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Voice for the Defense Volume 47, No. 6 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

***Carpenter v. United States,* No. 16-402, 2018 U.S. LEXIS 3844 (U.S. June 22, 2018) [Fourth Amendment and historical cell-site records]**

The Government conducts a search under the Fourth Amendment when it accesses historical cellphone records that provide a comprehensive chronicle of the user?s past movements.

An individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI, so the location information obtained from the wireless carriers was the product of a search.

Historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle considered in *United States v. Jones,* 565 U.S. 400 (2012), or the bugged container considered in *United States v. Knotts,* 460 U.S. 276 (1983). Unlike *Jones* and *Knotts,* a cellphone [almost a ?feature of human anatomy,? *Riley,* 134 S.Ct. at 2484] tracks nearly exactly the movements of its owner. And while individuals

regularly leave their vehicles, ?they compulsively carry cellphones with them all the time,? and in fact, ?a cellphone faithfully follows its owner beyond public thoroughfares and into private residences, doctor?s offices, political headquarters, and other potentially revealing locales.?

The ?retrospective quality? of the data gives police access to a category of information otherwise unknowable. While in the past, attempts to reconstruct a person?s movements ?were limited by a dearth of records and the frailties of recollection,? now with CSLI, the Government can ?travel back in time to retrace a person?s whereabouts, subject only to the retention polices of the wireless carriers, which currently maintain records for up to five years.? And: ?[C]ritically, because location information is continually logged for all of the 400 million devices in the United States?not just those belonging to persons who might happen to come under investigation?this newfound tracking capacity runs against everyone. Unlike with the GPS device in *Jones,* police need not even know in advance whether they want to follow a certain individual, or when.?

***Byrd v. United States,* No. 16-1371, 2018 U.S. LEXIS 2803 (U.S. May 14, 2018)**

One who owns and possesses a car, like one who owns and possesses a house, almost always has a reasonable expectation of privacy in it. A person need not always have a recognized common-law property interest in the place searched to be able to claim a reasonable expectation of privacy in it. Legitimate presence on the premises of the place searched standing alone is not enough to accord a reasonable expectation of privacy because it ?creates too broad a gauge for measurement of Fourth Amendment rights.? Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.

The mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his otherwise reasonable expectation of privacy.

Facts:

- In September 2014, a PA trooper pulled over a car driven by Byrd, who was the only person in the car.
- The trooper ?was suspicious of Byrd because he was driving with his hands at the ?10 and 2? position on the steering wheel, sitting far back from the steering wheel, and driving a rental car.?
- The trooper followed Byrd and soon pulled him over for a possible traffic violation.
- The car was rented by a friend, who had given Byrd permission to drive it.
- Byrd was **not** listed on the rental agreement as an authorized driver even though the agreement explicitly stated that ?the only ones permitted to drive the vehicle other than the renter are the renter?s spouse, the renter?s co-employee (with the rent-er?s permission, while on company business), or a person who appears at the time of the rental and signs an Additional Driver Form.? The agreement also stated that permitting an unauthorized driver is a violation of the rental agreement.
- The troopers told Byrd they did **not** need his consent to search the car, including its trunk, where they found body armor and 49 bricks of heroin.
- Byrd filed an MTS, which was denied by the district court and affirmed by the 3rd Cir.

The mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his otherwise reasonable expectation of privacy.

- Under *Rakas v. Illinois,* 439 U.S. 128, 133 (1978), a person must show that his own Fourth Amendment rights were infringed by the search and seizure and must have had a ?legitimate expectation of privacy in the premises.? Expectations of privacy need not be based on a common-law interest in real or personal property, or on the invasion of such an interest.
- One who owns and possesses a car, like one who owns and pos-sesses a house, almost always has a reasonable expectation of privacy in it. A person need not always have a recognized common-law

property interest in the place searched to be able to claim a reasonable expectation of privacy in it. Legitimate presence on the premises of the place searched standing alone is **not** enough to accord a reasonable expectation of privacy because it ?creates too broad a gauge for measurement of Fourth Amendment rights.? Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.

- The mere fact that a driver in lawful possession or control of a rental car is **not** listed on the rental agreement will **not** defeat his otherwise reasonable expectation of privacy.

[3]

***Collins v. Virginia*, No. 16-1027, 2018 U.S. LEXIS 3210 (U.S. May 29, 2018)**

The automobile exception to the Fourth Amendment does not permit an officer, uninvited and without a warrant, to enter the curtilage of a home to search a vehicle parked within the curtilage.

The automobile exception extends no further than the automobile.

In *South Dakota v. Opperman*, 428 U.S. 364 (1976), the court explained that automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order. Thus, under the automobile exception to the search warrant requirement, officers may search an automobile without having obtained a warrant so long as they have probable cause to do so.

Under *Florida v. Jardines*, 569 U.S. 1 (2013), curtilage is the area immediately surrounding and associated with the home and considered part of the home for Fourth Amendment purposes. A physical intrusion into the curtilage to gather evidence is presumptively unreasonable absent a warrant.

