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From Editor Michael Mowla:

Please do not rely solely on the summaries set forth below. The reader is advised to read the full text of each opinion in addition to the brief synopses provided.

TCDLA thanks the Court of Criminal Appeals for graciously administering a grant which underwrites the majority of the costs of our Significant Decisions Report. We appreciate the Court?s continued support of our efforts to keep lawyers informed of significant appellate court decisions from Texas, the United States Court of Appeals for the Fifth Circuit, and the Supreme Court of the United States. However, the decision as to which cases are reported lies exclusively with our Significant Decisions editor. Likewise, any and all editorial comments are a reflection of the editor?s view of the case, and his alone.

Supreme Court of the United States

***Editor?s note:*There have been no significant decisions handed down yet by the SCOTUS this term.**

United States Court of Appeals for the Fifth Circuit

***United States v. Beverly*, No. 18-20729, 2019 U.S.App.LEXIS 33977 (5th Cir. Nov. 14, 2019) (designated for publication) [Good-faith exception; Stored Communications Act]**

Under *Davis v. United States*, 564 U.S. 229, 238 (2011), the good-faith exception provides an exception to the exclusionary rule if investigators acted with an objectively reasonable, good-faith belief that their conduct was lawful. Where official action is pursued in complete good faith, the deterrence rationale loses much of its force. The exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good-faith ones.

The good-faith exception does not apply if the: (1) issuing magistrate was misled by information in an affidavit that the affiant knew or reasonably should have known was false; (2) issuing magistrate wholly abandoned his judicial role; (3) warrant affidavit is so lacking in indicia of probable cause as to render official belief in its existence unreasonable; and (4) warrant is so facially deficient in failing to particularize the place to be searched or things to be seized that executing officers cannot reasonably presume it valid.

Under *United States v. Leon*, 468 U.S. 897, 906 (1984), the good-faith exception applies to evidence

obtained from warrants that were obtained without probable cause.

Under *Illinois v. Krull*, 480 U.S. 340, 342 (1987), the good-faith exception applies to evidence obtained from warrantless searches later held to be unconstitutional. It applies where officers acted in objectively reasonable reliance upon a statute authorizing warrantless administrative searches, but the statute was after found to violate the Fourth Amendment. Excluding evidence obtained prior to a judicial declaration will not deter future Fourth Amendment violations by an officer who fulfilled his responsibility to enforce the statute as written.

Under the Stored Communications Act (SCA), 18 U.S.C. §§?2701?2711, law enforcement may obtain a court order compelling the disclosure of certain telecommunications records when the agency offers specific and articulable facts showing that there are reasonable grounds to believe that the records sought are relevant and material to an ongoing criminal investigation. 18 U.S.C. §?2703(d). This is the reasonable suspicion standard under *Terry v. Ohio*, 392 U.S. 1 (1968), and is less stringent than the probable-cause standard required for a search warrant.

Under *Carpenter v. United States*, 138 S.Ct. 2206 (2018), obtaining historical cell-site location information (CSLI) from a wireless carrier is a search under the Fourth Amendment because an individual has a legitimate expectation of privacy in the record of his physical movements as captured through CSLI.

***United States v. Gentry*, No. 17-10165, 2019 U.S.App.LEXIS 32238 (5th Cir. Oct. 28, 2019) (designated for publication) [Conflict of interest for breakdown in communication; enhancement under U.S.S.G. §?3C1.1 for obstruction of justice; sufficient indicia of reliability of information in a PSR]**

An attorney?s conflict of interest may be so flagrant that it violates the Sixth Amendment. Where the alleged conflict is due to a conflict between the attorney?s personal interest and his client?s (rather than multiple client representation), *Strickland v. Washington*, 466 U.S. 668 (1984), applies: A defendant must show that counsel?s performance was deficient and it prejudiced the defense.

A district court is constitutionally required to provide substitute counsel if there is a complete breakdown in communication. Reversal is inappropriate if the breakdown is attributed to the defendant?s intransigence and not to the neglect of defense counsel or the trial court.

