KNIVES OUT: A CALL FOR THE SUPREME COURT OF TEXAS TO ABOLISH THE SO-CALLED "RULE" AGAINST INFERENCE STACKING

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I. INTRODUCTION

1. "Inference: A conclusion reached by considering other facts and deducing a logical consequence from them."[1]

> The origin of the so-called rules against basing an inference upon an inference or a presumption upon a presumption is obscure, but . . . despite the almost unanimous criticisms of legal scholars and of those courts which have gone into the matter at any length, the "rules" have shown amazing vitality . . . .[2]

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1. *Inference*, BLACK'S LAW DICTIONARY (9th ed. 2009).

2. W.E. Shipley, Annotation, *Modern Status of the Rule Against Basing an Inference upon an Inference or a Presumption upon a Presumption*, 5 A.L.R. 3d 100, 105 (1966).

In its 1969 decision in *Briones v. Levine's Department Store, Inc.*, the Texas Supreme Court noted "the general rule in [is] this state that an inference may not be based upon another inference."[3] But commentators have condemned this rule for a century.[4] The Fifth Circuit,[5] the Texas Court of Criminal Appeals,[6] and courts across the country have repudiated the rule.[7] The time has come for the Texas Supreme Court to join them and plunge a much-needed stake through the heart of the so-called rule against inference stacking.

Texas law governing the proper role of inferences in civil cases is hopelessly confused. Some of the Texas Supreme Court's decisions over the past three decades appear to reject the rule.[8] But more recently, the Court has cited the rule.[9] Reflecting this inconsistency, some lower courts reject the rule while others apply it.[10] And when courts do apply the rule, they usually do so improperly—treating it as a two-inferences-and-you're-out bar.[11] This approach exemplifies the "familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem."[12] Methodology aside, even references to "inference stacking" confuse Texas sufficiency review.[13]

The Texas Supreme Court should do what the Texas Court of Criminal Appeals did in 2007:[14] bring Texas into the national mainstream by repudiating the rule against inference stacking, instructing lower courts to avoid inference-stacking language, and clarifying that the proper review of inferences asks simply whether they are reasonable in light of the evidence.

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3. Briones v. Levine's Dep't Store, Inc., 446 S.W.2d 7, 10 (Tex. 1969) (citing Rounsaville v. Bullard, 276 S.W.2d 791, 793–94 (Tex. 1955)).

4. *See infra* notes 123–131 and accompanying text (providing a number of cases in which the rule is discussed).

5. *See infra* notes 106–116 and accompanying text (discussing a Fifth Circuit opinion in which the rule was repudiated).

6. *See infra* notes 118–121 and accompanying text (providing the context of the Texas Court of Criminal Appeals opinion condemning the rule in 2007).

7. *See infra* Part I.C.3 (providing a survey of United States courts' decisions on the rule).

8. *See infra* Part I.B.2 (discussing several Texas Supreme Court cases that seemingly reject the rule).

9. *See* Ford Motor Co. v. Castillo, 444 S.W.3d 616, 620–23 (Tex. 2014).

10. *See infra* notes 98–104 and accompanying text (discussing intermediate court opinions providing differing opinions on the validity of the rule).

11. *See, e.g.*, Miller v. Superior Forestry Serv., Inc., No. 03-17-00043-CV, 2018 WL 4039562, at *7 (Tex. App.—Austin Aug. 24, 2018, pet. denied) (holding evidence insufficient due to the need to "stack" multiple inferences).

12. Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580, 591 (Tex. 2016) (quoting WILLIAM L. PROSSER, LAW OF TORTS § 87, at 592 (3d ed. 1964)).

13. *See id.*

14. *See* Hooper v. State, 214 S.W.3d 9, 15–17 (Tex. Crim. App. 2007).

A. Making Permissible Inferences Is a Core Jury Function

To infer is "to derive by reasoning; conclude or judge from premises or evidence."[15] To draw inferences, then, is to engage in "a process of reasoning by which a fact or proposition sought to be established . . . is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted."[16]

A century ago, the United States Supreme Court confirmed "that it is the province of the jury to hear the evidence and by their verdict to settle the issues of fact."[17] This pronouncement reflects the jury's core role—framed by the Seventh Amendment—as "a valuable safeguard to liberty" and "the very palladium of free government."[18] "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[19]

In deciding cases, juries consider both direct and circumstantial evidence.[20] Direct evidence tends to prove or disprove an ultimate fact in issue.[21] Circumstantial evidence tends to prove or disprove a fact, which—while not itself in issue—by inference tends to prove or disprove an ultimate fact in issue.[22] As the United States Supreme Court has noted, "direct evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."[23]

Inferences are critical to the jury's mission of deciding truth. Without inferences, proof by circumstantial evidence would be nearly impossible—"[l]ike Achilles of Zeno's paradox, we might never reach a conclusion."[24] Thus, "select[ing] from among conflicting inferences" is part of "[t]he very essence of [the jury's] function."[25]

B. A Brief Summary of the Texas Civil Rule Against Stacking Inferences

The rule against inference stacking has more modest origins than one might assume. Rather than springing from some seminal court ruling, the rule originated with a single evidence commentator in the early 1800s:

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15. *Infer*, DICTIONARY.COM, https://www.dictionary.com/browse/infer (last visited May 30, 2020).
16. Greiner v. Volkswagenwerk Aktiengesellschaft, 429 F. Supp. 495, 498 (E.D. Pa. 1977) (alteration in original).
17. Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 387 (1913).
18. *See* THE FEDERALIST No. 83, at 421 (Alexander Hamilton) (Ian Shapiro ed., 2009).
19. Blakely v. Washington, 542 U.S. 296, 306 (2004).
20. CHARLES MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, § 338, at 789 (2d ed. 1972).
21. *See id.*
22. *See id.*
23. Michalic v. Cleveland Tankers, Inc., 364 U.S. 325, 330 (1960).
24. Cora Pub, Inc. v. Cont'l Cas. Co., 619 F.2d 482, 485 (5th Cir. 1980).
25. Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, 35 (1944).