Facts:

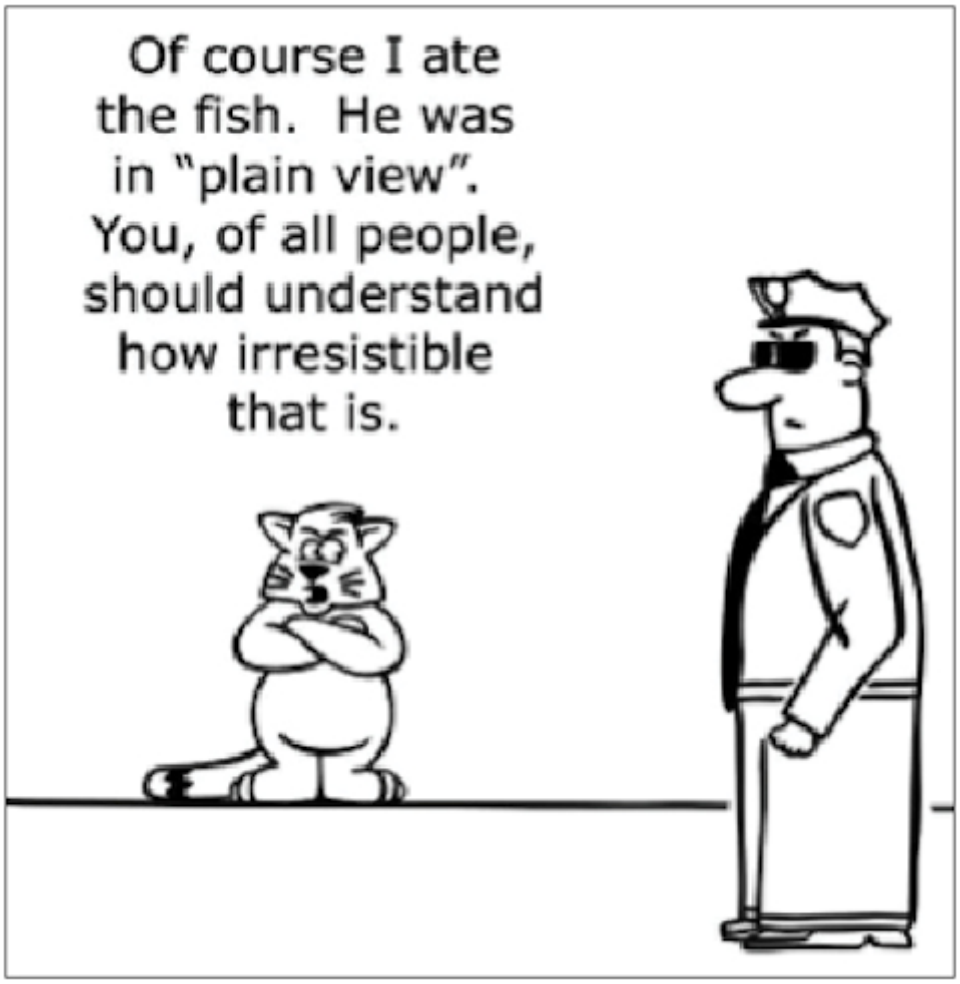
- Officer McCall saw the driver of an orange and black motorcycle with an extended frame commit a

traffic infraction. The driver eluded McCall?s attempt to stop him.

- A few weeks later, Officer Rhodes saw an orange and black mo-torcycle traveling over the speed limit, but the driver got away from him also.
- The officers concluded that the incidents involved the same motorcyclist.
- The officers learned that the motorcycle likely was stolen and in the possession of Collins.
- Rhodes discovered photos on Collins? Facebook page that featured an orange and black motorcycle parked in the driveway of a house where Collins? girlfriend lived, and at which Collins stayed a few nights per week.
- Rhodes drove to the home, parked on the street, and saw what appeared to be a motorcycle with an extended frame covered with a white tarp parked at the same angle and in the same location as in the Facebook photo.
- Without a warrant, Rhodes walked toward the house, stopped to take a photo of the covered motorcycle from the sidewalk, and then walked onto the property to where the motorcycle was parked.
- In order ?to investigate further,? Rhodes pulled off the tarp, revealing a motorcycle that looked like the one from the speeding incident.
- Rhodes ran a search of the license plate and VIN, which confirmed that the motorcycle was stolen.
- Rhodes took a photo of the uncovered motorcycle, put the tarp back on, left the property, and returned to his car to wait for Collins.
- When Collins returned, Rhodes walked up to the front door and knocked.
- Collins answered, agreed to speak with Rhodes, and admitted that the motorcycle was his and that he had bought it without title.
- Rhodes arrested Collins.
- Collins was indicted in Virginia for receiving stolen property.
- He filed an MTS, which was denied. The SCOTUS of Virginia affirmed.

The automobile exception to the Fourth Amendment doesnot permit an officer, uninvited and without a warrant, to enter the curtilage of a home to search a vehicle parked within the curtilage

- In *South Dakota v. Opperman,* 428 U.S. 364 (1976), the court explained that automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order. Thus, under the automobile exception to the search warrant requirement, officers may search an automobile without having obtained a warrant so long as they have probable cause to do so.
- Under *Florida v. Jardines,* 569 U.S. 1 (2013), curtilage is the area immediately surrounding and associated with the home and considered part of the home for Fourth Amendment purposes. A physical intrusion into the curtilage to gather evidence is pre-sumptively unreasonable absent a warrant.
- Collins? motorcycle was parked within the curtilage because the driveway runs alongside the front lawn and up a few yards past the front perimeter of the house.
- In physically intruding on the curtilage of the home to search the motorcycle, Rhodes not only invaded Collins? Fourth Amendment interest in the item searched (the motorcycle) but also invaded Collins? Fourth Amendment interest in the curtilage of his home.
- The automobile exception does not justify invasion of curtilage because the scope of the automobile exception extends no further than the automobile. Officers cannot enter a home or its curtilage without a warrant to access a vehicle.



