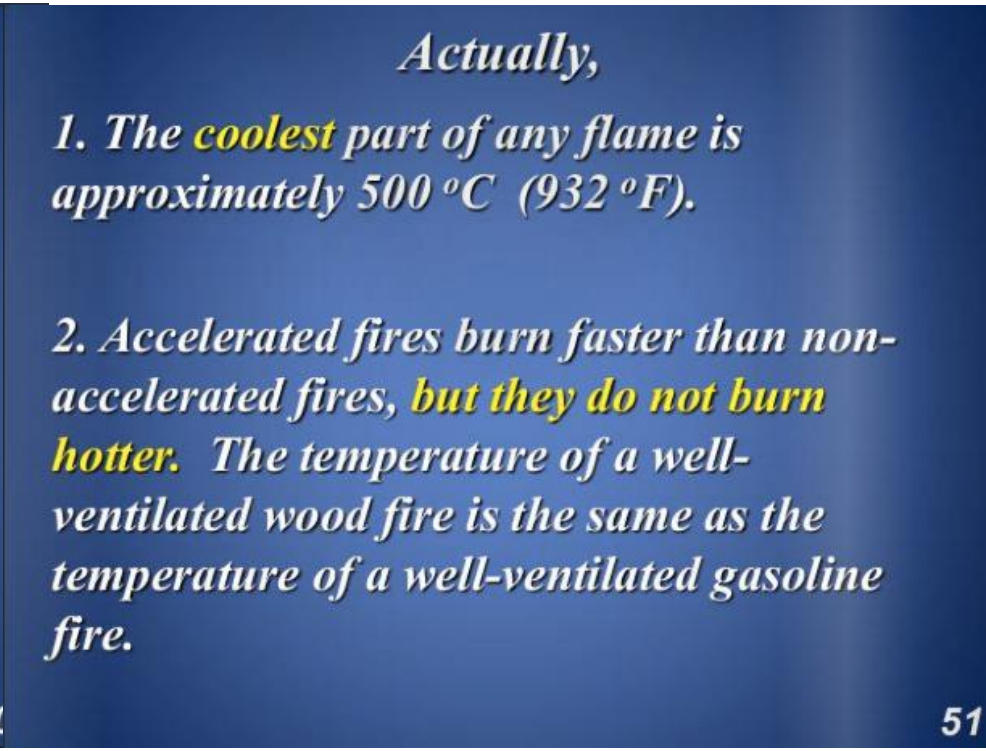
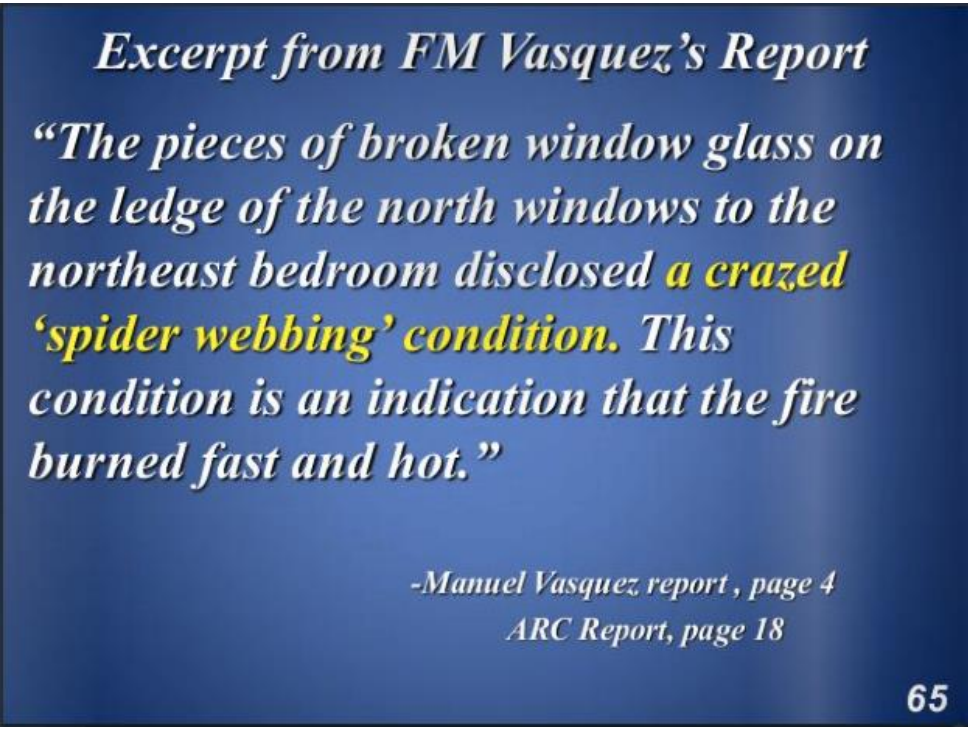