> Starkie first enunciated the concept that the premises, which support an inference must be established by direct evidence. He said:
>
> "In the first place, as the very foundation of indirect proof is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by *direct evidence*, in the same manner as if they were the very facts in issue."
>
> From this obscure origin, the principle came into existence that one inference cannot be predicated upon another inference.[26]

By 1875, the Supreme Court had opined that arriving at a conclusion of fact by deriving "inferences from inferences" was "generally, if not universally, inadmissible."[27] In discussing the history of the rule against inference stacking, three preliminary observations may be helpful.

First, "in many jurisdictions, courts appear perfectly content both to endorse and to reject the 'rule' with no particular concern for inconsistency."[28]

Second, courts routinely use the terms *presumption* and *inference* interchangeably.[29] But they are different.[30] A presumption is a rule of law requiring the trier of fact to draw a certain conclusion from given facts absent evidence rebutting the conclusion.[31] An inference is a conclusion that a trier of fact may—but is not required to—draw from proved facts.[32]

Finally, courts often cite the rule without actually applying it.[33]

> In the case of the anti-pyramiding rules, familiarity, born of unnecessary repetition, breeds fondness rather than contempt. The emotional ties which bind the courts to the rules are so strong that, occasionally, a court will pay homage to them in a case which does not involve the problem of sufficiency of the evidence to support a finding.[34]

1. Inference Stacking in the Texas Supreme Court from 1859 to the 1970s

The phrase "inference on an inference" first appeared in the Texas Supreme Court's jurisprudence in 1859, in a case dealing with the propriety

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26. Bryon T. Jenings, *Probative Value of an Inference Drawn upon Another Inference, with Special Consideration of Ohio Decisions*, 22 U. CIN. L. REV. 39, 39 (1953) (citing 1 THOMAS STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE 57 (3d ed. 1824)).

27. United States v. Ross, 92 U.S. 281, 283 (1875).

28. CLIFFORD S. FISHMAN & ANNE T. MCKENNA, 1 JONES ON EVIDENCE: CIVIL AND CRIMINAL § 4:58 at 397 (7th ed. 2019 Update).

29. Carlos C. Cadena, *The Pyramiding of Presumptions and Inferences in Texas*, 4 ST. MARY'S L.J. 1, 1 (1972).

30. *See* FISHMAN &MCKENNA, *supra* note 28, at §§ 4:1–:2.

31. Cadena, *supra* note 29, at 2.

32. *Id.*

33. *See id.* at 18.

34. *Id.*

of impeachment based on an inference of credibility.[35] In 1889, the Court denied evidentiary support for a negligence verdict based on deducing "one presumption from another."[36] And in 1914, the Court reiterated that:

> A presumption of fact cannot rest upon a fact presumed. The fact relied upon to support the presumption must be proved. "No inference of fact should be drawn from premises which are uncertain. Facts upon which an inference may legitimately rest must be established by direct evidence, as if they were the facts in issue. One presumption cannot be based upon another presumption."[37]

The Court confirmed this principle in a series of decisions during the 1940s[38] and then twice again in the 1960s. In 1968, in *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*,[39] the Court reiterated that "a vital fact may not be established by piling inference upon inference."[40] And finally, a year later in *Briones*, the Court referred to "the general rule" against stacking inferences.[41]

Briones is the only time the Court has used the word *rule* in relation to inference stacking.[42] And *Briones* did not even rely on inference stacking.[43] In that case, a woman sustained injuries after tripping over a lawn mower while shopping for clothes in a department store.[44] The jury's verdict depended on its finding that the lawn mower "was amongst the clothes on a clothes rack."[45] But the Court held the permissible inference that the clothing display ran the length of the display table did not support an additional inference that the lawn mower was "amongst" the clothes.[46] This holding had nothing to do with stacking inferences; the Court simply could not draw the second inference from the evidence nor the first inference.[47]

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35. Boon v. Weathered's Adm'r, 23 Tex. 675, 685 (1859).

36. Mo. Pac. Ry. Co. v. Porter, 11 S.W. 324, 325 (Tex. 1889).

37. Fort Worth Belt Ry. v. Jones, 166 S.W. 1130, 1132 (Tex. 1914).

38. *See* Tex. & New Orleans Co. v. Burden, 203 S.W.2d 522, 531 (Tex. 1947) (citing Wells v. Tex. Pac. Coal & Oil Co., 164 S.W.2d 660, 663 (Tex. 1942) ("An inference may be drawn from a fact proved, but an inference may not be drawn from another inference.")); Tex. & Pac. Ry. Co. v. Brown, 181 S.W.2d 68, 73 (Tex. 1944) ("While it is true that an inference may be drawn from facts proved, an inference cannot be drawn from another inference."); *Wells*, 164 S.W.2d at 663 ("That would be to permit an inference to be drawn from highly conjectural testimony and then to draw a still further inference from that inference.").

39. Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp., 435 S.W.2d 854, 858 (Tex. 1968).

40. *Id.*

41. Briones v. Levine's Dep't Store, Inc., 446 S.W.2d 7, 10 (Tex. 1969) (citing Rounsaville v. Bullard, 276 S.W.2d 793–94 (Tex. 1955)).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* (internal quotations omitted).

46. *Id.*

47. *Id.*

2. In 1975, the Texas Supreme Court Begins Discussing Inferences Differently

The Texas Supreme Court's discussion of inferences changed with its 1975 decision in *Farley v. M M Cattle Co.*[48] There, two cowboys—Farley and Beebe—were working cattle when their horses collided, throwing Farley to the ground and injuring him.[49] At trial, Beebe testified that Farley could have prevented the collision by reining his horse hard to the right; Farley remembered nothing.[50]

The jury could have found proximate cause by inferring that: (1) Farley reined his horse to the right, and (2) the horse—known to be obstinate—refused the command.[51] But the trial court granted judgment to the defense before the jury could return a verdict.[52] The court of appeals affirmed, citing the rule against inference stacking:

> We find no evidence, direct or circumstantial, that Benny Farley tried to turn or rein the horse, or that if he did try to rein him, that the animal failed to respond. In order to reach the ultimate fact as to causation, it would be necessary to base one presumption upon another presumption, and it is well established that such process is not permissible and is of no probative force.[53]