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***Dahda v. United States*, No. 17-43, 2018 U.S. LEXIS 2806 (U.S. May 14, 2018)**

Under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §?2510 et seq., federal judges may issue wiretap orders for up to 30 days (extendable) authorizing the interception of communications to help prevent, detect, or prosecute serious federal crimes. The judge must find ?probable cause,? and requirements under 18 U.S.C. §?2518 must be met.

Under 18 U.S.C. §?2518(10)(a), contents of any wire or oral communication that a wiretap intercepts must be suppressed if the communication was (i) unlawfully intercepted; (ii) the order of approval is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval.

An order is ?insufficient? insofar as it is ?deficient? or ?lacking in what is necessary or requisite.? An order may not be deficient or lacking in anything necessary or requisite but may contain defects. Not every defect results in an insufficiency.

An extra sentence that is invalid in a wiretap order does not make the entire order insufficient on its face if removal of that sentence makes the order valid

***Lagos v. United States*, No. 16-1519, 2018 U.S. LEXIS 3209 (U.S. May 29, 2018)**

Under 18 U.S.C. §?3663A(b)(4), the Mandatory Victims Restitution Act of 1996, defendants convicted of a listed range of offenses must reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

The words ?investigation? and ?proceedings? in the Mandatory Victims Restitution Act refer to government investigations and criminal proceedings, not private investigations and civil proceedings.

United States Court of Appeals for the Fifth Circuit

***Busby v. Davis*, No. 15-70008, 2018 U.S. App. LEXIS 15864 (5th Cir. June 13, 2018) (designated for publication)**

Federal courts may deny as an abuse of the writ an actual-innocence claim that a defendant is innocent of the death penalty if the: (1) claim is brought in a successive application under 28 U.S.C. §?2244, and (2) factual predicate for the claim could have been discovered previously through the exercise of due diligence. There is no basis for concluding that the federal constitution prohibits the states from similarly denying as an abuse of the writ claims of actual innocence of the death penalty first asserted in a second, successive state habeas petition.

A federal court cannot grant habeas relief under 28 U.S.C. §?2254(d) unless the petitioner shows that the state-court decisions are: (i) contrary to or involved an unreasonable application of clearly established Federal law as determined by the SCOTUS; or (ii) based on an unreasonable determination of the facts considering the evidence presented in state court.

Section 2254(d) applies even where there has been a ?summary denial? of habeas relief.

Under *Davila v. Davis*, ineffective assistance of state habeas counsel is not sufficient cause to excuse the procedural default of a claim for ineffective assistance of direct appeal counsel. Because a prisoner does not have a constitutional right to counsel in state postconviction proceedings, ineffective assistance in those proceedings does not qualify as cause to excuse a procedural default.

***United States v. Evans*, Nos. 17-20158 & 17-20159, 2018 U.S. App. LEXIS 15785 (5th Cir. June 12, 2018) (designated for publication)**

Controlled substances are classified into Schedules I through V. 21 U.S.C. §?812(a). As the schedule number decreases, the potential for abuse and the addictive properties increase. 21 U.S.C. §?812(b). Schedule I drugs like cocaine, heroin, and methamphetamine are deemed to have no medical use and cannot be legally prescribed. 21 U.S.C. §?812(b)(1); 21 C.F.R. §?1308.11. Schedule II drugs (while legal) have a high potential for abuse and may be obtained only through written prescription by a doc-tor. 21 U.S.C. §§?812(b)(2) & 829(a).

Sufficiency-of-the-evidence challenges are evaluated with substantial deference to the jury verdict. A conviction must be affirmed if a reasonable juror could conclude that the elements of the crime were established beyond a reasonable doubt. The evidence must be viewed in the light most favorable to the verdict. All reasonable inferences from the evidence must be drawn to support the verdict. The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilty, and the jury is free to choose among reasonable constructions of the evidence.

Error raised for the first time on direct appeal that could have been (but was not) raised in the district court is reviewed for plain error, which requires showing: (1) an error (2) that is clear or obvious, (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. Error is plain only if it is so clear or obvious that the trial judge and prosecutor were derelict in countenancing it even absent the defendant?s timely assistance in detecting it. Establishing plain error requires a showing that the error was clear under the law in place at the time of trial. Plain error is not usually found if the court has not previously addressed the issue.

For a sufficiency challenge, an error is ?clear or obvious? only when the record is ?devoid of evidence pointing to guilt? or ?the evidence of a key element of the offense is so tenuous that a conviction would be shocking.?

Under 18 U.S.C. §?1957 (money laundering), the government must prove: (1) property valued at more than $10,000 was derived from a specified unlawful activity, (2) the defendant?s engagement in a financial transaction with the property, and (3) the defendant?s knowledge that the property was derived from unlawful activity.

