

**Court of Criminal Appeals**  
**June 18, 2014**

***Soliz v. State***

No. AP-76,768

Case Summary written by Rebekah Jacobson, Staff Member.

Justice Meyers delivered the opinion of the unanimous Court.

Mark Anthony Soliz and his accomplice, Jose Ramos, committed approximately thirteen burglaries, aggravated robberies, and shootings during an eight-day crime spree that ended when Soliz crashed his vehicle while fleeing from police. During questioning, officers obtained two typed and signed statements from Soliz that summarized his verbal statements of the crimes. In the second typed statement, Soliz admitted that he and Ramos drove to the victim's residence, threatened her with a gun, and burglarized her home. Though Soliz first denied that he was the one who shot the victim, he later confessed to having been the one who pulled the trigger. He wrote and initialed a sentence at the end of his second typed statement that read: "It was me that shot that wom[a]n!!!" A witness, who was riding with Soliz when he fled from police, further solidified Soliz's statement when she testified that Soliz had bragged to her about killing the victim. In addition to this testimony, forensic evidence connected Soliz to the victim's murder. One expert testified that a shell case recovered from the victim's home was fired through the same type of handgun recovered from the vehicle that Soliz crashed when fleeing from police. A second expert witness further concluded that the bullet recovered from the victim's home was in fact fired from the recovered handgun.

Soliz was convicted of intentional murder in the course of committing or attempting to commit burglary, or robbery, and was sentenced to death. Direct appeal to the Court of Criminal Appeals is automatic, and in his petition, Soliz raised eighteen points of error.

Overruling all eighteen points of error, the Court affirmed the judgment of the trial court. In point of error one, Soliz argued that the evidence at trial was insufficient to sustain his conviction. The Court concluded there was ample evidence of Soliz's guilt, relying on both his confession, and witness and expert testimony. In point of error two, Soliz asserted that the evidence at trial was insufficient to sustain his death sentence. In particular, Soliz asserted that the evidence was insufficient to support the jury's finding on the future-dangerous special issue. The Court reasoned that Soliz's history of violent conduct, gang affiliation, drug abuse, and defiant behavior while awaiting trial, could have led a rational trier of fact to determine beyond a reasonable doubt that it was likely that Soliz would commit future, dangerous acts. In points of error three through six, Soliz argued that the trial court erred when it overruled his motion to suppress both his verbal and written statements to police because his statements were involuntary. The Court concluded that because the defense offered Soliz's verbal statements into evidence, and the written statements were summaries of the verbal statements, Soliz waived error

concerning the trial court's ruling on his motion to suppress the statements. In points of error seven through ten, Soliz argued that the imposition of the death penalty was unconstitutional because he suffered from permanent brain damage resulting from partial fetal-alcohol syndrome. The Court reasoned that because the jury considered Soliz's evidence of brain damage, and determined that the evidence did not warrant a life sentence, the Court would not second-guess the jury's determination. In points of error eleven through seventeen, Soliz argued a variety of death-penalty claims previously heard and rejected by the Court. The Court declined to revisit its decisions concerning these claims. Finally, in point of error eighteen, Soliz argued that the Texas lethal-injection protocol was in violation of the Eight Amendment. The Court determined this claim was not yet ripe for review.

***Brown v. State***

No. PD-1723-12

Case Summary written by McKenzie Jordan, Staff Member.

Per curiam.

Appellant was on trial for murder and sustained a gunshot wound to the head on the morning of the final day of his trial in the guilt phase. The trial court conducted the remainder of the trial in appellant's absence and refused to hold a hearing to determine whether he was competent to stand trial after receiving the gunshot wound. The appellate court granted the competency hearing and the case was remanded for a new trial.

The state originally sought discretionary review from the Court of Criminal Appeals, the Court found that the trial court did not follow proper procedures, and the case was remanded to the court for a competency hearing. However, because appellant recently passed away, the State moved to permanently abate the appeal. The motion to abate the appeal was granted, and the Court's previous opinion regarding the retrospective competency hearing was withdrawn. All appellate court opinions were also ordered to be withdrawn.

***Ex Parte Navarajo***

No. WR 79,281-01

Case Summary written by Matt A. Kelley, Staff Member.

