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Voice for the Defense Volume 47, No. 2 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

***Battaglia v. State*, No. AP-77,069, 2017 Tex. Crim. App. LEXIS 908 (Tex. Crim. App. Sep. 20, 2017) (*Alcala, J. dissenting*) (designated for publication),*cert. denied,Battaglia v. Texas*, No. 17-7646 (U.S. Feb. 1, 2018)**

Editor?s note:

- On February 1, 2018, Texas executed my client, John Battaglia. He was convicted of Capital Murder for the May 2, 2001, murders of his nine- and six-year-old daughters, Faith and Liberty.
- He was sentenced to death on April 30, 2002.
- The underlying crime was horrific.
- I was appointed very late in the proceedings (in early 2016) to litigate the issue of whether Battaglia was incompetent to be executed under the standard of *Panetti v. Quarterman.*
- Three competent experts observed, "Do these comments sound like those of a competent person who has a rational understanding of why the State wants to execute him?"

- We obtained two stays of execution but were unable to get the third and final execution date stayed.
- I had two petitions for writs of certiorari pending: the one cited above and another that was filed against a ruling by the Fifth Circuit, which dealt with the right to investigative funding in a federal ha-beas proceeding.
- On February 1, 2018, shortly before 9:00 p.m. Texas time (10:00 p.m. in D.C.), the SCOTUS lifted the temporary stay and denied both petitions. Battaglia was executed soon thereafter.
- I provided all of the facts on the electronic SDR, all of which come from the record (to avoid clutter, I did not provide the citations, but am happy to provide them to anyone who requests them?just send me a direct email).
- Read the facts online and then you decide whether Battaglia was incompetent-to-be-executed.

***The standard for execution-incompetency under* Panetti**

- In *Panetti*, six experts testified.
- The experts agreed that Panetti had the cognitive functionality to communicate coherently much of the time, but he still suffers from delusions about the world around him.
- The experts differed about whether Panetti understands the State?s reason for seeking his execution and appreciates the connection between his crimes and his execution.
- All found that he suffered from schizoaffective disorder.
- When a person is schizophrenic, it does **not** diminish their cognitive ability: ?[I]nstead, you have a situation (schizophrenia thought-disorder) where the logical integration and reality connection of their thoughts are disrupted, so the stimulus comes in, and instead of being analyzed and processed in a rational, logical, linear sort of way, it gets scrambled up and it comes out in a tangential, circumstantial, symbolic . . . not really relevant kind of way. *He* may have interactions that are ?[r]easonably lucid . . . whereas a more extended conversation about more loaded material would reflect the severity of his mental illness.?
- ?[A] prisoner?s awareness of the State?s rationale for an execution is **not** the same as a rational understanding of it,? and although *Ford* requires mere awareness of the State?s reason for executing him rather than a rational understanding of it, ?[*F*]*ord* does not foreclose inquiry into the latter.?
- Capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime and to allow the community, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed. However, these goals **are called in question if the prisoner?s mental state is so distorted by a men-tal illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community.**
- A prisoner?s awareness of the State?s rationale for an execution is **not** the same as a rational understanding of it. A person sentenced to death for ?an atrocious murder may be so callous as to be unrepentant; so self-centered and devoid of compassion as to lack all sense of guilt; so adept in transferring blame to others as to be considered, at least in the colloquial sense, to be out of touch with reality.? ?[T]he beginning of doubt about competence in a case like (Panetti?s) is not a misanthropic personality or an amoral character. It is a psychotic disorder.?
- Under the Eighth and Fourteenth Amendments, an inmate is incompetent to be executed if he lacks a rational understanding of the reason for his execution due to delusions stemming from a severe mental illness that place his awareness of the connection between his crime and his punishment in a context so far removed from reality that the punishment can serve no proper purpose.

Opinion of the TCCA

- ?Battaglia knows he is to be executed by the State, he knows he was convicted of killing his daughters, and he knows his execution is imminent. There is support in the record that Battaglia is malingering. Even though he denies being involved in the mur-ders of his daughters, there is evidence in the record supporting the conclusion that he comprehends that there is a ?causal link? between the

capital offense and his imminent execution beyond merely identifying the State?s articulated rationale for the execution. Therefore, the trial court?s decision that Battaglia failed to establish by a preponderance of the evidence that he is incompetent to be executed was within the zone of reasonable disagreement and not an abuse of the trial court?s discretion.? *Battaglia, id.* at 91?93.

Editor?s Note:

- The conclusion provided by the TCCA is not the *Panetti* standard.
- The TCCA did not find that Battaglia has a rational understanding of the reason for his execution.
- Rather, the TCCA majority provided explanations of why it believes that there is ?support in the ?record? that Battaglia is malingering.?
- The trial court and the TCCA misunderstood the holding and significance of *Wood v. Thaler,*787 F. Supp.2d 458, 480?485 (W.D. Tex. 2011).

United States Court of Appeals for the Fifth Circuit

***United States v. Alvarez*, No. 17-40078, 2018 U.S. App. LEXIS 1613 (5th Cir. Jan. 23, 2018) (designated for publication)**

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 se-riously affects the fairness, integrity, or public reputation of ju-di-cial proceedings.

Under U.S.C. §?3583(d), conditions of supervised release must be ?reasonably related? to one of the four statutory factors in 18 U.S.C. §?3553(a): (1) the nature and characteristics of the offense and the history and characteristics of the defendant, (2) the deterrence of criminal conduct, (3) the protection of the pub--lic from further crimes of the defendant, and (4) the provision of needed educational or vocational training, medical care, or other correctional treatment to the defendant.

Under 18 U.S.C. §?3583(d)(2) & (d)(3), a special condition cannot involve a ?greater deprivation of liberty than is reasonably necessary for the purposes? of the last three statutory factors and must be ?consistent with any pertinent policy statements issued by the Sentencing Commission.?

Under U.S.S.G. §?5D1.3(d)(5), mental health treatment is appropriate ?if the court has reason to believe that the defendant needs psychological or psychiatric treatment.?

The sentencing court must state in open court the reasons for its imposition of the sentence, including for special conditions. If there is no factual finding, the appellate court may affirm a special condition it can infer the district court?s reasoning after an examination of the record. If the district court?s reasoning is unclear after review of the record, the special condition must be vacated as an abuse of discretion.

Editor?s Note: It is not clear how the district court reached a conclusion that Alvarez needs coercive ?mental health treatment.? A good reversal by the Fifth Circuit. Perhaps the district court saw something nobody else saw:

"My tattoo was a lot cheaper than therapy."