When tainted money is mingled with untainted money in a bank account, there is no way to distinguish the tainted from the untainted because money is fungible. To deal with the commingling problem, the court uses the clean-funds-out-first rule: The defendant is deemed to first withdraw her clean funds in a commingled account before reaching into tainted funds. Where an account contains clean funds sufficient to cover a withdrawal, the Government cannot prove beyond a reasonable doubt that the withdrawal contained dirty money. If a defendant makes several withdrawals, each individually for less than the clean-fund total in the account, a withdrawal would only use clean money even though in aggregate the defendant would have had to dip into tainted funds. In this situation, the court aggregates the transactions, so the Government need only show aggregate withdrawals greater than $10,000 above the amount of clean funds in the account to prove money-laundering.

Under 18 U.S.C. §?1341 (mail fraud), the government must prove: (1) a scheme to defraud; (2) use of the mails to execute that scheme; and (3) specific intent to defraud.

?Scheme to defraud? means ?any false or fraudulent pretenses or representations intended to deceive others to obtain something of value from the [entity] to be deceived.? The falsity must be material (must have a natural tendency to influence, or be capable of influencing, the decision of the decisionmaking body to which it was addressed). This ?natural tendency? test ?is an objective one focused on whether the statement is ?of a type capable of influencing a reasonable decision maker?? and focuses on the ?intrinsic qualities? of the statement and transcends the immediate circumstances in which it is offered.

?Intent to defraud? requires an intent to: (1) deceive and (2) cause some harm to result from the deceit. A defendant acts with the intent to defraud when he acts knowingly with the specific intent to deceive for causing pecuniary loss to another or bringing about some financial gain to himself.

Evidentiary rulings are reviewed for abuse of discretion. If error occurred, it can be excused if harmless. If the alleged error is nonconstitutional, it is harmless if it had a ?substantial and injurious effect or influence in determining the jury?s verdict.? The court asks whether the error had substantial influence on the jury considering what happened at trial. If the court is left in grave doubt, the conviction cannot stand.

Under Fed. Rule Evid. 602, a witness? testimony must be based on personal knowledge, which can include inferences and opinions so long as they are grounded in personal observation and experience.

Under Fed. Rule Evid. 701, a lay witness may state his ultimate opinion provided it is based on personal perception, one that a normal person would form from those perceptions, and helpful to the jury. Such opinions must be the product of reasoning processes familiar to the average person in everyday life.

Per the U.S. Dept. of Justice, United States Attorneys? Manual §?9-11.151, a ?target? is a person as to whom the prosecutor or the grand jury has substantial evidence linking him to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.

Analysis for a Confrontation Clause violation is directed by five nonexclusive factors set forth in *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986): (1) the importance of the witness? testimony in the prosecution?s case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence

corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution?s case.

***United States v. Hernandez-Avila*, No. 16-51009, 2018 U.S. App. LEXIS 15896 (5th Cir. June 13, 2018) (designated for publication)**

To determine whether a prior conviction under Tex. Penal Code §?22.011(a)(2) qualifies as a ?crime of violence,? which includes ?statutory rape? and ?sexual abuse of a minor,? the court applies the ?categorical approach,? which requires it to look to the elements of the offense enumerated by the Guideline section and compare those elements to the elements of the prior offense for which the defendant was convicted. The court does not consider the defendant?s conduct in committing the offense.

Under *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017), the SCOTUS held that ?in the context of statutory rape offenses that criminalize sexual intercourse based solely on the age of the participants, the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16.?

A prior conviction under Tex. Penal Code §?22.011(a)(2) is not a ?crime of violence? within the meaning of U.S.S.G. §?2L1.2(b)(1)(A)(ii) (2015) because it proscribes sexual conduct with a ?child? (a person younger than 17) regardless of whether the person knows the age of the child. Because Tex. Penal Code §?22.011(a)(2) criminalizes sexual intercourse with a victim under 17 rather than a victim under 16 and does so ?based solely on the age of the participants,? it is categorically overbroad under Esquivel-Quintana.

Texas Court of Criminal Appeals

***Bien v. State*, Nos. PD-0365-16 & PD-0366-16, 2018 Tex. Crim. App. LEXIS 241 (Tex. Crim. App. June 6, 2018) (designated for publication)**

To determine whether there have been multiple punishments for the same offense, the ?same elements? under *Blockburger v. United States*, 284 U.S. 299 (1932), is applied. Two offenses are not the same if each requires proof of a fact which the other does not. Courts look to the pleadings for the *Blockburger* test: If the offenses have the same elements under the cognate-pleadings approach, the judicial presumption is that the offenses are the same for double jeopardy. The presumption can be rebutted by a clearly expressed legislative intent to create two separate offenses. If two pleaded offenses have different elements under *Blockburger*, the judicial presumption is that the offenses are different for double-jeopardy purposes and multiple punishments may be imposed. This presumption can be rebutted by a showing that the legislature clearly intended only one punishment.

To determine whether an offense qualifies as a lesser-included offense, the cognate-pleadings approach is used: Elements of a lesser-included offense do not have to be pleaded in the indictment if they can be deduced from the facts alleged in the indictment. The functional-equivalence concept is used in the lesser-included-offense analysis: The court examines the elements of the lesser offense and decides whether they are ?functionally the same or less than those required to prove the charged offense.?

Criminal solicitation requires the State to prove a defendant believed the conduct he was soliciting would be capital murder. The State proves criminal solicitation by proving that what a defendant believes the circumstances to be surrounding the solicited conduct, and that such conduct would be a crime under those circumstances. The State need not prove that those circumstances existed. This element of criminal solicitation is subsumed within the proof necessary to establish the intent to commit capital murder under attempted capital murder.