Under U.S.S.G. §?3C1.1, a 2-level increase to a defendant?s offense level is added if: (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant?s offense of conviction and any relevant conduct; or (B) a closely related offense. A finding of obstruction of justice under U.S.S.G. §?3C1.1 is a factual finding that is reviewed for clear error.

Requests to substitute counsel alone do <u>not</u> amount to obstruction of justice under U.S.S.G. §?3C1.1. A defendant?s failure to work in harmony with court-appointed counsel may occur for reasons like anxiety related to the consequences of a criminal conviction, differences in personality, and incompatible communication styles. District courts must be cautious not to punish defendants for their distrust of the criminal justice system or lack of knowledge related to the procedures applied. District courts must avoid applying the obstruction-of-justice sentence enhancement in a way that discourages defendants from actively participating in their defenses and asserting their constitutional right to effective assistance of counsel.

Sentences based upon erroneous and material information or assumptions violate due process.

A district court?s calculation of the quantity of drugs involved in an offense is a factual determination. Factual findings regarding sentencing factors are entitled to considerable deference and will be reversed only if they are clearly erroneous. The remedy where a trial court relies upon erroneous information or

assumptions is to remand for a new sentencing hearing.

A district court may extrapolate the quantity of drugs from any information that has sufficient indicia of reliability to support its probable accuracy.

Information in a PSR generally bears a sufficient indicia of reliability to be considered evidence for making factual determinations. But mere inclusion in the PSR does not convert facts lacking an adequate evidentiary basis with sufficient indicia of reliability into facts that may be relied upon. If the facts lack sufficient indicia of reliability, it is error for the district court to consider it. When facts contained in the PSR are supported by an adequate evidentiary basis with sufficient indicia of reliability, a defendant must offer rebuttal evidence demonstrating that the facts are materially untrue, inaccurate, or unreliable.

Editor?s note: This case presents a good example of ways to deal with very difficult clients while maintaining client confidentiality and protecting the attorney-client privilege.

***United States v. Johnson,* No. 18-50826, 2019 U.S.App.LEXIS 35005 (5th Cir. Nov. 22, 2019) (designated for publication) [Plain error review; counting a prior sentence as part of criminal history under U.S.S.G. §?4A1.2(e)]**

Under *Gall v. United States,* 552 U.S. 38, 51 (2007), a district court commits a significant procedural error at sentencing if it improperly calculates the Guidelines range or selects a sentence based on clearly erroneous facts.

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

Under U.S.S.G. §?4A1.2(e), a prior sentence is not counted unless: (1) it was a prison sentence exceeding 1 year and 1 month that was imposed within 15 years of the defendant?s commencement of the present offense, or (2) it was any other sentence that was imposed within 10 years of the defendant?s commencement of the present offense.

***United States v. Kearby,* No. 18-10874, 2019 U.S.App.LEXIS 35280 (5th Cir. Nov. 25, 2019) (designated for publication) [Calculation of drug-quantity; 2-level increase for importing meth per U.S.S.G. §?2D1.1(b)(5); 2-level reduction per U.S.S.G. §?3B1.2(b) for being a minor participant]**

Under *Gall v. United States,* 552 U.S. 38, 46 (2007), sentences are reviewed per bifurcated process: (1) examine whether the district court committed significant procedural error, and if not, (2) consider the substantive reasonableness of the sentence.

Calculation of drug-quantity is a factual determination that is not reversed unless implausible considering the entire record. A district court may consider estimates of quantity for sentencing purposes. A court may consider statements of coconspirators even they are somewhat imprecise in calculating drug quantity.

When making factual findings for sentencing purposes, the district court may consider any information that bears a sufficient indicia of reliability to support its probable accuracy. It may adopt facts in a PSR

without inquiry if the facts had an adequate evidentiary basis and the defendant does not present rebuttal evidence.

If uncorroborated hearsay is sufficiently reliable, a district court may rely on it in making sentencing findings.

Under U.S.S.G. §?2D1.1(b)(5), a 2-level increase is allowed if the offense involved the importation or manufacture of meth of meth from listed chemicals that the defendant knew were imported unlawfully and the defendant is not subject to an adjustment under §?3B1.2 (Mitigating Role). The distribution or possession with intent to distribute of imported meth alone may subject a defendant to the §?2D1.1(b)(5) enhancement. It applies even if the distributor doesn?t know of the foreign origins.