[4]

***United States v. Ballard*,No. 4-15-CR-00077, 2018 U.S. Dist. LEXIS 6819 (E.D. Tex. Jan. 16, 2018)**

Under *United States v. Berry*, 977 F.2d 915, 919 (5th Cir. 1992), the simultaneous possession of a firearm and ammunition are not separate offenses. Although the Government may try a defendant for being a felon in possession of ammunition and in possession of a firearm, there may not be simultaneous convictions and sentences, and such a simultaneous conviction and sentence violates the double jeopardy clause. The fact that a court may order the sentences to run concurrently does not change the *Berry* rule. *Id.*

Editor?s Note: This opinion was decided by Judge Mazzant in the E.D. Tex. and was excellently litigated by Seth Kretzer of Houston. From a 30-year sentence, Seth?s efforts resulted in a 20-year reduction (to 10 years) for his client.

Editor?s Note: I agree with Judge Mazzant that ?common sense is not evidence.? But how about ?uncommon sense??

"It's not just that you lack common sense, you have a lot of uncommon sense to boot."

[5]

***United States v. Broussard*, No. 17-30298, 2018 U.S. App. LEXIS 2827 (5th Cir. Feb. 5, 2018) (designated for publication)**

Under *DeShaney v. Winnebago Cnty.*, 489 U.S. 189, 199?200 (1989), and *United States v. McKenzie*, 768 F.2d 602, 605?606 (5th Cir. 1985), when the State takes a person into custody, the Constitution imposes a duty to assume some responsibility for his safety and general well-being. A law enforcement officer may be held liable for the substantive offense if the evidence shows awareness of a constitutional violation and no effort to prevent the violation.

Under U.S.S.G. §?1B1.3(a)(1)(A), if more than one base-offense level could apply, the court should determine the base-offense level based on all the acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or will-fully caused by the defendant.

Under U.S.S.G. §?1B1.3(a)(1)(B), if the case involved ?jointly undertaken criminal activity,? the defendant is accountable for ?all acts and omissions of others that were: (i) within the scope of the jointly undertaken criminal activity, (ii) in furtherance of that criminal activity, and (iii) reasonably foreseeable in connection with that criminal activity. The is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, not on whether the defendant is criminally liable as a principal, accomplice, or conspirator.

Under U.S.S.G. §?2H1.1, the district court must apply the greatest base-offense level from: (1) the offense level from the offense guideline applicable to any underlying offense; (2) 12, if the offense involved two or more participants; (3) 10, if the offense involved (A) the use or threat of force against a person; or (B) property damage or the threat of property damage; or (4) 6, otherwise.

***United States v. Draper*, No. 16-50960, 2018 U.S. App. LEXIS 2975 (5th Cir. Feb. 7, 2018) (designated for publication)**

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.

Under Fed. Rule Crim. Proc. 11(c)(1), an attorney for the government and the defendant?s attorney may discuss and reach a plea agreement. The court must not participate in these discussions. This is a bright-line rule that constitutes an absolute prohibition on all forms of judicial participation in or interference with the plea negotiation process. This strict prohibition serves to diminish the possibility of judicial coercion of a guilty plea, as pressure is inherent in any involvement by a judge in the plea negotiation process.

Judges clearly violate Rule 11(c)(1) where their statements could be construed as predictive of the defendant?s criminal-justice outcome; suggestive of the best or preferred course of action for the defendant; or indicative of the judge?s views as to guilt.

Under *Missouri v. Frye,* 566 U.S. 134 (2012), and *Lafler v. Cooper,* 566 U.S. 156 (2012), defendants could have viable claims for IATC if counsel fails to communicate a plea offer and the de-fendant loses the opportunity to plead to less serious charges or to receive a less serious sentence.

Frye appears to encourage the use of Rule 11 plea colloquies to confirm that formal offers have been conveyed. Trial courts may adopt some measures to help ensure against late, frivolous, or fabricated IATC claims. Formal offers can be made part of the record at any subsequent plea proceeding or before a trial on the merits, all to ensure that a defendant has been fully advised before those further proceedings commence. To the extent Frye permits judges to engage in such inquiry, it must also allow them to ask reasonable follow-up questions and probe the responses of the parties. Otherwise, a judge would not be able to probe an ambiguous or unclear answer.

***United States v. Fairley,* No. 17-60001, 2018 U.S. App. LEXIS 1451 (5th Cir. Jan. 22, 2018) (designated for publication)**

Under *Milanovich v. United States,* 365 U.S. 551, 554 (1961) and 18 U.S.C. §?641, it is a crime to: (1) embezzle, steal, purloin, or knowingly convert to the defendant?s use or the use of another (2) a thing of value of the United States (stealing from the United States); or (1) receive, conceal, or retain (2) a thing of value of the United States (3) with the intent to convert it to the defendant?s use or gain (4) knowing it to have been embezzled, stolen, purloined, or converted (knowingly receiving stolen United States property).

The verbs in paragraph one of 18 U.S.C. §?641 (*embezzle, steal, purloin,* and *convert*) describe illegal acts, while the verbs in paragraph two (*receive, conceal,* and *retain*) describe both innocent and illegal acts.

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 se-ri-ously affects the fairness, integrity, or public reputation of ju-di-cial proceedings.

The validity of an indictment is governed by practical, not technical, considerations, and its basic purpose is to inform a defendant of the charge.

An indictment is legally sufficient if (1) each count contains the essential elements of the offense charged, (2) the elements are described with particularity, and (3) the charge is specific enough to protect the defendant against a subsequent prosecution for the same offense. An indictment need not precisely track statutory language.

A jury instruction must: (1) correctly state the law, (2) clearly instruct the jurors, and (3) be factually supportable. Jury instructions are to be judged not in isolation but must be considered in the context of the entire instructions and the trial record.

Verdict forms are considered part of the jury instruction, and the USCA5 evaluates the combined

effect on the jury. Although verdict forms standing alone may confuse the jury, the confusion may be clarified when considered versus the entire jury instruction. When reviewing a jury verdict form, the court determines whether along with the instructions read to the jury it adequately stated the law.

Under *United States v. Gaudin*, 515 U.S. 506, 511 (1995), the Constitution gives a defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged

Additional jury notations that are not directly responsive to the jury charge and verdict form are surplusage and are to be ignored.

Under Fed. Rule Evid. 801(d)(2)(E), a statement is not hearsay if it is offered against an opposing party and was made by the party?s co-conspirator during and in furtherance of the conspiracy. To introduce the statement, the proponent must show by a preponderance of the evidence: (1) the existence of the conspiracy; (2) the statement was made by a coconspirator of the party; (3) the statement was made during the conspiracy; and (4) the statement was made in furtherance of the conspiracy. The proponent cannot establish admissibility based on the statement alone, and there must be independent evidence establishing the conspiracy.

