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Voice for the Defense Volume 48, No. 3 Edition

Editor: Michael Mowla

From Editor Michael Mowla:

1.?I summarize each opinion in a manner that allows readers to **generally** use this SDR instead of reading every opinion.

2.?If you determine that a summarized opinion is relevant to one of your cases, I urge you to read the opinion and **not** rely solely upon these summaries.

3.?The summaries reflect the facts and relevant holdings and do **not** reflect **my opinion** of whether the cases correctly: (1) recite the facts presented at trial; or (2) apply the law. My opinions (if any) are preceded by ?Editor?s Note.?

4.?This SDR is for you. Send me suggestions on how I may improve it.

Supreme Court of the United States

***Garza v. Idaho*, No. 17-1026, 2019 U.S. LEXIS 1596 (U.S. Feb. 27, 2019) [Plea-waivers and ineffective counsel]**

Under *Strickland v. Washington*, 466 U.S. 668, 686 (1984), a defendant who claims IATC must prove that: (1) counsel?s representation fell below an objective standard of reasonableness, and (2) prejudice. Prejudice is presumed if trial counsel?s constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken.

A valid and enforceable appeal waiver precludes only challenges that fall within its scope because plea bargains are essentially contracts.

When deficient counsel causes the loss of an entire proceeding, it will not bend the presumption-of-prejudice rule simply because a defendant seems to have had poor prospects at success.

Under *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), there is a presumption of prejudice when an attorney?s deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, and prejudice should be presumed with no further showing from the defendant of the merits of his underlying claims. The rule applies if the defendant signed an appeal waiver.

***Madison v. Alabama*, No. 17-7505, 2019 U.S. LEXIS 1595 (U.S. Feb. 27, 2019) [*Panetti* is applied to dementia]**

Under *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007), the Eighth Amendment prohibits the execution of a prisoner whose mental illness prevents him from rationally understanding why the State seeks to execute him. The Eighth Amendment applies similarly to a prisoner suffering from dementia because either condition may or may not impede the requisite comprehension of his punishment.

The Eighth Amendment does not forbid execution when a prisoner shows that a mental disorder has left him without any memory of committing his crime because a person lacking such a memory may still be able to form a rational understanding of the reasons for his death sentence.

Editor?s note: the opinion compares having no recollection of committing a crime yet having a ?rational understanding? of why the State wants to impose punishment for the crime to not: (1) having an independent recollection of the Civil War but having a rational understanding of it and its consequences; or (2) recalling your first day of school but understanding why you may have been sent home. Thus, the death penalty is analogized with not ?recalling? a well-documented war that ended 154 years ago or an irrelevant event from when you were 5 years old. Based on this rationale, the State can charge you with a crime that you have no memory of committing but because you have a ?rational understanding? of why the State would want to punish the crime, the State is free to punish you. This could have been reasoned better.

***Yovino v. Rizo*, No. 18-272, 2019 U.S. LEXIS 1354 (U.S. Feb. 25, 2019) [What constitutes a quorum on a federal appellate panel or en banc court; for a vote to count, the judge must be active]**

Under *United States v. American-Foreign S. S. Corp.*, 363 U.S. 685 (1960), a judge may change his position up to the very moment when a decision is released. Only active judges may sit en banc.

A court of appeals case may be decided by a panel of three judges, of which two judges constitute a quorum and are able to decide an appeal provided they agree. When a judge on a three-judge panel dies, retires, or resigns after an appeal is argued or submitted without argument, the other two judges may issue a decision if they agree since they still constitute a quorum. The same rule applies to an en banc court: If a judge on an en banc court dies, retires, or resigns after an appeal is argued or submitted without argument, the remaining judges can agree if they still constitute a quorum.

Federal judges are appointed for life, not for eternity.

Editor?s note: Only active judges may sit en banc, the law since 1960. It?s unclear how the Ninth Circuit got it wrong. Some issues should be more obvious than others.

***Moore v. Texas*, 586 U. S. ____, No. 18-443, 2019 U.S. LEXIS 821 (U.S. Feb. 19, 2019) [The TCCA must abide by*Moore I*, and Texas may no longer use the*Briseno* factors in deciding whether a person is intellectually disabled under*Atkins*]**

Editor?s note: On March 28, 2017, *Moore I* was handed down. *See Moore v. Texas*, 137 S.Ct. 1039 (2017). Held:

- Texas may no longer use the *Briseno* factors in deciding whether a person is intellectually disabled under *Atkins*

- The TCCA?s conclusion that an IQ score of near-but-above 70 establishes that an inmate is not intellectually disabled is irreconcilable with *Hall* because under *Hall,* where an IQ score is close to, but above, 70, courts must account for the test?s ?standard error of measurement.? The standard error of measurement is ?a statistical fact, a reflection of the inherent imprecision of the test itself.? This imprecision in the testing instrument means that an individual?s score is best understood as a range of scores on either side of the recorded score, within which one may say an individual?s true IQ score lies.

The facts recited in Moore I:

- Moore fatally shot a store clerk during a botched robbery. He was convicted of capital murder and sentenced to death.
- In a writ filed under Tex. Code Crim. Proc. Art. 11.071m, Moore argued he was intellectually disabled under *Atkins* and therefore exempt from execution.
- During the state habeas proceeding, the court received affidavits and heard testimony from Moore?s family members, former counsel, and court-appointed mental-health experts.
- The evidence showed that Moore had significant mental and social difficulties beginning at an early age. At 13, Moore lacked basic understanding of the days of the week, the months of the year, and the seasons; he could barely tell time or comprehend the standards of measure or the basic principle that subtraction is the reverse of addition. At school, because of his limited ability to read and write, Moore could not keep up with lessons. Often, he was separated from the rest of the class and told to draw pictures. Moore?s father, teachers, and peers called him ?stupid? for his slow reading and speech. After failing every subject in the ninth grade, Moore dropped out of high school. Cast out of his home, he survived on the streets, eating from trash cans even after two bouts of food poisoning.
- In evaluating Moore?s assertion of intellectual disability, the state habeas court consulted current medical diagnostic standards, relying on the 11th edition of the American Association on Intellectual and Developmental Disabilities (AAIDD) clinical manual and on the DSM-5.
- The trial court followed the generally accepted, uncontroversial intellectual-disability diagnostic definition, which identifies three core elements: (1) intellectual-functioning deficits (indicated by an IQ score ?approximately two standard deviations below the mean??a score of roughly 70?adjusted for ?the standard error of measurement,? (2) adaptive deficits (inability to learn basic skills and adjust behavior to changing circumstances), and (3) the onset of these deficits while still a minor.
- Moore?s IQ- scores, the habeas court determined, established subaverage intellectual functioning. The court credited six of Moore?s IQ scores, the average of which (70.66) indicated mild intellectual disability.
- Relying on testimony from several mental-health experts, the habeas court found significant adaptive deficits. In determining the significance of adaptive deficits, clinicians look to whether an individual?s adaptive performance falls two or more standard deviations below the mean in any of the three adaptive skill sets (conceptual, social, and practical). Moore?s performance fell roughly two standard deviations below the mean in all three skill categories.
- The trial court made detailed FFCL and determined that under *Atkins,* Moore qualified as intellectually disabled.
- The TCCA declined to adopt the FFCL, finding that the trial court erroneously employed intellectual-disability guides currently used in the medical community rather than the 1992 guides adopted by the TCCA in *Ex parte Briseno,* 135 S. W. 3d 1 (2004).
- The TCCA also found that the evidentiary factors in *Briseno* ?weighed heavily? against overturning Moore?s death sentence.

