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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

***United States v. Davis*, No. 18-431, 2019 U.S. LEXIS 4210 (U.S. June 24, 2019) [18 U.S.C. §?924(c)(3)(B) is unconstitutionally vague]**

The residual clause of 18 U.S.C. §?924(c)(3)(B) (defining a crime of violence as an offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense) is unconstitutionally vague.

***Flowers v. United States*, No. 17-9572, 2019 U.S. LEXIS 4196 (U.S. June 21, 2019) [*Batson*]**

Where all relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State?s peremptory strike of a minority juror is not motivated in substantial part by discriminatory intent, reversal is required.

Under *Batson*, once a prima facie case of discrimination has been shown by a defendant, the State must

provide race-neutral reasons for its peremptory strikes. The trial court must determine whether the prosecutor?s stated reasons were the actual reasons or instead were a pretext for discrimination.

***Gamble v. United States*, No. 17?646, 2019 U.S. LEXIS 4173 (U.S. June 17, 2019) [Dual-sovereignty doctrine]**

The Double Jeopardy Clause of the Fifth Amendment protects individuals from being twice put in jeopardy ?for the same offence? and not for the same conduct or actions, so the dual-sovereignty rule is not an exception to double jeopardy. An ?offence? is defined by a law, and each law is defined by a sovereign. So where there are two sovereigns, there are two laws, and two ?offences.?

Editor?s note: if you enjoy reading long law-review-style articles that are heavy on historical perspectives, including learning about ancient cases heard before the English Court of Chivalry, this opinion is a good read. Otherwise, the holding above is all you need to know.

***Mitchell v. Wisconsin*, No. 18-6210, 2019 U.S. LEXIS 4400 (U.S. June 27, 2019) (plurality op.) [A statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement]**

Under *Missouri v. McNeely*, 569 U.S. 141, 149 (2013), the exigent-circumstances exception allows warrantless searches to prevent the imminent destruction of evidence (there is compelling need for official action and no time to secure a warrant). However, the exception does not cover BAC testing of suspects considering that blood-alcohol evidence is always dissipating due to the natural metabolic processes.

Exigency exists when: (1) BAC evidence is dissipating; and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when a drunk-driving suspect is unconscious. With such suspects, too, a warrantless blood-draw is lawful.

A statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement

Editor?s note: This is a plurality opinion. Under *Marks v. United States*, 430 U.S. 188, 193 (1977): ?[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ?the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds ?? So for example in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (Miranda issue): Four justices agreed on the ?majority? opinion, and five justices agreed on a single rationale explaining the result. Plurality opinions are generally not binding in Texas:

- *Cooper v. State*, 67 S.W.3d 221, 224 (Tex.Crim.App. 2002): a plurality opinion has limited or no precedential value.
- *Vernon v. State*, 841 S.W.2d 407, 410 (Tex.Crim.App. 1992): a plurality opinion does not have ?significant precedential value.?
- *State v. Hardy*, 963 S.W.2d 516, 519 (Tex.Crim.App. 1997): ?we may look to ?plurality? opinions for their persuasive value.?
- *Pearson v. State*, 994 S.W.2d 176, 177 n.3 (Tex.Crim.App. 1999): plurality opinions are not binding precedent.

***Quarles v. United States*, No. 17-778, 2019 U.S. LEXIS 4027 (U.S. June 10, 2019) [ACCA and remaining-in burglary]**

Under the Armed Career Criminal Act (ACCA), 18 U.S.C. §?924(e), a 15-year minimum sentence applies to a felon who unlawfully possesses a firearm and has 3 prior convictions for a serious drug offense

or violent felony, which includes burglary. Per *Taylor v. United States*, 495 U.S. 575, the generic term ?burglary? means ?unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.?

For purposes of the ACCA ?violent felony? prerequisite, ?remaining-in? burglary occurs when a person forms the intent to commit a crime at any time while unlawfully remaining in a building or structure.