The evidentiary rule of conspiracy is founded on concepts of agency law and differs from conspiracy as a crime. A conspiracy under Fed. Rule Evid. 801(d)(2)(E) may be shown by engaging in a joint plan that was noncriminal.

The ?in furtherance of? element of Fed. Rule Evid. 801(d)(2)(E) is not to be construed too strictly such that the purpose of the exception is defeated. Statements made to encourage loyalty and obedience among the conspirators is a purpose clearly in furtherance of the conspiracy.

Editor?s Note: As well-intentioned as HUD is (and its offspring Freddie Mac & Fannie Mae), the programs have had problems. It was not until 1998 (33 years after LBJ signed the Housing and Urban Development Act of 1965) that HUD opened an enforcement department to investigate HUD fund recipients who violate laws and regulations. Enforcement of the laws and regulations has been weak, and management of the programs has been shaky.

***United States v. Ganji*, No. 16-31119, 2018 U.S. App. LEXIS 2279 (5th Cir. Jan. 30, 2018) (designated for publication)**

A verdict is affirmed unless viewing the evidence and reasonable inferences in light most favorable to the verdict, no rational jury could have found the essential elements of the offense to be satisfied beyond a reasonable doubt.

A verdict may not rest on mere suspicion, speculation, or conjecture, or on an overly attenuated piling of inference on in-ference. Although the jury may make factually based inferences, a conviction cannot rest on an unwarranted inference, the determination of which is a matter of law.

Under 18 U.S.C. §?1349 (healthcare fraud), the government must prove beyond a reasonable doubt that: (1) two or more per-sons made an agreement to commit healthcare fraud; (2) that the defendant knew the unlawful purpose of the agreement; and (3) that the defendant joined in the agreement with the intent to further the unlawful purpose. Agreements need not be spoken or formal, and the Government can use evidence of the conspirators? concerted actions to prove an agreement existed. But, an agreement is a necessary element of conspiracy, and as such, the Government must prove its existence beyond a reasonable doubt.

When proving an agreement exists by using the concert-of-action theory, the Government must present evidence of the conspirators? individual actions that, taken together, evidence an agreement to

commit an unlawful objective beyond a reasonable doubt.

Under 18 U.S.C. §?1347 (healthcare fraud), the Government must show that the defendant knowingly and willfully executed a scheme or artifice: (1) to defraud any healthcare benefit program; or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises any healthcare benefit program?s money in connection with the delivery of or payment for healthcare services.

***Mance v. Sessions*, No. 15-10311, 2018 U.S. App. LEXIS 1279 (5th Cir. Jan. 19, 2018) (designated for publication)**

Under 18 U.S.C. §?922(a)(3) and (b)(3), and 27 C.F.R. §?478.99(a), an FFL-holder may tender or sell a firearm only to residents of the same state. The law does not apply to the sale or delivery by an FFL-holder of a rifle or shotgun to an out-of-state resident if the FFL-holder meets in person with the out-of-state resident to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both states. Nor does it apply to the sale of a curio, antique, or relic.

Under *District of Columbia v. Heller*, the Second Amendment guarantees the individual right to possess and carry weapons in case of confrontation. Self-defense was the central component of the right itself. The American people have considered the handgun to be the quintessential self-defense weapon. In contemplating why a citizen might prefer a handgun over long guns for home defense, whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

Like most rights, the right secured by the Second Amendment is not unlimited: Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

In creating the in-state FFL-holder requirement, Congress sough to address issues concerning the sale of concealable weapons by FFL-holders to nonresidents of the State in which the FFL-holder?s places of business are located, activities that tended to make ineffective the laws in the several States and local jurisdictions regarding such firearms.

The in-state FFL-holder sales requirement is narrowly tailored because: (1) there are more than 123,000 FFL-holders nationwide, and it is unrealistic to expect that each of them can become and remain knowledgeable about the handgun laws of all 50 states and local laws within the states; (2) FFL-holders are not engaged in the practice of law, and the court does not expect even an attorney in one state to master of the laws of 49 other states; (3) the laws of the states differ as to who may lawfully possess a firearm, since all but one state (Vermont) prohibits possession of a firearm by a felon, even then, definitions of ?felony? differ; (4) restrictions based on mental illness vary; (5) some states prohibit the purchase of a firearm by drug abusers; (6) some states restrict purchases by those who have abused alcohol; (7) it is reasonable for the government to expect that an FFL-holder in a state master and remain current on the firearm laws of that state.

[6] 

Editor?s Note: 18 U.S.C. §?921(a)(16) defines a curio, antique, or relic antique firearm as:

(A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; or

(B) any replica of any firearm described in subparagraph (A) if such replica

(i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or

(ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; or

(C) any muzzle-loading rifle, muzzle-loading shotgun, or muzzle-loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition. For purposes of this subparagraph, the term ?antique firearm? shall not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle-loading weapon, or any muzzle-loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

Texas Law

- To be eligible to possess a firearm in Texas, if a person is subject to or completes deferred adjudication for a misdemeanor or a felony, under Texas law, he may possess a firearm.
- Tex. Penal Code §?46.04 prohibits those who are finally convicted of a felony from possessing a firearm before the fifth anniversary of his release from ?confinement? (release from community supervision, parole, or prison).
- Those placed on deferred adjudication are not subject to the firearms-possession restrictions of Tex.

Penal Code §?46.04 because deferred adjudication is ?not deemed a conviction for general purposes.? *Yazdchi v. State*, 428 S.W.3d 831, 838 (Tex. Crim. App. 2014).

- Tex. Penal Code §?46.04 requires a final felony conviction as an element of the offense. *Cuellar v. State*, 70 S.W.3d 815, 820 (Tex. Crim. App. Feb. 13, 2002); *see also Ramon v. State*, No. 13-15-00146-CR, 2016 Tex. App. LEXIS 6343 (Tex. App. Corpus Christi June 16, 2016) (not designated for publication) (because the defendant was not finally convicted of a felony but was merely on deferred adjudication, he could not have been guilty of felon-in-possession of a firearm under Tex. Penal Code §?46.04, so the officer was mistaken in arresting the defendant based on suspicion of a violation of Tex. Penal Code §?46.04).