Alcala, J., delivered the opinion of the court in which Keller, P.J., Meyers, Keasler, Hervey, and Cochran, JJ., joined. Price, J., filed a concurring opinion. Womack and Johnson, JJ., dissented.

In 1999 appellant Frank Navarajo was convicted of aggravated sexual assault of a child. The victim of the assault was the five-year-old child of Navarajo, who was seven at the time of her father's jury trial. The victim provided graphic testimony

describing the sexual assault in detail, though the defense put on video evidence of the victim recanting and stating that she had “told a lie,” in addition to evidence demonstrating that Navarijo had been diagnosed with prostate cancer and was impotent at the time of the alleged sexual assault. The expert testimony of Dr. Nancy Kellogg was perhaps the most compelling piece of evidence for the prosecution. Dr. Kellogg describes her examination of the victim’s genitals just three days after the initial outcry and discovers disturbing evidence of sexual abuse. Although the defense provided medical testimony to rebut the evidence presented by Dr. Kellogg, the jury found Navarijo guilty and he was sentenced to 20 years in prison.

In July of 2012, the appellant filed an application for post-conviction writ of habeas corpus, in which he proffered new evidence in the form of a 2011 recantation by the victim, now nineteen years old, of the sexual abuses for which Navarijo was convicted. Appellant also proffered affidavits from his ex-wife, a psychologist, and several of the jurors who had convicted him testifying to their belief in Navarijo’s innocence in light of the recantation. A habeas hearing was held in which a habeas court concluded the recantation by the victim was credible and that no reasonable juror would have convicted the appellant in light of the new evidence.

On review, the Court of Criminal Appeals determined that the applicable law required them to determine, in light of the incriminating evidence adduced at trial, if the victim’s recantation constitutes such compelling exculpatory evidence as to unquestionably demonstrate the appellant’s innocence. The appeals court found the recantation wanting in terms of credibility, as the victim’s memory of the events was vague and uncertain at best. The court further found that the new recantation did little to rebut the compelling evidence proffered by Dr. Kellogg at trial. In addition, the court reasoned that at the appellant’s original trial the jury had considered a recantation by the victim to a Child Protective Services agent, found it incredible, and convicted the appellant anyway. The new evidence, in the form of another recantation, was therefore found insubstantial when considered in light of the entire trial record, and the court held that the appellant had failed to unquestionably establish his innocence and reversed the decision of the habeas court.

#### Judge Price, concurring

Judge Price agreed with the majority, but wrote separately in order to further discuss the demanding burden defendants face in post-conviction applications for writ of habeas corpus and to clarify the role and authority of the court of appeals as the court of return. Judge Price noted that the task of the court in a post-conviction proceeding is not only to determine the credibility of the new evidence, but also to determine whether that evidence, when considered in the context of the trial record, demonstrates the defendant’s innocence such that no reasonable juror would have convicted the defendant. The habeas court found the victim’s recantation to be credible and based its reversal of Navarijo’s conviction upon it, a determination that is ordinarily afforded a great deal of deference. Judge Price accounted for the

deference the court of appeals must show to the findings of the habeas court so far as those findings are supported by the record, however he does not agree that the appellate court is necessarily bound by those findings when its own determinations are better supported by the record.

***Guerra v. State***

No. PD-0318-13

Case Summary written by Samantha Kelly, Staff Member.

Judge Johnson delivered the unanimous opinion of the Court.

Guerra was in his car outside the Immigration and Customs Enforcement (ICE) facility in Midland on April 28, 2010. An off-duty ICE employee saw his car driving slowly around the building and stopping occasionally. Testimony revealed that Guerra had been seen observing children at a nearby dance, cheer, and gymnastics building, and that a female employee of ICE had recently been followed after leaving the office. The off-duty employee went into the facility to report Guerra's behavior to Stone, a federal agent working late that night. Stone got into his car, put on the emergency lights, and pursued Guerra's car.