Conclusion: The TCCA?s continued reliance on theBrisenofactors violates the Eighth Amendment

- In *Hall v. Florida,* 134 S.Ct. 1986 (2011), the SCOTUS held that a State cannot refuse to entertain other evidence of intellectual disability when a defendant has an IQ score above 70. *Atkins* and *Hall*

left to the States the task of developing appropriate ways to enforce the restriction on executing the intellectually disabled, but the determination must be ?informed by the medical community?s diagnostic framework.?

- The TCCA?s conclusion that Moore?s IQ scores established that he is not intellectually disabled is irreconcilable with *Hall* because under *Hall,* where an IQ score is close to, but above, 70, courts must account for the test?s ?standard error of measurement.? The standard error of measurement is ?a statistical fact, a reflection of the inherent imprecision of the test itself.? This imprecision in the testing instrument means that an individual?s score is best understood as a range of scores on either side of the recorded score, within which one may say an individual?s true IQ score lies.
- A test?s standard error of measurement reflects the reality that an individual?s intellectual functioning cannot be reduced to a single numerical score.
- Moore?s score of 74, adjusted for the standard error of measurement, yields a range of 69 to 79. Because the lower end of Moore?s score range falls at or below 70, the TCCA had to move on to consider Moore?s adaptive functioning.
- The TCCA?s consideration of Moore?s adaptive functioning also deviated from prevailing clinical standards and from the older clinical standards the court claimed to apply.
- In concluding that Moore did not suffer significant adaptive deficits, the TCCA overemphasized Moore?s perceived adaptive strengths, such as living on the streets, mowing lawns, and playing pool for money.
- The TCCA departed from clinical practice by concluding that Moore?s record of academic failure and the childhood abuse and suffering he endured detracted from a determination that his intellectual and adaptive deficits were related. Such traumatic experiences count in the medical community as ?risk factors? for intellectual disability and are relied upon by clinicians to explore the prospect of intellectual disability further, not to counter the case for a disability determination.
- The TCCA also departed from clinical practice by requiring Moore to show that his adaptive deficits were not related to ?a personality disorder.? Many intellectually disabled people also have other mental or physical impairments such as attention-deficit/hyperactivity disorder, depressive, bipolar disorders, and autism. Coexisting conditions frequently encountered in intellectually disabled individuals have been described in clinical literature as ?comorbidities.? DSM-5 at 40. The existence of a personality disorder or mental-health issue is not evidence that a person does not also have intellectual disability.
- The TCCA also departed from clinical practice by relying on the *Briseno* factors, which create an unacceptable risk that persons with intellectual disability will be executed. After observing that persons with ?mild? intellectual disability might be treated differently under clinical standards than under Texas? capital system, the TCCA defined its objective as identifying the ?consensus of Texas citizens? on who ?should be exempted from the death penalty.? Mild levels of intellectual disability, although they may fall outside Texas citizens? consensus, nevertheless remain intellectual disabilities.
- Skeptical of what it viewed as ?exceedingly subjective? medical and clinical standards, the TCCA in *Briseno* advanced lay perceptions of intellectual disability.

Facts of Moore II:

- On remand, the TCCA reached the same conclusion before *Moore I,* reaching the same three criteria: intellectual-functioning deficits, adaptive deficits, and early onset.
- But this time, the TCCA focused almost exclusively on adaptive deficits.
- Moore filed a petition for certiorari in which he argued that the trial court record demonstrates his intellectual disability.
- The State agreed with Moore that he is intellectually disabled and cannot be executed.
- The TCCA must abide byMoore I**,**and Texas may no longer use theBrisenofactors in deciding whether a person is intellectually disabled underAtkins
- The TCCA again relied less upon the adaptive deficits to which the trial court had referred than upon Moore?s apparent adaptive strengths.

- The TCCA?s discussion of Moore?s communication skills does not discuss the evidence relied upon by the trial court, which includes the young Moore?s inability to understand and answer family members and a failure on occasion to respond to his own name.
- Instead, the TCCA emphasized Moore?s capacity to communicate, read, and write based in part on pro se papers Moore filed in court. This evidence is relevant but lacks convincing strength without a determination about whether Moore wrote the papers on his own, a finding that the TCCA declined to make, finding that even if other inmates ?composed? the pleadings, Moore?s ?ability to copy such documents by hand? was ?within the realm of only a few intellectually disabled people.?
- The TCCA also erroneously stressed Moore?s ?coherent? testimony in various proceedings but acknowledged that Moore had ?a lawyer to coach him? in all but one.
- The TCCA also relied heavily upon adaptive improvements made in prison despite *Moore I*?s caution against reliance on adaptive strengths developed in prison.
- The TCCA also concluded that Moore failed to show that the cause of his deficient social behavior was related to deficits in general mental abilities rather than emotional problems. However, in *Moore I,* the SCOTUS concluded that the TCCA departed from clinical practice when it required Moore to prove that his problems in kindergarten stemmed from his intellectual disability rather than emotional problems.
- Further, *Moore I* concluded that a personality disorder or mental-health issue is not evidence that a person does **not** also have intellectual disability.
- Despite the TCCA?s statement that it would abandon reliance on the *Briseno* evidentiary factors, the court used many of those factors in reaching its conclusion: (1) *Briseno* asked whether the offense required forethought, planning, and complex execution of purpose, and the TCCA concluded that Moore?s crime required a level of planning and forethought; (2) *Briseno* asked whether the defendant could respond coherently, rationally, and on point to oral and written questions, and the TCCA con-cluded that *Moore* responded rationally and coherently to questions; (3) *Briseno* asked whether the defendant?s conduct shows leadership or that he is led around by others, and the TCCA concluded that Moore?s refusal to mop up some spilled oatmeal (and other such behavior) showed that he influences others and stands up to authority.
- Petition is granted, the TCCA?s opinion is reversed, and the case is remanded.

***Timbs v. Indiana,* No. 17-1091, 2019 U.S. LEXIS 1350 (U.S. Feb. 20, 2019) (slip op.) [The Eighth Amendment?s Excessive Fines Clause is an incorporated protection applicable to the States under the Fourteenth Amendment?s Due Process Clause]**

Under the Eighth Amendment, excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. This limits the government?s power to extract payments as punishment.

Under *Austin v. United States,* 509 U.S. 602 (1993), civil in rem forfeitures fall within the Excessive Fines Clause?s protection when they are at least partially punitive.

The Fourteenth Amendment incorporates a protection in the Bill of Rights if the protection is fundamental or deeply rooted.

The Eighth Amendment?s Excessive Fines Clause is fundamental and deeply rooted. It is an incorporated protection applicable to the States under the Fourteenth Amendment?s Due Process Clause.

United States Court of Appeals for the Fifth Circuit

***United States v. Araiza-Jacobo,* No. 17-40958, 2019 U.S. App. LEXIS 6097 (5th Cir. Feb. 28, 2019) (designated for publication) [Deliberate ignorance instruction; circumstantial evidence of knowledge of criminal activity]**

The standard of review of a defendant?s claim that a jury instruction was inappropriate is whether the entire charge is a correct statement of the law and clearly instructs jurors as to the principles of law applicable to the factual issues confronting them. The court may not instruct the jury on a charge that is not supported by evidence. In assessing whether evidence supports a jury instruction, the Fifth Circuit views the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the Government.

