

Reversed and Rendered and Majority and Concurring Opinions filed
November 16, 2021.



In The
Fourteenth Court of Appeals

NO. 14-19-00445-CR
NO. 14-19-00446-CR

EX PARTE JULIE ANN FAIRCHILD-PORCHE, Appellee¹

**On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause Nos. 1581954 & 1627541**

CONCURRING OPINION

While dutifully stating that it is not relying on the authority of the unpublished per curiam opinion of the court of criminal appeals in *Ex parte Jones*, this court nonetheless follows the high court's opinion. *See Ex parte Jones*, No. PD-0552-18, 2021 WL 2126172 (Tex. Crim. App. May 26, 2021) (per curiam) (unpublished); *see*

¹ To avoid ambiguity and clearly identify this case as an appeal, I would use the style State v. appellee, which to me seems clear is the correct practice from reading the 1997 Texas Rules of Appellate Procedure.

Tex. R. App. P. 77.3 (“Unpublished opinions have no precedential value and **must not be cited as authority by counsel or by a court.**”) (emphasis added). And who can legitimately blame this court when the high court writes 43 pages that effectively rewrite Penal Code section 21.16(b) to avoid constitutional infirmities created by another department of government, then takes no long-term responsibility for the rationale that supports the high court’s judgment? The courts of appeals have no choice but to take responsibility for our opinions.

Judge Yeary dryly began his concurring opinion as follows: “Today the Court reverses the published court of appeals’ opinion in this case in an unpublished per curiam opinion. If it were up to me alone, I would publish the Court’s opinion.” Well said.

I understand that the court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal. Tex. R. App. P. 47.1. This court’s opinion in these appeals should not be a memorandum opinion because it involves issues of constitutional law important to the jurisprudence of Texas. Tex. R. App. P. 47.4(b). But we do not have to place the notation “publish” on the opinion merely because it is designated “Opinion.” Tex. R. App. P. 47.2.

We pretty much know what the court of criminal appeals will do if we do not follow the unpublished *Jones* opinion, but I decline to participate in making *Jones* precedent through the back door. We do not have to publish, and opinions and memorandum opinions not designated for publication in criminal cases have no precedential value but may be cited with the notation “(not designated for publication).” Tex. R. App. P. 47.7(a).

I would give the high court opinion the weight the Texas Rules of Appellate Procedure give it, and I would not make it precedent through the opinion in these cases. The high court can write its own precedent.

I respectfully concur in the judgments.

/s/ Charles A. Spain
Justice

Panel consists of Justices Jewell, Spain, and Wilson (Wilson, J., majority).

Publish — Tex. R. App. P. 47.2(b).