Under U.S.S.G. §?3B1.2(b), a 2-level reduction is allowed if the defendant was a minor participant in the criminal activity?substantially less culpable than the average participant but whose role was not minimal. Whether the reduction applies is based on the totality of the circumstances. The district court should consider these factors: knowledge, planning, authority, responsibility, and benefit from the scheme. The court need not expressly weigh each factor but may address them if the parties cite them and proffer facts and contentions relating to them.

***United States v. Sparks,* No. 18-50225, 2019 U.S.App.LEXIS 31900 (5th Cir. Oct. 24, 2019) (designated for publication) [*Miller v. Alabama* does not add procedural requirements above 18 U.S.C. §?3553(a)]**

Under *Miller v. Alabama*, 567 U.S. 460 (2012), the SCOTUS held that juveniles may not receive mandatory LWOP sentences. Under *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), *Miller* is retroactive to cases on collateral review. *Miller* does not foreclose life without parole on a discretionary basis. *Miller* has no relevance to sentences less than LWOP, so sentences of life with the possibility of parole or early release are allowed. A term-of-years sentence cannot be characterized as a de facto life sentence.

The procedural component of *Miller* requires a sentencer to consider a juvenile?s youth and attendant characteristics before determining that life without parole is a proportionate sentence.

Under 18 U.S.C. §?3553(a), a court shall impose a sentence sufficient to comply with the purposes of sentencing. The court must examine the nature and circumstances of the offense and the history and characteristics of the defendant, and consider the policy statements of the Sentencing Commission, which allow for consideration of age. *Miller* does not add procedural requirements above 18 U.S.C. §?3553(a).

Texas Court of Criminal Appeals

***Allen v. State,* No. PD-1042-18, 2019 Tex.Crim.App. LEXIS 1172 (Tex.Crim.App. Nov. 20, 2019) (designated for publication) (Aggravated Robbery, Harris Co.) [Summoning witness/mileage fee in Tex. Code Crim. Proc. Art. 102.011(a)(3), (b) does not violate separation of powers principles]**

The summoning witness/mileage fee in Tex. Code Crim. Proc. Art. 102.011(a)(3), (b) does not violate separation of powers principles.

Under Tex. Gov. Code §?311.021, there is a presumption that a statute is valid. In a challenge to the constitutionality of a statute, a court must interpret the statute such that its constitutionality is supported and upheld and must make every reasonable presumption in favor of its constitutionality, unless the contrary is clearly shown.

Under *City of Los Angeles v. Patel*, 135 S.Ct. 2443, 2449 (2015), a facial challenge is an attack on a statute itself as opposed to a particular application. Such a challenge requires the challenger to establish that no set of circumstances exists under which the statute would be valid.

Under Tex. Const. Art. II, §?1, and *Ex parte Lo,* 424 S.W.3d 10, 28 (Tex.Crim.App. 2013) (op. on State?s motion for reh.), the three branches of government?legislative, executive, and judicial?are separate and distinct branches, and no person or collection of persons being of one of these departments shall exercise any power properly attached to either of the others unless expressly permitted in the Constitution. This division ensures that power granted one branch may be exercised by only that branch, to the exclusion of the others. One way the separation of powers provision is violated is when one branch of government assumes or is delegated a power more properly attached to another branch.

The authority to impose taxes is vested in the legislative branch, and the authority to collect taxes is delegated to the executive branch. The courts are delegated a power more properly attached to the executive branch if a statute turns the courts into tax gatherers. But under certain circumstances, a court?s collection of fees in a criminal case is a proper part of the judicial function and does not constitute an impermissible tax.

Constitutionally permissible court costs are those that: (1) reimburse criminal justice expenses incurred in connection with the defendant?s criminal prosecution, and (2) are to be expended to offset future criminal justice costs.

A statute assessing costs for future expenses or an interconnected statute must expressly direct the collected fees to be expended for a legitimate criminal justice purpose. Such costs are legitimate when imposed to recoup expenses incurred during a prosecution.