Federal Law

- If a person is convicted of a felony F-3 and above, or a SJF where the underlying sentence is more than one year, he is forever prohibited by federal law from possessing or purchasing even a single bullet. 18 USC 922(g)(1).
- If there is a finding of family violence for any offense, the person will forever be prohibited by federal law from possessing or purchasing even a single bullet. 18 USC 922(g)(9).
- If there is no finding of family violence, while he is on deferred adjudication for a felony, he still may not under 18 U.S.C. 922(d)(1) possess a firearm because he is considered ?under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year.?
- Once the person completes deferred adjudication, he is no longer ?under indictment for? a crime punishable by imprisonment for a term exceeding one year. To determine what is a ?conviction? is determined by the law of the jurisdiction in which the proceedings were held, look at 18 U.S.C. 921(a)(20) and 27 CFR 478.11.
- Under 18 U.S.C. 921(a)(20), a ?crime punishable by imprisonment for a term exceeding one year? does not include (B) any State offense classified?as a misdemeanor and punishable by a term of imprisonment of two years or less?(and for felonies)?shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Also, a conviction that was expunged or pardoned is not considered a conviction.
- 27 CFR 478.11(b) provides additional guidance:

(b) A person shall not be considered to have been convicted of such an offense for purposes of this part unless:

(1) The person is considered to have been convicted by the jurisdiction in which the proceedings were held; and

(2) The person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(3) In the case of a prosecution for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either (i) The case was tried by a jury, or (ii) The person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

- *United States v. Gispert*, 864 F.Supp 1193 (S.D. Fla. 1994): Before being indicted and convicted for felon-in-possession of a firearm under 18 U.S.C. §?921(g)(1): (1) the defendant had pleaded guilty to a Florida felony that did not involve family violence, (2) the state court ?withheld adjudication and placed him on probation? (which is the same as our deferred adjudication), (3) he successfully completed the deferred probation, and (4) the Florida court terminated his probation and criminal pro-ceedings without ever adjudicating him guilty. Thus, the district court found that this was not a ?conviction? under 18 U.S.C. §?921(a)(20) and so as a matter of law, he could not have violated 18 U.S.C. §?921(g)(1).

- *United States v. Daugherty,* 264 F.3d 513 (5th Cir. 2001): The defendant was convicted in Texas of delivery of marijuana and injury to a child. He was sent to TDCJ. The trial court granted him shock probation and put him on probation for 10 years. He successfully completed shock probation and was discharged. The Fifth Circuit affirmed his conviction for felon-in-possession of a firearm under 18 U.S.C. §?922(g) because although he was discharged from probation, he did not qualify for the ?unless? clause of 18 U.S.C. §?921(a)(20). The court noted that this was a final conviction (as opposed to a deferred adjudication), and under *Beecham v. United States,* 511 U.S. 368, 371 (1994), what constitutes a conviction under 18 U.S.C. §?922(g) must be determined per the law of the jurisdiction in which the state proceedings were held. In Texas, a final felony conviction is considered a ?conviction? for a felony under 18 U.S.C. §?921(a)(20) but deferred adjudication is not.
- Thus, upon successful completion of deferred adjudication in Texas, there is no ?conviction,? so the defendant will not be federally prohibited from possessing a firearm once he is discharged from deferred adjudication community supervision.

***United States v. Murra*, No. 17-10117, 2018 U.S. App. LEXIS 906 (5th Cir. Jan. 15, 2018) (designated for publication)**

Review of a trial court?s decision to admit expert testimony is for abuse of discretion. A trial court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly er-roneous assessment of the evidence. If the trial court abuses its discretion, reversal will not occur unless it affected the defendant?s substantial rights, which is shown if the ruling affected the outcome of the proceedings. Error does not affect substantial rights if after reviewing the entire record, the court is sure that the error did not influence the jury or had a very slight effect on its verdict.

Under Fed. Rule Evid. 702, witnesses who are qualified as experts by knowledge, skill, experience, training, or education may provide opinions if: (1) the expert?s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the expert has reliably applied the principles and methods to the facts of the case.

The advisory committee notes to Rule 702 also contemplates where it ?might also be important . . . for an expert to educate the factfinder about general principles, without attempting to apply these principles to specific facts of the case.? If so, Rule 702 requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony ?fit? the facts of the case.

Factual findings underlying a ruling of psychotherapist-patient privilege is reviewed for clear error, and application of the legal principles are reviewed de novo. Factual findings are clearly erroneous if, on the entire evidence, the court is left with a ?definite and firm conviction? that a mistake was committed.

Under *Jaffee v. Redmond,* 518 U.S. 1 (1996), a privilege protecting confidential communications between a psychotherapist and patient ?promotes sufficiently important interests to outweigh the need for probative evidence.? The privilege covers confidential communications made to licensed psychiatrists and psychologists and confidential communications made to licensed social workers during psychotherapy.

A person does not forfeit the psychotherapist privilege when she divulges information to her psychotherapist that amounts to allegations that a crime has been committed. The mere assertion that facts were disclosed to third parties (for prosecution) and at trial does not by itself establish that victims or their psychotherapists disclosed the substance of confidential communications.

The application of the attorney-client privilege is a question of fact to be determined considering the purpose of the privilege and guided by judicial precedents. Factual findings underlying a ruling of attorney-client privilege is reviewed for clear error, and application of the legal principles are reviewed de

novo. Factual findings are clearly erroneous if, on the entire evidence, the court is left with a ?definite and firm conviction? that a mistake was committed.

For a communication to be protected under the attorney-client privilege, the proponent must prove: (1) that he made a con-fidential communication; (2) to a lawyer or his subordinate; (3) for the primary purpose of securing either a legal opinion or legal services, or assistance in some legal proceeding.

Public disclosure of facts does not destroy the attorney-client privilege with respect to confidential communications about those facts.

Under *Griffin v. California,* 380 U.S. 609 (1965), the Fifth Amendment forbids comment by the prosecution, either direct or indirect, on the defendant?s silence. Review of an assertion a Fifth Amendment violation on this ground involves a determination of whether the: (1) prosecutor made an impermissible remark, which is (i) whether the prosecutor?s manifest intent was to comment on the defendant?s silence or (ii) whether the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant?s silence. If there is an equally plausible explanation for the remark, the prosecutor?s intent is not manifest; and (2) remark casts serious doubt on the correctness of the jury?s verdict, which is (i) the magnitude of the prejudicial effect of the remarks (tested by looking at the remarks in the context of the trial and elucidating their intended effect), (ii) the efficacy of any cautionary instruction by the judge (an immediate curative instruction cures alleged harm), and (iii) the strength of the evidence supporting the conviction.