After Guerra stopped the car, Stone saw a stun gun sticking out of Guerra's shirt pocket. Guerra told Stone he also had a gun, prompting Stone to search Guerra's vehicle. Stone found two guns, a pocket knife, a group of zip ties, zip ties joined to form a set of plastic handcuffs, a jacket with a holster for concealing a gun with strips of duct tape attached to the jacket, and bungee cords attached to cloth padding, which appeared to be gags. There was also a plastic bag with lubricant, a condom, and a pill bottle labeled "Viagra." Stone then called a Midland police officer. Stone is not a peace officer himself (only a federal agent), he did not see Guerra commit any kind of criminal act, and he did not have a warrant when he searched Guerra's car.

The trial court granted Guerra's motion to suppress for only some of the evidence obtained after Guerra's detention. It denied his motions to suppress evidence obtained from the initial stop of Guerra's car, and evidence obtained from a subsequent search of his apartment conducted pursuant to a warrant. Guerra was convicted of unlawful use of a criminal instrument with intent to commit the offense of aggravated kidnapping or aggravated sexual assault. The Court of Appeals affirmed the trial court, holding that the trial court did not err in denying Guerra's motions to suppress. Citing Articles 2.122 and 14.03 of the Texas Code of Criminal Procedure, the Court of Appeals also concluded that federal agents, though not peace officers, have authority to arrest and temporarily detain people "found in suspicious circumstances that reasonably showed that he was guilty of a felony, or threatened to commit, or was about to commit, a felony."

On appeal before Court of Criminal Appeals, Guerra challenged the court of appeals' decision to construe Articles 2.122 and 14.03 of the Texas Code of Criminal Procedure together and to conclude that federal agents have authority under the provisions to arrest and temporarily detain people in suspicious circumstances under a "reasonable showing" standard. Article 14.03 authorizes peace officers to

make arrests and detentions without a warrant. Article 2.122 authorizes ICE agents to makes arrests and conduct searches and seizures for felony offenses only. Under both provisions, the peace officer and the federal agent must act only under reasonable suspicion.

The Court held that Stone observed behavior that gave rise to reasonable suspicion of felonious activity, and that as an ICE agent, he was authorized to stop and temporarily detain Guerra under Article 2.122. First, it clarified the law on reasonable suspicion. Whether an agent had reasonable suspicion is determined by considering the totality of the circumstances, which includes articulable facts known to the agent and reasonable inferences from those facts. It is not necessary that the suspicion relate to any specific criminal offense. Second, the Court examined the facts known to Stone when he stopped Guerra, some of which include the following:

1. Stone knew that Guerra was the sole occupant of a vehicle and he had been observing children in the area;
2. A female employee in the ICE facility had been followed home;
3. ICE received an alert that all suspicious people and vehicles near government facilities should be reported ; and
4. ICE was investigating a drug trafficking organization that was distributing to people in Big Spring, and one of the people involved in the organization has been seen in the same kind of car as Guerra's.

Finally, the Court concluded that facts known to Stone raised a potential for drug activity or felonious conduct. Therefore, he had the requisite reasonable suspicion to stop and temporarily detain Guerra. Furthermore, because Article 2.122 statutorily vests ICE agents with the powers of arrest and search and seizure concerning felonies, Stone had authority to make the stop and detention. The judgment of the Court of Appeals is affirmed.

***Johnson v. State***

No. PD-0473-13

Case Summary written by Bryson Matthews, Staff Member.

Judge Price delivered the opinion of the Court, joined by Presiding Judge Keller, and Judges Meyers, Womack, Keasler, Hervey, Cochran, and Alcala. Judge Johnson Concurred in the result.

The appellant was accused of capital murder. During the trial, the appellant sought to show bias on the part of two state witnesses on cross-examination. The appellant wanted to inform the jury of the witnesses' specific felonies and their possible punishment ranges. One of the State's witnesses was indicted for felony theft, while the other was indicted for felony robbery.

The trial court limited the appellant on cross-examination to only inquiring into the nature of the witnesses' offense, i.e., whether it was a misdemeanor or a felony. The appellant claimed this was violating his right under the Sixth Amendment's Confrontation Clause, but the trial court continued with its decision. The appellant was convicted of capital murder. Before the First Court of Appeals, the appellant again argued that the decision of the trial court violated his right under the Confrontation Clause of the Sixth Amendment. The court of appeals affirmed the decision below, holding that the trial court did not err in limiting the appellant's cross-examination. The Court of Criminal Appeals granted discretionary review.