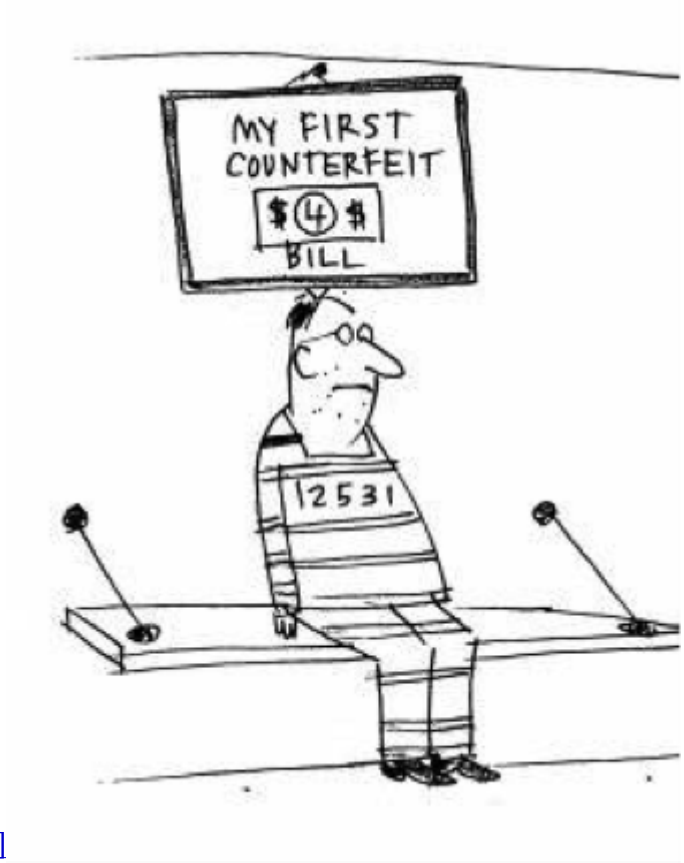
Review of a deliberate ignorance instruction is a fact-intensive endeavor based on the totality of the evidence. A deliberate ignorance instruction should rarely be given and is appropriate only when the evidence shows: (1) the defendant?s subjective awareness of a high probability of the existence of illegal conduct (overlaps with an inquiry into a defendant?s actual knowledge because the same evidence that raises an inference that the defendant had actual knowledge of the illegal conduct ordinarily will raise the inference that the defendant was subjectively aware of a high probability of the existence of illegal conduct); and (2) purposeful contrivance to avoid learning of the illegal conduct (circumstances were so overwhelmingly suspicious that the failure to conduct further inspection or inquiry suggests a conscious effort to avoid incriminating knowledge?may be established by direct or circumstantial evidence).

Even when an erroneous deliberate ignorance instruction is given, the error is harmless where there is substantial evidence of the defendant?s actual knowledge. Substantial evidence means relevant evidence acceptable to a reasonable mind as adequate to support a conclusion.

Less-than-credible-stories, including inconsistent stories, can show knowledge of criminal activity. An implausible account provides persuasive circumstantial evidence of a defendant?s consciousness of guilt.

A high value or quantity of drugs can provide circumstantial evidence of knowledge.

Editor?s note: Araiza?s explanation to CBP was: ?I met a vendor selling candy next to the bridge, who introduced me to a man who needed two bags of candy brought into the U.S. for $7. I thought the man ?looked trustworthy.? The bags of candies ?looked okay.?? Araiza does <u>not</u> strike me as a particularly bright guy regardless of whether his story was true or if he thought CBP would believe his story. Some criminal schemes are doomed to fail at inception:



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***United States v. Ayelotan*, et al, No. 17-60397, 2019 U.S. App. LEXIS 6518 (5th Cir. March 4, 2019) (designated for publication) [Confrontation Clause, removing a juror]**

Under *Crawford v. Washington*, 541 U.S. 36, 51?53 (2004), the Confrontation Clause prohibits admitting out-of-court statements as evidence against defendants in a criminal case unless they can cross-examine the declarant. This prohibition applies only if the statements are testimonial. Under *Davis v. Washington*, 547 U.S. 813, 822 (2006), statements are testimonial if their primary purpose is to establish or prove past events potentially relevant to later criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 822 (2006). Under *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009), business records must be for the administration of the business? affairs and not for the purpose of establishing or proving some fact at trial.

Under Fed. Rule Crim. Proc. 24(c), a judge may remove jurors who cannot perform their duties. A court may not dismiss a juror without factual support or for a legally irrelevant reason. A juror who cannot remain awake during much of the trial is unable to perform his duty. Other good reasons for removal are lack of candor and an inability or unwillingness to follow instructions. Even ?hold-out? jurors may be removed for just cause.

Editor?s note: Although the appellants raised multiple claims, the ones worth discussing pertain to the Confrontation Clause and removing a sleeping juror.

Editor?s note: in addition to the analysis in the opinion, a few more issues to note regarding the Confrontation Clause:

- Under *Wall v. State*, 184 S.W.3d 730, 734?735 (Tex.Crim.App. 2006), and *Crawford v. Washington*, 541 U.S. 36, 59?60, 68 (2006), the admission of a hearsay statement made by a nontestifying declarant violates the Sixth Amendment if: (1) the statement was testimonial, and (2) the defendant lacked a prior opportunity for cross-examination. Both factors were present here.
- The SCOTUS identified three kinds of statements that are testimonial: (1) ?ex parte in-court testimony or its functional equivalent?that is, material such as affidavits, custodial examinations, prior testimony

that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; (2) extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and (3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.? *Crawford*, 541 U.S. at 51?52.

- Testimonial statements are inadmissible absent a showing that the declarant is presently unavailable, and the defendant had a prior opportunity for cross-examination even if the statement ?falls under a ?firmly rooted hearsay exception? or bears ?particularized guarantees of trustworthiness.?? *Crawford*, 541 U.S. at 41?43.
- Firmly rooted hearsay exceptions are those that rest on such a solid foundation considering longstanding judicial and legislative experience that admission of virtually any evidence within the category comports with the substance of the constitutional protection. *Idaho v. Wright*, 497 U.S. 805, 817 (1990). Such statements fall within a category of hearsay ?whose conditions have proven over time ?to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath? and cross-examination at trial.? *Id.* They may include spontaneous declarations, dying declarations, and statements against penal interest. *See, e.g.*, *Dewberry v. State*, 4 S.W.3d 735, 753 (Tex.Crim.App. 1999).

Editor?s note: Judge Don Willett?s intros are sometimes quotable: ?Three Africa-based cybercriminals?Ayelotan, Mewase, and Raheem?masterminded a sprawling international romance scam that stole hearts, and money. Posing as bachelors (and bachelorettes) online, these Nigerian nationals kindled digital romances with scores of lovelorn Americans. The fraudsters sat at overseas computers, prowling the Internet and spinning false promises of love and romance, ultimately duping their unsuspecting victims into sending money to Nigeria and South Africa. Many fauxmance swindlers escape scot-free, their victims, broke and brokenhearted, too embarrassed to come forward. Not this time. A wary target reported her suspicions, and the scammers didn?t fare as well in court as they had online.?

On a different note, it defies logic how people continue to fall for these scams.

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***United States v. Eaden*, No. 18-50379, 2019 U.S.App.LEXIS 3576 (5th Cir. Feb. 5, 2019) (designated for publication) [4-level enhancement under U.S.S.G. §?2K2.1(b)(6)(B) for using or possessing the ammunition in connection with another felony offense]**

Under U.S.S.G. §?2K2.1(b)(6)(B), a 4-level enhancement is applied if the defendant used or possessed any firearm or ammunition in connection with another felony offense. ?In connection with? mandates that the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense.

Possession of ammunition alone may be sufficient for the 4-level enhancement where the defendant possesses a loaded or unloaded gun, or ammunition alone. Whether it is sufficient must be decided on a case-by-case basis.