The Court found the inferences permissible and remanded.[54] The Court began by holding—for the first time—that "the rule against piling one presumption on another does not apply" to inferences.[55] Instead, the Court looked to the rules governing inferences and deemed it "well established that a number of inferences may be drawn from a single fact situation."[56] The Court concluded that each inference necessary to support the finding of proximate cause was derived from direct evidence.[57] Farley was a capable cowboy and the horse was known to be stubborn.[58]

In *Farley*, the Court looked past the number of inferences and asked simply whether those inferences were reasonably based on the evidence.[59]

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48. Farley v. M M Cattle Co., 529 S.W.2d 751 (Tex. 1975), *abrogated on other grounds by* Parker v. Highland Park, Inc., 565 S.W.2d 512 (Tex. 1978).
49. *Id.* at 753.
50. *Id.* at 756.
51. *Id.*
52. *Id.*
53. Farley v. M M Cattle Co., 515 S.W.2d 697, 705 (Tex. App.—Amarillo 1974), *rev'd*, 529 S.W.2d 751 (Tex. 1975).
54. *Farley*, 529 S.W.2d at 757, 759.
55. *Id.* at 756–57.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*

Continuing this trend toward evaluating multiple inferences in light of the evidence, the Court reiterated in 1983 that "a number of inferences may be drawn from a single fact situation" in *Walters v. American States Ins.*[60] *Walters* involved the unsolved homicides of an interior designer and his employee.[61] The issue was whether the employee's death occurred within the course of employment, which would entitle the family to insurance benefits.[62]

In *Walters*, an unknown customer called the designer multiple times to schedule a meeting about a design project.[63] The designer told his employee the two of them would meet the customer at an airport hotel.[64] The day of the meeting, the two men were found shot to death in a field near the airport.[65]

The jury found the employee's death occurred within the scope of his work for the designer.[66] This finding depended on a series of inferences, including:

- the prospective customer made the telephone calls for the purpose of luring the designer to the meeting;[67]
- the employee accompanied the designer to the meeting;[68]
- the employee's only reason for accompanying the designer was to fulfill an employment function;[69] and
- the prospective customer murdered the two men.[70]

Without even mentioning the rule against inference stacking, the Court held that the jury's conclusion was reasonable in light of the evidence presented.[71] According to the Court, the question was simply "whether the jury, upon the basis of the facts proved, made a reasonable inferential leap or whether their logical leap was too far."[72]

More recently in its 2001 opinion in *Lozano v. Lozano*,[73] the Texas Supreme Court examined the nature of circumstantial evidence in the context of the equal inference rule. Holding that circumstantial evidence must "transcend mere suspicion," the Court held that each piece of circumstantial evidence must be evaluated, "not in isolation, but in light of all the known circumstances."[74]

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60. Walters v. Am. States Ins., 654 S.W.2d 423, 426 (Tex. 1983) (first citing Peveto v. Smith, 133 S.W.2d 572, 576 (Tex. [Comm'n Op.] 1939); and then citing Mo.-Kan.-Tex. R.R. Co. v. Sanderson, 174 S.W.2d 646, 649 (Tex. App.—Eastland 1943, writ ref'd w.o.m.)).
61. *Id.* at 424.
62. *Id.* at 424–25.
63. *Id.* at 427.
64. *Id.* at 426.
65. *Id.* at 427.
66. *Id.* at 424.
67. *See id.* at 426.
68. *Id.* at 427.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 426.
73. Lozano v. Lozano, 52 S.W.3d 141, 144 (Tex. 2001) (per curiam).
74. *Id.* at 149 (Phillips, C.J., concurring in part and dissenting in part) (first citing Brinegar v.

Lozano included three dissenting and concurring opinions.[75] Each opinion discussed the need for inferences to be reasonable in relation to the evidence.[76] Not one of them mentioned any rule against inference stacking.[77]

Finally, the Court discussed the nature of inferences and circumstantial evidence in its 2014 opinion in *Ford Motor Co. v. Castillo*.[78] In discussing sufficiency review, the Court instructed that:

> When reviewing circumstantial evidence that favors the verdict, we must "view each piece of circumstantial evidence, not in isolation, but in light of all the known circumstances." If circumstantial evidence, when viewed in light of all the known circumstances, is equally consistent with either of two facts, then neither fact may be inferred. But where the circumstantial evidence is not equally consistent with either of two facts, and the inference drawn by the jury is within the "zone of reasonable disagreement," a reviewing court cannot substitute its judgment for that of the trier-of-fact.[79]

Castillo involved a $3 million settlement procured by collusion between a juror and the plaintiff's attorney.[80] A jury found the settlement agreement invalid.[81] The court of appeals reversed the finding for lack of legally sufficient evidence.[82] The Texas Supreme Court reinstated the jury's verdict, finding sufficient circumstantial evidence to support it.[83]

The verdict in *Castillo* rested on multiple inferences.[84] The most important of these inferences concerned a note sent by the accused juror during the underlying trial.[85] The note requested a daylong recess due to an alleged illness or injury to one of the juror's children.[86] But at the later fraud trial, the juror could not remember the specifics of that illness or injury.[87]

Porterfield, 705 S.W.2d 236, 238–39 (Tex. App.—Texarkana 1986), *aff'd*, 719 S.W.2d 558, 560 (Tex. 1986); and then citing State Farm Fire & Cas. Ins. v. Vandiver, 970 S.W.2d 731, 736 (Tex. App.—Waco 1998, no writ)).

75. *See id.* at 144.

76. *See id.* at 148 (Phillips, C.J., concurring in part and dissenting in part); *Id.* at 157–58 (Hecht, J., concurring in part and dissenting in part); *see id.* at 166 (Baker, J., concurring in part and dissenting in part).

77. *See id.* at 148 (Phillips, C.J., concurring in part and dissenting in part); *Id.* at 157–58 (Hecht, J., concurring in part and dissenting in part); *see id.* at 166 (Baker, J., concurring in part and dissenting in part).

78. Ford Motor Co. v. Castillo, 444 S.W.3d 616 (Tex. 2014) (per curiam).

79. *Id.* at 621 (citations omitted) (citing City of Keller v. Wilson, 168 S.W.3d 802, 813–14, 821–22 (Tex. 2005)).

80. *Id.* at 618–19.