Issue: Whether the trial court abused its discretion and violated the appellant's right under the Sixth Amendment's Confrontation Clause by limiting the appellant's cross-examination?

The court held that the Confrontation Clause, while guaranteeing the opportunity for effective cross-examination, was a right subject to the discretion of the trial court. The court began by articulating that a trial court has discretion to place limits on cross-examination in areas where the defendant fails to establish a causal connection or a logical relationship in the pending charges and the vulnerable position of the witness. If there is no causal connection or logical relationship, then the defendant failed to show that the evidence was relevant. For the evidence to be relevant, it must make the existence of the bias more or less probable than without the evidence. The court began by examining whether allowing the jury to find out about the witnesses' specific felonies was relevant. The court concluded that informing the jury of the specific felony offences, as opposed to a pending felony generally, would not provide the jury with a greater capacity to evaluate the witnesses' potential for bias. Therefore, the court did not find a logical relationship with respect to this first limitation by the trial court. Next, the court examined whether a logical relationship existed with regards to the range of punishment. A logical relationship was found to exist, because a jury would be in a better position to assess the bias of a witness if they knew the extent of the potential punishment the witness might face by not testifying favorably for the State. This evidence was found to have a logical relationship and was relevant.

Having found the evidence relevant, the court proceeded to determine if the trial court abused its discretion by excluding the evidence of the punishment ranges. A trial court abuses its discretion when it drastically alters the defendant's cross-examination, prohibiting the defendant from arguing on the record about the witness's bias. The court provided two situations in which this could occur: 1. When the trial court prohibits all inquiry into the witness's bias, or 2. When the trial court limits the cross-examination to the point that the jury would have received a significantly different impression of the credibility of the witness if the defendant had been permitted to do their planned cross-examination. The court found that the appellant was able to create an argument on the record about the witnesses' bias towards the State and, therefore, did not fall into either of the situations described by the court. The appellant was not prohibited from inquiring into the potential

bias, and the court found that the jury would not have received a significantly different impression of the witnesses' credibility from hearing the appellant's planned cross-examination. The court also recognized that while the appellant's cross-examination might have been marginally less effective from the exclusion of this evidence, the trial court abuses its discretion on a constitutional level when the limitations placed on the cross-examination are such that the whole cross-examination is rendered ineffective. The Court of Criminal Appeals affirmed the judgment of the First Court of Appeals, which held that the trial court did not err in limiting the cross-examination of the appellant.

*Rodriguez v. State*

No. PD-1189-13

Case Summary written by Jeri Leigh McDowell, Staff Member.

MEYERS, J., delivered the opinion of the court, in which KELLER, P.J., and PRICE, WOMACK, KEASLER, HERVEY, and COCHRAN, JJ., joined. ALCALA, J. Filed a dissenting opinion, in which JOHNSON, J., joined.

The State charged appellant, Nilda Rodriguez, with felony murder following the death of her two-month-old son. Rodriguez's son was taken to the hospital after Rodriguez found him "unconscious and unresponsive." The hospital pronounced the infant dead, and an autopsy showed that he died from a combination of malnutrition and dehydration. As Rodriguez was the only adult responsible for the infant, the State charged her with "murder during the course of and in furtherance of the commission of the felony offense of injury to a child." The jury convicted Rodriguez and sentenced her to thirty years in prison.

On appeal, Rodriguez challenged the validity of the indictment, claiming that the under the Texas Penal Code a conviction for murder required her to actually commit an act during the course of the felony injury to a child. She argued that the nature of the offense—starvation and neglect—constituted omissions of action rather than action itself. Although the appellate court found this issue not preserved for review, it did request supplemental briefing from the parties on the question of whether the evidence was legally sufficient to support a conviction.

The appellate court affirmed. After reviewing the supplemental briefs, it held that a reasonable jury could have inferred from the evidence that Rodriguez acted by feeding her son. Even though the feedings were not enough to sustain life, evidence that Rodriguez had fed her son some food could support the conviction. Rodriguez appealed and this Court granted her petition for discretionary review.