There is no presumption of facilitation when ammunition alone is present at the time of the drug-trafficking offense.

Facilitation can be presumed when (1) a firearm was possessed (2) in close proximity to contraband during a drug-trafficking offense. This presumption is available only when both conditions are present: a firearm and a trafficking offense. For the 4-level enhancement to apply, the government must show evidence of both (1) possession of a firearm or ammunition, and (2) that the firearm or ammunition facilitated or had the potential to facilitate the other offense.

***United States v. Garcia-Sanchez*, No. 18-40088, 2019 U.S. App. LEXIS 5282 (5th Cir. Feb. 22, 2019) (designated for publication) [Sentencing-enhancement under U.S.S.G. §?2L1.2(b)(3) and aggregation under U.S.S.G. §?4A1.2(a)(2)]**

Under U.S.S.G. §?2L1.2(b)(3), if at any time after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct resulting in (A) a felony conviction for which the sentence imposed was five years or more, increase by 10 levels; (B) a felony conviction for which the sentence imposed was two years or more, increase by 8 levels; (C) a felony conviction for which the sentence imposed exceeded one year and one month, increase by 6 levels; (D) any other felony conviction, increase by 4 levels; or (E) three or more misdemeanors convictions that are crimes of violence or drug-trafficking offenses, increase by 2 levels. The prior criminal conduct cannot include illegal reentry offenses. ?Sentence imposed? means sentence of imprisonment (time spent incarcerated) and refers to the maximum sentence imposed.

Under U.S.S.G. §?4A1.2(a)(2), if a defendant has multiple prior sentences, a court must determine whether those sentences are counted separately or as a single sentence: (1) counted separately if they were imposed for offenses that were separated by an intervening arrest (defendant is arrested for the first offense prior to committing the second offense); (2) counted separately if there is no intervening arrest unless the sentences: (A) resulted from offenses contained in the same charging instrument; or (B) were imposed on the same day. If prior sentences are treated as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.

***United States v. Kelly*, No. 17-60133, 2019 U.S.App.LEXIS 3975 (5th Cir. Feb. 8, 2019) (designated for publication) [Appeal-waivers and IATC on direct appeal]**

The Fifth Circuit reviews de novo whether an appeal waiver bars an appeal. A defendant may waive his statutory right to appeal in a valid plea agreement. When deciding whether an appeal of a sentence is barred by an appeal waiver, the Fifth Circuit considers whether the waiver: (1) was knowing and voluntary, and (2) applies to the circumstances at hand based on the plain language of the agreement.

For a plea waiver to be knowing and voluntary, a defendant must know that he had a right to appeal his

sentence and that he was giving up that right. A waiver is both knowing and voluntary if the defendant indicates that he read and understood the agreement and the agreement contains an explicit, unambiguous waiver of appeal. A defendant may avoid a waiver on the limited grounds that the waiver of appeal itself was tainted by IATC.

Normal principles of contract interpretation are considered when construing plea agreements. When determining whether an appeal waiver applies to the issues presented, the Fifth Circuit ascertains the ordinary meaning of the waiver provision and construes appeal waivers narrowly against the government. The government has a strong and legitimate interest in the finality of convictions and in the enforcement of plea bargains.

Although a defendant may avoid a waiver on the limited grounds that the waiver of appeal itself was tainted by IATC, the general rule is that a claim of IATC cannot be resolved on direct appeal when the claim has not been raised before the district court since no opportunity existed to develop the record on the merits. Only in rare occasions where the record is sufficiently developed will the Fifth Circuit consider claims of IATC on direct appeal. Otherwise, the Fifth Circuit declines to consider the issue without prejudice to a defendant?s right to raise it in a subsequent proceeding.

***United States v. Matthew*, No. 17-10863, 2019 U.S. App. LEXIS 4986 (5th Cir. Feb. 21, 2019) (designated for publication) [Mandatory Victim Restitution Act (MVRA) (18 U.S.C. §?3663A); loss resulting from a fraud offense is a specific offense characteristic per U.S.S.G. §?2B1.1(b)(1); offense against loss]**

The Mandatory Victim Restitution Act (MVRA) (18 U.S.C. §?3663A) limits restitution to the actual loss directly and proximately caused by the offense of conviction. Restitution cannot compensate for losses caused by uncharged conduct or unspecified in a guilty plea. When the offense involves a scheme, conspiracy, or pattern of criminal activity (the scheme is an element of the conviction), restitution may be awarded to anyone directly harmed by the criminal conduct. But when the conviction does not require proof of a scheme, conspiracy, or pattern, the defendant is responsible only for restitution for conduct underlying the offense of convicted, and restitution cannot include losses caused by conduct that falls outside the temporal scope of the acts of conviction. Every dollar of restitution must be supported by record evidence.

Under 18 U.S.C. §?1028(a)(3), (b)(2)(B), it is it a crime knowingly to possess with intent to use unlawfully or transfer unlawfully five or more authentication features issued by or under the authority of the United States. There is no fraudulent scheme as an element.

When a defendant pleads guilty to fraud, for restitution pur-poses the scope of the scheme is defined by the mutual understanding of the parties rather than the strict letter of the charging document.

Under U.S.S.G. §?2B1.1(b)(1), the loss resulting from a fraud offense is a specific offense characteristic that increases the base offense level. It is the government?s burden to show by a preponderance of the evidence the amount of loss attributable to fraudulent conduct. The district court need only make a reasonable estimate of the loss based on available information. Given the district court?s unique position to assess the evidence and estimate the loss amount, its loss determination is entitled to appropriate deference. The loss is the greater of actual loss or intended loss. ?Actual loss? is the reasonably foreseeable pecuniary harm that resulted from the offense. ?Reasonably foreseeable pecuniary harm? is pecuniary harm that the defendant knew or reasonably should have known was a potential result of the offense. ?Intended loss? is the pecuniary harm that the defendant sought to inflict. Whether loss is actual or intended, the court must reduce that loss by the fair market value of the property returned and the services rendered to the victim before the offense was detected.

In the context of healthcare fraud and restitution, to be entitled to an offset against actual loss, a defendant must establish that: (1) the services he provided to Medicare beneficiaries were legitimate, and (2)

Medicare would have paid for those services but for his fraud. If he satisfies this burden, the government can rebut with additional evidence.

***United States v. Najera*, No. 17-50802, 2019 U.S.App.LEXIS 4491 (5th Cir. Feb. 14, 2019) (designated for pub-li-ca-tion) [U.S.S.G. §?2L1.1(b)(6) enhancement for in-ten-tionally or recklessly creating a substantial risk of death or serious bodily injury to another person; acceptance of responsibility under U.S.S.G. §?3E1.1]**

Review of a district court?s interpretation or application of the U.S.S.G. is de novo and factual findings are for clear error. There is no clear error if a factual finding is plausible considering the entire record. The Fifth Circuit does not rule that a district court?s finding of fact was clearly erroneous based only on the Circuit?s belief that had it been sitting as the trier of fact, it would have weighed the evidence differently and made a different finding. The Circuit does not create per se rules (i.e., it will not create a per se rule that traveling through the South Texas brush creates a substantial risk of death or bodily injury.).

Under U.S.S.G. §?2L1.1(b)(6), the offense level of a defendant convicted of smuggling is enhanced if it involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person.

Under U.S.S.G. §?1B1.3(a)(1)(B), a defendant can be held responsible for all acts and omissions of others that were within the scope of the criminal activity, in furtherance of the criminal activity, and reasonably foreseeable in connection with that criminal activity.