81. *Id.* at 620.

82. *Id.*

83. *Id.* at 621.

84. *Id.*

85. *Id.*

86. *Id.* at 622.

87. *Id.*

The Court held that this lack of memory—coupled with suspicious occurrences during settlement negotiations—permitted the jury to infer that the juror initiated the recess to give the plaintiff additional time to negotiate a settlement before the jury returned a verdict for Ford.[88] That conclusion required stacking inferences that (1) the juror's proffered reason for the recess was untrue, and (2) the juror sought to help the plaintiff.[89] Yet the Court said nothing about inference stacking; it deemed the jury's inference reasonable based on the evidence.[90] According to the Court, the "circumstantial evidence . . .establish[ed] a pattern—a pattern that reasonably implicate[d]" the accused wrongdoer.[91]

These decisions seem to suggest a shift in the Court's thinking away from rules about inference stacking and toward evaluating each inference for a reasonable basis in the evidence.[92] In 2003, however, without any explanation or analysis, the Court reverted to the language of inference stacking in *Marathon Corp. v. Pitzner*:[93] "We have also said that an inference stacked only on other inferences is not legally sufficient evidence."[94] Perhaps the Court's use of the word *only*—that an inference resting *only* on other inferences is insufficient—was intended to support the jury's prerogative to base an inference upon another inference so long as each inference is reasonable under the evidence.[95] The Court, however, did not say so explicitly.[96]

3. Intermediate Courts Apply the Rule Inconsistently

Decisions by lower courts reflect confusion over the rule against inference stacking.[97] In 1944, the Eastland court held that "*inferences* may be founded on *inferences*."[98] In 1972, the San Antonio court expressed doubt as to whether "the rule . . . actually exists."[99] Most recently, the Texarkana court held that "[w]hether inferences are stacked is often a matter of semantics, and

88. *Id.* at 623.
89. *Id.*
90. *Id.* at 621.
91. *Id.* at 622.
92. *See id.*
93. Marathon Corp. v. Pitzner, 106 S.W.3d 724, 728 (Tex. 2003) (per curiam).
94. *Id.* (first citing Lozano v. Lozano, 52 S.W.3d 141, 148 (Tex. 2001) (per curiam); then citing Hammerly Oaks, Inc. v. Edwards, 958 S.W.2d 387, 392 (Tex. 1997); then citing Cont'l Coffee Prods., Inc. v. Cazarez, 937 S.W.2d 444, 450 (Tex. 1996); and then citing Litton Indus. Prods., Inc. v. Gammage, 668 S.W.2d 319, 324 (Tex. 1984)).
95. *Id.*
96. *Id.*
97. *See* K Mart Corp. v. Rhyne, 932 S.W.2d 140, 143 (Tex. App.—Texarkana 1996, no writ); Royalty Indem. Co. v. Hume, 477 S.W.2d 683, 686 (Tex. App.—San Antonio 1972, no writ); Strain v. Martin, 183 S.W.2d 246, 248 (Tex. App.—Eastland 1944, no writ).
98. *Strain*, 183 S.W.2d at 248.
99. *Hume*, 477 S.W.2d at 686.

thus depends upon the wording of the inference. The ultimate test on any inference should be its reasonable probability."[100]

Other courts, however, apply an absolute rule against inference stacking, often based on the decision in *Marathon Corp*. Both Houston courts have cited *Marathon Corp.* in rejecting inference stacking.[101] The Waco, Amarillo, Austin, and El Paso courts have applied the rule.[102] The Dallas court has applied the rule even to reasonable inferences: "Even if these inferences are reasonable, they are not permissible because [the plaintiff] is inferring facts from previously inferred facts. Stacking of inferences to reach an ultimate conclusion is not allowed."[103] More recently, the Dallas court applied the rule[104] despite acknowledging the widespread criticism of it.[105]

C. Scholars Condemn the Rule and Courts Across the Country—Including the Fifth Circuit and Texas Court of Criminal Appeals—Have Repudiated It

1. The Fifth Circuit Abandoned the Rule in 1980

In *Cora Pub, Inc. v. Continental Casualty Co.*,[106] the Fifth Circuit explicitly rejected the existence of any rule against inference stacking: "The so-called rule against pyramiding inferences, if there really is such a 'rule' and if it is anything more than an empty pejorative, is simply legalese fustian

100. *Rhyne*, 932 S.W.2d at 143.

101. Peine v. HIT Servs., L.P., 479 S.W.3d 445, 453 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (citing Marathon Corp. v. Pitzner, 106 S.W.3d 724, 728 (Tex. 2003)); Harris Cty. Appraisal Dist. v. Sigmor Corp., No. 01-06-00740-CV, 2008 WL 921073, at *4 (Tex. App.—Houston [1st Dist.] Apr. 3, 2008, no pet.) (mem. op.) (citing *Marathon Corp.*, 106 S.W.3d at 728).

102. Pekar v. St. Luke's Episcopal Hosp., 570 S.W.2d 147, 150 (Tex. App.—Waco 1978, writ ref'd n.r.e.) (citing Rounsaville v. Bullard, 276 S.W.2d 791, 794 (Tex. 1995)); Bell Aerospace Corp. v. Anderson, 478 S.W.2d 191, 197 (Tex. App.—El Paso 1972, writ ref'd n.r.e.) (citing Briones v. Levine's Dep't Store, Inc., 446 S.W.2d 7, 10 (Tex. 1969)); McClish v. R. C. Young Feed & Seed Co., 225 S.W.2d 910, 913 (Tex. App.—Amarillo 1949, writ ref'd)).

103. Nagy v. First Nat'l Gun Banque Corp., 684 S.W.2d 114, 117 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (citing *Briones*, 446 S.W.2d at 10; Regal Petroleum Corp. v. McClung, 608 S.W.2d 276, 278 (Tex. App.—Dallas 1980, no writ)).

104. Shaun T. Mian Corp. v. Hewlett-Packard Co., 237 S.W.3d 851, 864 & n.10 (Tex. App.—Dallas 2007, pet. denied) (citing *Marathon Corp.*, 106 S.W.3d at 728).