***Rehaif v. United States*, No. 17-9560, 2019 U.S. LEXIS 4199 (U.S. June 21, 2019) [18 U.S.C. §?924(a)(2) and 18 U.S.C. §?922(g)]**

Under *Staples v. United States*, 511 U.S. 600, 605 (1994), and *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994), whether a statute requires the Government to prove the defendant acted knowingly is a question of congressional intent. In determining such intent, there is a presumption that Congress intends to require a defendant to possess a culpable mental state regarding each elements of the offense that criminalize otherwise innocent conduct even if Congress does not specify any scienter in the statute.

?Knowingly? applies both to the defendant?s conduct and to the defendant?s status. To convict under 18 U.S.C. §?924(a)(2) for violating 18 U.S.C. §?922(g), the Government must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it.

United States Court of Appeals for the Fifth Circuit

***United States v. Jones*, No. 18-10590, 2019 U.S. App. LEXIS 18628 (5th Cir. June 21, 2019) (designated for publication) [Enhancement under U.S.S.G. §?2K2.1(b)(4)]**

Under U.S.S.G. §?2K2.1(b)(4), a four-level enhancement is added to the base offense level if a firearm had an altered or oblit-erated serial number. U.S.S.G. §?2K2.1(b)(4) applies when a serial number on the frame is obliterated even if serial numbers on other components of the firearm remain unaltered. This rule ?may serve as a deterrent to tampering even when incomplete.? Further, this single-obliteration rule could facilitate tracking each component that bears a serial number given that various parts of firearms may be severable.

A firearm?s serial number is ?altered or obliterated? when it is materially changed in a way that makes accurate information less accessible.

***United States v. Perez-Mateo*, No. 18-40768, 2019 U.S. App. LEXIS 17300 (5th Cir. June 10, 2019) (designated for publication) [Plain error and criminal history score calculation under U.S.S.G. §?4A1.2]**

When the defendant does not object to error before the district court, plain error review applies. Under Fed. Rule Crim. Proc. 52(b), a court of appeals may consider errors that are plain and affect substantial rights even though they are raised for the first time on appeal. Under *Molina-Martinez v. United States*, 136 S.Ct. 1338 (2016), and *United States v. Olano*, 507 U.S. 725 (1993), these conditions must be met before a court may consider plain error: (1) error that has not been intentionally relinquished or abandoned; (2) the error must be plain (clear or obvious); (3) the error must have affected the defendant?s substantial rights, which requires the defendant to show a reasonable probability that but for the error, the outcome of the proceeding would have been different; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Under *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1907 (2018), a U.S.S.G. error that satisfies the first three *Olano* factors ordinarily also satisfies the fourth and warrants relief under Rule 52(b) because such plain error usually establishes a reasonable probability that a defendant will serve a sentence that is more

than necessary to fulfill the purposes of incarceration. Additional factors favoring correction are: (1) resentencing is relatively easy; and (2) U.S.S.G. miscalculations result from judicial error rather than a defendant?s strategy. Where the record is silent as to what the district court might have done had it considered the correct U.S.S.G. range, the district court?s reliance on an incorrect range in most instances will suffice to show an effect on the defendant?s substantial rights.

Under U.S.S.G. §?4A1.2, which governs whether prior sentences count for criminal history purposes, a prior sentence of imprisonment exceeding a year and a month is counted if it: (1) was imposed within 15 years of committing the present offense, or (2) resulted in the defendant being incarcerated during any part of the 15-year period. Other prior sentences imposed within 10 years of committing the present offense is counted. Any other prior sentence is not counted.

***United States v. Vinagre-Hernandez*, No. 18-50402, 2019 U.S. App. LEXIS 17193 (5th Cir. June 7, 2019) (designated for publication) [18 U.S.C. §?3161(b), speedy trial in federal cases]**

Under 18 U.S.C. §?3161(b), the Speedy Trial Act, any indictment charging an individual with an offense shall be filed within 30 days from the date on which the individual was arrested or served with a summons in connection with such charges. Certain periods are excluded from the calculation of the 30 days, including delay resulting from pretrial motions, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion. The Act does not lay out a method for computing time, so under Fed. Rule Crim. Proc. 45 (computing time periods in any statute that does not specify a method of computing time), the day of the event that triggers the period is not counted, but the last day of the period is counted, but if the last day is a Saturday, Sunday, or legal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.