Issue: Was the evidence legally sufficient to show that Rodriguez "committed an act clearly dangerous to human life?"

The Court of Criminal Appeals disagreed with the appellate court, holding that the distinction between an act and an omission precluded a reasonable jury from finding that Rodriguez had committed any affirmative action causing the death of her child. The Court reasoned that Rodriguez's provision of insufficient

amounts of food, while an affirmative action, would have actually prolonged her son's life rather than been a "clearly dangerous act" hastening his death. The Court noted that if it followed the court of appeal's reasoning practically any omission could be evidence from which a reasonable jury could infer an act (e.g. a jury finding that parents had affirmatively acted when they failed to provide their child with a coat and he died of exposure because they had previously provided him with some clothing).

Thus, the Court concluded that the State had presented no evidence showing Rodriguez affirmatively acted to cause the death of her child by starvation. For the underlying felony of injury to a child, however, the Court concluded that the State presented ample evidence to support a conviction. Accordingly, the Court reversed the court of appeal's judgment and remanded back to the trial court for a reformation of the judgment and a new punishment hearing.

#### ALCALA, J. dissenting

Judge Alcala dissented, claiming that a reasonable fact finder could rationally infer that Rodriguez's continued act of feeding the infant less food than was necessary to sustain life was an action causing the child's death. Although Judge Alcala agreed with the majority that felony murder requires an act, she disagreed with their conclusion that starvation was not an "act of commission and omission." To begin, Judge Alcala cited several cases from other jurisdictions where a parent's starvation of a child constituted an act of commission and omission. Judge Alcala then analogized the situation to a car wreck. She noted that a person who, while driving at a high rate of speed, hits another driver has caused injury through the act of commission (by accelerating) and omission (by failing to brake). Similarly, Rodriguez caused injury through an act of commission and omission by continually feeding the child but by failing to feed him enough to sustain life. Thus, Judge Alcala would have affirmed the court of appeals, upholding both Rodriguez's conviction and sentence.

#### ***Fleming v. State***

No. PD-1250-12

Case Summary written by Julio Montiel, Staff Member.

Meyers, J., delivered the majority opinion. Keasler, Hervey, Cochran, and Alcala, J., joined in the judgment. Cochran, J., filed a concurring opinion. Alcala, J., filed a concurring opinion. Keller, P.J., filed a dissenting opinion in which Price and Johnson, J.J., joined. Womack, J., concurred.

In April 2007, Fleming, age 25, began a relationship with a girl that had told him she was 22 years old. She was actually 13. On their second date, the two went to Fleming's hotel and had consensual sexual intercourse. After being sexually active for 2 months, the girl's mother found out about Fleming and his age. The mother called the police who questioned Fleming. Fleming told the police that he



did not know she was underage. Nevertheless, Fleming was charged with aggravated sexual assault under Texas Penal Code 22.021(a)(i)(B)(iii). Fleming motioned to quash the indictment by arguing that the Texas Penal Code's aggravated sexual assault section is unconstitutional because it does not require proof that he knew the victim was a minor and does not recognize an affirmative defense regarding the defendant's reasonable belief that the victim is 17 or older.

During trial, Fleming testified that he believed the girl was 22 because the girl and her friend had told him so. In addition, he relied on the age she had posted on her MySpace page. The girl denied Fleming's claims. Also, the State provided evidence that Fleming had dated a friend of the mother who sometimes babysat the girl. During the testimony, one of the jurors revealed a conflict of interest. Rather than risk a mistrial, the trial court gave Fleming a ten-year probated sentence and denied his motion to quash. On appeal, the court of appeals reasoned that the strict-liability nature of statutory rape laws was a widely known exception to the mental state requirement for criminal culpability. The appellate court also said that Section 22.021 involves personal contact with the victim and the ability to discover his true age. Finally, the appellate court held that a statutory rape statute does not require a mental state component or mistake of age defense as a fundamental right from either federal Due Process or Texas Due Course of Law. As a result, the court of appeals affirmed the trial court because strict liability for statutory rape furthers the legitimate government interest of protecting children from sexual abuse.