When a defendant is convicted in a single criminal trial of two offenses that are considered the same for

double jeopardy, under the ?most serious punishment? test, the remedy is to vacate the offense that is the lesser punishment if that is what the prosecutor requests.

***Ex parte Kussmaul; Ex parte Long; Ex parte Pitts; & Ex parte Sheldon*, Nos. WR-28,586-09; WR-28,772-02; WR-35,508-03; & WR-84,754-01, 2018 Tex. Crim. App. LEXIS 177 (Tex. Crim. App. June 6, 2018) (designated for publication)**

Under Tex. Code Crim. Proc. Art. 11.07 §?4(a), the applications contain sufficient specific facts establishing that: (1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or (2) by a preponderance of the evidence, but for a violation of the United States Con-sti-tution, no rational juror could have found the applicant guilty beyond a reasonable doubt.

Tex. Code Crim. Proc. Art. 11.073 applies to relevant scientific evidence that: (1) was not available to be offered by a convicted person at the convicted person?s trial; or (2) contradicts scientific evidence relied on by the state at trial. Relief can be granted upon a threefold showing that: (i) relevant scientific evidence is currently available and was not available at the time of the convicted person?s trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person?s trial; and (ii) the scientific evidence would be admissible under the Tex. Rule Evid. at a trial held on the date of the application; and (iii) had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted. Art. 11.073 and Chapter 64 are intended to work together because Art. 11.073 affords an avenue for relief under the same standard required for a favorable Chapter 64 finding.

In postconviction habeas corpus proceedings, the convicting court is the ?original factfinder? (the trial court is responsible for gathering evidence and making fact-findings) while the TCCA is the ?ultimate factfinder? (TCCA has a statutory duty to review the trial court?s FFCL to ensure that they are supported by the record and are in accordance with the law). The TCCA will defer to and accept a trial court?s FFCL when they are supported by the record. If the TCCA?s independent review of the record reveals that the trial court?s FFCL are not supported by the record, the TCCA can exercise its authority to make contrary or alternative FFCL.

A *Herrera* actual innocence claim is a bare claim of innocence based solely on newly discovered evidence. An applicant claiming actual innocence is not claiming that the evidence at trial was insufficient to support the conviction. Rather, the applicant shows by clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found the applicant guilty considering the new evidence. An applicant must also prove that the evidence he relies on was not known to him at the time of trial and could not be known to him even with the exercise of due diligence. Many actual-innocence cases are based on a single piece of new evidence such as DNA or the recantation of a victim or witness, but multiple pieces of newly discovered evidence can make a meritorious case for relief. The TCCA highlights the new evidence and considers whether it persuasively establishes innocence when comparing it to the evidence establishing guilt. The applicant must make a ?truly persuasive? showing of innocence, regardless of whether he pled guilty or had a jury trial. A convicting court must consider a guilty plea and make a case-by-case determination about the reliability of the newly discovered evidence.

***Lee v. State*, No. PD-0736-17, 2018 Tex. Crim. App. LEXIS 349 (Tex. Crim. App. June 13, 2018) (designated for publication)**

Per *Ocon v. State*, 284 S.W.3d 880, 885 (Tex. Crim. App. 2009), though requesting lesser remedies (request to disregard) is <u>not</u> a prerequisite to a motion for mistrial, when the movant does <u>not</u> request a lesser remedy, an appellate court will not reverse a judgment if the problem could have been cured by the less

drastic alternative. If a curative instruction would have sufficed, the trial court did not abuse its discretion by denying a mistrial request.

***Niles v. State*, Nos. PD-0234-17 & PD-0235-17, 2018 Tex. Crim. App. LEXIS 350 (Tex. Crim. App. June 13, 2018) (designated for publication)**

Under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Sentencing factors like elements are facts that must be submitted to the jury and proved beyond a reasonable doubt.

Under *Blakely v. Washington*, 542 U.S. 296, 303 (2004), the ?statutory maximum? for *Apprendi* purposes is the maximum sentence a judge may impose solely based on the facts reflected in the jury verdict or admitted by the defendant.

Under *Alleyne v. United States*, 570 U.S. 99, 113 (2013), the crime and the fact triggering as mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury.

Under *Washington v. Recuenco*, 548 U.S. 212, 222 (2006), *Apprendi* error is not structural error. Unlike a jury charge that misdefines the State?s burden of proof as being less than beyond a reasonable doubt, such violations can be subject to a harm analysis.

Structural (automatically reversible) error goes to a complete misdirection or failure to instruct on the reasonable doubt standard. Failure to instruct the jury on one element of an offense or a failure to submit a sentencing issue to the jury under *Apprendi* is not structural error but is subject to harm analysis.

***Miller v. State*, No. PD-0891-15, 2018 Tex. Crim. App. LEXIS 142 (Tex. Crim. App. May 23, 2018) (op. on reh.) (designated for publication)**

Under *Strickland*, 466 U.S. 668 (1984), a defendant is entitled to postconviction relief on an IATC claim if he demonstrates by a preponderance of the evidence that: (1) trial counsel?s performance was deficient and; (2) the applicant was prejudiced because of that deficient performance. Trial counsel?s performance is deficient if it falls below an objective standard of reasonableness.

