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Voice for the Defense Volume 47, No. 10 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

Editor?s Note: As of this submission, no significant decisions have been handed down by the SCOTUS during this term. As it?s Thanksgiving, we should be thankful (especially for conversations with our appreciative clients):

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United States Court of Appeals for the Fifth Circuit

***United States v. Bowens*, No. 17-10822, 2018 U.S. App. LEXIS 30015 (5th Cir. Oct. 24, 2018) (designated for publication) [Aiding-and-abetting per 18 U.S.C. §?2 and Hobbs Act robbery is a crime-of-violence predicate]**

Under *Jackson v. Virginia,* 443 U.S. 307, 319 (1979), when reviewing the sufficiency of the evidence, a court views all evidence, whether circumstantial or direct, in the light most favorable to the government, with all reasonable inferences and credibility choices to be made in support of the jury?s verdict. The jury retains the sole authority to weigh any conflicting evidence and to evaluate the credibility of witnesses. Evidence is sufficient to support a conviction if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The inquiry is limited to whether the jury?s verdict was

reasonable, not whether the reviewing court believes it to be correct. A preserved sufficiency claim is reviewed de novo but with substantial deference to the jury verdict.

Under 18 U.S.C. §?1951(a) (Hobbs Act robbery), it is a crime to obstruct, delay, or affect commerce or the movement of any article or commodity in commerce by robbery.

Under 18 U.S.C. §?2, any individual who aids or abets an offense against the United States is liable as a principal. Under *Standefer v. United States*, 447 U.S. 10, 20 (1980), per 18 U.S.C. §?2, all participants in conduct violating a criminal statute are principals and are punishable for their criminal conduct. The fate of other participants is irrelevant. Although one cannot aid or abet himself, the government need not identify a specific person or individuals as the principal.

The elements of a Hobbs Act robbery are: (1) the offense was committed by some person while committing interference with commerce by robbery; (2) the defendant associated with the criminal venture; (3) the defendant participated in the criminal venture; and (4) the defendant sought by action to make that venture successful.

The residual-clause per 18 U.S.C. §?924(c)(3)(B) (an offense is a crime of violence if by its nature involves a substantial risk that physical force against the person or property of another may be used while committing the offense) was held unconstitutionally vague under *Sessions v. Dimaya,* 138 S.Ct. 1204, 1210 (2018).

Under the elements clause of 18 U.S.C. §?924(c)(3)(A), an offense is a crime of violence if it has as an element the use, attempted use, or threatened use of physical force against the person or property of another. Under the residual clause 18 U.S.C. §?924(c)(3)(B), an offense is a crime of violence if by its nature it involves a substantial risk that physical force against the person or property of another may be used while committing the offense.

Hobbs Act robbery is a crime-of-violence predicate as defined in 18 U.S.C. §?924(c)(1)(A).

Editor?s Note: Hobbs Act robbery cases often yield exceptionally long sentences.

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***Hancock v. Davis*, No. 16-20662, 2018 U.S. App. LEXIS 29892 (5th Cir. Oct. 23, 2018) (designated for publication) [Actual-innocence claims under*Schlup v. Delo,* 513 U.S. 298 (1995), and*McQuiggin v. Perkins,* 569 U.S. 383 (2013)]**

Under *Schlup v. Delo,* 513 U.S. 298 (1995), and *McQuiggin v. Perkins,* 569 U.S. 383 (2013), if proved, actual innocence serves as a gateway through which a petitioner may pass even if the impediment is a procedural bar or expiration of the statute of limitations. As a threshold, a credible gateway claim of actual innocence requires the petitioner to support his allegations of constitutional error with new reliable evidence that was not presented at trial. A petitioner does not meet this threshold unless he persuades the district court that considering the new evidence, no juror acting reasonably would have voted to find him guilty beyond a reasonable doubt.

Under *Moore v. Quarterman,* 534 F.3d 454, 465 (5th Cir. 2008), evidence does not qualify as ?new? under the *Schlup* actual-innocence standard if ?it was always within the reach of petitioner?s personal knowledge or reasonable investigation.

***McDaniels v. United States,* No. 16-20508, 2018 U.S. App. LEXIS 30294 (5th Cir. Oct. 26, 2018) (designated for publication) [Fed. Rule Civ. Proc. 59 motions and successive motions under 28 U.S.C. §?2255]**

Under Fed. Rule Civ. Proc. 59, a party may move to alter or amend a judgment no later than 28 days after entry of judgment. But a defendant is generally permitted only one motion under §?2255 and may not file successive motions without first obtaining authorization from the Fifth Circuit. Absent the authorization, a district court lacks jurisdiction to hear the §?2255 motion.

A motion under Fed. Rule Civ. Proc. 59 that seeks to add a new ground for relief or attacks the court?s previous resolution of a claim on the merits is a successive 28 U.S.C. §?2255 petition. But a motion that merely targets a procedural defect in the integrity of the habeas proceedings is a bona fide motion over which a district court has jurisdiction.

A movant under 28 U.S.C. §?2255 is entitled to a hearing un-less the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief on the claims. Denial of an evidentiary hearing is reviewed for abuse of discretion. To warrant reversal, a petitioner must present independent indicia of the likely merit of his allegations, typically in the form of one or more affidavits from reliable third parties. If the showing consists of conclusory allegations or is otherwise inconsistent with the bulk of his conduct, an evidentiary hearing is unnecessary.

Where a defendant pleads guilty based on a promise by the prosecutor, breach of that promise taints the voluntariness of his plea and violates the Fifth Amendment.

***United States v. Miller,* No. 17-10594, 2018 U.S. App. LEXIS 29377 (5th Cir. Oct. 18, 2018) (designated for pub-lication) [Abuse of a position of public or private trust enhancement under U.S.S.G. §?3B1.3 and the so-phisticated means enhancement under U.S.S.G. §?2B1.1(b)(10)(C)]**

Under U.S.S.G. §?3B1.3, two levels are added to the offense level if the defendant abused a position of public or private trust or used a special skill in a manner that significantly facilitated the commission or concealment of the offense. The court first determines whether the defendant occupied a position of trust, which is characterized by: (1) professional or managerial discretion, and (2) minimal supervision. Those holding a position of trust are subject to significantly less supervision than employees whose responsibilities are nondiscretionary in nature. This enhancement does not apply to an embezzlement or theft by an ordinary teller or hotel clerk because such positions are not characterized by the factors. The court considers the extent to which the position provides the freedom to commit a difficult-to-detect wrong to be a ?primary trait? in determining whether a person is in a position of trust.

If the defendant occupied a position of trust, then the court must determine the extent to which the defendant used that position to facilitate or conceal the offense. The defendant?s position must: (1) provide the opportunity to defraud; and (2) significantly facilitate its commission or concealment, which is determined by whether the defendant occupied a superior position relative to others to commit the offense as a result of the job.

Under U.S.S.G. §?2B1.1(b)(10)(C), two levels are added to the offense level if the offense involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means. ?Sophisticated means? means an especially complex or intricate offense conduct pertaining to the execution or concealment of an offense. Hiding assets or transactions through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means. The application of the sophisticated-means enhancement is affirmed if some method made it more difficult for the offense to be detected even if that method was not by itself particularly sophisticated.