Under U.S.S.G. §?3E1.1, a defendant?s offense level is reduced by two levels if the defendant clearly demonstrates acceptance of responsibility. The adjustment does not apply to a defendant who puts the government to its burden of proof at trial by denying the factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. However, conviction by trial does not automatically preclude a defendant from consideration for acceptance of responsibility. A defendant may clearly demonstrate an acceptance of responsibility for criminal conduct even though he exercises his constitutional right to a trial where he goes to trial to assert and preserve issues that do not relate to factual guilt (to challenge a statute or the applicability of a statute to conduct).

A defendant who proceeds to trial on an admission or a stipulation of the facts necessary for conviction while expressly reserving the right to appeal from an adverse suppression ruling is not deemed to have waived the suppression issue. Nor will the admission or stipulation render the suppression issue harmless, and he is eligible for an acceptance of responsibility reduction.

***United States v. Richmond*, No. 17-40299, 2019 U.S.App.LEXIS 3974 (5th Cir. Feb. 8, 2019) (designated for publication) [Search of tires by ?tapping?; safety exception under Tex. Transp. Code §?547.004(a)]**

United States v. Jones, 565 U.S. 400, 409 (2012), reversed in part *Katz v. United States*, 389 U.S. 347 (1967), by reviving the rule that property interests control the right of the government to search and seize where police placed a GPS tracking device on the undercarriage of a car (the ?common-law trespassory test?), a separate basis for finding a search alongside the *Katz* ?reasonable expectation of privacy? test. Under *United States v. Karo*, 468 U.S. 705, 713 (1984), a trespass does not automatically amount to a search. Actual trespass is neither necessary nor sufficient to establish a constitutional violation. A trespass must be conjoined with an attempt to find something or obtain information. This prevents a mere physical touching, such as when an officer leans on the door of a car while questioning its driver, from being a ?search? (?expectation of contact?).

The ?expectation of contact? is high for a tire since it is rou-tinely checked for air pressure.

Under *Heien v. North Carolina*, 135 S.Ct. 530, 536 (2014), a Fourth Amendment violation requires a search

that is unreasonable.

Under *United States v. Knights*, 534 U.S. 112, 118?119 (2001), the reasonableness of a search depends on balancing the governmental interest in the search against the degree of the intrusion on the individual.

Under *Maryland v. Dyson*, 527 U.S. 465, 467 (1999), probable cause to believe a vehicle contains contraband allows a warrantless search because of mobility.

The tapping of a tire that is wobbly and attached with stripped bolts is justified by ensuring that vehicles on the road are operated safely and responsibly and gives a reasonable officer probable cause to believe that the tire posed a safety risk under Tex. Transp. Code §?547.004(a) (misdemeanor to operate a vehicle that is unsafe so as to endanger a person).

Texas Court of Criminal Appeals

***Doyal v. State*, No. PD-0254-18, 2019 Tex.Crim.App. LEXIS 161 (Tex.Crim.App. Feb. 27, 2019) (designated for publication) [The Texas Open Meetings Act (Tex. Gov. Code §?551.143) is unconstitutionally vague on its face]**

The Texas Open Meetings Act (TOMA) (Tex. Gov. Code §?551.143) is unconstitutionally vague on its face.

Under Tex. Gov. Code §?551.143(a), TOMA requires that meetings of governmental bodies be open to the public, and a crime occurs when a member or group of members of a governmental body knowingly conspire to circumvent the openness by meeting in numbers less than a quorum for secret deliberations. ?Deliberation? means ?a verbal exchange during a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body or any public business.? ?Governmental body? includes a county commissioners court.

?Meeting? means (A) a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action; or (B) except as otherwise provided by this subdivision, a gathering: (i) that is conducted by the governmental body or for which the governmental body is responsible; (ii) at which a quorum of members of the governmental body is present; (iii) that has been called by the governmental body; and (iv) at which the members receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the governmental body, about the public business or public policy over which the governmental body has supervision or control. It does not include the gathering of a quorum of a governmental body at a social function unrelated to the public business that is conducted by the body, the attendance by a quorum of a governmental body at a regional, state, or national convention or workshop, ceremonial event, or press conference, if formal action is not taken and any discussion of public business is incidental to the social function, convention, workshop, ceremonial event, or press conference.

?Quorum? means a majority of a governmental body unless defined differently by applicable law or rule or the charter of the governmental body.

When a vagueness challenge involves First Amendment considerations, a criminal law may be held facially invalid even though it may not be unconstitutional as applied to the defendant?s conduct.

A law that imposes criminal liability must be sufficiently clear: (1) to give a person of ordinary

intelligence a reasonable opportunity to know what is prohibited; and (2) to establish determinate guidelines for law enforcement. When the law also implicates First Amendment freedoms, it must also be sufficiently definite to avoid chilling protected expression. Greater specificity is required when First Amendment freedoms are implicated because uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas are clearly marked. Perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity. A scienter requirement in the statute may sometimes alleviate vagueness concerns but does not always do so.

What renders a statute vague is the indeterminacy of precisely what the prohibited conduct is.

Under *Ex parte Lo,* 424 S.W.3d 10, 14 (Tex.Crim.App. 2013), whether a statute is facially constitutional is a question of law that is reviewed de novo. If there is a reasonable construction that will render the statute constitutional, it must be upheld. Courts presume the statute is valid and that the Legislature did not act unreasonably or arbitrarily. The burden normally rests upon the person challenging the statute to establish its unconstitutionality.

Under *Ex parte Lo,* the First Amendment limits the government?s power to regulate speech based on its substantive content. Content-based regulations are those that distinguish favored from disfavored speech based on the idea or message expressed. When the government seeks to restrict and punish speech based on its content, the usual presumption of constitutionality is reversed. Content-based regulations (laws that distinguish favored from disfavored speech based on the ideas expressed) are presumptively invalid, and the government bears the burden to rebut that presumption.

Under *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973), strict scrutiny is applied to content-based regulations. If the statute punishes conduct and not speech, a rational-basis level of review to determine if the statute has a rational relationship to a legitimate state purpose. Before a statute will be invalidated on its face as overbroad, the overbreadth must be real and substantial when ?judged in relation to the statute?s plainly legitimate sweep.? A statute should not be invalidated for overbreadth merely because it is possible to imagine some unconstitutional application. Statutes are not necessarily unconstitutionally vague merely because the words or terms employed in the statute are not specifically defined.

Under Tex. Gov. Code §?311.011(a), when a statute does not define the words used, plain meaning is applied. Words and phrases shall be read in context and construed according to the rules of grammar and common usage.

Under *Kolender v. Lawson,* 461 U.S. 352, 357 (1983), the void-for-vagueness doctrine invalidates a statute if it fails to define the offense in such a manner as to give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited.

Editor?s note: Doyal was indicted under the TOMA by meeting in a number less than a quorum for secret deliberations ?by engaging in a verbal exchange concerning an issue within the jurisdiction of the Montgomery County Commissioners Court, namely, the contents of the potential structure of a November 2015 Montgomery County Road Bond,? but the TCCA held that the TOMA is facially unconstitutional. The TCCA got it right, as sometimes it is unclear what really is being discussed at ?open meetings? and we should not criminalize these discussions:

[5]

***Sims v. State*, No. PD-0941-17, 2019 Tex.Crim.App.LEXIS 41 (Tex.Crim.App. Jan. 16, 2019) (designated for publication) [Expectation of privacy in the real-time location information and cell-site location information (CSLI)]**

Under *Boykin v. State,* 818 S.W.2d 782, 785 (Tex.Crim.App. 1991), and *Ramos v. State,* 303 S.W.3d 302, 306 (Tex.Crim.App. 2009), statutory construction is a question of law reviewed de novo. The court seeks to effectuate the collective intent of the legislators who enacted the legislation by looking to the statute to determine if its language is plain. The court presumes that the legislature intended for every word to have a purpose and gives effect if reasonably possible to each word, phrase, and clause of the statutory language. Words and phrases are read and construed according to the rules of grammar and usage. If the language is plain, the court follows it unless it leads to absurd results that the legislature could not have possibly intended. If it leads to absurd results or the language is ambiguous, the court considers extratextual factors to discern the legislature?s intent.

