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SIXTH AMENDMENT RIGHT TO COUNSEL HAS TEETH
C/W called def. at behest of detective and elicited inculpatory statements to secure conviction; those statements should have been excluded

Rubalcado v. State, No. PD-0195-13, Keller, 3-19-14, Publish. CW was stepdaughter-ish. She called him with help of detective and chatted him up with stuff like, 'so why did you want to have sex with underage pitiful me'. He was represented by counsel; counsel was not there at the time of these conversations. Those statements were introduced as substantive evidence of guilt. Q IS: Whether, after the 6th A right to counsel has attached, the govt has knowingly circumvented the def's right to counsel by using an undisclosed govt agent to deliberately elicit incriminating info. 6A attaches when prosecution has commenced—"at the first appearance before a judicial officer at which the def is told of the formal accusations against him and restrictions are imposed on his liberty."[1] 6a is offense specific—it attaches only to an offense for which a prosecution has been initiated. *Blockburger*[2] double jeopardy tests applies to decide whether or not it is the same offense—loosely translated into does one of the offenses contain an element that the other does not have. Offense committed in a different county are different offenses but they cannot be introduced into trial as extraneous offenses if obtained by a 6th A. violation. The constitutional violation occurs when the uncounseled interrogation is conducted not when those same statements are introduced. State's knowledge is imputed from one actor to another in this case from Odessa police and court system to the Midland Police.[3] The CW in this case was a govt agent: Midland police encouraged CW to call, for the purpose of eliciting a confession, Supplied her with the recording equipment and an officer was present during those calls. In this case 'explicit interrogation' occurred not only by the questioning but also by statements nonetheless designed to invoke incriminating responses. The concept of a knowing and voluntary waiver of 6A rights does not apply in the context of communications with an undisclosed undercover informant acting for the Govt. Appellant did not initiate the calls the CW did. She made statements during the calls that were designed to lull appellant into believing that she was not adverse to him. Notably these statements can come into evidence in the Midland trial for the times he had sex with her there.

TCCA FINDS ANOTHER STATUTE UNCONSTITUTIONAL
TEX. GOV'T CODE 402.010 FOUND TO VIOLATE THE SEPERATION OF POWERS

Ex parte John Christopher Lo, No. PD-1560-12, per curiam, Keller concurrence, Publish, 3-19-14. Lo got a statute held unconstitutional (see below). Section 402.010 of the Texas Government Code states that THE COURT may not enter a final judgment holding a statute of this state unconstitutional before the 45th day after the day notice is served on the AG's ofc. Held that statute violates the separation-of-powers doctrine of our state constitution. Tex. Const. Art. II sec. 1. This provision generally violated either when: (1) when one branch of govt. assumes or is delegated a power 'more properly attached' to another branch, OR (2) when one

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[1] Rothgery v. Gillespie County, *554 U.S. 191, 198 (2008).*

[2] Blockburger v. United States, *284 U.S. 299 (1932).*

[3] *TCCA indicates would be a different result if dealing with a different state or the feds.*

branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers. The length of the delay is not the problem. The problem is the fact of the attempted interference at all. Entering a final judgment is a core judicial power; it falls within that realm of judicial proceedings, "so vital to the efficient functioning of the court to be beyond legislative power. "*Armadillo Bail Bonds v. State*, 802 S. W. 2d 237, 239 (Tex. Crim. App. 1990). Janet's thoughts: The TCCA is not gonna let the AG's office who cannot even practice in front of them tell them how to run their docket when they have 9000+ cases a year and the AG can check the website same as everyone else.

Penal Code 33.021(b) (1) and (2)[4] is unconstitutionally over broad under the First Amendment[5]

*Ex parte Christopher Lo*No. PD-1560-12, (10/30/13, publish, Cochran, unanimous). Presumption of constitutionality of a statute is reversed when the government seeks to restrict and punish speech based on its content—this includes speech via computer and email and talking dirty or even showing dirty pictures to minors as long as they are not obscene. Things do not have to be as explicit to be obscene for minors as for adults—the word is defined differently for minors but titillating is not always obscene. Regulations that punish speech must survive strict scrutiny and be (1) necessary to serve a compelling government interest (2) narrowly drawn—(a) employ the least restrictive means to achieve its goal (b) have a close nexus between the govt's compelling interest and the restriction. "The only material that this subsection covers that is not already covered by another penal statute is otherwise constitutionally protected speech." Indecent /sexually explicit is not identical to obscene and is constitutionally protected—even when minors are involved.

COMPETENCY : RIGHT TO COMPETENCY DETERMINATION EVEN WITH SELF INFLICTED GUNSHOT WOUND MID-TRIAL
DUCKED: TRIAL IN ABSTENTIA ISSUE

Brown v. State, No. PD-1723-12, Johnson, Cochran concurrence (but she also joined maj opinion so not plurality), Price dissent, Keasler dissent (joined by Keller and Hervey). Murder trial, defendant sustains gunshot wound in the middle of the guilt innocence phase. Goes to hospital and is in coma instead of returning to trial. TCT decided that he had voluntarily absented himself although there was some question whether it was self inflicted or not. After hearing testimony about appellant's injuries and current status, the TCT found that appellant had voluntarily absented himself based on the TCT's understanding of the law and appellant's prior testimony. It denied his motion for continuance and motion for competency evaluation. One month later appellant was at the sentencing hearing. He was able to stand and to respond to questions. The TCT did not inquire if he was able to assist his attorneys or if he had a rational as well as factual understanding of the proceedings. A defendant has the right to be competent throughout the entire trial—this includes the punishment phase. In addition one of the most

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[4] *A person who is 17 years of age or older commits an offense if, with the intent to arouse or gratify the sexual desire of any person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, intentionally: (1) communicates in a sexually explicit manner with a minor; or (2) distributes sexually explicit material to a minor.*

[5] *U.S. Const. Amend. I.*

basic rights guaranteed by the confrontation clause is the accused's right to be present in the courtroom throughout the entire trial. Once there is a suggestion of incompetency from any source the TCT MUST hold an informal inquiry. If there is evidence to support the defendant's incompetence, the court MUST empanel a jury and conduct a trial to determine competence. Because remanded to conduct a retrospective competency determination not determined whether the trial in his absence violated his rights. If the jury determines that appellant was competent then the TCT shall consider whether appellant's absence was voluntary. If he was incompetent the trial should not have proceeded and not necessary to determine whether his absence was voluntary.

STATUTORY INTERPRETATION
'FIDUCIARY CAPACITY'
APPELLATE STUFF
NO RIGHT TO NEW PUNISHMENT TRIAL DESPITE FACT ONE OF THE CONVICTIONS REVERSED ON EVIDENTIARY SUFFICIENCY

Berry v. State, No. PD-1416-12, Alcala, publish, 3-19-14. Texas Penal Code sec. 32.45(a)(1)(C)(b)—it only encompasses special relationships of confidence or trust in which one party is obligated to act primarily for the benefit of the other. This does not include 'arm's length business transactions'– in this case taking money for new blinds but never coming through with the blinds. 41 times. HELD: no rational trier of fact could have determined that appellant was acting in a fiduciary capacity when he received customers' orders and payments for blinds and shutters and then failed to deliver those goods. Fiduciary relationship is one based on trust, confidence, good faith, and utmost fair dealing, but also on a justifiable expectation that he will place the interests of the other party above his own. TCCA granted review on its own motion to determine whether appellant was entitled to a new punishment trial on remaining theft conviction. NO! Appellant failed to argue, let alone establish that the TCT's consideration of the misapplication count contributed to his sentence on the theft charge.

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