Editor?s Note: If the numbers recited in the case are accurate (300 forged checks totaling $2,239,407.68 stolen), two observations: (1) This company had no internal controls in place; and (2) the appellant was extremely greedy. We all may know an attorney whose employee stole money. If you have not already, implement strong internal controls and keep a close eye on your bank accounts. Most thefts from law firms occur through the IOLTA account. If a client is ripped off by a dishonest employee, it is YOU the SBOT comes after, not the employee. Read Tex. Disciplinary Rule Prof. Conduct 5.03 (Responsibilities Regarding Nonlawyer Assistants) carefully:

(a)?a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person?s conduct is compatible with the professional obligations of the lawyer; and

(b)?a lawyer shall be subject to discipline for the conduct of such a person that would be a violation of these rules if engaged in by a lawyer if:

(1)?the lawyer orders, encourages, or permits the conduct involved;

or

(2)?the lawyer: (i) is a partner in the law firm in which the person is employed, retained by, or associated with; or is the general counsel of a government agency?s legal de-partment in which the person is employed, retained by or associated with; or has direct supervisory authority over such person; and (ii) with knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of that person?s misconduct.

***United States v. Porter*, No. 16-31184, 2018 U.S. App. LEXIS 30351 (5th Cir. Oct. 26, 2018) (designated for publication) [Competency to stand trial]**

Under 18 U.S.C. §?4241, a district court may grant a hearing to determine competency where there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent. The court must determine by a preponderance of the evidence whether the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. A district court can consider factors including but not limited to: its observations of the defendant?s demeanor and behavior; medical testimony; and observations of others who have interacted with the defendant. A defendant is competent where he has the present ability to consult with his lawyer with a reasonable de-gree of rational understanding and has a rational as well as factual understanding of the proceeding against him.

Review of a district court?s competency determination is a type of clear-error review: After reanalyzing

the facts and con-sidering the trial court?s ultimate conclusion, the court will reverse only if the finding was clearly arbitrary or unwarranted.

It is not the task of an appellate court to relitigate the battle of the experts.

Distrust or disagreement with one?s attorney does not make one mentally unable to consult.

***United States v. Rivas-Estrada*, No. 17-40033, 2018 U.S. App. LEXIS 28953 (5th Cir. Oct. 15, 2018) (designated for publication) [Special conditions of supervised release must be orally pronounced at sentencing]**

When a defendant had no opportunity to object to special conditions of supervised release because they were not mentioned at sentencing, review is for abuse of discretion, and unpronounced special conditions must be stricken from the written judgment.

Mandatory (standard) conditions need not be recited orally as they are implicit in supervised release. Special conditions require a specific oral pronouncement.

Under the Sixth Amendment?s Confrontation Clause, a de-fen-dant has a right to be present at sentencing. If a written judg-ment clashes with the oral pronouncement, the oral pronounce-ment controls.

***Rubio v. Davis*, No. 16-20671, 2018 U.S. App. LEXIS 30724 (5th Cir. Oct. 30, 2018) (designated for publication) [?Custody? requirement under 28 U.S.C. §§?2241(c)(3) & 2254(a)]**

Under 28 U.S.C. §§?2241(c)(3) & 2254(a) and *Maleng v. Cook*, 490 U.S. 488, 490-491 (1989) , a habeas petitioner may seek relief from a state court judgment only if he is ?in custody? under the conviction or sentence under attack at the time the petition is filed. Under *Duncan v. Walker*, 533 U.S. 167, 176 (2001), the custody requirement can be satisfied by noncriminal judgments including commitment-orders.

Under *Garlotte v. Fordice*, 515 U.S. 39, 41 (1995) and *Peyton v. Rowe*, 391 U.S. 54, 67 (1968), a prisoner serving consecutive sentences is considered ?in custody? under all the sentences. This applies even if the sentences were imposed by different au-thorities.

***United States v. Dickerson*, No. 17-20161 & 17-20270, 2018 U.S. App. LEXIS 32520 (5th Cir. Nov. 16, 2018) (designated for publication) [MNT under Fed. Rule Crim. Proc. 33]**

Under Fed. Rule Crim. Proc. 33, the defendant may file an MNT to vacate a judgment in the interest of justice or newly discovered evidence. An MNT based on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the district court may not grant a motion for a new trial until the appellate court remands the case. On grounds other than newly discovered evidence, the MNT must be filed within 14 days after the verdict or finding of guilty.

Under the ?Berry rule conditions? from *United States v. Erwin*, 277 F.3d 727, 731?732 (5th Cir. 2001), and *Berry v. State*, 10 Ga. 511 (1851), to grant an MNT based on newly discovered evidence, (1) the evidence must be newly discovered unknown to the defendant at the time of trial; (2) the failure to detect the evi-dence must not have been due to a lack of diligence; (3) the evidence cannot be merely cumulative or impeaching; (4) the evidence must be material; and (5) if the evidence were to be introduced at a new trial, the probable result must be an acquittal. (If a *Napue* violation occurs from *Napue v. Illinois*, 360 U.S. 264 1959, where the Government knowingly used false testimony, this fifth condition is not required).

Hearings for motions for new trial under Fed. Rule Crim. Proc. 33 are reserved for unique situations usually involving allegations of jury tampering, prosecutorial misconduct, or third-party confession.

***United States v. Reed*, No. 17-30296, 2018 U.S. App. LEXIS 31244 (5th Cir. Nov. 5, 2018) (designated for publication) [?Official act? under*McDonnell v. United States*, 136 S. Ct. 2355 (2016) and severance**

of defendants]

Under *McDonnell v. United States*, 136 S. Ct. 2355 (2016), the SCOTUS held that an ?official act? in the federal bribery statute (18 U.S.C. §?201) (?any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official?s official capacity, or in such official?s place of trust or profit?) should not be read broadly, and implicated only actions ?involving a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee.?

Under Fed. Rule Crim. Proc. 14(a), a court may sever a trial if joinder appears to prejudice a defendant. The federal system prefers joint trials of defendants who are indicted together, and a defendant is not entitled to severance just because it would increase his chance of acquittal or because evidence is introduced that is admissible against certain defendants. Alleging a spillover effect where the jury imputes the defendant?s guilt based on evidence pre-sented against codefendants is insufficient. A defendant must prove that: (1) the joint trial prejudiced him to such an extent that the district court could not provide adequate protection; and (2) the prejudice outweighed the government?s interest in economy. Severance is proper only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence.

Texas Court of Criminal Appeals

***Golliday v. State*, No. PD-0812-17, 2018 Tex.Crim.App. LEXIS 1007 (Tex.Crim.App. Oct. 31, 2018) (designated for publication) [Offer of proof does not preserve an objection]**

Under *Reyna v. State*, 168 S.W.3d 173 (Tex.Crim.App. 2005), making an offer of proof under Tex. Rule Evid. 103 does not pre-serve an objection. To preserve the objection, a defendant must make the proper constitutional object per Tex. Rule App. Proc. 33.1, which imposes the requirement of making a specific request, objection, or motion to preserve error on appeal. Parties are not permitted to ?bootstrap a constitutional issue from the most innocuous trial objection,? and trial courts must be pre-sented with and have the chance to rule on the specific constitutional basis for admission because it can have such heavy implications on appeal.

Facts:

- An intoxicated complainant asked Appellant (a neighbor in the apartment complex) to drive her to the 7-Eleven for cigarettes.
- When they returned to the apartment complex, the complainant invited Appellant inside to have a drink and watch a movie.
- They began kissing consensually, but when Appellant began making further physical advances and the complainant asked him to stop and then leave, Appellant retorted, ?I took you to the store.? Appellant then grabbed her, pulled her pajama pants and panties off, and sexually assaulted her.
- Outside the presence of the jury, Appellant questioned the complainant about statements she had made to a SANE nurse. Appellant attempted to introduce these statements: Complainant told treatment providers that she had not accepted the fact that she was raped; complainant said she was a ?love addict,? that she conveyed to a therapist that she learned how to manipulate men, and that she considered herself to be a ?giant problem? to everyone; complainant had previously accused a friend?s hus-band of assaulting her, but the charges were dropped; complainant had herpes; and complainant was mixing Zoloft with alcohol on that night in question and was prescribed Xanax for a panic attack.
- The State objected to the testimony as irrelevant hearsay and inadmissible under ?404.?
- Trial counsel argued that it is relevant, and the jury should know ?the whole picture of the situation.?
- The court sustain the state?s objection.
- The State then called the SANE nurse, who testified about the complainant?s treatment after the

assault.