Under *Strickland*, counsel enjoys a ?strong presumption? that his ?conduct fell within the wide range of reasonable professional assistance,? so when ?a legal proposition or a strategic course of conduct is one on which reasonable lawyers could disagree, an error that occurs despite the lawyer?s informed judgment should not be gauged by hindsight or second-guessed.? However, to be reasonably likely to render reasonably effective assistance to his client, ?a lawyer must be sufficiently abreast of developments in criminal law aspects implicated in the case at hand? because the Sixth Amendment guarantees a defendant the benefit of trial counsel who is familiar with the applicable law. Thus, ignorance of well-defined general laws, statutes, and legal propositions is not excusable, and if it prejudices a client, IATC may be found.

The prejudice prong of *Strickland* requires a habeas applicant to show a ?reasonable probability that, but for counsel?s unprofessional errors, the result of the proceeding would have been different.? In the guilty-plea context, this amounts to no more than a showing ?that there is a reasonable probability that, but for counsel?s errors, he would not have pleaded guilty and would have insisted on a trial.?

Under *Hill v. Lockhart*, 474 U.S. 52, 59 (1985), a defendant is entitled to effective assistance of counsel in the guilty-plea context.

When a defendant receives bad advice about probation eligibility, the defendant must show a

reasonable likelihood that he would have opted for a jury if his attorney had correctly advised him about his eligibility. The defendant need not demonstrate a reasonable likelihood that the jury trial he waived would have yielded a more favorable result than the TBC.

***Ex parte Moore*, No. WR-13,374-05, 2018 Tex. Crim. App. LEXIS 178 (Tex. Crim. App. June 6, 2018) (designated for publication) (Alcala, J. dissenting)**

Editor?s Note: the TCCA did not make any specific holdings other than to find that Moore is not intellectually disabled as defined by *Atkins* and modern medical standards. Read this case or at least the online SDR version. The majority opinion and dissent are a combined 102 pages, so summarizing it in a few paragraphs is difficult.

***Oliva v. State*, No. PD-0398-17, 2018 Tex. Crim. App. LEXIS 139 (Tex. Crim. App. May 23, 2018) (designated for publication)**

The fact that the parties agreed that the existence of a prior conviction is an element of the offense is not binding on the TCCA because the TCCA is not bound by any agreement or con-cessions by the parties on an issue of law.

Because the prior-conviction provision Tex. Penal Code §?49.09(a) is not a jurisdictional issue (as opposed to prior intoxication convictions that enhance to a felony DWI), Tex. Penal Code §?49.09(a) is a punishment issue so litigation of a prior DWI conviction should occur at the punishment stage.

Facts:

- The 3400 block of Hadley Street is a two-lane public roadway that runs east and west and has no lane markings. Homes are on both sides.
- At about 1:00 a.m. on May 10, 2015, Houston officers Aldana and Habukiha responded to a call regarding a suspicious person on Hadley Street.
- Within a few minutes, the officers arrived at the scene and saw a parked car.
- The car was parallel-parked beside the street curb, perhaps in the lane of moving traffic.
- As the officers approached the car, they noticed that the engine was running, the key was in the ignition, and its emergency lights were not activated.
- The officers found appellant asleep, slouched, in the driver?s seat.
- Appellant was not wearing a seatbelt, a shirt, or shoes.
- The car?s cup holder had one open container of beer.
- The officers tried to wake appellant, but he was unresponsive. When the officers opened the door, appellant woke up and fell out onto the street.
- The officers detected a strong odor of alcohol in the car and on appellant?s breath.
- Appellant slurred his speech and had glassy eyes and poor balance.
- Appellant showed six clues on the HGN, and his breath-test results were 0.184 and 0.183 at 2:18 a.m. and 2:21 a.m.
- The technical supervisor with the TDPS?s Breath Alcohol Testing Program testified that ?using the average of .02 per standard drink,? it would take ?roughly about nine drinks? for a person to reach appellant?s alcohol-concentration level.
- Appellant was charged by information with DWI. The information contained a paragraph that alleged a prior DWI conviction.
- During the guilt-innocence phase of trial, the State referred only to the DWI offense that occurred in May 2015 on Hadley Street.
- The State did not attempt to prove that appellant had a prior DWI conviction.
- The trial court?s charge to the jury did not mention the prior DWI conviction.
- The jury convicted appellant of DWI.

- During the punishment phase, the state introduced evidence that appellant previously had been convicted of DWI. The jury found that the appellant had a prior DWI conviction and assessed his punishment at 180 days? in jail.
- The trial court?s judgment shows that appellant was convicted of ?DWI 2ND? and the degree of offense was labeled as a ?Class A Misdemeanor.?

The court of appeals held that a prior DWI conviction is an element of Class A DWI and a fact that is legally required to convict for Class A DWI

The Court of Appeals reached its decision per the legal-sufficiency review in which the court views all the evidence in the light most favorable to the prosecution and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). The Appellant argued: (1) a prior DWI conviction is not a punishment enhancement for a Class B misdemeanor and is an element of Class A DWI, so it must be proven during the guilt-innocence phase; and (2) because no evidence was presented during the guilt-innocence phase of the trial that appellant had a prior DWI conviction, the evidence is legally insufficient to support appellant?s conviction.