Because Tex. Code Crim. Proc. Art. 38.23(a) is the general suppression provision and the SCA and Tex. Code Crim. Proc. Art. 18.21 are special suppression provisions and 21 were enacted after Art. 38.23(a), the exclusivity provisions in the SCA and Art. 18.21 prevail as exceptions to the general Art. 38.23(a) remedy of suppression when dealing with nonconstitutional violations of the SCA and Art. 18.21.

Appellant did not have a legitimate expectation of privacy in his physical movements or his location as reflected in the less than three hours of real-time CSLI records accessed by police by pinging his phone less than five times. A 5?4 split on the SCOTUS in *Carpenter* supported the idea that longer-term surveillance might infringe on a person?s legitimate expectation of privacy if the location records reveal the privacies of his life, but this is not that case.

Suppression is not an available remedy under the Stored Communications Act unless the violation also violates the United States Constitution.

Suppression is not an available remedy for a violation of Tex. Code Crim. Proc. Art. 18.21 unless the violation infringes on the United States or Texas constitutions.

Texas Courts of Appeals

***Akins v. State*, Nos. 09-18-00057-58-59-60-CR, 2019 Tex. App. LEXIS 1704 (Tex.App.?Beaumont March 6, 2019) (designated for publication) [Abandonment of property]**

Under *Crain v. State*, 315 S.W.3d 43, 48 (Tex.Crim.App. 2010), *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex.Crim.App. 2000), and *Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App. 1997), a ruling on an MTS is reviewed under a bifurcated standard of review: almost total deference to the trial court?s determination of historical facts that turn on credibility and demeanor, de novo on other application-of-law-to-fact issues, nearly total deference to application-of-law-to-fact questions (mixed questions of law and fact) if their resolution turns on an evaluation of credibility and demeanor, and de novo on mixed questions of law and fact if their resolution does not turn on an evaluation of credibility and demeanor. Under *Osbourn v. State*, 92 S.W.3d 531, 538 (Tex.Crim.App. 2002), and *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex.Crim.App. 2008), the trial court?s decision must be affirmed if it is correct on any theory of law that finds support in the record.

Under *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex.Crim.App. 1996), *Miles v. State*, 241 S.W.3d 28, 36 (Tex.Crim.App. 2007), and Tex. Code Crim. Proc. Art. 38.23(a), to prevail on an alleged violation of the exclusionary rule, a defendant must demonstrate that he had a legitimate expectation of privacy in the property. Art. 38.23(a) applies to illegal searches or seizures conducted by law enforcement officers or other persons even when those other persons are not acting in conjunction with or at the request of government officials. The defendant must prove facts that establish a legitimate expectation of privacy by showing that by his conduct, he exhibited an actual subjective expectation of privacy, a genuine intention to preserve something as private, and circumstances existed under which society was prepared to recognize his subjective expectation as objectively reasonable.

Under *Swearingen v. State*, 101 S.W.3d 89, 101 (Tex. 2003), abandonment of property occurs if: (1) the defendant intended to abandon the property, and (2) his decision to abandon the property was not due to police misconduct. When property has been abandoned before police take possession of it, there is no seizure under the Fourth Amendment.

Under *Matthews v. State*, 431 S.W.3d 596, 609 (Tex.Crim.App. 2014), abandonment is primarily a question of intent, which may be inferred from words spoken, acts done, and other objective facts, and the court should consider all relevant circumstances that existed when the alleged abandonment occurred. The issue is whether the person prejudiced by the search had voluntarily relinquished his interest in the property so that he could no longer retain a reasonable expectation of privacy in the property when the search occurred (as opposed to abandonment in the strict property-right sense). When a defendant voluntarily abandons property, he lacks standing to contest the reasonableness of the search of the property.

Under *State v. Granville*, 423 S.W.3d 399, 409 (Tex.Crim.App. 2014), a person loses a reasonable expectation of privacy in a cellphone if he abandons it. The same rule may be applied to other electronic devices.

Editor?s note: Here is the relevant law on the standard of review for an MTS:

- Under *Crain v. State*, 315 S.W.3d 43, 48 (Tex.Crim.App. 2010), *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex.Crim.App. 2000), and *Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App. 1997), a ruling on an MTS is reviewed under a bifurcated standard of review: almost total deference to the trial court?s determination of historical facts that turn on credibility and demeanor, de novo on other application-of-law-to-fact issues, nearly total deference to application-of-law-to-fact questions (mixed questions of law and fact) if their resolution turns on an evaluation of credibility and demeanor, and de novo on mixed questions of law and fact if their resolution does not turn on an evaluation of credibility and demeanor. Under *Osbourn v. State*, 92 S.W.3d 531, 538 (Tex.Crim.App. 2002), and *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex.Crim.App. 2008), the trial court?s decision must be

affirmed if it is correct on any theory of law that finds support in the record.

[6]

***Castillo v. State*, No. 01-18-00284-CR, 2019 Tex. App. LEXIS 1661 (Tex.App.?Houston [1st Dist.] March 5, 2019) (designated for publication) [Ex post facto, rule of optional completeness, Art. 38.37]**

Under *Ortiz v. State*, 93 S.W.3d 79, 91 (Tex.Crim.App. 2002), and *Ex parte Heilman*, 456 S.W.3d 159, 163?165 (Tex.Crim.App. 2015), the federal and Texas guarantees against ex post facto laws are directed at the legislature, not the courts. To state a cognizable ex post facto claim, a defendant must show that the statute operates retroactively and not that a trial court retroactively applied them to an offense committed before enactment.

Under *Henley v. State*, 493 S.W.3d 77, 82?83 (Tex.Crim.App. 2016), a trial court?s decision on admissibility of evidence is reviewed for an abuse of discretion. A reviewing court may reverse the trial court only if its decision lies outside the zone of reasonable disagreement. A reviewing court misapplies the abuse-of-discretion standard if it reverses merely because it disagrees with trial court?s evidentiary decision.

Under *White v. State*, 549 S.W.3d 146, 151?152 (Tex.Crim.App. 2018), the proponent of evidence has the burden of establishing its admissibility. If the opposing side makes a proper objection to the admissibility of evidence, the proponent must demonstrate that the evidence overcomes the stated objection.

Under *Cofield v. State*, 891 S.W.2d 952, 954 (Tex.Crim.App. 1994), a hearsay objection is sufficiently specific to require the offering party to show that the evidence is not hearsay or is admissible under an exception to the hearsay rule.

Under Tex. Rule Evid. 801(e)(1)(B) and *Hammons v. State*, 239 S.W.3d 798, 808?09 (Tex.Crim.App. 2007), the prior statement of a witness that is consistent with her trial testimony is not hearsay if it is offered to rebut an express or implied charge that the witness recently fabricated it or acted from a recent im-proper motive in so testifying. To qualify for admission as a prior consistent statement, the witness must have made the statement before her ostensible motive to fabricate or other improper motive arose.