- Appellant argued that the State had opened the door to the com-plainant?s medical history by asking the SANE nurse about the treatment and sought to elicit the prohibited testimony.
- The trial court again sustained the State?s objections.
- Trial counsel did **never** make a confrontation-clause objection.
- The jury convicted Appellant of sexual assault.
- On direct appeal, the en banc majority held that Appellant effectively communicated to the trial court that the complained-of rulings denied him the right to present his defense.

Appellant did not clearly articulate a constitutional basis supporting the admission of the excluded evidence at trial.

- Under *Reyna v. State,* 168 S.W.3d 173 (Tex.Crim.App. 2005), making an offer of proof under Tex. Rule Evid. 103 does not pre-serve an objection. To preserve the objection, a defendant must make the proper constitutional object per Tex. Rule App. Proc. 33.1, which imposes the requirement of making a specific request, objection, or motion to preserve error on appeal. Parties are not permitted to ?bootstrap a constitutional issue from the most innocuous trial objection,? and trial courts must be presented with and have the chance to rule on the specific constitutional basis for admission because it can have such heavy implications on appeal.
- When Appellant made his offer of proof, the exchange between the parties and the trial court contained dialogue about hearsay and relevance but not the confrontation clause.
- The judgment of the court of appeals is reversed.

***In re State of Texas Ex. Rel. Wesley Mau Hays County v. Third Court of Appeals,* No. WR-87,818-01, 2018 Tex.Crim.App. LEXIS 1012 (Tex.Crim.App. Oct. 31, 2018) (designated for publication) [Tex. Code Crim. Proc. Art. 1.13 and*McDonald* require state?s written approval to waive a jury trial]**

Under *In re State ex rel. Young v. Sixth Judicial Court of Appeals*, 236 S.W. 3d 207, 210?211 (Tex.Crim.App. 2007), to obtain mandamus relief, the relator must show that: (1) he does not have an adequate remedy at law to address the complaint, and (2) what he seeks is a ministerial act not involving discretion or judicial decision-making (can satisfy this prong by establishing that he has a clear right to the relief he seeks under law that is definite and unambiguous, and that unquestionably applies to the indisputable facts of the case.).

Under *In re State ex rel. Tharp,* 393 S.W.3d 751 (Tex.Crim.App. 2013), and Tex. Code Crim. Proc. Art. 2614, if a defendant in a felony case pleads guilty or no contest, if the punishment is not absolutely fixed by law, a jury shall be impaneled to assess the punishment after hearing the evidence unless the defendant waives his right to a jury trial under Tex. Code Crim. Proc. Arts. 1.13 or 37.07. If a defendant changes his plea from not guilty to guilty after jury trial commenced, even if the defendant expressly elected to have the trial court assess his punishment, the defendant converts his trial into a unitary proceeding in which (notwithstanding the pretrial election to have the judge assess punishment) the jury must assess punishment.

Under Tex. Code Crim. Proc. Art. 1.13 and *State ex rel. Turner v. McDonald,* 676 S.W.2d 371, 374 (Tex.Crim.App. 1984), other than in a death penalty case, a defendant has the right upon entering a plea to waive the right of trial by jury provided the waiver is made in person by the defendant and in writing in open court with the consent and approval of the court and the state. Absent written consent of the State, a trial court has no discretion to resolve the issue of punishment in any manner but by a jury trial.

***State v. Waters,* No. PD-0792-17, 2018 Tex.Crim.App. LEXIS 1011 (Tex.Crim.App. Oct. 31, 2018) (designated for publication) [Collateral estoppel is inapplicable following a ?not true? finding at a revocation hearing]**

Under *Ashe v. Swenson,* 397 U.S. 436 (1970), the SCOTUS held that collateral estoppel is a component of the double jeopardy clause. When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in a future lawsuit. Where a previous judgment of acquittal was based upon a general verdict, a court must examine the record of a prior proceeding considering the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.

Collateral estoppel is inapplicable following a ?not true? finding at a revocation hearing

Facts:

- In October 2015, while Waters was on community supervision for an offense, she was arrested for DWI.
- The State filed a motion to revoke her community supervision alleging that she violated the terms of her supervision by committing the DWI.
- The trial court held a hearing on the State?s motion to revoke during which the state?s sole evidence that Waters committed DWI was the testimony of community supervision officer Jetton.
- Jetton was aware that Waters had been arrested for DWI but otherwise had no personal knowledge of the facts surrounding the DWI.
- The trial judge determined that the State had failed to prove by a preponderance that Waters committed DWI as alleged in the motion and found the allegation ?not true.?
- In March 2016, the State filed an information charging Waters with the DWI that had been alleged in the motion to revoke.
- Waters filed a pretrial application for a writ of habeas corpus in which she contended that her prosecution for DWI was barred by collateral estoppel per *Tarver,* 725 S.W.2d at 199. Waters asserted that because the State had sought to revoke her community supervision based on the same DWI that was alleged in the information and the trial court at the revocation hearing found the allegation ?not true,? the State was precluded from prosecuting her for the DWI.
- The trial court granted the pretrial habeas application and dismissed the information for the DWI.

Collateral estoppel is inapplicable following a ?not true? find-ing at a revocation hearing

- In *Tarver,* the TCCA held that the issue of whether Tarver committed the assault alleged in the information has been found adversely to the State, and collateral estoppel bars relitigating that issue in a later prosecution. It was only in the circumstances where the trial court makes a finding of fact that the allegation is ?not true? that a fact has been established to bar relitigation of that same fact.
- Under *Ashe v. Swenson,* 397 U.S. 436 (1970), the SCOTUS held that collateral estoppel is a component of the double jeopardy clause. When an issue of ultimate fact has once been determined by a valid and final judgment, that issue **cannot** again be litigated between the same parties in a future lawsuit. Where a previous judgment of acquittal was based upon a general verdict, a court must examine the record of a prior proceeding considering the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.
- Collateral estoppel is inapplicable following a ?not true? finding at a revocation hearing
- *Ashe* is distinguishable because Ashe was subjected to criminal prosecution for an offense followed by a second attempt at prosecution under circumstances that would have required re-litigation of the same facts already found in his favor in the first trial.
- But in this case involving a revocation hearing followed by a first attempt at criminal prosecution rather than successive criminal prosecutions involving the same facts, the defendant is **not** on trial for the newly alleged offense. Instead, in a revocation proceeding, the central question is whether the probationer violated terms of community supervision and whether she remains a good candidate for

supervision rather than being one of guilt or innocence of the new offense. And because guilt or innocence is **not** the central issue at a revocation hearing, a defendant does **not** face punishment for the newly alleged offense in the revocation proceeding.

- Because there is **no** possibility of a new conviction and punishment arising from a revocation hearing, jeopardy does **not** attach for an offense that is alleged as a violation of the terms of community supervision in a revocation hearing, and double jeopardy protections are inapplicable.

***Johnson v. State,* No. PD-0197-17, 2018 Tex. Crim. App. LEXIS 1025 (Tex.Crim.App. Nov. 7, 2018) (designated for publication) [Legal sufficiency in theft by a mortuary operator]**

Under *Jackson v. Virginia,* 443 U.S. 307, 319 (1979), and *Brooks v. State,* 323 S.W.3d 893, 895 (Tex. Crim. App. 2010), 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). Circumstantial evidence and direct evidence can be equally probative in establishing the guilt of a defendant, and guilt can be established by circumstantial evidence alone. 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).

The reviewing court considers events occurring before, during, and after the commission of the offense and may rely on actions of the defendant that show an understanding and common design to do the prohibited act. It is not required that each fact ?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.