Review of the interpretation of the U.S.S.G. is de novo, but review of a finding of unusual vulnerability is for clear error and determined on whether the conclusion was plausible considering the entire record.

Under U.S.S.G. §?3A1.1(b)(1) (vulnerable-victim enhancement), if the defendant knew or should have known that a victim of the offense was a vulnerable victim, the level is increased by two levels. A ?vulnerable victim? is a person who is a victim of the offense of conviction and who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct. The enhancement should not be applied if the factor that makes the person a vulnerable victim is incorporated in the offense-guideline.

***United States v. Shepherd*, No. 15-50991, 2018 U.S. App. LEXIS 1995 (5th Cir. Jan. 26, 2018) (designated for publication)**

Under *United States v. Fields,* 761 F.3d 443, 479 (5th Cir. 2014), free-standing actual innocence claims may not be brought in a federal habeas proceeding.

Under the Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. §?20913(a), and 18 U.S.C. §?2250(a), a sex offender must register and keep the registration current in each jurisdiction where he resides. A defendant is subject to SORNA if he: (1) has a state law sex offense requiring registration as a sex offender; (2) travels in interstate commerce; and (3) knowingly fails to register or update his registration as required by state law.

Under Tex. Crim. Proc. Code §?62.003(a), an out-of-state sex offender is required to register in Texas if his offense falls within the requirements of Tex. Code Crim. Proc. Ch. 62. DPS determines whether an out-of-state offense is substantially similar to a reportable Texas offense.

To determine whether a guilty plea was valid, a court determines whether the plea represents a voluntary and intelligent choice among the alternative choices to the defendant. The conditions for a valid plea require that the defendant have notice of the charges against him, understand the constitutional protections waived, and have access to the advice of competent counsel.

Under *Strickland v. Washington,* 466 U.S. 668 (1984), and *Hill v. Lockhart,* 472 U.S. 52 (1985), the voluntariness of a plea depends on whether counsel?s advice was within the range of competence demanded of attorneys in criminal cases. The defendant must show that: (1) counsel?s performance was deficient, falling below an objective standard of reasonableness considering all the circumstances; and (2) the deficient performance prejudiced the defense, that there is a reasonable probability that but for counsel?s errors, he would not have pleaded guilty and would have insisted on going to trial.

If a defendant claims that counsel erred by failing to investigate or discover certain exculpatory evidence, the prejudice determination depends on whether the discovery of such evidence would have influenced counsel to change his advice regarding the guilty plea, and may be based on: (1) defendant?s evidence to support his assertion that he would have gone to trial had he known the circumstances; (2) likelihood of success at trial; (3) risks he would have faced at trial; (4) his representations about his desire to retract his plea; and (5) the district court?s admonishments.

***United States v. Suarez,* No. 16-41267, 2018 U.S. App. LEXIS 863 (5th Cir. Jan. 12, 2018) (designated for publication)**

Review of the sufficiency of evidence is de novo when a de-fen-dant moves for acquittal in the district court.

On a sufficiency claim that is preserved, the verdict is affirmed unless viewing the evidence and reasonable inferences in light most favorable to the verdict, no rational jury could have found the essential elements of the offense to be satisfied beyond a reasonable doubt.

A verdict may not rest on mere suspicion, speculation, or con-jecture, or on an overly attenuated piling of inference on in-ference. Although the jury may make factually based inferences, a conviction cannot rest on an unwarranted inference, the determination of which is a matter of law.

Sufficiency claims not preserved are reviewed for plain error, which requires showing: (1) an error (2) that is clear or ob-vi-ous, (3) that affects substantial rights, and (4) that seriously af-fects the fairness, integrity, or public reputation of judicial pro-ceedings. Plain error on sufficiency of the evidence claims is clear or obvious only if the record is devoid of evidence pointing to guilt, or the evidence on a key element of the offense is so tenuous that a conviction would be shocking.

To prove a drug conspiracy, the Government must prove: (1) an agreement between two or more persons to violate narcotics laws; (2) knowledge of the agreement; and (3) voluntarily participation in the agreement.

A conviction, especially one accompanied by an accomplice instruction, may be sustained on the uncorroborated testimony of an accomplice so long as the testimony is not incredible or otherwise insubstantial on its face.

To support a conviction for possession of a firearm in furtherance of a drug trafficking crime under 18 U.S.C. §?924(c)(1)(A), the Government must prove that the defendant had either actual or constructive possession of a firearm and that the possession furthered, advanced, or helped forward the drug trafficking offense. These nonexclusive factors are relevant to determining whether possession is ?in furtherance? of a drug trafficking crime: (1) type of drug activity conducted; (2) accessibility of the firearm; (3) type of firearm; (4) whether the firearm is stolen; (5) legality of the possession; (6) whether the gun is loaded; (7) proximity of the weapon to the drugs; and (8) time and circumstances under which the firearm is found. The mere presence of a firearm is insufficient.

When evidence of more than one firearm is presented to the jury to support a single count of possession of a firearm in furtherance of a drug trafficking crime under 18 U.S.C. §?924(c)(1)(A), the jury is not

required to agree unanimously on which weapon the defendant possessed.

Under 26 U.S.C. §?5861(d), possession of unregistered firearms, possession may be actual or constructive. Constructive possession is established when the evidence supports a plausible inference that the defendant had knowledge of and access to the weapon or contraband.

Under 18 U.S.C. §?924(c)(1)(B)(i), if a person possessed a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon in committing a crime defined in 18 U.S.C. §?924(c), the person shall be sentenced to a term of imprisonment of not less than 10 years consecutive to other sentences.

Under *Alleyne v. United States*, 133 S.Ct. 2151 (2013), a mandatory-minimum sentence under 18 U.S.C. §?924(c) is an element of the offense that must be found by a jury beyond a reasonable doubt. Otherwise, the sentence violates the Sixth Amendment. Any fact issue that increases the mandatory minimum sentence must be submitted to a jury and found beyond a reasonable doubt.

***Uranga v. Davis*, No. 15-10290, 2018 U.S. App. LEXIS 881 (5th Cir. Jan. 12, 2018) (designated for publication)**

Under *Gonzalez v. Crosby*, 545 U.S. 524 (2005), a postjudgment motion like a motion under Fed. Rule Civ. Proc. 59(e) that is in fact a second or successive §?2254 application is subject to the restrictions of the AEDPA and does not toll the time for filing a notice of appeal. A postjudgment motion should be treated as a successive §?2254 application if the motion adds a new ground for relief or attacks the district court?s previous resolution of a claim on the merits. However, a postjudgment motion should not be treated as a successive §?2254 application if the motion asserts that a previous ruling that precluded a merits determination was in error (denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar) or when the motion ?attacks some defect in the integrity of the federal habeas proceedings.?