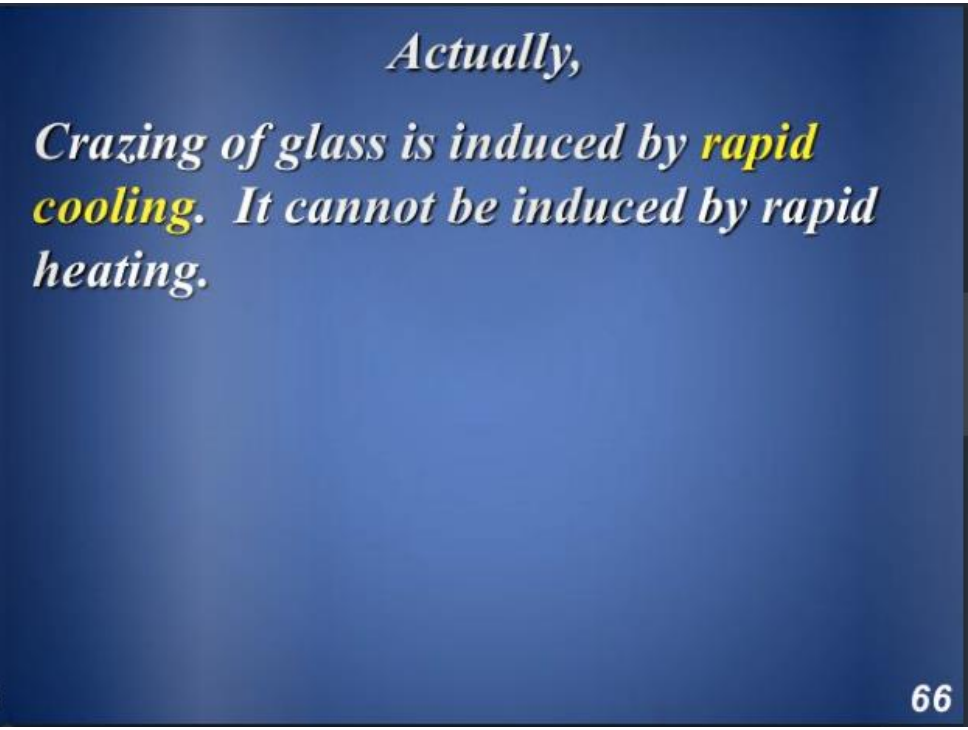
Todd Willingham