Under Tex. Penal Code §?31.03(a), theft is the unlawful appropriation of property without the effective consent of the owner with the intent to deprive the owner of property. Consent is not effective if induced by deception. ?Deception? may mean prom-ising performance that is likely to affect the judgment of another in the transaction and the actor does not intend to perform or knows will not be performed, except that failure to perform the promise without other evidence of intent or knowledge is insufficient proof that the actor did not intend to perform or knew the promise would not be performed.

Under Tex. Penal Code §?31.03(c), in a theft case arising from a contract, the State must prove that the defendant intended to deprive the owner of the property when it was taken. Intent can be demonstrated by proof that the defendant engaged in other similar, recent transactions.

***Lang v. State,* No. PD-0563-17, 2018 Tex. Crim. App. LEXIS 1120 (Tex.Crim.App. Nov. 21, 2018) (designated for publication) [Organized retail theft under Tex. Penal Code §?31.16(b)(1) & (2)]**

Under *Boykin v. State,* 818 S.W.2d 782, 785 (Tex. Crim. App. 1991), *State v. Hardy,* 963 S.W.2d 516, 520 (Tex. Crim. App. 1997), *Yazdchi v. State,* 428 S.W.3d 831, 837 (Tex. Crim. App. 2014), and *Bryant v. State,* 391 S.W.3d 86, 92 (Tex. Crim. App. 2012), when interpreting statutes, a court seeks to determine the collective intent or purpose of the legislators who enacted the legislation by focusing on the literal text of the statute and attempts to discern the fair, objective meaning of that text at the time of its enactment. If the meaning of the text when read using the established canons of construction relating to the text should have been plain to the legislators who voted on it, a court ordinarily gives ef-fect to that plain meaning. A court must presume that every word in a statute has been used for a purpose, and that each word, phrase, clause, and sentence should be given effect if reasonably possible. Words and phrases are to be read in context and construed according to the rules of grammar and common usage. Courts may consult standard dictionaries in determining the objective meaning of undefined statutory terms. If a statute?s language is ambiguous or application of its plain meaning would lead to an absurd result that the Legislature could not possibly have intended, a court may consider extratextual factors. A statute is ambiguous when it may be understood by

reasonably well-informed persons in two or more different senses. A statute is unambiguous when it reasonably permits no more than one understanding.

Under Tex. Gov. Code §?311.023 and *Arteaga v. State*, 521 S.W.3d 329, 334 (Tex. Crim. App. 2017), extratextual factors that may be considered include: (1) the object sought to be attained by the Legislature; (2) the circumstances under which the statute was enacted; (3) the legislative history; (4) the common law or former statutory provisions, including laws on the same or similar subjects; (5) the consequences of a particular construction; (6) the administrative construction of the statute; and (7) the title or caption, preamble, and any emergency provision. Statutory construction is a question of law that is reviewed de novo.

Under Tex. Penal Code §?31.16(b)(1) & (2), a person commits an offense if she intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, or disposes of: (1) stolen retail merchandise; or (2) merchandise explicitly represented to the person as being stolen retail merchandise.

The legislative history of organized retail theft under Tex. Penal Code §?31.16(b)(1) & (2) shows that it was not intended to criminalize every act of shoplifting but was instead intended to target professional crime rings involved in the large-scale theft and reselling of stolen merchandise.

Facts:

- Appellant was seen at HEB placing unpaid-for merchandise into reusable shopping bags in her cart tied to the hand side of her cart. When Appellant went through the checkout, she was seen placing the bags from inside her cart on the conveyor belt so that the items inside could be scanned by the cashier, but not the bag tied to the side of her cart.
- After appellant paid for the items that had been inside her cart, she loaded the items back into the cart and headed towards the store?s exit.
- Appellant was stopped by employees and questioned her about the bag tied to the side of her cart, which was full of unpaid-for items.
- The police were called, who arrested appellant for $565.59 in theft (the paid-for merchandise totaled $262.17).
- Appellant was convicted for SJF theft of organized retail theft involving merchandise valued at $500 or more but less than $1,500 per Tex. Penal Code §?31.16(b)(1) & (c)(3). The trial court assessed her punishment at confinement for 20 months in a state jail facility.
- The court of appeals held that the evidence was legally sufficient.

The evidence was legally insufficient to prove organized retail theft

- This statute is susceptible of more than one reasonable interpretation, so it is ambiguous. It refers to an ?activity? involving ?stolen retail merchandise.? By its use of the past participle of steal (e.g., ?stolen?), the statute indicates that whatever ?activity? is covered takes place with respect to retail merchandise that has already been stolen. But what type of ?activity? suffices to satisfy the statute?s requirements? Is it enough for a person to shoplift merchandise and attempt to leave the store with the stolen items, thus conducting an activity (leaving the store) in which the person possesses the merchandise she just stole? Or, does the phrase ?intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, etc. . . . stolen retail merchandise? indicate that the statute requires proof of activity distinct from the conduct inherent in shoplifting itself (i.e., does the statute require proof of something more than the mere continued possession of stolen retail merchandise during an attempt to leave the store following the simple act of shoplifting?)?
- Because both views of the language are plausible, the court must consult extratextual sources to determine the Legislature?s intent.
- The legislative history of organized retail theft under Tex. Penal Code §?31.16(b)(1) & (2) shows that

it was **not** intended to criminalize every act of shoplifting but was instead intended to target professional crime rings involved in the large-scale theft and reselling of stolen merchandise.
- The evidence is legally insufficient to support appellant?s conviction for organized retail theft. The judgment of the court of appeals is reversed and the case is remanded to the court of appeals for it to consider whether the judgment should be reformed to a lesser-included offense.

***Turner v. State,* No. AP-76,580, 2018 Tex. Crim. App. LEXIS 1101 (Tex.Crim.App. Nov. 14, 2018) (designated for publication) [Application of*McCoy v. Louisiana,* 138 S.Ct. 1500 (2018)]**

Under the Sixth Amendment, the right to defend is personal, and a defendant?s choice in exercising that right must be honored. The choice is not all or nothing. To gain assistance (of counsel), a defendant need not surrender control entirely to counsel. The Sixth Amendment contemplates that the defendant and not the lawyer is master of the defense.

Under *Gonzalez v. United States*, 553 U.S. 242, 248 (2008), trial management is up to the trial attorney, who assists by making decisions such as what arguments to pursue, objections to raise, and agreements to conclude regarding the admission of evidence.

Under *Jones v. Barnes*, 463 U.S. 745, 751 (1983), some decisions are reserved for the client: whether to plead guilty, waive the right to a jury trial, testify in one?s own behalf, and forgo an appeal.

Under the Sixth Amendment, autonomy to decide that the objective of the defense is to assert innocence is reserved for the client. Just as a defendant may refuse to plead guilty in the face of overwhelming evidence or reject the assistance of legal counsel despite the defendant?s inexperience and lack of professional qualifications, the defendant may also insist on maintaining innocence at the innocence-guilt phase of a capital trial. Violation of this autonomy is structural error that is not subject to harmless-error review.

***Wice v. Fifth Judicial District Court of Appeals,* No. WR-86,920-02, 2018 Tex. Crim. App. LEXIS 1121 (Tex. Crim. App. Nov. 21, 2018) (designated for publication) (Richardson, J. concurring; Yeary, J. concurring and dissenting; Alcala, J. dissenting, Keel, J. dissenting; Walker, J. dissenting) [Indigent and pro tem prosecutor pay rates under Tex. Code Crim. Proc. Arts. 2.07 & 26.05 and local rules]**

Tex. Code Crim. Proc. Arts. 2.07 & 26.05 together provide: (1) Appointed prosecutors are entitled to compensation in the same amount and manner as appointed defense attorneys if the appointed prosecutors are not already prosecutors serving in another office; (2) appointed defense attorneys are entitled to compensation according to a schedule of fees adopted by formal action of the district courts trying criminal cases within a county; and (3) the fee schedule adopted by the courts trying criminal cases within a county must state reasonable fixed rates or minimum and maximum hourly rates.