***Garcia v. State,* No. PD-0035-18, 2019 Tex.Crim.App.LEXIS 1112 (Tex.Crim.App. Nov. 20, 2019) (designated for publication) (Aggravated Sexual Assault of a child, Harris Co.) [Election rule in sexual assault cases]**

In a sexual assault trial where one act is alleged in the indictment and more than one act is shown by the evidence, the State must elect the act upon which it would rely for conviction. The trial court has discretion to order the State to make an election at any time before the State rests its case-in-chief. Once the State rests, if the defendant makes a timely request the trial court must order the State to decide. Failure to do so constitutes constitutional error subject to a Tex. Rule App. Proc. 44.2(a) harm analysis.

The purpose of the election rule is to: (1) protect the defendant from the introduction of extraneous offenses; (2) minimize the risk that the jury might convict not because one or more crimes were proved beyond a reasonable doubt but because all of them convinced the jury that the defendant was guilty; (3) ensure a unanimous verdict on one incident that constituted the offense charged; and (4) give the defendant notice of the offense the State intends to rely upon for prosecution and afford the defendant an opportunity to defend.

Texas Courts of Appeals

***August v. State,* No. 14-18-00448-CR, 2019 Tex. App.?LEXIS 9672 (Tex.App.?Houston [14th Dist.] Nov. 5, 2019) (designated for publication) (Burglary of a habitation, Waller Co.) [Show-up identifications]**

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 *Barley v. State,* 906 S.W.2d 27, 32?33 (Tex.Crim.App. 1995), a pretrial identification procedure may be so suggestive and conducive to mistaken identification that use of it at trial is a denial of due process. The question is reviewed de novo. The Appellant must show by clear and convincing evidence that the pretrial identification procedure: (1) was impermissibly suggestive, and (2) gave rise to a substantial likelihood of irreparable misidentification.

The five nonexclusive factors to determine whether an impermissibly suggestive identification procedure gave rise to a substantial likelihood of irreparable misidentification are the: (1) witness? opportunity to view the suspect at the time of the crime; (2) witness? degree of attention; (3) accuracy of the witness? prior description of the suspect; (4) level of certainty demonstrated by the witness at the confrontation; and (5) time between the crime and the confrontation.

?Show up? identifications do not necessarily violate a defendant?s right to due process but tend to be suggestive. The totality of the circumstances is considered to determine whether a show-up was impermissibly suggestive. If the totality of the circumstances indicates that a substantial likelihood of irreparable misidentification exists, due process is violated.

Editor?s note: This is the complete law on the standard of review for motions to suppress:

- 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 *Barley v. State,* 906 S.W.2d 27, 32?33 (Tex.Crim.App. 1995), a pretrial identification procedure may be so suggestive and conducive to mistaken identification that use of it at trial is a denial of due process. The question is reviewed de novo. The Appellant must show by clear and convincing evidence that the pretrial identification procedure: (1) was impermissibly suggestive, and (2) gave rise to a substantial likelihood of irreparable misidentification.
- The five nonexclusive factors to determine whether an impermissibly suggestive identification procedure gave rise to a substantial likelihood of irreparable misidentification are the: (1) witness? opportunity to view the suspect at the time of the crime; (2) witness? degree of attention; (3) accuracy of the witness? prior description of the suspect; (4) level of certainty demonstrated by the witness at the confrontation; and (5) time between the crime and the confrontation.
- ?Show up? identifications do not necessarily violate a defendant?s right to due process but tend to be suggestive. The totality of the circumstances is considered to determine whether a show-up was impermissibly suggestive. If the totality of the circumstances indicates that a substantial likelihood of irreparable misidentification exists, due process is violated.

Editor?s note: Suggestive lineups and show-ups do nothing other than either confirm what the police already know or pin a crime on the wrong person. The police wouldn?t like it if the tables were turned on them.

