

the Jasuta / Schulman report

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TIBA's Case of the Week

First Court of Appeals

[Case Name]: **The State of Texas v. Tom Peterson**

- **OFFENSE:** Pre-Trial *Habeas Corpus*
- **COUNTY:** Harris
- **C/A CASE No.** 01-24-00640-CR and 01-25-00633-CR
- **DATE OF OPINION:** July 14, 2026 **OPINION:** [Justice David Gunn](#)
- **DISPOSITION:** Trial Court Reversed
- **TRIAL COURT:** 263rd D/C; Hon. Melissa Morris
- **LAWYERS:** [Mark Hochglaube](#) (Defense); [Bridget Holloway](#) (State)

[Background Facts]: In 2023, the trial court held a jury trial on a charge of indecency with a child by contact and a charge of indecency with a child by exposure against Appellee. Prior to reading the charge to the jury, the trial court declared a mistrial due to an instance of juror misconduct. A grand jury then indicted Appellee for the offense of continuous sexual abuse of a young child. Appellee filed three pretrial applications for writ of *habeas corpus* seeking dismissal of all three charges, the two indecency with a child charges and the new continuous sexual abuse charge, based on double jeopardy. The trial court granted the application and dismissed all three charges. On appeal, the State challenges the trial court's ruling granting *habeas* relief and dismissing the continuous sexual abuse indictment.

[§61.01 Challenges to Prosecution / Double Jeopardy / Actual Jeopardy]: The State argues that the mistrial on the two indecency charges does not have double jeopardy implications and bar the continuous sexual abuse charge because the charges are distinct, and the indecency charges are incapable of being predicates for the continuous sexual abuse charge.

[Holding]: In a double jeopardy inquiry, we must determine whether the offenses involved are the "same." When distinct statutory provisions are at issue, we determine "legal sameness" by applying the [same-elements test of *Blockburger v. United States*, 284 U.S. 299 (1932)] to determine whether each provision requires proof of a fact which the other does not. Under that test, lesser included offenses are legally the same as the greater offense and are subsumed by the

elements of the greater offense unless the potential lesser-included offense requires proof of a fact that is not required to establish the greater offense. *Ex parte Castillo*, 469 S.W.3d 165 (Tex.Cr.App. 2015)[see ¶8, [Vol. 23, No. 23](#); 06/08/2015]; *Brown v. Ohio*, 432 U.S. 161 (1977)(“Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense”). *** To determine if an offense is a lesser-included offense of another, we compare the “elements of the greater offense as pled to the statutory elements of the potential lesser-included offense in the abstract.” *Bigon v. State*, 252 S.W.3d 360 (Tex.Cr.App. 2008)[see ¶8, [Vol. 16, No. 2](#); 01/21/2008](“[W]hen resolving whether two crimes are the same for double-jeopardy purposes, we focus on the elements alleged in the charging instrument.”). An offense is a lesser-included offense if the indictment for greater offense “alleges all of the elements of the lesser-included offense” or “alleges elements plus facts (including descriptive averments, such as non-statutory manner and means, that are alleged for purposes of providing notice) from which all of the elements of the lesser-included offense may be deduced.” *Ex parte Watson*, 306 S.W.3d 259 (Tex.Cr.App. 2009)[see ¶8, [Vol. 17, No. 18](#); 05/13/2009; [Vol. 17, No. 50](#); 12/21/2009]. *** The elements of the lesser-included offense need not be pleaded in the indictment “if they can be deduced from facts alleged in the indictment.” *State v. Meru*, 414 S.W.3d 159 (Tex.Cr.App. 2013)[see ¶8, [Vol. 21, No. 48](#); 12/02/2013]. *** The parties agree that indecency with a child by contact, as alleged in the indictment against [Appellee], is not a lesser-included offense of continuous sexual abuse. The indecency by contact indictment alleged that [Appellee] committed the offense by touching the complainant’s breast. *** The parties’ disagreement centers on the Fourteenth Court’s recent opinion in *Alvarez v. State*, 694 S.W.3d 847 (Tex.App. - Houston [14th] 2024)[see ¶8, [Vol. 32, No. 16](#); 04/29/2024]. *** The State argues that *Alvarez* is either “wrong in its conclusion, or at least as it would apply in this case.” It first argues that indecency by exposure and aggravated sexual assault are not the same offenses because indecency by exposure has an additional element -- the exposure must occur “with intent to arouse or gratify the sexual desire of any person -- that is not established by the same or less than the proof required for aggravated sexual assault. *** The State then argues that indecency by exposure cannot be a lesser-included offense of the aggravated sexual assault predicate of continuous sexual abuse because the indecency indictment alleged a date for the offense outside the date range alleged in the continuous indictment. *** [Appellee], on the other hand, argues that indecency by exposure can be a lesser included offense of aggravated sexual assault. In the first trial, the complainant testified that on some occasions [Appellee] only exposed his genitals, but on other occasions, he made her perform oral sex, and thus the exposure preceded contact and penetration. Because the continuous indictment did not specify the manner and means by which [Appellee] allegedly committed aggravated sexual assault, any possible lesser-included offense by any possible manner and means was jeopardy barred. *** This Court acknowledges the force of [Appellee]’s arguments about *Alvarez*. We also acknowledge the State’s view that *Alvarez* may have been wrongly decided, but resolution of the *Alvarez* debate can wait for another day because we ultimately conclude that *Alvarez* is factually distinguishable. *** When comparing the indecency by exposure indictment and the continuous sexual abuse

indictment, we cannot conclude the offenses are legally the same. *** We therefore hold that the trial court erred by granting *habeas* relief to [Appellee] and dismissing the continuous sexual abuse indictment.

Sidebars

[\[David A. Schulman\]](#) Although I ultimately have no real dispute with the holding(s) in this opinion, I have to say [as would have the late Rusty Duncan] that this case gives me a headache, although the problem is not with the opinion, it is with the facts of the case. The opinion sets out the law very well, but the facts involved and what they mean tend to get a bit confusing.

[\[John G. Jasuta\]](#) I think the opinion is ultimately correct and that this isn't going any further.