105. *Id.* at 864 n.10 (first citing Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 365 (1960); then citing Phoenix Ref. Co. v. Powell, 251 S.W.2d 892, 902 (Tex. App.—San Antonio 1952, writ ref'd n.r.e.) ("This form of statement is often employed by the courts, and has been used by this writer, as and for a shorthand rendition of the rule which requires that verdicts be based upon more than surmise and guesswork. The rule cannot be literally applied in all factual circumstances."); then citing WILLIAM V. DORSANEO, III, ET AL., TEXAS LITIGATION GUIDE § 146.03(6)(e)(i)(B) (online ed. 2007) ("Texas courts would be much better off to abandon the inference-piling approach to "no evidence" review because it is hard to apply, easy to manipulate, and simply not a reliable tool for assessing the reasonableness of an inference."); and then citing 1 JOHN H. WIGMORE, EVIDENCE § 41 (Tillers Rev. 1983) ("There is no such orthodox rule; nor can there be. If there were, hardly a single trial could be adequately prosecuted.")).

106. Cora Pub, Inc. v. Cont'l Cas. Co., 619 F.2d 482, 486 (5th Cir. 1980).

to cover a clumsy exclusion of evidence having little or no probative value."[107]

Cora Pub concerned a company accused of burning its building for the insurance money.[108] The Fifth Circuit noted the series of permissible inferences—similar to the Miller's evidence—necessary to support the arson finding.[109] The incendiary origin of the fire was proved by circumstantial evidence including:

- how rapidly the fire burned;[110]
- the lack of any discoverable accidental cause;[111] and
- suspicious activity by a man observed at the restaurant right after the fire began.[112]

The Fifth Circuit explained that to reach the ultimate finding—that Cora Pub burned its building—"require[d] another inference, joining the fact of the corporation's motive to commit arson with the opportunity of one of its principal figures."[113] The court concluded that this method of proof was acceptable.[114] It deemed the

> [I]mportant question [to be] whether the inference is reasonably well supported by the evidence. We must judge the inference as we would any other, taking into consideration that its probability may be attenuated by each underlying inference. Having examined the record carefully, we find the evidence sufficient to create an issue for the jury.[115]

In a later case, the Fifth Circuit "recognize[d] that a jury may properly reconstruct a series of events by drawing an inference upon an inference" so long as each inference is reasonable.[116] Thus, the probative value of each inference should be evaluated based simply on whether it "is reasonably well supported by the evidence."[117]

107. *Id.* (citing NLRB v. Camco, Inc., 340 F.2d 803, 811 (5th Cir. 1965)).
108. *Id.* at 484.
109. *Id.* at 486.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. Fenner v. Gen. Motors Corp., 657 F.2d 647, 650–51 (5th Cir. 1981) (citing Smith v. Gen. Motors Corp., 227 F.2d 210, 213–14 (5th Cir. 1955)).
117. *Cora Pub*, 619 F.2d at 486.

2. The Texas Court of Criminal Appeals Repudiated the Rule for Criminal Cases in 2007

In 2007 in *Hooper v. State*, the Texas Court of Criminal Appeals instructed lower courts to stop using inference-stacking language in their opinions.[118]

Recognizing that it had reversed convictions based on inference stacking in "the distant past," the court pointed out that this "rule" had not been part of its sufficiency review "in over 50 years."[119] Yet the court noted the continued citation by intermediate courts of the rule against inference stacking, theorizing that the confusion might be rooted in the continued validity of the rule in civil cases.[120] The court instructed lower courts not only to stop applying the rule but to abandon inference-stacking language:

> Inference stacking is not an improper reasoning process; it just adds unnecessary confusion to the legal sufficiency review without adding any substance. Rather than using the language of inference stacking, courts of appeals should . . . determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all of the evidence when viewed in the light most favorable to the verdict.[121]

3. Courts Across the Country Have Repudiated the Rule

Courts across the country have rejected the rule against inference stacking. Here is a sampling of federal circuit court decisions:[122]

> **First Circuit**: "Appellant decries this approach, claiming that it necessitates the stacking of inference upon inference. In one sense, at least, this may be so—but '[t]he rule is not that an inference, no matter how reasonable, is to be rejected if it, in turn, depends upon another reasonable inference; rather, the question is merely whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that a defendant is guilty beyond a reasonable doubt.' Chains of inference are a familiar, widely accepted ingredient of any process of ratiocination. This method of reasoning, commonly called logic, is regularly relied

118. Hooper v. State, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007).

119. *Id.* at 15.

120. *Id.*

121. *Id.* at 16–17.

122. United States v. Summers, 414 F.3d 1287, 1294 n.3, 1295 (10th Cir. 2005). The Tenth Circuit has retained the rule but cautioned against "a formalistic approach" to its application, acknowledging the possibility that a judgment may in some cases be sustained by "a reasonable inference built on yet another reasonable inference." *Id.*

upon in the realm of human endeavor, and should not be forbidden to a criminal jury."[123]

Second Circuit: "This court has rejected 'as untenable the often urged claim that an inference may not be grounded on an inference . . . .'"[124]

Third Circuit: "It was once suggested that an 'inference upon an inference' will not be permitted . . . . There is no such orthodox rule; nor can be."[125]

Fourth Circuit: "Although the old rule that disallowed the piling of inference upon inference has been abrogated, such pilings must be 'well supported by the evidence.'"[126]

Sixth Circuit: "The rule is not that an inference, no matter how reasonable, is to be rejected if it in turn depends upon another reasonable inference; rather, the question is merely whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that the defendant is guilty beyond a reasonable doubt."[127]

Seventh Circuit: "So long as the finder of fact is reasonably certain of a preliminary inference, it is not unreasonable to use that inference as the basis for further reasoning."[128]

Eighth Circuit: "It is too much to say, however, that an inference is necessarily invalid or impermissible because it is based on a fact established in whole or in part by a preceding inference."[129]

Ninth Circuit: "The fallacy that an inference may not be based on another inference has been frequently repudiated by the courts including this one."[130]

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123. United States v. Spinney, 65 F.3d 231, 237–38 (1st Cir. 1995) (citation omitted) (quoting Dirring v. United States, 328 F.2d 512, 515 (1st Cir. 1964)).