***State v. Castanedanieto,* Nos. 05-18-00870-CR, 05-18-00871-CR, & 05-18-00872-CR, 2019 Tex.App.?LEXIS 8884 (Tex.App.?Dallas Oct. 3, 2019) (designated for publication) (Aggravated Robbery, Dallas Co.) [Later confession tainted a prior one]**

Under *Sterling v. State*, 800 S.W.2d 513, 519?520 (Tex.Crim.App. 1990), to determine whether a later confession is tainted by a prior one, courts must consider: (1) whether the condition rendering the first confession inadmissible persisted through later questioning; (2) the length of the break between the two confessions; (3) whether the defendant was given renewed *Miranda* warnings; (4) whether the defendant initiated the interrogation that resulted in the later confession; and (5) any other relevant circumstances, including whether a magistrate warned the defendant of his rights between confessions, the defendant?s latter confession was motivated by earlier improper influences brought to bear on him, the defendant remained in custody between the confessions, the defendant conferred with counsel between confessions or requested counsel, and the defendant gave the second confession when he otherwise might not have because he had already given the first one.

***Cole v. State,* Nos. 09-18-00124-CR & 09-18-00125-CR, 2019 Tex.App.?LEXIS 9873 (Tex.App.?Beaumont, Nov. 13, 2019) (designated for publication) (Aggravated Robbery, Jefferson Co.) [Self-representation under*Faretta v. California,* 422 U.S. 806 (1975)]**

Under *Faretta v. California*, 422 U.S. 806, 835?836 (1975), a criminal defendant has a constitutional right to conduct his own defense if the defendant has voluntarily, knowingly, and intelligently elected to do so. Forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so. When the defendant elects to represent himself, he waives his right to assistance of counsel. Due to the consequences likely to result from the election, trial courts must conduct an inquiry and determine whether the defendant is voluntarily, knowingly, and intelligently waiving his right to counsel. The trial court must inform the defendant of the disadvantages and dangers of proceeding without counsel. This inquiry is required so the record shows the defendant ?knows what he is doing? and making the choice with his ?eyes open.?

Under *Scarborough v. State*, 777 S.W.2d 83, 92 (Tex.Crim.App. 1989), if a defendant?s valid election to represent himself must be honored even if it causes inconvenience that may be somewhat disruptive of the trial. If the disruption is not a calculated effort to obstruct the trial, the fact that some inconvenience results is insufficient to allow a court to reject a defendant?s valid election of his right to represent himself.

***State v. Couch,* No. 03-16-00727-CR, 2019 Tex.App.?LEXIS 7867 (Tex.App.?Austin Aug. 29, 2019) (designated for publication) (DWI, Comal Co.) (McNeely, Garcia, and the elimination rate in blood of substances other than alcohol]**

Under *Missouri v. McNeely*, 569 U.S. 141, 148 (2013), and *State v. Garcia*, 569 S.W.3d 142, 148 (Tex.Crim.App. 2018), the exigent-circumstances exception applies when exigencies make the needs of law enforcement so compelling that a warrantless search is objectively reasonable. An officer may be justified in conducting a warrantless search to prevent the imminent destruction of evidence. The natural dissipation of alcohol in the blood may support a finding of exigency but does not do so categorically. An exigent-circumstances review is informed by the totality of the facts and circumstances available to the officer and analyzed under an objective standard of reasonableness. In investigations where officers can reasonably obtain a warrant before blood can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. Relevant factors are: (1) the officer?s knowledge of the body?s natural metabolic process and the attendant evidence destruction over time; (2) procedures in place for obtaining a warrant; (3) the availability of a magistrate; and (4) the practical problems of obtaining a warrant within a timeframe that preserves the opportunity to obtain reliable evidence. When the circumstances include an auto accident, additional considerations are: (1) the time required to complete the investigation;, (2) the lack of available law enforcement to assist in the investigation; (3) the accident?s severity; and (4) the

potential medical intervention that the circumstances require.