Issue: Is the Texas Penal Code Section 22.021 unconstitutional under the Fourteenth Amendment's Due Process Clause and the Texas Constitution's Due Course of Law because the section (1) does not require the State to prove that the defendant had a culpable mental state regarding the alleged victim's age and (2) does not recognize an affirmative defense based on the defendant's reasonable belief that the alleged victim was 17 years of age or older?

The Court of Criminal Appeals held that Texas's aggravated sexual assault statute was constitutional and did not adopt a mistake of fact defense. The Court of Criminal Appeals cited *Regina v. Prince* and *Morissette v. United States*. Both cases agreed with denying a mistake of age defense and imposing strict liability for statutory rape. *See Regina v. Prince*, 13 Cox, Criminal Case 138 (Eng. Crim. App. 1876); *Morissette v. United States*, 342 U.S. 246 (1952). For the mental state requirement, federal law does not require proof that the defendant know that her sexual partner is a minor. The Court also reasoned that the legislature clearly did not intend to require proof of a mental state for aggravated sexual assault because the Texas Penal Code does not list a mental state as to age for either sexual assault or murder. Moreover, the Court held that the statute served a legitimate government interest because it protected children from being coerced by the power of adults. The Court favored placing the burden on the adult to ascertain the age of his potential sexual partner. Therefore, the court did not find a fundamental right to a mental state requirement dealing with the age of the victim. For the mistake of fact defense claim, the Court held that protecting children from sexual assault outweighed any claim of a mistake of age defense. The Court reasoned that the

legislature's intent to protect children was clear and without exceptions. Thus, the Court found it unconscionable to provide a mistake of fact defense for aggravated assault. Consequently, the Court affirmed the ruling of the court of appeals.

#### Cochran, J., Concurring

Judge Cochran referred to his prior concurring opinions to establish his belief that the mistake of fact defense already applies to consensual statutory rape. Still, Judge Cochran reluctantly joined the majority opinion because the currently Texas does not apply a mistake of fact defense to consensual statutory rape.

#### Alcala, J., Concurring

Judge Alcala wrote separately to discuss how the majority opinion is consistent with Supreme Court precedent because the Court has exempted proof of a mental state in statutory rape cases as in *Morissette*. Furthermore, the Supreme Court has never held that placing the burden on the adult to ascertain the age of his sexual partner was unconstitutional. Alcala also argued that *Lawrence v. Texas* did not rule on relationships involving minors. As result, the judge argued that a mistake of fact defense is not constitutionally required for statutory rape cases and the Texas Legislature should decide whether to provide it. In addition, Judge Alcala wanted to highlight that mistakes resulting from communications through emerging technology, i.e. MySpace, in statutory rape cases will be irrelevant if sexual intercourse actually takes place because the adult ascertains true age upon making physical contact. Therefore, emerging technology would not compel a mistake of fact defense. As a matter of public policy, the judge did find it appropriate for the Texas Legislature to consider a mistake of fact defense for older high school aged teenagers. Judge Alcala also added that allowing a mistake of fact defense would hurt the reporting and prosecution of statutory rape because such a defense would lead to victim bashing during trial and less reporting of rape for fear of such bashing. Finally, Judge Alcala believed the mistake of fact defense unreasonable in this case because Fleming was not reasonably mistaken. The judge concluded that due process does not require a mistake of fact defense in aggravated sexual assault cases relying on the Texas Legislature's goal of protecting young children as further support.

#### Keller, P.J., Dissenting

Presiding Judge Keller held that under *Lawrence v. Texas*, due process would require a mistake of age defense in a small number of statutory rape cases. Moreover, such a defense would not automatically be prohibited by the complainant being under 14 years old. Keller discussed the fundamental nature of mental culpability to argue that the requirement of a mental state is "firmly embedded in the common law." Keller also discussed how strict liability is usually tied to "light offenses" with minor penalties. Moreover, Keller argued that the Supreme Court

has held strict liability requires the defendant to be aware of certain facts that place him on notice of strict regulation. Then, the presiding judge discussed how notice was important to substantive due process in determining whether specific behavior could constitute a crime. Keller then moved on to discuss Texas case law to argue that due process requires a defensive instruction regarding involuntary intoxication in DWI cases because inflicting harsh punishment upon a person who lacks culpability for consuming intoxicating substances violates principles of justice.