Texas Courts of Appeals

***Cochran v. State,* Nos. 06-18-00048-CR & 06-18-00049-CR, 2018 Tex. App. LEXIS 8857 (Tex. App. Texarkana Oct. 31, 2018) (designated for publication) [Fourth Amendment rights of probationers and parolees]**

Under *Butler v. State,* 189 S.W.3d 299, 303 (Tex.Crim.App. 2006), and Tex. Code Crim. Proc. Arts. 42A.301(a) & 42A.104(a), trial courts are afforded ?broad discretion? in devising terms of community supervision. They may impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant.

Under *Speth v. State*, 6 S.W.3d 530, 534 (Tex.Crim.App. 1999), a defendant does not have a right to

community su-per-vision. It is a contract setting out terms between the court and the defendant. Contractual terms of community supervision are accepted unless objected to when established. In the absence of an objection, the defendant is seen to have waived any rights en-croached on by the terms of the contract.

Under *Dansby v. State,* 448 S.W.3d 441, 447 (Tex.Crim.App. 2014), a defendant who is fairly notified of the conditions of community supervision at a hearing at which he has an opportunity to object forfeits any later complaint about those conditions as long as those conditions do not involve a systemic right or prohibition.

Under *Tamez v. State,* 534 S.W.2d 686, 690 (Tex.Crim.App. 1976), a term of community supervision generally authorizing a search and seizure at any time requested by officers without further restriction is unreasonable and invalid. However, a condition of community supervision authorizing a search does not violate the Fourth Amendment or Tex. Const. Art. I, §?9 if it is reasonably restricted to promote the purposes of community supervision. Under *Garrett v. State,* 791 S.W.2d 137, 140 (Tex.Crim.App. 1990), probationers and parolees do not enjoy the same Fourth Amendment protections accorded defendants only suspected of a crime but are allowed only conditional liberty properly dependent on observance of special supervisory restrictions.

Under *Samson v. California,* 547 U.S. 843, 850 (2006), suspicionless searches of parolees based on state law requiring consent in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or with-out a search warrant and with or without cause, served governmental interests in reducing recidivism and do not violate the Fourth Amendment because the parolee did not have an expectation of privacy that society would recognize as legitimate.

Facts:

- Cochran was on deferred adjudication community supervision for drug possession. A condition of community supervision required him to ?submit to a search of his person, residence, or vehicle at any time by law enforcement for illegal drugs or contraband.?
- Paris PD received information from a CI that Hurley might be a drug dealer. Detectives Foreman and Crawford tried and failed to conduct a controlled purchase of drugs between Hurley and the CI because Hurley had no drugs to sell.
- Officers discovered that Hurley had visited an unnamed supplier at a motel. The motel clerk reported that Hurley visited Cochran in that room.
- Cochran stayed at the motel for 13 days that month and had already paid to spend the night of the day of the search.
- There was no warrant, exigent circumstance, or probable cause authorizing entry into Cochran?s room
- When the police learned who Cochran was, based on the condition of community supervision, the police searched the room and found drugs.
- Cochran filed an MTS, which was denied.
- Cochran pleaded guilty to possessing a penalty-group-1 controlled substance, four grams or more but less than 200 grams (in a DFZ), and a penalty-group-3-or-4 controlled substance, less than 28 grams.
- The trial court sentenced Cochran to 15 and 5 years in prison.

The trial court did not err by overruling the MTS

- Under *Crain v. State,* 315 S.W.3d 43, 48 (Tex.Crim.App. 2010), *Carmouche v. State,* 10 S.W.3d 323, 327 (Tex.Crim.App. 2000), and *Guzman v. State,* 955 S.W.2d 85, 89 (Tex.Crim.App. 1997), a ruling on an MTS is reviewed under a bifurcated standard of review: almost total deference to the trial court?s determination of historical facts that turn on credibility and demeanor, de novo on other application-of-law-to-fact issues, nearly total deference to application-of-law-to-fact questions (mixed questions of law and fact) if their resolution turns on an evaluation of credibility and demeanor, and de

novo on mixed questions of law and fact if their resolution does **not** turn on an evaluation of credibility and demeanor. Under *Osbourn v. State*, 92 S.W.3d 531, 538 (Tex.Crim.App. 2002), and *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex.Crim.App. 2008), the trial court?s decision must be affirmed if it is correct on any theory of law that finds support in the record.

- Under *Carmouche v. State*, 10 S.W.3d 323, 328 (Tex.Crim.App. 2000), if the trial court does **not** make explicit FFCL, the evidence is reviewed in a light most favorable to the trial court?s ruling, and the review assumes that the trial court made implicit findings of fact supported in the record that buttress its conclusion.
- Under *Butler v. State*, 189 S.W.3d 299, 303 (Tex.Crim.App. 2006), and Tex. Code Crim. Proc. Arts. 42A.301(a) & 42A.104(a), trial courts are afforded ?broad discretion? in devising terms of community supervision. They may impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant.
- Under *Speth v. State*, 6 S.W.3d 530, 534 (Tex.Crim.App. 1999), a defendant does **not** have a right to community supervision. It is a contract setting out terms between the court and the de-fendant. Contractual terms of community supervision are accepted unless objected to when established. In the absence of an objection, the defendant is seen to have waived any rights encroached on by the terms of the contract.
- Under *Dansby v. State*, 448 S.W.3d 441, 447 (Tex.Crim.App. 2014), a defendant who is fairly notified of the conditions of community supervision at a hearing at which he has an opportunity to object forfeits any later complaint about those con-ditions as long as those conditions do not involve a systemic right or prohibition.
- Under *Tamez v. State*, 534 S.W.2d 686, 690 (Tex.Crim.App. 1976), a term of community supervision generally authorizing a search and seizure at any time requested by officers without further restriction is unreasonable and invalid. However, a condition of community supervision authorizing a search does **not** violate the Fourth Amendment or Tex. Const. Art. I, §?9 if it is reasonably restricted to promote the purposes of community supervision. Under *Garrett v. State*, 791 S.W.2d 137, 140 (Tex.Crim.App. 1990), probationers and parolees do **not** enjoy the same Fourth Amendment protections accorded defendants only suspected of a crime but are allowed only conditional liberty properly dependent on observance of special supervisory restrictions.
- Under *Samson v. California*, 547 U.S. 843, 850 (2006), suspicionless searches of parolees based on state law requiring consent in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause, served governmental interests in reducing recidivism and do not violate the Fourth Amendment because the parolee did not have an expectation of privacy that society would recognize as legitimate.
- Although Cochran did **not** consent to the search of the motel room, he previously agreed to submit to searches of his person, residence, and vehicle for illegal drugs or contraband as a condition of receiving his bargained-for community supervision.
- While the term and condition in *Tamez* failed to contain any restrictions, the term and condition of community supervision here was limited to searches for illegal drugs or contraband.
- A condition of community supervision is invalid if it: (1) has no relationship to the crime; (2) relates to conduct that is **not** itself criminal; **and** (3) forbids or requires conduct that is **not** reasonably related to the future criminality of the defendant or does **not** serve the statutory ends of probation. ?Reasonably related? means: (1) the purposes sought to be served by probation; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers; and (3) the legitimate needs of law enforcement.
- Trial court?s judgment is affirmed.