Under *State v. Garcia,* 569 S.W.3d 142, 148 (Tex.Crim.App. 2018), the TCCA clarified how courts are to apply the bifurcated standard of review where the State claims that exigent circumstances existed: (1) if supported by the record, findings are entitled to deference; (2) whether an exigency justifies a warrantless search depends on what facts were available to the officer when he conducts the search; (3) in assessing the reasonableness of an officer?s actions, a court should consider the facts known to the officer and reasonable inferences that he is entitled to draw from the facts considering his experience (the determination of whether the inferences are reasonable is a legal conclusion not entitled to deference); and (4) an officer?s subjective motivation for conducting a warrantless search is irrelevant to the exigency analysis (it is irrelevant if the officer did not infer that he was faced with an exigency?if the known facts objectively support an exigency, the search is upheld?but if the officer subjectively inferred that he was faced with an exigency but facts objectively counter that inference, the search should be suppressed. Once (1)?(4) are settled, the court determines whether considering the known facts and reasonable inferences from those facts an objectively reasonable officer would conclude that in the time it would take to secure a warrant the efficacy of the search would be significantly undermined. This Fourth-Amendment reasonableness inquiry is reviewed de novo.

Under *State v. Garcia,* 569 S.W.3d 142, 154 (Tex.Crim.App. 2018), the possible presence of substances other than alcohol in blood can support a finding of exigency even if the substance lacks a known elimination rate because without such a rate, officers face inevitable evidence destruction without the ability to know?unlike alcohol?s widely accepted rate?how much evidence it was losing as time passed. But for the other substance to be considered in the exigency analysis, the record must show how or why the officer might reasonably have suspected that the person was using the other substance.

***In re Fletcher,* No. 01-18-01109-CR, 2019 Tex.App.?LEXIS 7079 (Tex.App.?Houston [1st Dist.] Aug. 13, 2019) (designated for publication) (Mandamus, Chambers Co.) (Right to keep appointed counsel)**

Under *State ex rel. Young v. Sixth Judicial District Court of Appeals,* 236 S.W.3d 207, 210 (Tex.Crim.App. 2007), to be entitled to mandamus relief, a relator must show: (1) no adequate remedy at law to redress the alleged harm; and (2) must have a clear right to the relief sought (must show that what he seeks to compel is a ministerial act not involving a discretionary or judicial decision?can satisfy if he can show he has a clear right to the relief sought?that the facts and circumstances dictate only one rational decision under unequivocal, well-settled (statutory, constitutional, or caselaw), and clearly controlling legal principles.

Under *Stearnes v. Clinton,* 780 S.W.2d 216, 219 (Tex.Crim.App. 1989), in a case involving the arbitrary disqualification of appointed counsel rather than retained counsel of choice, the regular appellate process does not provide an adequate remedy even if it results in a reversal and new trial. Although an indigent defendant does not have the right to counsel of his own choosing, once counsel is appointed, the trial judge is obliged to respect the attorney-client relationship created through the appointment. To overcome the presumption against the removal of appointed counsel after an attorney-client relationship has been established, there must be a ?principled reason? for the removal.

It may be proper for a court to remove counsel over the client?s objection where the integrity of the judicial process and orderly administration of justice is impeded. But even the judge?s opinion that counsel is incompetent may not justify removing the attorney. Nor may the appearance of a conflict of interest show good cause for removal.

***Rodriguez-Cruz v. State,* No. 04-18-00905-CR, 2019 Tex.App.?LEXIS 7810 (Tex.App.?San Antonio Aug. 28, 2019) (designated for publication) (DWI under Tex. Penal Code §?49.04(a), Bexar Co.) [Motion for continuance based on a missing witness and after trial begins under Tex. Code Crim. Proc. Art. 29.13]**

Under Tex. Code Crim. Proc. Art. 29.13, after trial has begun, a continuance may be granted on motion when the trial court is satisfied that by some unexpected occurrence since the trial began, which no reasonable diligence could have anticipated, the movant is so taken by surprise that a fair trial cannot be had.

Under *Harrison v. State*, 187 S.W.3d 429, 434 (Tex.Crim.App. 2005), when a defendant?s motion for continuance is based on an absent witness, the defendant must show that (1) he has exercised diligence to procure the witness? attendance; (2) the witness was not absent by the procurement or consent of the defense; (3) the motion was not made for delay; and (4) the facts expected to be proved by the witness are material. Review of a trial court?s denial of a mid-trial continuance is for an abuse of discretion.