124. United States v. Medico, 557 F.2d 309, 317 n.12 (2d Cir. 1977) (quoting United States v. Ravich, 421 F.2d 1196, 1204 n.10 (2d Cir. 1970)).

125. V.I. Labor Union v. Caribe Constr. Co., 343 F.2d 364, 368–69 (3d Cir. 1965) (quoting 1 JOHN H. WIGMORE, EVIDENCE § 41, at 434–36 (3d ed. 1940)).

126. Bouchat v. Balt. Ravens, Inc., 241 F.3d 350, 362–63 (4th Cir. 2001) (King, J., dissenting) (citing Cora Pub, Inc. v. Cont'l Cas. Co., 619 F.2d 482, 486 (5th Cir. 1980)).

127. United States v. O'Leary, No. 86-5396, 1987 WL 36581, at *2 (6th Cir. Jan. 7, 1987) (per curiam) (unpublished table decision) (first quoting United States v. Harris, 435 F.2d 74, 89–91 (D.C. Cir. 1970); and then quoting Devore v. United States, 368 F.2d 396, 399 (9th Cir. 1966)).

128. Ray v. Clements, 700 F.3d 993, 1031 n.11 (7th Cir. 2012) (Manion, J., concurring in part and dissenting in part) (first quoting United States v. An Article of Device, 731 F.2d 1253, 1262, 1263 (7th Cir. 1984) ("We think it would be the better practice to avoid the 'inference on inference' language and to concentrate instead on the jury's duty not to engage in speculation that is beyond the scope of the evidence."); and then citing Wis. Mem'l Park Co. v. C.I.R., 255 F.2d 751, 753 (7th Cir. 1958)).

129. United States v. Shahane, 517 F.2d 1173, 1178 (8th Cir. 1975).

130. Fegles Constr. Co. v. McLaughlin Constr. Co., 205 F.2d 637, 640 (9th Cir. 1953) (first citing E. K. Wood Lumber Co. v. Andersen, 81 F.2d 161, 166 (9th Cir. 1936); then citing Ross v. United States, 103 F.2d 600, 606 (9th Cir. 1939); then citing N.Y. Life Ins. Co. v. McNeely, 79 P.2d 948 (Ariz. 1938); then citing Hinshaw v. State, 47 N.E. 157 (Ind. 1897); then citing Welsch v. Charles Frusch Light & Power Co., 193 N.W. 427 (Iowa 1923); then citing L'Esperance v. Sherburne, 155 A. 203 (N.H. 1931); then

> **Eleventh Circuit**: "According to federal law there is no prohibition against pyramiding inferences; instead all inferences are permissible so long as they are reasonable."[131]
>
> **D. C. Circuit**: "The rule is not that an inference, no matter how reasonable, is to be rejected if it in turn, depends upon another reasonable inference."[132]

Here is a sampling of state-court opinions:

> **Arizona**: "We think that this is the true meaning of the 'inference upon inference' rule . . . that the courts do not mean that under no circumstances may an inference be drawn from an inference, but rather that the prior inferences must be established to the exclusion of any other reasonable theory . . . in order that the last inference of the *probability* of the ultimate fact may be based thereon."[133]
>
> **California**: "The true rule is and should be that an inference cannot be based on an inference that is too remote or conjectural."[134]
>
> **Connecticut**: "There is, in fact, no rule of law that forbids the resting of one inference upon facts whose determination is the result of other inferences."[135]
>
> **Idaho**: "Nevertheless, even assuming that this testimony and the inferences drawn therefrom represent a 'stacking' of inferences, we do not find it impermissible."[136]
>
> **Illinois**: "While there is no rule against basing one inference upon another inference, the chain of inferences must not become so tenuous that the final inference has no probative value."[137]
>
> **Indiana**: "Appellant does not show the Court any specific 'inference drawn on another inference' and in any case there is no general rule in Indiana against such a procedure."[138]
>
> **Iowa**: "We disagree . . . that an inference may not be based upon another inference . . . . While some authorities use substantially the

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citing Jackson v. Del., L. & W. R.R. Co., 170 A. 22 (N.J. 1933); then citing State v. Fiore, 88 A. 1039 (N.J. 1913); then citing Hepp v. Quickel Auto & Supply Co., 25 P.2d 197 (N.M. 1933); then citing Gypsy Oil Co. v. Ginn, 3 P.2d 714 (Okla. 1931); then citing Madden v. Great Atl. & Pac. Tea Co., 162 A. 687 (Pa. 1932); then citing Neely v. Provident Life & Accident Ins. Co., 185 A. 784 (Pa. 1936); and then citing Jackson v. U.S. Pipe Line Co., 191 A. 165 (Pa. 1937)).

131. Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321, 1324 (11th Cir. 1982) (first citing Fenner v. Gen. Motors Corp., 657 F.2d 647, 650–51 (5th Cir. 1981); and then citing Cora Pub, Inc. v. Cont'l Cas. Co., 619 F.2d 482, 486 (5th Cir. 1980)).

132. *Harris*, 435 F.2d at 89 (quoting *DeVore*, 368 F.2d at 399).

133. *McNeely*, 79 P.2d at 955 (emphasis in original).

134. People v. Chessman, 238 P.2d 1001, 1014 (Cal. 1951), *overruled on other grounds by* People v. Daniels, 459 P.2d 225 (Cal. 1969) (quoting Vaccarezza v. Sanguinetti, 163 P.2d 470, 477 (Cal. Dist. Ct. App. 1945)).