***Fowler v. State,* No. 04-17-00636-CR, 2018 Tex. App. LEXIS 8420 (Tex. App. San Antonio Oct. 17, 2018) (designated for publication) [Enhancement using a conviction from another jurisdiction]**

Under *Wood v. State*, 486 S.W.3d 583, 589 (Tex.Crim.App. 2016), with regard to enhancement allegations, a trial court considers whether the totality of the evidence establishes beyond a reasonable doubt

that the defendant was previously convicted of the enhancement offense as alleged in the indictment. The reviewing court considers all the evidence in the light most favorable to the trial court?s finding and determines whether a rational trier of fact could have found the essential elements beyond a reasonable doubt.

Under Tex. Penal Code §?12.42(d), when a defendant has previously been finally convicted of two felony offenses, the defendant shall be punished by imprisonment in TDCJ Texas for life or 25?99 years.

Under Tex. Penal Code §?12.41, when a defendant?s prior convictions resulted from a prosecution in another jurisdiction, the court determines how the offense should be classified under Texas law in order to determine the applicability of Tex. Penal Code §?12.42(d).

Under *Ex parte Pue,* 552 S.W.3d 226, 232 (Tex.Crim.App. 2018), a conviction in another jurisdiction is classified under Texas law as a felony if imprisonment in a prison is affixed to the offense as a possible punishment.

Editor?s note: Three-strikes laws like Tex. Penal Code §?12.42(d) do not consider the seriousness of the prior or present felony convictions, yet the punishment is the same. In Fowler?s case, merely possessing a ?machine-gun? is not as serious as using a weapon in a crime (any weapon). Congress outlawed ?machine-guns? under the illusion that such firearms are *per se* dangerous and even more dangerous if enclosed in a rifle safe than a revolver in the hands of a mass-shooter. And ?escape? under 18 U.S.C. §?751 can be merely walking away from a federal prison-camp work detail for an hour. Fowler?s present crime is possessing a firearm as a felon. Merely possessing a firearm is legal had Fowler not been under the status of a prior felon. Tex. Penal Code §?12.42(d) does not differentiate between him and the criminal who committed two prior serious felonies that hurt the victims and is again convicted of a similar offense. Both Fowler and the violent criminal receive a minimum of 25 years.

***State v. Heath*, No. 10-18-00187-CR,*2018 Tex. App. LEXIS 8908* (Tex. App. Waco Oct. 31, 2018) (designated for publication) [State?s responsibility under Tex. Code Crim. Proc. Art. 39.14(a) requires a written request by the defense that ?designates? the items requested]**

Under *Francis v. State,* 428 S.W.3d 850, 855 (Tex.Crim.App. 2014), review of a trial court?s order to exclude evidence withheld from a defendant in violation of a discovery order or Art. 39.14(a) is for an abuse of discretion.

In order to trigger the requirements of Art. 39.14(a), the defendant must timely request discovery and the request must designate what items are requested to be produced before the State is required to produce them.

Facts:

- To obtain discovery on the case, trial counsel asked in an email: ?Can I get discovery on this client? Cause #2017-241-C2.?
- 11 days prior to the 4th jury trial setting, the state discovered the existence of a 911 call that had been made on the day of the alleged offense. The state received the recording 4 days later and produced the recording to defense counsel the next day, 6 days before the scheduled jury trial date.
- Defense counsel filed a ?Writ for Habeas Corpus and Motion to Exclude Evidence? that was heard by the trial court on the day of the trial setting.
- The trial court excluded the recording based on the prosecutor?s failure to produce the recording ?as soon as practicable? per Art. 39.14(a) and defense counsel?s objection to a continuance.

State?s responsibility under Tex. Code Crim. Proc. Art. 39.14(a) requires a written request by the defense that ?designates? the items requested

- Under *Francis v. State*, 428 S.W.3d 850, 855 (Tex.Crim.App. 2014), review of a trial court?s order to exclude evidence withheld from a defendant in violation of a discovery order or Art. 39.14(a) is for an abuse of discretion.
- In order to trigger the requirements of Art. 39.14(a), the defendant must timely request discovery and the request must designate what items are requested to be produced before the State is required to produce them.
- The request here did not reference Art. 39.14(a) and did not designate items sought to be produced. This is insufficient to give the State notice of what is requested to be produced under Art. 39.14(a).

Editor?s Note: The Court of Appeals is splitting hairs here because Art. 39.14(a) is clear about what should be produced. But to avoid these problems, make a specific request for discovery under Art. 39.14(a). The best practice is to track the statute. Here is what I use:

> ?Per Tex. Code Crim. Proc. Art. 39.14(a), please tender copies to defense counsel of all: offense reports, designated documents, papers, written or recorded statements of the defendant and all witnesses, including witness statements of law enforcement officers (but not including the work product of counsel for the state in the case and their investigators and their notes or reports), all designated books, accounts, letters, photographs, objects, or other tangible things (including all electronic evidence) not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the State.?

This along with a *Brady*/*Giglio* request that demands ?work product of counsel for the state in the case and their investigators and their notes or reports if these items contain *Brady* or *Giglio* material? should cover all possible discovery. Here is my *Brady*/*Giglio* request to the State:

> Under *Brady v. Maryland*, 373 U.S. 83 (1963), ?[T]he suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.? *Brady*, 373 U.S. at 87. This includes evidence favorable to the defendant, ?either direct or impeaching.? *Williams v. Dutton*, 400 F.2d 797, 800 (5th Cir. 1968), *cert. denied*, 393 U.S. 1105 (1969) (?*Brady* imposes an affirmative duty on the prosecution to produce evidence which is materially favorable to the accused either as direct or impeaching evidence?); *see also Giglio v. United States*, 405 U.S. 150, 154-155 (1972) (?[S]uppression of material evidence justifies a new trial ?irrespective of the good faith or bad faith of the prosecution? . . . When the ?reliability of a given witness may well be determinative of guilt or innocence,? nondisclosure of evidence affecting credibility falls within this general rule . . . A finding of materiality of the evidence is required under *Brady* . . . a new trial is required if ?the false testimony could...in any reasonable likelihood have affected the judgment of the jury.?).
> ?Further, the obligation to disclose evidence favorable to a defendant is automatic for the government, and failure to disclose such information is not excused merely because the prosecutor did not have actual knowledge of such favorable evidence. *California v. Trombetta*, 467 U.S. 479, 485 (1984); *United States v. Auten*, 632 F. 2d 478, 481-482 (5th Cir. 1980). And, the duty of disclosure affects not only the prosecutor, but the government as a whole, including all prosecutors or employees in the prosecutor?s office, and all investigative agencies. *Giglio*, 405 U.S. at 154 (A prosecutor?s office is an ?entity? and that information in the possession of one attorney in the office ?must be attributed? to the office as a whole); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (Prosecutors must not only disclose information within their own personal knowledge, but ?have a duty to learn of any evidence favorable to the defense that is known to others acting on the government?s behalf in the case, including the police.?); *Ex parte Richardson*, 70 S.W.3d 865, 871-873 (Tex.Crim.App. 2002) (duty under *Brady* applies despite the prosecutor?s lack of personal knowledge of favorable information); *e.g.*, *United States v. Bryant*, 439 F.2d 642, 658 (D.C. Cir. 1971) (same).
> ?Thus, Defendant requests all material and exculpatory evidence from the State, including but not

limited to work-product of counsel for the state in the case and their investigators and their notes or reports if these items contain *Brady* or *Giglio* material.