Keller's main point is that due process means freedom from harsh criminal punishment when a mental state is not required. For Keller, a mental state is absent only if the defendant lacks a mental state for both a crucial element of the offense and the existence of facts that would put him on notice of a duty to assure that his conduct is legal. These requirements would mean that strict liability has a somewhat implied mental state. According to the presiding justice, strict liability statutes that require such an implied mental state do not involve a fundamental right because the mental state is not really absent. Nevertheless, statutes that impose "rigorous" strict liability and do not require a mental state at all do involve a fundamental right if the penalty is harsh and the defendant completely lacks mental culpability of committing the crime. As a result, such statutes have to be narrowly tailored to serve a compelling government interest to conform to due process.

Then, Keller frames the idea that due process requires a mistake of age defense because of logic, precedent, and *Lawrence v. Texas*. In addition, a fundamental rights analysis under due process is proper for aggravated sexual assault of a child because of harsh penalties and the added burden of the registration system for sex offenders. Before discussing *Lawrence*, Keller argues that the abolition of the offense of fornication, the rising age of consent, and the lack of limitation for the prosecution of most child sex offenses undermine the wrongful conduct rationale for imposing strict liability on aggravated sexual assault. The presiding judge uses this argument as background to argue that *Lawrence* changed the fundamental rights analysis for aggravated sexual assault cases. According to Keller, the decision completely negated the wrongful conduct rationale because a defendant does not act "at his peril when he reasonably believes that he is having sexual relations with an adult." Therefore, a mistake of fact defense is necessary to protect adults who reasonably believe that they are engaging in sexual intercourse with another adult because *Lawrence* serves as constitutional protection for consensual sexual intercourse between adults. In addition, this reasonable belief would negate any mental culpability. As a result, failing to provide a mistake of fact defense triggers a due process analysis but the defendant must believe that his partner is over 18.

Keller then considers another rationale based on empirical research as to a person's ability to ascertain the age of a minor. While children of certain ages cannot possibly be mistaken for an adult, some minors could be mistaken for adults following the empirical rationale. According to the presiding judge, due process questions must take consideration of how the defendant was able to ascertain the

age of his partner and its effects on his mental culpability. After Keller argues that due process requires a mistake of age defense under *Lawrence*, the presiding judge moves on to discuss the second part of the due process analysis which asks whether the government's compelling interest is narrowly tailored to achieve such an interest. Of course the government's interest in protecting children physically and psychologically is compelling. Notwithstanding, for Keller, the statute is not narrowly tailored because it is overbroad and punishes the most diligent, but still mistaken, defendant. In addition, other options exist to ensure the protection of children such as a requirement of diligence or placing the burden of proof on the defendant when raising the mistake of age defense.

Keller also argues that fears of decreased deterrence are highly speculative and prove insufficient to justify narrow tailoring. Moreover, the strict liability statute may produce innocent defendants who lack any mental state and adults who are victims of blackmail by minors. Another problem with the statute occurs when a minor rapes an adult. Under the statute, the adult victim could be liable because the law ignores the actor's lack of mental culpability. The presiding judge argues that such an issue furthers his holding that without a mistake of age defense, the aggravated sexual assault statute is unconstitutional when the defendant demonstrates that he reasonably believed, after exercising due diligence, that his sexual partner was at least 18 if the conduct is protected under *Lawrence*. To fix the situation, Keller drafted the following mistake of age affirmative defense:

At the time of his conduct:

- (1) The defendant actually believed that the complainant was eighteen years of age or older, and the defendant was unaware of any substantial risk that the complainant was under the age of eighteen,
- (2) This belief and the lack of awareness was reasonable,
- (3) This actual, reasonable belief was based upon the exercise of diligence that a reasonable adult who contemplated sexual relations would exercise, and
- (4) But for the complainant's age, the defendant's conduct would constitute constitutionally protected consensual activity.

The defendant must support each element with evidence as is customary for all defenses. Also, the complainant's physical appearance could show that the defendant could not be mistaken her age. Consequently, Presiding Judge Keller would remand the case to the court of appeals.