135. State v. Crafts, 627 A.2d 877, 883 (Conn. 1993).

136. Smith v. Praegitzer, 749 P.2d 1012, 1016 (Idaho Ct. App. 1988).

137. Private Bank v. Silver Cross Hosp. & Med. Ctrs., 98 N.E.3d 381, 393 (Ill. App. Ct. 2017).

138. Buckner v. State, 248 N.E.2d 348, 350 (Ind. 1969).

statement defendants urge upon us it is unsound and, like many other courts, we have rejected it."[139]

Kentucky: "But this 'rule' cannot bar all inferences based on other inferences, despite being stated in absolute terms."[140]

Maine: "Our Court has not adopted such a specific rule against the pyramiding of inferences."[141]

Maryland: "A conviction may be sustained on the basis of a single strand of circumstantial evidence or successive links of circumstantial evidence."[142]

Massachusetts: "An inference may be based on another inference, provided the inference is not speculative."[143]

Michigan: "Thus, if evidence is relevant and admissible, it does not matter that . . . an inference gives rise to further inferences. . . . [W]e overrule 'the inference upon an inference' rule . . . ."[144]

Mississippi: "[I]t is not the unqualified rule that an inference may not be based on another inference. . . . But the great weight of opinion . . . admonishes us, first . . . in allowing inference upon inference, [we] do so with the firm limitation that the probabilities thereby permitted to be entertained are safe and dependable probabilities . . . . The second admonition is that . . . we should do so no further than the reasonable necessities of the case, in the interest of justice, require."[145]

Missouri: "However, there is in fact no absolute rule of law that forbids the resting of one inference on facts whose determination is the result of other inferences. On the contrary, inferences may be based on facts whose determination is the result of other inferences, *so long as the first inference is based on such evidence as to be regarded as a proved fact and the conclusion reached is not too remote or conjectural*."[146]

New Hampshire: "Unless the inference be too remote in logic, or offend against the rules as to confusion of issues, or surprise, it may well be drawn from another inference . . . ."[147]

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139. Soreide v. Vilas & Co., 78 N.W.2d 41, 44 (Iowa 1956).
140. Southworth v. Commonwealth, 435 S.W.3d 32, 45 (Ky. 2014).
141. Ginn v. Penobscot Co., 334 A.2d 874, 880 (Me. 1975).
142. Hebron v. State, 627 A.2d 1029, 1034 (Md. 1993).
143. Cont'l Assur. Co. v. Diorio-Volungis, 746 N.E.2d 550, 555 (Mass. App. Ct. 2001) (first citing Commonwealth v. Dostie, 681 N.E.2d 282, 284 & n.6 (Mass. 1997); and then citing 1A JOHN H. WIGMORE, EVIDENCE § 41 (1983)).
144. People v. Hardiman, 646 N.W.2d 158, 165 (Mich. 2002).
145. Goodyear Tire & Rubber Co. v. Brashier, 298 So.2d 685, 688–89 (Miss. 1974).
146. State v. Grim, 854 S.W.2d 403, 421 (Mo. 1993) (en banc) (Robertson, C.J., dissenting) (emphasis in original).
147. L'Esperance v. Sherburne, 155 A. 203, 209 (N.H. 1931).

North Carolina: "Insofar as . . . other cases hold that in considering circumstantial evidence an inference may not be made from an inference, they are overruled."[148]

Ohio: "[T]he rule forbidding the stacking of an inference upon an inference is disfavored by scholars and many courts. . . . We therefore caution the bench and bar against resorting to this rule too readily and without a sufficient awareness of its pitfalls."[149]

Oregon: "The true rule is and should be that an inference cannot be based on an inference that is too remote or conjectural. In a civil case, if the first inference is a reasonably probable one it may be used as a basis for a succeeding inference."[150]

Pennsylvania: "[A]n inference may properly be based upon an inference . . . ."[151]

Rhode Island: "If an inference is the only reasonable one to be drawn from the underlying facts, then a secondary inference may be drawn from the primary inference."[152]

South Carolina: "The rule forbidding the building of an inference on an inference is one of the many principles that may be validly applied in some instances, but does not rise to the level of a universal rule of evidence."[153]

Vermont: "[C]ourts have moved away from a hard and fast rule forbidding evidence based on inferences upon inferences. . . . The only special test for inferences is that they must be reasonable."[154]

Virginia: "[T]here is no rule of law which prohibits basing an inference or presumption upon another inference or presumption."[155]

Wyoming: "[T]he court . . . adopted the Wigmore view . . . that an inference may be drawn from a fact that itself was inferred when the circumstances demonstrate no other reasonable theory or alternative inference . . . ."[156]

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148. State v. Childress, 362 S.E.2d 263, 267 (N.C. 1987).

149. Motorists Mut. Ins. Co. v. Hamilton Twp. Trs., 502 N.E.2d 204, 207–08 (Ohio 1986).

150. Smith v. J.C. Penney Co., 525 P.2d 1299, 1302–03 (Or. 1974) (quoting Vaccarezza v. Sanguinetti, 163 P.2d 470, 477 (Cal. Dist. Ct. App. 1945)).

151. Commonwealth v. Bolger, 126 A.2d 536, 539 (Pa. 1956).

152. *In re* Derek, 448 A.2d 765, 768 (R.I. 1982) (first citing Carnevale v. Smith, 404 A.2d 836, 840–41 (R.I. 1979); then citing Conlin v. Greyhound Lines, Inc., 384 A.2d 1057, 1059–60 (R.I. 1978); then citing Waldman v. Shipyard Marina, Inc., 230 A.2d 841, 845 (R.I. 1967); and then citing 1 JOHN H. WIGMORE, EVIDENCE § 41, at 434–41 (3d ed. 1940)).

153. Edwards v. Pettit Constr. Co., 257 S.E.2d 754, 755 (S.C. 1979).

154. State v. Godfrey, 996 A.2d 237, 243–44 (Vt. 2010).

155. Johnson v. Commonwealth, 422 S.E.2d 593, 595 (Va. App. 1992) (citing CHARLES E. FRIEND, THE LAW OF EVIDENCE IN VIRGINIA § 91, at 266 (3d ed. 1988)).

156. Loredo v. Solvay Am., Inc., 212 P.3d 614, 621 (Wyo. 2009).

4. Commentators Condemn the Rule

The prohibition against inference stacking makes little sense. Consider the hypothetical Three Stooges Murder Case.[157] If Curly is found flattened by a piano on the sidewalk, Moe's involvement might be proved by eyewitness testimony. But such firsthand evidence is rare.[158] Moe's culpability more likely would be established by circumstantial evidence that Moe was angry at Curly, that his fingerprints were on the piano, and that he had a key to the room where the piano was stored. This would involve stacking inferences. But each inference would be reasonable under the evidence.