Under 28 U.S.C. §?2254(d)(1), habeas relief may not be granted on a claim that was adjudicated on the merits by a state court unless the adjudication of the claim resulted in a decision that was contrary to or involved an unreasonable application of, clearly established Federal law, as determined by the SCOTUS. When a state court fails to adjudicate a claim on the merits, this deferential standard of review is inapplicable, and the federal courts must instead conduct a plenary review.

Under *Brooks v. Dretke*, 444 F.3d 328 (5th Cir. 2006), per *United States v. Remmer*, 347 U.S. 227 (1954), a person is entitled to an unbiased jury under the Sixth Amendment, and bias of a juror may be actual or implied. The determination of implied bias is an objective legal judgment made as a matter of law and is not controlled by sincere and credible assurances by the juror that he can be fair. However, it is only in ?extreme situations? implied juror bias may be found, which include where the juror is an employee of the prosecuting agency, the juror is a close relative of one of the participants in the trial or the criminal transaction, or the juror was a witness or somehow involved in the criminal transaction.

Editor?s Note: Always beware of implied juror bias.

Texas Court of Criminal Appeals

***State v. Cortez*, No. PD-0228-17, 2018 Tex. Crim. App. LEXIS 49 (Tex. Crim. App. Jan. 24, 2018) (designated for publication)**

Under Tex. Transp. Code §?545.058(a), an operator may drive on an improved shoulder to the right of the main traveled portion of a roadway if that operation is necessary and may be done safely, but only: (1) to stop, stand, or park; (2) to accelerate before entering the main traveled lane of traffic; (3) to decelerate before making a right turn; (4) to pass another vehicle that is slowing or stopped on the main

traveled portion of the highway, disabled, or preparing to make a left turn; (5) to allow another vehicle traveling faster to pass; (6) as permitted or required by an official traffic-control device; or (7) to avoid a collision. ?Improved shoulder? means a paved shoulder, and ?shoulder? means the portion of a highway that is (A) adjacent to the roadway; (B) designed or ordinarily used for parking; (C) distinguished from the roadway by different design, construction, or marking; and (D) not intended for normal vehicular travel. It is a violation to drive on an improved shoulder if it appears that driving on the improved shoulder was not necessary to achieving one of the seven approved purposes or it appears that driving on the improved shoulder could not be done safely.

*Editor?s Note:*how would Tex. Transp. Code §?545.058(a) apply on this road?

[7] 

***Lerma v. State*, No. PD-1229-16, 2018 Tex. Crim. App. LEXIS 48 (Tex. Crim. App. Jan. 24, 2018) (designated for publication)**

Review of a trial court?s ruling on an MTS is the bifurcated standard of review: The trial judge is the sole trier of fact and judge of credibility of witnesses and the weight to be given to their testimony. Almost complete deference is afforded to the trial court in determining historical facts. Review is de novo re-garding whether the facts are sufficient to give rise to reasonable suspicion.

When the trial court does not make explicit FFCL, the appellate court views the evidence in the light most favorable to the trial court?s ruling and assumes the trial court made implicit findings of fact supported by the record.

The ruling of a trial court on an MTS is sustained if it is correct under any applicable theory of law.

A Fourth Amendment analysis regarding an officer?s stop and frisk is considered as whether the: (1) officer?s action was justified at its inception; and (2) search and seizure were reasonably related in scope to the circumstances that justified the stop.

Officers are justified in stopping a vehicle when the officers have reasonable suspicion to believe that a traffic violation has occurred. A traffic stop made for investigating a traffic violation must be reasonably related to that purpose and may not be prolonged beyond the time to complete the tasks associated with the traffic stop. During a traffic stop the officer may request certain information from a driver?such as the driver?s license, vehicle registration, and proof of insurance?and run a computer check on that information. An officer is also permitted to ask drivers and passengers about matters unrelated to the purpose of the stop, so long as the questioning does not measurably extend the duration of the stop.

During a traffic stop, once the officer knows that the driver has a current valid license, no outstanding warrants, and the car is not stolen, the traffic stop investigation is fully resolved and must be terminated. But if an officer develops reasonable sus-picion that the driver or an occupant of the vehicle is involved in criminal activity, the officer may continue questioning the individual regardless of whether the official tasks of a traffic stop have come to an end.

During a detention, an officer may in certain circumstances conduct a pat-down search of an individual to determine whether the person is carrying a weapon if the officer reasonably believes that the suspect is armed and dangerous, such that the officer can point to specific and articulable facts which reasonably lead him to conclude that the suspect might possess a weapon. Reasonable suspicion in this context is based on an objective assessment of the officer?s actions considering the facts and circumstances sur-rounding the detention. The officer?s subjective fear is not controlling. The question is whether a reasonably prudent person would justifiably believe that his safety or the safety of others was in danger.

Under *Rodriguez v. United States,* 135 S.Ct. 1609 (2015), a police stop exceeding the time needed to handle the matter for which the stop was made violates the Fourth Amendment. The officer?s investigation includes the ordinary inquiries incident to the traffic stop such as checking the driver?s license, determining whether there are outstanding warrants against the driver, and inspecting the vehicle?s registration and proof of insurance. Traffic stops are often dangerous to officers, so they may need to take some negligibly burdensome precautions to complete the investigation safely. The legitimate and weighty interest in officer safety may outweigh a ?di minimis? intrusion on the occupant?s Fourth Amendment rights, such as requiring a driver and passenger to exit the vehicle during the stop.

***State v. Velasquez,* No. PD-0228-16, 2018 Tex. Crim. App. LEXIS 52 (Tex. Crim. App. Feb. 7, 2018) (designated for publication)**

Under Tex. Code Crim. Proc. Art. 28.01, the court may set a pretrial hearing and direct the defendant and his attorney and the State?s attorney to appear before the court at the time and place stated in the court?s order for a conference and hearing. At the pretrial hearing, any preliminary matters not raised or filed seven days before the hearing will not be allowed to be raised or filed except by permission of the court for good cause shown, pro-vided that the defendant shall have sufficient notice of such hearing to allow him not less than ten days in which to raise or file such preliminary matters. Thus, the notice requirement applies to the defendant and not the state.

Tex. Code Crim. Proc. Art. 28.01 requires formal notice of a pretrial hearing only when the court designates a separate, pretrial setting for the hearing, not when the court elects for the hearing to take place on the trial setting itself.