Under Tex. Rule Evid. 107 and *Pena v. State*, 353 S.W.3d 797, 814 (Tex.Crim.App. 2011), the rule of

optional completeness is an exception to the hearsay rule. If a party introduces into evidence part of a conversation or recorded statement, the opponent may introduce any other conversation or recorded statement that is necessary to explain or allow the jury to fully understand the part previously introduced. If a party questions a witness about statements made by another during a recorded interview, the opponent may introduce any remaining part of the interview that concerns the same subject and is necessary to permit the jury to place those specific statements in their proper context. Only those parts of a recorded statement necessary to make the previously admitted evidence fully understood are admissible.

Under Tex. Code Crim. Proc. Art. 38.37 §?2(b) and *Jacobs v. State,* 560 S.W.3d 205, 207 (Tex.Crim.App. 2018), when a defendant is tried for certain sex offenses against children, including continuous sexual abuse of a child, indecency with a child, and aggravated sexual assault, so long as the trial court first determines after a hearing outside the jury?s presence that the evidence likely to be admitted will be adequate to support a jury finding that the defendant committed the separate offense beyond a reasonable doubt, the State may introduce evidence that the defendant has committed a separate sex offense against another child. The evidence is admissible for any relevant purpose including as proof of the defendant?s character and propensity to act in conformity with his character. It may consist solely of the other child?s testimony about the other sex offense.

Facts:

- Castillo was indicted for continuous sexual abuse of a young child, two counts of aggravated sexual assault, and two counts of indecency with a child per Tex. Penal Code §§?21.02(b), 21.11(a), 22.021(a)(1)(B), & (a)(2)(B) for alleged acts against the same complainant who was younger than 6 and the daughter of a woman whom Castillo dated.
- At trial (when she was 13), the complainant testified that Castillo touched and penetrated her vagina with his hand on many occasions and threatened to harm her mother if the complainant didn?t keep it a ?secret.?
- The complainant did not tell anyone what had happened until she was 11 because she did not think anyone would believe her. But when she was 11, she asked her mother why the complainant?s father was in prison, and her mother told her that he had been convicted of sexually abusing the complainant?s older stepsister (Castillo?s daughter). The complainant then outcried to her mother.
- Defense counsel cross-examined the complainant about inconsistencies in her allegations, including during her interview with a CAC interviewer, Dula, that took place after the complainant made the outcry to her mother, including about inconsistencies about her age when the alleged abuse occurred, the first time Castillo abused her, whether he threatened to hurt her mother, and the sex acts involved.
- Over objection that her testimony was not admissible under Tex. Code Crim. Proc. Art. 38.37, the complainant?s stepsister testified about Castillo molesting her when she was 11. On cross-examination, defense counsel tried to question the stepsister about letters she had written to Castillo after the alleged incident in which she was friendly to Castillo, arguing that the evidence would show her state of mind. The trial court sus-tained the State?s relevancy objection.
- The complainant?s mother testified that the complainant told her about the alleged abuse.
- Ornelas (SANE) did not find any physical injuries to complainant. She had been sexually abused was what the complainant had told her.
- Over defense counsel?s objection, the trial court admitted the CAC interview as a prior consistent statement.
- The State waived indecency with a child counts, the aggravated sexual assault counts, requested that they be submitted as lesser-included offenses of continuous sexual abuse of a child, and the trial court granted this request.
- The jury charge instructed the jury to consider only alleged conduct occurring before the presentment of the indictment and after September 1, 2007, when the complainant was more than two-and-a-half years old.
- The jury found Castillo not guilty of continuous sexual abuse of a child and aggravated sexual assault

by putting his mouth on the complainant?s vagina, and guilty of aggravated sexual assault by digital penetration and indecency with a child by touching the complainant?s vagina with his hand.
- Because the indecency with a child by touching was a lesser-included offense of aggravated sexual assault by digital penetration, the trial court vacated the indecency finding and entered a judgment for aggravated sexual assault.
- The trial court assessed Castillo?s punishment at 50 years.

There was no Ex Post Facto violation

- Under Tex. Penal Code §?22.021(f)(1) and Tex. Gov. Code §?508.145(a), punishment for aggravated sexual assault against a child younger than 6 years of age is a minimum of 25 years with no parole.
- Castillo argues that the application of these statutes violates the ex post facto rule under U.S. Const. Art. I, §?10, cl. 1 and Tex. Const. Art. 1, §?16 because the jury heard evidence of assaults occurring before and after September 1, 2007, the effective date of these statutes, and the trial court may have applied these statutes to conduct that he engaged in before they became law.
- Under *Ortiz v. State,* 93 S.W.3d 79, 91 (Tex.Crim.App. 2002), and *Ex parte Heilman,* 456 S.W.3d 159, 163?165 (Tex.Crim.App. 2015), the federal and Texas guarantees against ex post facto laws are directed at the legislature, not the courts. To state a cognizable ex post facto claim, a defendant must show that the statute operates retroactively and **not** that a trial court retroactively applied them to an offense committed before enactment.
- Because Castillo does **not** argue that these statutes operate retroactively, his ex post facto claim fails.

Admission of the CAC interview was proper under the rule of optional completeness

- Under *Henley v. State*, 493 S.W.3d 77, 82?83 (Tex.Crim.App. 2016), a trial court?s decision on admissibility of evidence is reviewed for an abuse of discretion. A reviewing court may reverse the trial court only if its decision lies outside the zone of reasonable disagreement. A reviewing court misapplies the abuse-of-discretion standard if it reverses merely because it disagrees with trial court?s evidentiary decision.
- Under *White v. State,* 549 S.W.3d 146, 151?152 (Tex.Crim.App. 2018), the proponent of evidence has the burden of establishing its admissibility. If the opposing side makes a proper objection to the admissibility of evidence, the proponent must demonstrate that the evidence overcomes the stated objection.
- Under *Cofield v. State,* 891 S.W.2d 952, 954 (Tex.Crim.App. 1994), a hearsay objection is sufficiently specific to require the offering party to show that the evidence is **not** hearsay or is admissible under an exception to the hearsay rule.
- Under Tex. Rules Evid. 801?802, hearsay is statement made outside of court that is offered for its truth and generally is inadmissible.
- Under Tex. Rule Evid. 801(e)(1)(B) and *Hammons v. State*, 239 S.W.3d 798, 808?09 (Tex.Crim.App. 2007), the prior statement of a witness that is consistent with her trial testimony is not hearsay if it is offered to rebut an express or implied charge that the witness recently fabricated it or acted from a recent improper motive in so testifying. To qualify for admission as a prior consistent statement, the witness must have made the statement before her ostensible motive to fabricate or other improper motive arose.
- Under Tex. Rule Evid. 107 and *Pena v. State,* 353 S.W.3d 797, 814 (Tex.Crim.App. 2011), the rule of optional completeness is an exception to the hearsay rule. If a party introduces into evidence part of a conversation or recorded statement, the opponent may introduce any other conversation or recorded statement that is necessary to explain or allow the jury to fully understand the part previously introduced. If a party questions a witness about statements made by another during a recorded interview, the opponent may introduce any remaining part of the interview that concerns the same subject and is necessary to permit the jury to place those specific statements in their proper context. Only those parts of a recorded statement necessary to make the previously admitted evidence fully

understood are admissible.

- To qualify as a prior consistent statement, the complainant would had to have sat for her forensic interview before learning that her stepsister accused the complainant?s father of molesting her. The record is clear that the complainant?s interview took place long after her mother told her why her father had been imprisoned. Thus, the prior consistent statements exception to rebut recent fabrication does **not** make the complainant?s CAC interview admissible.
- The rule of optional completeness supports the trial court?s ruling because throughout trial, the defense called into question all material aspects of the complainant?s allegations, including what, when, and where it happened, and whether Castillo said or did anything to ensure her silence. The State was entitled to introduce the video into evidence so that the jury could decide the extent, if any, to which her story had changed.