- The court of appeals reasoned that under Tex. Penal Code §?49.04(b), a DWI is a Class B misdemeanor, and under Tex. Penal Code §?49.09(a), a DWI is a Class A misdemeanor if it is proven that the person has previously been convicted one time of an offense relating to the operating of a motor vehicle while intoxicated.
- A **punishment enhancement** is a ?fact? that increases the pun-ishment range to a certain range above what is ordinarily prescribed for the indicted crime. It does not change the of-fense or the degree of the offense. A defendant is entitled to writ-ten notice of a punishment-enhancement allegation, but it need not be pled in the indictment nor proven during the guilt-innocence phase of trial. *Brooks v. State*, 957 S.W.2d 30, 34 (Tex. Crim. App. 1997).
- An **element** is a fact that is legally required for a factfinder to convict a person and must be proven beyond a reasonable doubt at the guilt-innocence phase of trial. A prior DWI convic-tion is an element of Class A DWI, and a fact that is legally required for a factfinder to convict a person of Class A DWI. If the defendant has a prior DWI conviction, the statute enhances the degree of the offense from a Class B misdemeanor DWI to a Class A misdemeanor DWI.
- Because no evidence of appellant?s prior DWI conviction was presented to the jury during the guilt-innocence phase, the court of appeals found that the evidence was legally insufficient to sustain appellant?s conviction under §?49.09(a).

The fact that the parties agreed that the existence of a prior conviction is an element of the offense is<u>not</u> binding on the TCCA because the TCCA is<u>not</u> bound by any agreement or concessions by the parties on an issue of law.

- An agreed outcome on a legal issue can sometimes be in both parties? self-interests.
- Appellant wants the prior conviction to be decreed an element so that he can prevail on his sufficiency challenge. This would benefit the State in most cases because it would enable the State to introduce evidence of the prior conviction at the guilt stage of trial instead of having to wait until the punishment stage.
- The State seeks review not because it disagrees with the result in the court of appeals but because it wishes to resolve this issue on a statewide basis, given the existence of conflicting opinions in the lower courts.

Because the prior-conviction provision Tex. Penal Code §?49.09(a) is not a jurisdictional issue (as opposed to prior in-tox-i-cation convictions that enhance to a felony DWI), Tex. Penal Code §? 49.09(a) is a punishment issue so litigation of a prior DWI conviction should occur at the punishment stage.

- Tex. Penal Code §?49.09(a) does **not** explicitly say whether the existence of a prior conviction should be litigated at the guilt stage or at punishment.
- Although the legislature has provided that an issue that increases the penalty for a crime be tried at the punishment stage, this is not the norm for statutes prescribing punishment issues in noncapital cases. This language is absent from Tex. Penal Code §?12.42 (prescribing penalties for repeat offenders) even though it would appear to be one of the most obvious examples of a codification of punishment issues.
- There is a statutory basis for distinguishing between a prior DWI under Tex. Penal Code §?49.09(a) that enhances to a class A misdemeanor and prior intoxication convictions that enhance to a felony DWI: Under Tex. Code Crim. Proc. Art. 36.01 when prior convictions are alleged for purposes of enhancement only and are not jurisdictional, then the reading of the allegations involving those convictions must be delayed until the punishment stage of trial. The two-prior-conviction in Tex. Penal Code §?49.09(b) is jurisdictional because the prior convictions are necessary to establish a felony to give the district court jurisdiction. However, the one-prior-conviction provision in Tex. Penal Code §?49.09(a) is not jurisdictional because the offense remains a misdemeanor (a more serious one).
- Four factors that weigh in favor of Tex. Penal Code §?12.42 being a punishment issue: (1) it is a prior-conviction provision, (2) it uses the preface ?if it is shown on the trial of,? (3) it uses ?punished for? to describe the effect of the provision, and (4) it is separated from provisions that more obviously prescribe elements of an offense.
- Tex. Penal Code §?49.09(a) is a punishment issue so litigation of a prior DWI conviction should occur at the punishment stage.
- The judgment of the court of appeals is reversed, and the judgment of the trial court is affirmed.

***Ramjattansingh v. State*, No. PD-0972-17, 2018 Tex. Crim. App. LEXIS 243 (Tex. Crim. App. June 6, 2018) (designated for publication)**

Under *Jackson v. Virginia,* 443 U.S. 307, 319 (1979), to determine whether evidence is legally sufficient, a reviewing court determines whether, after viewing the evidence in the light most favorable to the verdict, the trier of fact was rationally justified in finding the essential elements of the crime beyond a reasonable doubt. The evidence is measured by the elements of the offense as defined by the hypothetically correct jury charge. *Malik v. State,* 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The standard of review is the same for direct and circumstantial evidence. *Hooper v. State,* 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

Per *Johnson v. State,* 364 S.W.3d 292, 294 (Tex. Crim. App. 2012), the hypothetically correct jury charge does not necessarily have to track exactly all the charging instrument?s allegations. Only a material variance between what is alleged and one that prejudices a defendant?s substantial rights renders the evidence insufficient. This happens when the indictment: (1) fails to adequately inform the defendant of the charge against him, or (2) subjects the defendant to the risk of being prosecuted later for the same crime.