Editor?s note: I summarize only the speedy trial issue. The other issues either have been covered recently or are not relevant for this SDR.

Texas Court of Criminal Appeals

***Colone v. State*, No. AP-77,073, 2019 Tex.Crim.App. LEXIS 445 (Tex.Crim.App. May 8, 2019) (designated for publication) [change of venue]**

Editor?s note: I summarize only the change-of-venue issue. The other issues either have been covered recently or are not relevant for this SDR.

- The effect of a change of venue is to remove the cause absolutely from the jurisdiction of the court awarding the change and to confer to the court to which removal is had with the same jurisdiction held by the court of original venue.
- A trial court could rescind an order changing venue where no steps had been taken to carry out or to comply with the or-der changing venue and the record reflects that the order was improperly entered.
- Under Tex. Code Crim. Proc. Art. 31.03(a)(1) (2019), a change of venue may be granted in any felony case on the written motion of the defendant, supported by his own affidavit and the affidavit of at least two credible persons, residents of the county where the prosecution is instituted, for either of the following causes, the truth and sufficiency of which the court shall determine that there: (1) exists in the county where the prosecution is commenced so great a prejudice against him that he cannot obtain a fair and impartial trial; and (2) is a dangerous combination against him instigated by influential persons, by reason of which he cannot expect a fair trial.
- An order changing venue to a county beyond an adjoining dis-trict shall be grounds for reversal if upon timely contest by defendant the record of the contest affirmatively shows that any county in his own and the adjoining district is not subject to the same conditions which required the transfer. Widespread publicity alone is not inherently prejudicial. News stories that are accurate and objective

are generally not considered to be prejudicial or inflammatory.
- A trial court may use the jury selection process to help gauge the community climate.
- A trial court?s ruling on a motion for change of venue is reviewed for abuse of discretion.

***Fisk v. State*, No. PD-1360-17, 2019 Tex.Crim.App. LEXIS 541 (Tex.Crim.App. June 5, 2019) (designated for publication) [whether the elements of an offense under the laws of another state are substantially similar to the elements of a Texas offense]**

To determine whether the elements of an offense under the laws of another state are substantially similar to the elements of a Texas offense, there must be only a high degree of likeness between the offense but they may be less than identical.

Elements of sodomy with a child under UCMJ Art. 125 are substantially similar to the elements of sexual assault as defined by the Tex. Penal Code.

***Hyland v. State*, No. PD-0438-18, 2019 Tex.Crim.App. LEXIS 542 (Tex.Crim.App. June 5, 2019) (designated for publication) [*Franks v. Delaware* in intoxication cases]**

Probable cause exists when reasonably trustworthy facts and circumstances within the knowledge of the officer on the scene would lead a man of reasonable prudence to believe that the instrumentality of or evidence pertaining to a crime will be found.

In determining whether probable cause exists to support the issuance of a search warrant, the magistrate to whom the probable cause affidavit is presented is confined to considering the four corners of the search warrant affidavit as well as to logical inferences the magistrate might draw based on the facts contained in the affidavit.

Generally, a reviewing court applies a presumption of validity regarding a magistrate?s determination that a search warrant affidavit supports a finding of probable cause. When reviewing a magistrate?s probable-cause determination, a reviewing court must ordinarily view the magistrate?s decision to issue the warrant with great deference and must uphold the decision so long as the magistrate had a substantial basis for his finding.

Under *Franks v. Delaware,* 438 U.S. 154, 171?172 (1978), the presumption of validity regarding the magistrate?s probable-cause determination may be overcome if the defendant can show the presence of false statements in the search-warrant affidavit that were made deliberately or with reckless disregard for truth. Such statements must be purged from the affidavit and it is up to the judge to determine whether probable cause exists absent the excised statements.