Facts:

- Velasquez filed an MTS and served the prosecutor.
- On the day of trial, prior to empaneling the jury, the trial court decided to hear the MTS.
- The prosecutor argued that because ?motions to suppress in our court? ordinarily ?run with trial,? she was not prepared for any hearing pertaining to Velasquez?s motion.
- The trial judge decided that although it was his practice to run suppression rulings with trial, sometimes he may consider them if ?it?s something we can resolve without going to trial.?

The trial court did not err by hearing the MTS before trial, and the state was not entitled to separate notice of the hearing

- Tex. Code Crim. Proc. Art. 28.01 comes into play **only** when the trial court exercises its discretion to ?set? a pretrial hearing.

- Under Tex. Code Crim. Proc. Art. 28.01, the court may set a pre-trial hearing and direct the defendant and his attorney and the State?s attorney to appear before the court at the time and place stated in the court?s order for a conference and hearing. At the pretrial hearing, any preliminary matters not raised or filed seven days before the hearing will not be allowed to be raised or filed except by permission of the court for good cause shown, provided that the **defendant** shall have sufficient notice of such hearing to allow him not less than ten days in which to raise or file such preliminary matters. Thus, the notice requirement applies to the defendant and not the state.
- The mandatory notice provision of ten days is a condition that a defendant will **not** be held to the seven-day filing limitation un-less he has been accorded at least ten days? notice of the pre-trial hearing.
- Tex. Code Crim. Proc. Art. 28.01 requires formal notice of a pretrial hearing only when the court designates a separate, pre-trial setting for the hearing, **not** when the court elects for the hearing to take place on the trial setting itself.

Texas Courts of Appeals

***Amberson v. State,* No. 13-16-00306-CR, (Tex. App. Corpus Christi Jan. 18, 2018) (designated for publication)**

Under *Montgomery v. State,* 810 S.W.2d 372, 391 (Tex. Crim. App. 1990), *Weatherred v. State,* 15 S.W.3d 540, 542 (Tex. Crim. App. 2000), and *Prystash v. State,* 3 S.W.3d 522, 527 (Tex. Crim. App. 1999), an appellate court reviewing a trial court?s ruling on the admissibility of evidence must utilize an abuse-of-discretion standard of review and must uphold the trial court?s ruling if it was within the zone of reasonable disagreement. The appellate court must review the trial court?s ruling considering what was before the trial court at the time the ruling was made.

Under *Lagrone v. State,* 942 S.W.2d 602, 616 (Tex. Crim. App. 1997), the abuse-of-discretion standard of review applies to the admissibility of expert testimony.

Under *Kelly v. State,* 824 S.W.2d 568, 573 (Tex. Crim. App. 1992), one of the factors a trial court could consider in determining scientific reliability is the qualifications of the testifying expert.

Under Tex. Rule Evid. 701 and *Osbourn v. State,* 92 S.W.3d 531, 535?36 (Tex. Crim. App. 2002), if a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness? perception; and (b) helpful to clearly understanding the witness? testimony or to determining a fact in issue. Perceptions refer to a witness? interpretation of information acquired through his senses or experiences at the time of the event (i.e., things the witness saw, heard, smelled, touched, felt, or tasted). It is necessary that the witness personally observed or experienced the events about which he is testifying. Thus, the witness? testimony can include opinions, beliefs, or inferences so as they are drawn from his own experiences or observations. This incorporates the personal knowledge requirement of Tex. Rule Evid. 602 stating that a witness may not testify to a matter unless he has personal knowledge of the matter. There is a provision in Rule 602 for opinion testimony by expert witnesses that allows a person testifying as an expert un-der Tex. Rule Evid. 703 to base his opinion on facts and data that are of a type reasonably relied upon by experts in the field. Thus, expert testimony serves the purpose of allowing certain types of relevant, helpful testimony by a witness who does not possess personal knowledge of the events about which he is testifying. A lay witness? temporal proximity to the occurrence in question may be different from an expert?s relative removal from the occurrence in question.

Under Tex. Rule Evid. 702, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert?s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Under Tex. Rule App. Proc. 44.2(b), the violation of an evidentiary rule that results in the erroneous admission of evidence is nonconstitutional error. Under *Barshaw v. State*, 342 S.W.3d 91, 93 (Tex. Crim. App. 2011), an appellate court must disregard nonconstitutional error unless it affected substantial rights, which are affected when the error has a substantial and in-jurious effect or influence on the jury?s verdict. If the error had no or only a slight influence on the verdict, the error is harmless. A conviction will not be overturned for nonconstitutional error if after examining the entire record the court determines that the error did not influence the jury or influenced the jury only slightly

***Bates v. State*, No. 07-16-00386-CR, 2018 Tex. App. LEXIS 591 (Tex. App. Amarillo Jan. 18, 2018) (designated for publication)**

Under *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh.), and *Ngo v. State*, 175 S.W.3d 738, 745 (Tex. Crim. App. 2005), if the defendant preserved jury-charge error, the appellate court will reverse if the defendant suffered ?some harm.? Neither the State nor the defendant bears the burden of proving harm; the court of appeals must review the entire record to determine if the defendant suffered harm. To determine whether a defendant suffered ?some harm,? a reviewing court considers: (1) the entire jury charge; (2) the arguments of counsel; (3) the entirety of the evidence; and (4) other relevant fac-tors present in the record, including voir dire and opening state-ments. ?Some harm? requires a finding that the defendant ?suffered some actual, rather than merely theoretical, harm from the error.?

Under *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh.), if the defendant did not preserve jury-charge error, review is for egregious harm, which requires the appellate court to consider: (1) the entire jury charge, (2) the state of the evidence, (3) closing arguments of the parties, and (4) any other relevant information in the record. Jury-charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory.

Under *Rushing v. State*, 546 S.W.2d 610, 611 (Tex. Crim. App. 1977), Tex. Code Crim. Proc. Art. 13.04, and Tex. Code Crim. Proc. Art. 21.06, an offense may be alleged to have occurred in whichever county it is being prosecuted in so long as the offense occurred within 400 yards of the county, and the in-dict-ment does not need to specifically aver that the offense occurred within 400 yards of the county. Further, when the offense may be prosecuted in either of two or more counties, the indictment may allege the offense to have been committed in the county where it is prosecuted.

Under Tex. Rule App. Proc. 33.1, to preserve a complaint for appellate review, an appellant must have raised the issue at the trial court level stating the specific grounds for objection and received an adverse ruling.

A defendant?s entitlement to a pleading of the State?s intent to enhance the defendant?s punishment by proof of prior felony convictions is a right that must be specifically invoked or else it is forfeited.