***Martinez v. State*, No. 13-17-00475-CR, 2018 Tex. App. LEXIS 8927 (Tex. App. Corpus Christi Nov. 1, 2018) (designated for publication) [Legally sufficient evidence for a motion to revoke probation for failure to pay costs or fees]**

Under *Cobb v. State,* 851 S.W.2d 871, 874 (Tex.Crim.App. 1993) (en banc), and *Rickels v. State,* 202 S.W.3d 759, 763?764 (Tex.Crim.App. 2006), the State must prove by a preponderance of the evidence that the defendant violated a condition of community supervision as alleged in the MTR. The preponderance of the evidence standard is met when the greater weight of the credible evidence before the trial court supports a reasonable belief that a condition of community supervision has been violated. The trial court abuses its discretion in revoking community supervision if as to every ground alleged, the State fails to meet its burden of proof. The evidence is considered in the light most favorable to the trial court?s findings to determine whether it could make the findings that were returned. The trial judge is the trier of fact and the arbiter of the credibility of the testimony. When faced with a record supporting contradicting inferences, the appellate court presumes that the trial judge resolved such conflicts in favor of the findings even if not explicitly stated in the record.

Under *Bearden v. Georgia,* 461 U.S. 660, 672 (1983), and *Gip-son v. State,* 383 S.W.3d 152, 156 (Tex.Crim.App. 2012), when faced with a motion to revoke based on failure to pay, the trial court must: (1) inquire as to a defendant?s ability to pay and (2) consider alternatives to imprisonment if it finds that a defendant is unable to pay. If the probationer has made all reasonable bona fide efforts to pay and cannot do so through no fault of his own, it is fundamentally unfair to revoke community supervision automatically without considering whether adequate alternative meth-ods of punishing the probationer are available.

Under Tex. Code Crim. Proc. Art. 42A.751(i), the State must prove by a preponderance of the evidence that a defendant had the ability to pay and did not pay any of court costs, community supervision fees, or attorney fees. Here ?community supervision fees? applies to all fees imposed on a defendant as conditions of community supervision.

Under *Mathis v. State,* 424 S.W.3d 89, 95 (Tex.Crim.App. 2014), to consider a defendant?s ability to pay, a trial court may consider evidence of the likely range of income and likely living expenses or other liabilities including child-support orders. If evidence shows that the probationer is unable to pay, and the state fails to refute, and the trial court revokes community su-per-vision, it is an abuse of discretion. Mere proof of the failure to pay court costs or supervision fees is not sufficient. The State must show that the defendant could have paid and that his failure to do so was willful.

***Saenz v. State*, No. 08-17-00014-CR, 2018 Tex. App. LEXIS 8524 (Tex. App. El Paso Oct. 17, 2018) (designated for publication) [MTS regarding placement of stoplamps under the Federal Motor Safety Standards, 49 C.F.R. §?571.108]**

Under *Crain v. State,* 315 S.W.3d 43, 48 (Tex.Crim.App. 2010), trial court?s ruling of refusing an MTS is reviewed for an abuse of discretion. The evidence is reviewed in the light most fa-vorable to the trial court?s ruling. Almost total deference is af-forded to a trial court?s determination of historical facts and mixed questions of law and fact if those questions turn on the credibility and demeanor of witnesses, even if the determination is based on a video recording. If credibility and demeanor are not necessary to the resolution of a mixed question of law and fact, the question is reviewed de novo.

Under *Carmouche v. State,* 10 S.W.3d 323, 328 (Tex.Crim.App. 2000), if the trial court does not make explicit FFCL, the evidence is reviewed in a light most favorable to the trial court?s ruling and the review assumes that the trial court made implicit findings of fact supported in the record that buttress its conclusion.

Under *State v. Garcia-Cantu,* 253 S.W.3d 236, 241 (Tex.Crim.App. 2008), the prevailing party in an MTS is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence. An appellate court may uphold the trial court?s ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case.

Under *Delafuente v. State,* 414 S.W.3d 173, 177 (Tex.Crim.App. 2013), an officer may lawfully conduct a temporary detention when he has reasonable suspicion that an individual is involved in criminal activity. Reasonable suspicion requires more than a hunch and exists only when an officer has specific, articulable facts that, taken together with reasonable inferences from those facts, would lead the officer to reasonably conclude that the person detained is, has been, or soon will be engaging in criminal activity. The reasonable-suspicion determination is objective and is made by considering the totality of the circumstances.

Under Tex. Transp. Code §?547.004(a)(2), a person commits a misdemeanor offense if the person operates a vehicle that is not equipped in a manner that complies with the vehicle equipment standards and requirements established by Tex. Transp. Code Ch. 547. Under Tex. Transp. Code §?547.323, two stoplamps are required such that a red or amber light or a color between red and amber are displayed when the brake is applied. Under Tex. Transp. Code §?547.3215(1), lighting, reflective devices, and associated equipment on a vehicle must comply with the current Federal Motor Safety Standards per 49 C.F.R. §?571.108. Standard No. 108 (Lamps, reflective devices, and associated equipment) is to reduce traffic accidents, deaths, and injuries resulting from traffic accidents in part by enhancing the conspicuity of vehicles on public roads. Stoplamps are lamps giving a steady light to the rear of a vehicle to indicate a vehicle is stopping or diminishing speed by braking. All passenger vehicles less than 2032 mm in width and weighing less than 10,000 pounds must be equipped with two stoplamps mounted on the rear, at the same height, symmetrically about the vertical centerline, as far apart as practicable.

***State v. Lopez,* No. 04-17-00568-CR, 2018 Tex. App. LEXIS 8653 (Tex. App. San Antonio Oct. 24, 2018) (designated for publication) [Speedy trial and competency evaluations cannot violate constitutional rights]**

Review of a trial court?s implied decision not to order a com-petency evaluation is for an abuse of discretion, and the appellate court must consider the totality of the surrounding facts. Under Tex. Crim. Proc. Code §?46B.005(a), if after an informal inquiry the court determines that evidence exists to support a finding of incompetency, the court shall order an examination to determine whether the defendant is incompetent to stand trial in a criminal case. Generally this imposes a mandatory duty on the trial court, but the totality of the surrounding facts may lead to another conclusion.

Under U.S. Const. Art. VI, cl. 2, Tex. Gov. Code §?311.021(1), and *State v. Cortez,* 543 S.W.3d 198, 206 (Tex.Crim.App. 2018), a court cannot construe a state statute in conflict with the U.S. and Texas Constitutions. Rather, courts must narrowly construe statutes to avoid a constitutional violation.

A defendant must not be forced to undergo a competency evaluation in furtherance of the prosecution if the prosecution violates the defendant?s constitutional rights.

Under *Vermont v. Brillon,* 556 U.S. 81, 89 (2009), *Klopfer v. North Carolina,* 386 U.S. 213, 222?223 (1967), and *Hopper v. State,* 520 S.W.3d 915, 923 (Tex.Crim.App. 2017), the Sixth Amendment guarantees the right to a speedy trial. Tex. Const. Art. 1, §?10, also guarantees speedy trial.

Under *Balderas v. State,* 517 S.W.3d 756, 767?68 (Tex.Crim.App. 2016), when reviewing the trial court?s application of the *Barker* test, almost total deference is given to the trial court?s historical findings of fact that the record supports, and the court draws reasonable inferences from those facts necessary to support the trial court?s findings. The balancing test is a legal question reviewed de novo.

Under *Barker v. Wingo,* 407 U.S. 514, 530 (1972), in addressing a speedy-trial claim, a court must

balance the following: (1) the length of delay (12 months between the time of the accusation and the time of trial is presumptively prejudicial); (2) the State?s reason for the delay (deliberate attempts by the State to delay the trial to hamper the defense are weighed heavily against the State. Neutral reason such as negligence or overcrowded courts are weighted less heavily but should be considered since the ultimate responsibility for such circumstances rests with the State rather than with the defendant. When the record is silent regarding the reason for the delay, a court may presume neither a deliberate attempt on the part of the State to prejudice the de-fense nor a valid reason for the delay); (3) defendant?s assertion of his right to a speedy trial (although the defendant has no duty to bring himself to trial, he does have the responsibility to assert his right to a speedy trial); and (4) prejudice to the defendant be-cause of the length of delay (i) preventing oppressive pretrial incarceration, (ii) minimizing anxiety and concern of the defendant, and (iii) most importantly, limiting the possibility that the defense will be impaired.