Or consider a hypothetical property damage lawsuit. Leo files a civil lawsuit against Fred claiming that Fred backed into his car in a parking lot. Fred admits being in the lot at the same time as Leo but denies hitting anything. There are no witnesses. Leo introduces evidence that Fred was parked in the space directly across from him, shows photographs of corresponding damage to Fred's rear bumper and the front of his car, and shows photographs of red paint transferred onto his front bumper. Again, finding Fred liable requires stacking inferences. But each inference would be reasonable under the evidence. And disallowing these inferences would leave Leo with no means of proving his damages.

"Judges and legal scholars who have made any serious effort to analyze the [inference stacking] rule approach unanimity in condemning it."[159] Wigmore explained the folly of such a rule and the problems it would cause for cases involving proof by circumstantial evidence:

> It was once suggested that an inference upon an inference will not be permitted . . . and this suggestion has been repeated by several courts and sometimes actually has been enforced.
>
> There is no such orthodox rule; nor can there be. If there were, hardly a single trial could be adequately prosecuted. For example, on a charge of murder, the defendant's gun is found discharged. From this we infer that he discharged it, and from this we infer that it was his bullet that struck and killed the deceased. . . . In these and innumerable daily instances we build up inference upon inference, and yet no court (until in very modern times) ever thought of forbidding it. All departments of reasoning, all scientific work, every day's life, and every day's trials proceed upon such data. The

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157. *See* M. Alex Johnson, *"Circumstantial"—the Scarlet C?*, NBC NEWS (Apr. 21, 2003), http://www.nbcnews.com/id/3340617/ns/us_news-crime_and_courts/t/circumstantial-scarlet-c/#.XStWuC2ZPuQ. Hypothetical borrowed and gently adapted from NBC News. *Id.*

158. *See* Steven B. Duke, Ann Seung-Eun Lee & Chet K. W. Pager, *A Picture's Worth a Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions*, 44 AM. CRIM. L. REV. 1, 3 (2007).

159. Royal Indem. Co. v. Hume, 477 S.W.2d 683, 686 n.1 (Tex. App.—San Antonio 1972, no writ) (first citing 1 JOHN H. WIGMORE, EVIDENCE § 41, at 435 (3d ed. 1940); and then citing 5 A.L.R.3d 100, 105, 120–131 (1966)).

> judicial utterances that sanction the fallacious and impracticable limitation, originally put forward without authority, must be taken as valid only for the particular evidentiary facts therein ruled upon. [This] fallacy has been frequently repudiated in judicial opinions.[160]

As far back as the Civil War era, another commentator explained why stacking inferences sometimes is perfectly reasonable:

> Thus, if the body of a person of mature age is found dead, with a recent mortal wound, and the mark of a bloody *left* hand is upon the *left* arm, it may well be concluded that the person once lived, and that another person was present at or since the time when the wound was inflicted.[161]

In his seminal work on Texas sufficiency review, Justice Calvert referred to the "purported rule . . . that a 'no evidence' point must be sustained if a finding of a vital fact can be supported only by piling inference upon inference."[162] But, as he recognized, this is "not a separate rule of decision" at all; it is just "another way of saying that the vital fact may not reasonably be inferred from the meager facts proved in the particular case."[163]

As one prominent commentator on Texas civil procedure and evidence has summed it up: "Texas courts would be much better off to abandon the inference piling approach to no-evidence review because it is hard to apply, easy to manipulate, and simply not a reliable tool for assessing the reasonableness of an inference."[164]

II. CONCLUSION

Most jury verdicts in Texas civil cases rest on circumstantial evidence often involving inferences. Some types of cases—employment discrimination claims, for example—almost always involve proof by "a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination."[165]

The problem with rigid application of a two-inferences-and-you're-out rule is that it means "a fact finding must be arbitrarily rejected with no inquiry being made concerning the probative value of the facts and circumstances upon which the ultimate conclusion is based."[166] But "[t]here is no sweeping

160. 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 41, at 1106–20 (Tillers rev. ed., 1983) (footnotes omitted).

161. 1 GREENLEAF ON EVIDENCE § 13a, at 19 (11th ed. 1863) (emphasis in original).

162. Calvert, *supra* note 105, at 365.

163. *Id.*

164. William V. Dorsaneo III, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. 1497, 1511 n.71 (2000).

165. Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011) (footnote omitted).

166. Cadena, *supra* note 29, at 19.

exclusionary formula against drawing an inference from an inference . . . . Properly understood, we are simply dealing with the principle that the more remote an inference is, the more enfeebled is its probative force; the important consideration is whether the inference based on an inference is reasonable."[167]

The Texas Supreme Court should abolish the rule against inference stacking and instruct lower courts to phrase their review of inferences in terms of a reasonable basis in the evidence. The decisions by the Fifth Circuit and the Texas Court of Criminal Appeals provide a template for doing so.

The Fifth Circuit allows a jury to reconstruct events by "drawing an inference upon an inference" so long as each inference is reasonable.[168] The probative value of an inference is judged based on whether it "is reasonably well supported by the evidence."[169]

Similarly, the Texas Court of Criminal Appeals has instructed lower courts in criminal cases to "determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict."[170]

These approaches are consistent with the Texas Supreme Court's instructions concerning circumstantial evidence: View *each piece* of circumstantial evidence in light of *all* the known circumstances and examine the record for patterns that link apparently insignificant and unrelated events.[171] This approach makes far more sense than the rigid two-inferences and-you're-out rule, which is too often applied as a substitute for actual reasoning. The time has come for the Supreme Court of Texas to plunge a much needed stake through the heart of the rule against inference stacking.

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167. FISHMAN & MCKENNA, *supra* note 28, at 4:58.

168. Fenner v. Gen. Motors Corp., 657 F.2d 647, 650–51 (5th Cir. 1981) (per curiam) (citing Smith v. Gen. Motors Corp., 227 F.2d 210, 213 (5th Cir. 1955)).

169. Cora Pub, Inc. v. Cont'l Cas. Co, 619 F.2d 482, 486 (5th Cir. 1980).

170. Hooper v. State, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007).

171. *See* Ford Motor Co. v. Castillo, 444 S.W.3d 616, 622 (Tex. 2014) (per curiam); City of Keller v. Wilson, 168 S.W.3d 802, 813–14 (Tex. 2005).