Under *Villescas v. State*, 189 S.W.3d 290, 294 (Tex. Crim. App. 2006), when a defendant offers no defense to the enhancement allegations and does not request a continuance to prepare a defense, notice given at the beginning of the punishment phase satisfies due process.

Editor?s Note: Under *Young v. State*, 137 S.W.3d 65, 70 (Tex. Crim. App. 2004), the proper sequence for objections is:

1. Make a timely, specific objection. If the objection is overruled, error preserved.

   If objection is sustained, then

2. Make a request for an instruction to disregard, then

3. Move for a mistrial (and pursue your motion until you obtain a ruling from the court)

***State v. Bernard*, No. 14-15-00822-CR, 2018 Tex. App. LEXIS 614 (Tex. App. Houston [14th Dist.] Jan. 23, 2018) (designated for publication)**

Review of a trial court?s ruling on a MTS is the bifurcated standard of review: The trial judge is the sole trier of fact and judge of credibility of witnesses and the weight to be given to their testimony. Almost complete deference is afforded to the trial court in determining historical facts. Review is de novo re-garding whether the facts are sufficient to give rise to reasonable suspicion.

Under *State v. Iduarte,* 268 S.W.3d 544, 548 (Tex. Crim. App. 2008), when the trial judge makes express FFCL, considering the evidence in the light most favorable to the trial court?s ruling, the appellate court upholds the findings if it is supported by the record and correct under any theory of law applicable to the case.

Under *Berkemer v. McCarty,* 468 U.S. 420, 439 (1984), and *Derichsweiler v. State,* 348 S.W.3d 906, 914 (Tex. Crim. App. 2011), a warrantless automobile stop is a Fourth Amendment temporary detention and must be justified by reasonable suspicion. The reasonableness of a temporary detention is determined from the totality of the circumstances. Reasonable suspicion is present if the officer has ?specific, articulable facts that, combined with rational inferences from those facts, would lead the officer reasonably to conclude that the person is, has been, or soon will be engaged in criminal activity.? An officer?s stated purpose for a stop can neither validate an illegal stop nor invalidate a legal stop because the stop?s legality rests on the totality of the circumstances viewed objectively.

***State v. Doyal*, No. 09-17-00123-CR, 2018 Tex. App. LEXIS 1049 (Tex. App. Beaumont, Feb. 7, 2018) (designated for publication)**

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 govern-ment?s power to regulate speech based on its substantive con-tent. 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.

Under Tex. Gov. Code §?551.143(a), the Texas Open Meetings Act 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 quo-rum 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.

?Meeting? 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.

Tex. Gov. Code §?551.143 describes the offense with sufficient specificity that ordinary people can understand what conduct is prohibited. Is provides reasonable notice of the prohibited conduct. It is reasonably related to the State?s legitimate interest in assuring transparency in public proceedings. The alleged overbreadth is not real and substantial when judged in relation to its plainly legitimate sweep.

In re D.L., No. 14-17-00058-CV, 2018 Tex. App. LEXIS 546 (Tex. App. Houston [14th Dist.] Jan. 18, 2018) (designated for publication)

In a juvenile proceeding, a reviewing court reviews the sufficiency of the evidence to support a finding that a juvenile engaged in delinquent conduct using the standard applicable to criminal cases.

When reviewing the legal sufficiency of the evidence, under *Jackson v. Virginia,* 443 U.S. 307, 309, 319 (1979), the court views all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The trier of fact is the sole judge of the weight and credibility of the evidence and may draw reasonable inferences from basic facts to ultimate facts. Each fact need not point directly and independently to the guilt of the appellant, if the cumulative force of all the incriminating circumstances is sufficient to support the conviction. Direct evidence and circumstantial evidence are equally probative.

Under Tex. Penal Code §?30.05(a), a person commits criminal trespass if he enters or remains on or in another?s property, including a vehicle, without effective consent, and if the person had notice that entry was forbidden. Because the statute does not specify a culpable mental state, the State must prove that

the de-fen-dant acted intentionally, knowingly, or recklessly.

Under *Howard v. State,* 333 S.W.3d 137, 139 (Tex. Crim. App. 2011), where the jury charge asks whether a defendant acted using more than one mental state (?intentionally or knowingly? here) a reviewing court considers the evidence applying the lesser of the two alleged mental states.

Under Tex. Penal Code §?6.03(b), a person acts knowingly, or with knowledge, when he is aware of the nature of his conduct or that the circumstances exist.

There is no support for the notion that ?acting startled? at the appearance of a police officer or riding in a vehicle in public after curfew are circumstances from which a jury may reasonably infer a consciousness of guilt for the specific element of the charged offense.

Under *King v. State,* 638 S.W.2d 903, 904 (Tex. Crim. App. 1982), although presence at or near a crime scene and flight from a crime scene are circumstances from which the jury may draw an inference of guilt, neither are by themselves sufficient to sustain a guilty verdict.

***Drain v. State,* No. 07-17-00276-CR, 2018 Tex. App. LEXIS 809 (Tex. App. Amarillo Jan. 30, 2018) (designated for publication)**

Under Tex. Penal Code §?3.03(a) and *LaPorte v. State,* 840 S.W.2d 412, 415 (Tex. Crim. App. 1992) (en banc), should a pros-e-cution for multiple crimes arising out of a single criminal trans-action result in multiple convictions, a sentence for each con-viction must be pronounced and run concurrently. This lim-its the trial court?s discretion under Tex. Code Crim. Proc. Art. 42.08(a), which provides that if the defendant has been convicted in two or more cases, judgment and sentence shall be pronounced in each case, and in the discretion of the trial court, the judgment in the second and subsequent convictions shall begin when the judgment and the sentence imposed or sus-pended in the preceding conviction has ceased to operate, or the sentence imposed or suspended shall run concurrently with the other cases.

Under Tex. Code Crim. Proc. Art. 42.02, ?sentence? means that part of the judgment, or order revoking a suspension of a sentence, that orders the punishment to be carried into execution. When combined with Tex. Penal Code §?3.03(a), the legislature?s intent was to have the execution of multiple sentences occur in unison when §?3.03(a) applies.

Under Tex. Code Crim. Proc. Art. 42.02 and Tex. Penal Code §?3.03(a), when a person is sentenced for case 1 and case 2 that were prosecuted in the same trial but arose from the same criminal transaction, and case 1 is probated while case 2 is not probated, both sentences begin running at the same time, so even if the probated sentence (case 1) is later revoked, the prison sentence for case 1 does not ?add-on? to the time already served for the sentence for case 2.