The stepsister?s testimony about a separate alleged sex offense was proper

- Under Tex. Code Crim. Proc. Art. 38.37 §?2(b) and *Jacobs v. State*, 560 S.W.3d 205, 207 (Tex.Crim.App. 2018), when a defendant is tried for certain sex offenses against children, including continuous sexual abuse of a child, indecency with a child, and aggravated sexual assault, so long as the trial court first determines after a hearing outside the jury?s presence that the evidence likely to be admitted will be adequate to support a jury finding that the defendant committed the separate offense beyond a reasonable doubt, the State may introduce evidence that the defendant has committed a separate sex offense against another child. The evidence is admissible for any relevant purpose including as proof of the defendant?s character and propensity to act in conformity with his character. It may consist solely of the other child?s testimony about the other sex offense.
- Castillo previously pleaded guilty to sexually abusing his biological daughter, who is the complainant?s older stepsister. The trial court could properly conclude that there was evidence of a separate sex offense under Art. 38.37.
- The judgment of the trial court is affirmed.

***Welsh v. State*, No. 07-18-00227-CR, 2019 Tex. App. LEXIS 1428 (Tex.App.?Amarillo Feb. 27, 2019) (designated for publication) [Fabricating evidence and Tex. Penal Code §?37.09(a)]**

Under Tex. Penal Code §?37.09(a) and *Wilson v. State*, 311 S.W.3d 452, 465 (Tex.Crim.App. 2010), a person commits a crime if: (1) knowing that an investigation is pending or in progress; (2) he makes, presents, or uses a thing with knowledge of its falsity; and (3) acts with the intent to affect the course or outcome of the investigation. The purpose of §?37.09 is to maintain the honesty, integrity, and reliability of the justice system and to prohibit persons from creating, destroying, forging, altering, or otherwise tampering with evidence that may be used in an official investigation or judicial proceeding. Obstruction-of-justice offenses like tampering with evidence or government documents address the harm that comes from the defendant?s disobedience of the law, damage to the authority of the government, lessening the public?s confidence in our institutions; public cynicism, fear, and uncertainty, and a social climate that is likely to lead to even greater disobedience. This requires the making, presenting, or using of physical evidence with knowledge of its falsity, <u>not</u> merely the conveyance of false information about the evidence.

***Estrada v. State*, No. 07-17-00245-CR, 2019 Tex. App. LEXIS 1192 (Tex.App.?Amarillo Feb. 20, 2019) (designated for publication) [Engaging in organized criminal activity must be based on at least one enumerated predicate offense under Tex. Penal Code §?71.02(a); conviction based on a general verdict encompassing both a constitutional and an unconstitutional theory of conviction]**

Under Tex. Penal Code §?71.02(a), a person commits engaging in organized criminal activity if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination, the person commits or conspires to commit [enumerated predicate offenses, one of which being the unlawful manufacture, delivery, dispensation, or distribution of a controlled substance or dangerous drug, or unlawful

possession of a controlled substance or dangerous drug through forgery, fraud, misrepresentation or deception per Tex. Penal Code §?71.02(a)(5)]

Under *O?Brien v. State,* 544 S.W.3d 376, 391 (Tex.Crim.App. 2018), the gravamen of engaging in organized criminal activity is a circumstance surrounding the conduct?the existence or creation of a combination that collaborates in carrying on criminal activities. ?Combination? requires three or more persons who collaborate in carrying on criminal activities. ?Profits? means property constituting or derived from any proceeds obtained, directly or indirectly, from an enumerated offense. ?Conspires to commit? means that a person agrees with one or more persons that they or one or more of them engage in conduct that would constitute the offense, and that person and one or more of them perform an overt act in pursuance of the agreement. An agreement constituting conspiring to commit may be inferred from the acts of the parties. The overt act need not be criminal in itself, and acts that suffice for party liability (those that encourage, solicit, direct, aid, or attempt to aid the commission of the underlying offense) satisfy the overt-act element.

Possession with intent to deliver cannot be incorporated into ?delivery? to legitimize Tex. Penal Code §?71.02.

Under *Posey v. State,* 545 S.W.2d 162, 163 (Tex.Crim.App. 1977), it is a fundamental constitutional principle that one cannot be convicted for something that does not constitute an offense.

Under *Bowen v. State*, 374 S.W.3d 427 (Tex.Crim.App. 2012), if an appellate court concludes the evidence supporting a conviction is legally insufficient, the court is not limited to ordering an acquittal but may instead reform the judgment to reflect a conviction for a lesser-included offense and remand for a new punishment hearing. Under *Arteaga v. State,* 521 S.W.3d 329, 340 (Tex.Crim.App. 2017), *Bowen* was expanded to jury-charge error.

Under *Stromberg v. California,* 283 U.S. 359, 367?370 (1931), remand for a new trial is the appropriate remedy when the conviction was based on a general jury verdict encompassing both a constitutional and an unconstitutional theory of conviction. Where a verdict rendered by the jury is a general verdict, and it cannot be determined whether some or all of the jurors believed the defendant was guilty of an offense based upon a theory authorized by law or upon a theory not authorized by law, the record supports both possibilities. The appropriate remedy is not to acquit or to reform the judgment of conviction but to reverse and remand for a new trial.

***Sandoval v. State*, No. 01-17-00530-CR, 2019 Tex.App.LEXIS 984 (Tex.App.?Houston [1st Dist.] Feb. 12, 2019) (designated for publication) [commitment questions]**

Under *Barajas v. State*, 93 S.W.3d 36, 38 (Tex.Crim.App. 2002), and *Jacobs v. State*, 560 S.W.3d 205, 212 (Tex.Crim.App. 2018), the trial court has broad discretion over the process of selecting a jury, so appellate courts should not disturb a trial court?s ruling on the propriety of a voir dire question absent an abuse of discretion. An abuse of discretion occurs when a proper question about a proper area of inquiry is prohibited or when an improper question is allowed. The trial court?s voir dire limitation must render the trial fundamentally unfair.

Under *Sanchez v. State,* 165 S.W.3d 707, 712 (Tex.Crim.App. 2005), improper commitment questions are prohibited to ensure that the jury will listen to the evidence with an open mind that is impartial and without bias or prejudice, and render a verdict based upon that evidence. Commitment questions require a venireman to promise that he will base his verdict on specific set of facts before he has heard evidence, much less all the evidence in its proper context.

Under *Standefer v. State,* 59 S.W.3d 177, 179?184 (Tex.Crim.App. 2001), to determine whether a voir dire question is an improper commitment question: (1) the trial court must determine whether the question is a commitment question (commits a prospective juror to resolve, or to refrain from resolving, an issue a

certain way after learning a particular fact, usually eliciting a ?yes? or ?no? response, but can be open-ended if it asks the juror to set hypothetical parameters for his decision-making); (2) if the question is a commitment question, decide whether it is proper (if it would result in a valid challenge for cause, it is proper, with cause being where the juror possesses a bias against a phase of the law on which the State or defendant is entitled to rely, or would hold the State to a burden of proof higher than beyond a reasonable doubt); and (3) if the question gives rise to a valid challenge for cause, determine whether it contains only those facts necessary to test whether a prospective juror is challengeable for cause.

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[1] http://archive.voiceforthedefenseonline.com/channel/2/stories
[2] http://archive.voiceforthedefenseonline.com/source/tcdla
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[5] http://archive.voiceforthedefenseonline.com/image/april-2019-sdr-3
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