Under *McClintock v. State*, 444 S.W.3d 15, 19 (Tex.Crim.App. 2014), after statements have been purged from an affidavit under *Franks*, the reviewing court should not give deference to the magistrate?s initial probable-cause determination and should abandon the substantial-basis analysis because the court is now examining a new, different affidavit. The question is the same as it would be for a magistrate conducting an initial review of a search-warrant affidavit: whether the remaining statements in the affidavit establish probable cause. Reviewing courts are still required to read the purged affidavit in accordance with *Illinois v. Gates* and must undertake a totality-of-the-circumstances approach. *State v. Le*, 463 S.W.3d 872, 877 (Tex.Crim.App. 2015). The standard is not a heightened probable-cause standard.

Texas Courts of Appeals

***Martin v. State*, No. 02-18-00333-CR, 2019 Tex. App. LEXIS 4011 (Tex.App.?Fort Worth May 16, 2019) [Fireman?s knowledge of plain view contraband imputes to police]**

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.

A warrantless police entry into fire-damaged property is presumptively unreasonable unless it falls within the scope of an exceptions to the warrant requirement unless the fire is so devastating that no reasonable privacy interests remain in the ash and ruins.

Under *Payton v. New York,* 445 U.S. 573, 590 (1980), absent exigent circumstances, law enforcement may not enter a home without a warrant.

Exigent circumstances created by a fire are not extinguished the moment the fire is put out but continue for a reasonable time after the fire has been extinguished to allow fire officials to fulfill their duties, including making sure the fire will not rekindle and investigating the cause of the fire. The determination of ?reasonable time to investigate? varies with the circumstances of a fire.

Under *Michigan v. Clifford,* 464 U.S. 287, 294 (1984), if evidence of criminal activity is discovered by firefighters during a lawful search under exigent circumstances, firefighters may seize it under the plain-view doctrine.

Under *State v. Betts,* 397 S.W.3d 198, 206 (Tex.Crim.App. 2013), the requirements for seizure of an object in plain view are: (1) law enforcement must lawfully be where the object can be plainly viewed; (2) the incriminating character of the object in plain view must be immediately apparent; and (3) the officials must have the right to access the object.

Law enforcement officers may enter premises to seize contraband that was found in plain view by firefighters or other emergency personnel if the exigency is continuing and the emergency personnel are still lawfully present.

Where a lawful intrusion by a firefighter has occurred and the firefighter observed contraband in plain view, the invasion of privacy is not increased by allowing an officer to enter the resi-dence without a warrant and observe or seize the contraband.

Police officers often fill many roles, including paramedic, so-cial worker, and fire investigator. When those roles overlap the role of criminal investigator, it is not unreasonable to allow officers ?to step into the shoes of? the firefighter to observe and to seize the contraband without first obtaining a warrant. Allowing this limited entry by an officer constitutes no greater intrusion upon the defendant?s privacy interest than does a firefighter?s entry.

***State v. Wood,* No. 03-18-00839-CR, 2019 Tex. App. LEXIS 4215 (Tex.App.?Austin May 23, 2019) (designated for publication) [Littering under Tex. Health & Safety Code §?365.012 as reasonable suspicion for a traffic stop]**

Under Tex. Health & Safety Code §?365.012(a), a person com-mits an offense if the person disposes or allows or permits the disposal of litter at a place that is not an approved solid waste site, including a place on or within 300 feet of a public highway regardless of whether that litter causes a fire.

Under *Sims v. State*, 569 S.W.3d 634, 642 (Tex.Crim.App. 2019), if there is a conflict between a general provision and a specific provision, the specific provision prevails as an exception to the general provision.

Under *Harris v. State*, 359 S.W.3d 625, 629 (Tex.Crim.App. 2011), and Tex. Gov. Code §?311.011, a statute is construed with the plain meaning of its text unless the text is ambiguous or the plain meaning leads to absurd results that the legislature could not possibly have intended. In ascertaining the plain meaning of a word, we read words and phrases in context and construe them according to the rules of grammar and usage. Courts interpret statutes together and harmonized to give effect to all of the statutory provisions. Courts presume that every word has been used for a purpose, and that each word, phrase, clause, and sentence should be given effect if reasonably possible. If the plain language is clear and unambiguous, the analysis ends because the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute.