Three categories of variance are: (1) a statutory allegation that defines the offense (not subject to materiality analysis, or if it is, is always material)?the hypothetically correct jury charge will always include the statutory allegations in the indictment; (2) a nonstatutory allegation that is descriptive of an element of the offense that defines or helps define the allowable unit of prosecution (sometimes material)?hypothetically correct jury charge will sometimes include the nonstatutory allegations in the indictment and sometimes not; and (3) a nonstatutory allegation that has nothing to do with the allowable unit of prosecution (never material)?the hypothetically correct jury charge will never include the nonstatutory allegations in the indictment.

In a sufficiency review, the TCCA tolerates variances if they are not so great that the proof at trial ?shows an entirely different offense? than what was alleged in the charging instrument.

If a jury instruction includes the elements of the charged crime but incorrectly adds an extra, made-up element, a sufficiency challenge is still assessed against the elements of the charged crime regardless of the source of the extra element.

***White v. State*, No. PD-0442-17, 2018 Tex. Crim. App. LEXIS 351 (Tex. Crim. App. June 13, 2018) (designated for publication)**

Generally, if a party wants evidence admitted, that party has the burden to prove that the evidence is admissible. The proponent must identify to the trial court the basis of admissibility for the proffered evidence. The proponent?s burden is not triggered ?unless and until? the opponent of the evidence raises ?a specific objection? to such evidence. Once the opponent objects, the proponent bears the burden of demonstrating its admissibility by a preponderance of the evidence.

Although the proponent of evidence generally has the burden to establish admissibility, when the defendant has filed a pretrial MTS challenging the admissibility of the evidence, the defendant has the burden to produce some evidence at the hearing on the MTS to prove that the evidence was illegally obtained. An MTS is nothing more than a specialized objection to the admissibility of that evidence.

Texas Courts of Appeals

***Henderson v. State*, No. 07-17-00099-CR, 2018 Tex. App. LEXIS 3966 (Tex. App. Amarillo June 1, 2018) (designated for publication)**

To determine whether the evidence is legally sufficient, the reviewing court views the evidence in the light most favorable to the verdict to determine whether a rational jury could find the defendant guilty of all the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). When the reviewing court is faced with a record supporting contradicting inferences, the court must presume that the jury resolved any such conflict in favor of the verdict, even if it is not explicitly stated in the record.

Under *Coleman v. State*, 145 S.W.3d 649, 659?660 (Tex. Crim. App. 2004), to determine whether a weapon facilitated the commission of an offense, courts consider: (1) the type of fire-arm used; (2) whether the firearm was loaded; (3) whether the fire-arm was lawfully acquired; (4) the proximity of the firearm to the drugs; (5) the proximity or accessibility of the firearm to the defendant; (6) the quantity of drugs; (7) any evidence indicating a non-facilitating purpose; (8) whether the defendant was aware of the presence of the firearm; (9) whether the firearm was ?employed or utilized? to acquire or retain the drugs; and (10) whether the firearm caused any injury or increased the risk of injury.

***Thomas v. State*, Nos. 14-17-00240-CR, 14-17-00241-CR, & 14-17-00240-CR, 2018 Tex. App. LEXIS 3849 (Tex. App. Houston [14th Dist.] May 31, 2018) (designated for publication)**

Under Tex. Code Crim. Proc. Art. 37.07 §?3(a)(1), the parties may offer evidence as to any matter the court deems relevant to sentencing. In assessing punishment, a trial judge is entitled to consider a defendant?s truthfulness as he testifies. It is both necessary and proper for a trial judge to evaluate a defendant?s credibility as manifested by his conduct at trial and testimony under oath.

A defendant?s lack of veracity while testifying during a punishment hearing is a matter relevant to sentencing under Tex. Code Crim. Proc. Art. 37.07 §?3(a)(1) and may be considered.

Under *McGee v. State*, 233 S.W.3d 315, 318 (Tex. Crim. App. 2007), lying while testifying is an extraneous bad act.

[5]

***Weems v. State*, No. 14-17-00443-CR, 2018 Tex. App. LEXIS 2933 (Tex. App. Houston [14th Dist.] April 26, 2018) (designated for publication)**

Under *Smith v. State*, 165 S.W.3d 361, 363 (Tex. Crim. App. 2005), review a trial court?s decision on a motion related to DNA is bifurcated: almost total deference to the trial court?s determination of issues of historical fact and issues of application of law to fact that turn on credibility and demeanor of witnesses, and de novo other issues of application-of-law-to-fact questions that do not turn on the credibility and demeanor of witnesses, and on issues of law.

Under *Blacklock v. State*, 235 S.W.3d 231, 232?233 (Tex. Crim. App. 2007), the purpose of postconviction DNA testing is to provide a means through which a convicted person may es-tablish his innocence by excluding himself as the perpetrator of the offense of which he was convicted.

Under *Holberg v. State*, 425 S.W.3d 282, 284 (Tex. Crim. App. 2014), and Tex. Code Crim. Proc. Art. 64.03(a), a convicting court may order forensic DNA testing only if the statutory preconditions of Chapter 64 are met, which are: (1) the court finds that: (A) the evidence (i) still exists and is in a condition making DNA testing possible; and (ii) has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect; (B) there is a reasonable likelihood that the evidence contains biological material suitable for DNA testing; and (C) identity was or is an issue in the case; and (2) the convicted person establishes by a preponderance of the evidence that: (A) the person would not have been convicted if exculpatory results had been obtained through DNA testing; and (B) the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice.

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