Todd Willingham





Todd Willingham

Testimony from the Willingham Trial

Q.: Based upon your investigation and your examination of the scene and your conclusions, can you tell what the arsonist intended to do by setting this fire?

A.: Yes.

Q.: What is that?

A.: The intent was to kill the little girls.

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Motion to Test DNA

(a-1) A convicted person may submit to the convicting court a motion for forensic DNA testing of evidence that has a reasonable likelihood of containing biological material. The motion must be accompanied by an affidavit, sworn to by the convicted person, containing statements of fact in support of the motion.

(b) The motion may request forensic DNA testing only of evidence described by Subsection (a-1) that was secured in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense, but:

(1) was not previously subjected to DNA testing ; or

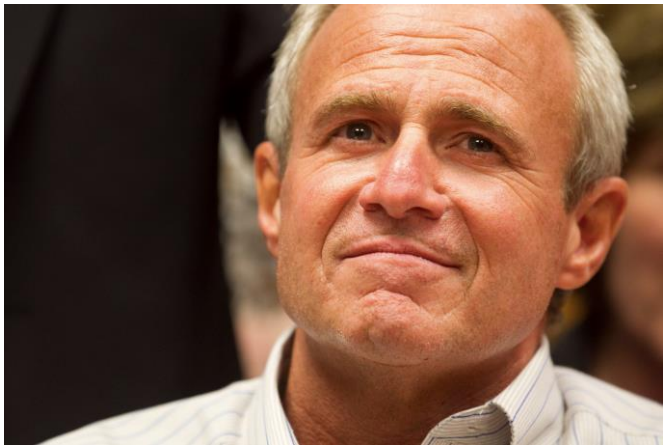
(2) although previously subjected to DNA testing, can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test.

Texas Code of Criminal Procedure art. 61.01. Enacted in 2001.

What if the Prosecution Hides Evidence?

- *Brady v. Maryland*
- Maryland prosecuted John Leo Brady and a companion, Donald Boblit, for murder. Brady admitted being involved in the murder, but claimed Boblit had done the actual killing. The prosecution withheld a written statement by Boblit confessing that he had committed the act of killing by himself.
- "We now hold that the suppression by the prosecution of evidence **favorable** to an accused *upon request* violates **due process** where the evidence is **material** either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."
- **What is material?**

Michael Morton



- Convicted of murdering his wife, Christine, in 1987
- Prosecution withheld evidence:
  - That son had witnessed murder and said it was not daddy, but a “monster”
  - Neighbors had seen a man repeatedly parked a van behind the Mortons’ house
  - Christine’s credit card allegedly was used at a San Antonio jewelry store after the attack
- Motion to test DNA in 2005 (excluding bloody bandana) – could not rule out Michael
- Motion to test DNA in 2011 on bloody bandana
  - Revealed Christine’s DNA and an unidentified male
  - DNA run through CODIS (database) and hit on Mark Norwood, a convicted murderer
- **Michael Morton Act**

Ken Anderson

- Prosecutor that withheld evidence
- Pleaded no contest to felony charges of criminal contempt of court
- Served 5 days of a 10 day sentence
- Disbarred
- The first time

EVER, anywhere a prosecutor has served jail time for withholding evidence

When Can You Keep Evidence Out?

- 4th Amendment: 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**, supported by oath or affirmation, and **particularly** describing the place to be searched, and the persons or things to be seized.
- **Exclusionary rule:** barring the use at trial of evidence obtained pursuant to an unlawful search and seizure

Fourth Amendment Search & Seizure

- There is a "search" when the government violates a person's "reasonable expectation of privacy." *Katz v. U.S.*, 389 U.S. 347 (1967)
  - Government action must intrude on your *subjective* expectation of privacy, and
  - Expectation of privacy must be *reasonable* in the sense that society in general would recognize it as such.
- Slippery definition because it can be self-fulfilling. Ex. Hacking case.

Recent Supreme Court Decisions

- People have a reasonable expectation of privacy in…
  - **U.S. v. Jones (2012).** Warrantless installation and monitoring of a GPS tracker on a suspect's car while parked in a public lot and driven on public streets is a "search" that requires a warrant.
  - **Florida v. Jardines (2013).** Drug-sniffing dog onto a suspect's front porch. The Supreme Court says dog must be kept outside the residential curtilage unless a warrant has already been obtained.
    - Why is your car different? No reasonable expectation of privacy in your vehicle or your drugs.
  - **Missouri v. McNeely (2013).** Must have a search warrant before a nonconsensual blood draw may occur.
  - **Riley v. California (2014).** Where the item is a cell phone (and by extension of reasoning, a laptop, iPad or similar digital data-storage device), it may no longer be searched incident to the arrest of the person from whom it was recovered.

Good Faith Doctrine

- *U.S. v. Leon*
- Exception to the exclusionary rule.
- Police get a warrant.
- Warrant has a defect which means it should be suppressible evidence.
- HOWEVER, officers had reasonable, good faith belief that they were acting according to legal authority. Do not suppress.