Under *Doggett v. U.S.,* 505 U.S. 647, 651?652 (1992), before a court engages in an analysis of each *Barker* factor, the defendant must ?first make a threshold showing that ?the interval between accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial? delay.? Affirmative proof of prejudice is not essential to every speedy trial claim because excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or even identify, but the presumption of prejudice to a defendant?s ability to defend himself is extenuated by the defendant?s acquiescence in some or all the delay.

Under *Strunk v. United States*, 412 U.S. 434, 440 (1973), and *Dragoo v. State,* 96 S.W.3d 308, 313 (Tex.Crim.App. 2003), if a violation of the speedy trial right is established, the only remedy is dismissal of the prosecution.

***Senn v. State*, No. 02-15-00201-CR, 2018 Tex. App. LEXIS 8722 (Tex. App. Fort Worth Oct. 25, 2018) [Prosecution under the bigamy statute, Tex. Penal Code §?22.011(f)]**

If the State prosecutes under Tex. Penal Code §?22.011(f), which elevates a sexual assault from an F-2 to an F-1 if the defendant would be committing bigamy if he ?marries? the alleged victim, the jury charge must include language from the bigamy statute, Tex. Penal Code §?25.01.

Under Tex. Code Crim. Proc. Art. 36.14, it is the trial court?s responsibility to deliver to the jury ?a written charge distinctly setting forth the law applicable to the case.? As ?law applicable to the case,? the definitions of words or phrases defined by statute must be included in the jury charge. If a word or phrase is not defined, the trial court may define them in the charge if they have an established legal or technical meaning.

Under the law of statutory construction, if the language of the statute is plain but effectuating that language would lead to absurd results or is ambiguous (reasonably susceptible to more than one interpretation), under Tex. Gov. Code §?311.023, a court may consult extratextual factors to ascertain the collective intent of the legislature: (1) the object sought to be attained by the legislature; (2) the circumstances under which the statute was enacted; (3) the legislative history; (4) the common law or former statutory provisions, including laws on the same or similar subjects; (5) the consequences of a particular construction; (6) the administrative construction of the statute; and (7) the title or caption, preamble, and any emergency provision. Statutory construction is a question of law is reviewed de novo.

Under *Almanza v. State,* 686 S.W.2d 157, 171 (Tex.Crim.App. 1985) (op. on reh.), when examining the record for egregious harm, the court considers the entire jury charge, the state of the evidence, the closing arguments of the parties, and 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.

Editor?s Note: the relevant parts of this case are the holdings from *Arteaga v. State,* 521 S.W.3d 329

(Tex.Crim.App. 2017):

- If the State prosecutes under Tex. Penal Code §?22.011(f), which elevates a sexual assault from an F-2 to an F-1 if the defendant would be committing bigamy if he ?marries? the alleged victim, the jury charge must include language from the bigamy statute, Tex. Penal Code §?25.01.
- Under Tex. Code Crim. Proc. Art. 36.14, it is the trial court?s responsibility to deliver to the jury ?a written charge distinctly setting forth the law applicable to the case.? As ?law applicable to the case,? the definitions of words or phrases defined by statute must be included in the jury charge. If a word or phrase is not defined, the trial court may define them in the charge if they have an established legal or technical meaning.
- Under the law of statutory construction, if the language of the statute is plain but effectuating that language would lead to absurd results or is ambiguous (reasonably susceptible to more than one interpretation), under Tex. Gov. Code §?311.023, a court may consult extratextual factors to ascertain the collective intent of the legislature: (1) the object sought to be attained by the legislature; (2) the circumstances under which the statute was enacted; (3) the legislative history; (4) the common law or former statutory provisions, including laws on the same or similar subjects; (5) the consequences of a particular construction; (6) the administrative construction of the statute; and (7) the title or caption, preamble, and any emergency provision. Statutory construction is a question of law is reviewed de novo.
- Under *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1985) (op. on reh.), when examining the record for egregious harm, the court considers the entire jury charge, the state of the evidence, the closing arguments of the parties, and 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.

***In re the State of Texas,* No. 07-18-00265-CV, 2018 Tex. App. LEXIS 6315 (Tex. App. Amarillo Aug. 10, 2018) (designated for publication) [Document requirements for mandamus or prohibition]**

Under *In re Reece*, 341 S.W.3d 360, 364 (Tex. 2011) (orig. proceeding), mandamus is appropriate only where the trial court has clearly abused its discretion and the relator has no adequate remedy by appeal. A trial court abuses its discretion if it clearly fails to analyze the law correctly or apply the law correctly to the facts. The party seeking relief (relator) bears the burden to provide a sufficient record to establish entitlement to mandamus relief.

Under *In re Medina,* 475 S.W.3d 291, 297 (Tex.Crim.App. 2015), and *State ex rel. Wade v. Mays,* 689 S.W.2d 893, 897 (Tex.Crim.App. 1985), prohibition must meet the same standards as mandamus. Prohibition seeks to prevent the commission of a fu-ture act, while mandamus seeks operates to undo or nullify an act already performed. To establish entitlement to relief through prohibition, an applicant must show that the act he wishes the court to restrict does not involve a discretionary or judicial decision, and that he has no adequate remedy at law. The applicant bears the burden to prove that he is entitled to prohibition.

Under Tex. Rule App. Proc 52.3(k)(1), the relator is required to: (1) file an appendix containing a certified or sworn copy of the orders complained of or documents showing the matter complained of; (2) a properly authenticated transcript of relevant testimony from the underlying proceeding; and (3) certify that every factual statement in the petition is supported by competent evidence included in the appendix or record.

Editor?s Note: Because he is apparently unhappy that defense counsel filed a 702/*Daubert* motion (i.e., he is unhappy that defense counsel is doing her job), the prosecutor acts vindictively by sending defense counsel a text in which he states that he is withdrawing plea-bargain offers on all pending cases in which defense counsel is the attorney. After the trial court disqualifies him, the prosecutor fails to follow simple rules in filing a mandamus or prohibition and gets flushed out by the court of appeals.

***Speck v. State*,No. 14-17-00755-CR, 2018 Tex. App. LEXIS 9470 (Tex.App.?Houston [14th Dist.] Nov. 20, 2018) (designated for publication) [Changing lanes under Tex. Transp. Code §?545.104(a)]**

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

Under Tex. Transp. Code §?545.104(a), a driver must signal to indicate an intention to turn, change lanes, or start from a parked position. ?Change lanes? is not defined by the statute, so under *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (in the absence of a statutory definition, words are to be given their plain meaning), ?change? means ?to make a shift from one to another? and ?lane? means ?a strip of roadway for a single line of vehicles.? When combined, the common understanding of ?change lanes? is to make a shift from one strip of roadway to another.

If a person is driving in a lane that is not an ?Exit Only? lane, but one that connects with an optional exit ramp, the person must use a signal to indicate an intention to take the optional exit if the person in fact takes the exit.

Facts:

- Appellant was driving northbound on a highway that had two lanes of traffic with an exit ramp attached to the outermost lane.
- Appellant was in that outermost lane, and he took the attached exit:

[5]

- An officer initiated a traffic stop because appellant exited the highway without signaling.
- The officer determined that appellant was inebriated so he arrested him for DWI.
- Appellant filed an MTS, arguing that the officer lacked reasonable suspicion to initiate the traffic stop because a signal was not required.
- The trial court denied the MTS, concluding that a signal was required because appellant had made a ?change of roadway course.?
- There is no dispute that appellant failed to signal since the episode was captured on the officer?s dash-cam video.
- Because the appellant failed to do this, the officer correctly initiated the traffic stop, so the trial court correctly denied the MTS.

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