# SIGNIFICANT DECISIONS
# UNITED STATES SUPREME COURT AND THE COURT OF CRIMINAL APPEALS
# FROM SEPTEMBER 2017 TO JUNE 2018

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## Acknowledgement

This paper has been the primary responsibility of my briefing attorney, Victoria Ford. Until she got a better job at the beginning of May. The rest of the stuff, including the dynamic use of italics and typos, comes from me. In some of the cases I have included commentary. The views therein are my own. My briefing attorney cannot be blamed for failing to stop me.

## Table of Contents

# SCOTUS/CCA Update

# Significant Decisions from September 2017 to June 2018

## I. INTRODUCTION

This paper covers the published opinions issued by the Court of Criminal Appeals between September 1, 2017 and June 29, 2018. It also includes the significant criminal cases from the United States Supreme Court that have broad applicability, issued during that same time frame. I even threw in a couple of Texas Supreme Court cases (one dealing with expunctions). Thus, this should amount to coverage of the complete terms for both the Court of Criminal Appeals and the United States Supreme Court. If you feel something is missing from the paper that should have been discussed, please email me though Nichole Reedy at nichole.reedy@txcourts.gov and we'll do our best to either correct or explain ourselves.

## II. MOTIONS TO SUPPRESS

### A. Expectation of Privacy

**1. Police must obtain a warrant supported by probable cause to seize seven or more days of cell-phone provider records regarding historical cell site location information.** In 2011, police officers arrested four men suspected of robbing a series of Radio Shack and T-Mobile stores in Detroit. One of the men confessed that, over the previous four months, the group had robbed nine different stores in Michigan and Ohio. This suspect gave the FBI the cell phone numbers of several of the accomplices, which led to the FBI discovering more phone numbers for other accomplices. The FBI took this information and obtained court orders under the Stored Communications Act to obtain cell phone records for Timothy Carpenter and several other suspects. This statute only required a showing of "reasonable grounds to believe" that the records were relevant and material to an ongoing criminal investigation. The FBI got two orders, one that produced records spanning 127 days, and another spanning a period of two days. Using this information, the government charged Carpenter with six counts of robbery and an additional six counts of carrying a firearm during a federal crime of violence. Prior to trial, Carpenter moved to suppress the cell-site data provided by the wireless carriers claiming that the seizure of these records violated the Fourth Amendment because they had been obtained without a warrant supported by probable cause. The District Court denied the motion, and the Sixth Circuit Court of Appeals later affirmed. According to the Sixth Circuit, Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers.

The United States Supreme Court reversed. ***Carpenter v. United States*, ___ S.Ct. ___; 2018 WL 3073916 (June 22, 2018).** Writing for a five-judge majority, Chief Justice Roberts explained that while the Fourth Amendment was tied to common-law trespass for much of the country's history, property rights are not the sole measure of Fourth Amendment violations. The Fourth Amendment protects people not places, and also protects certain expectations of privacy. As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, the Court has sought to preserve the degree of privacy against government that exited when the Fourth Amendment was adopted. According to Chief Justice Roberts, this case at the intersection of two lines of cases: a person's expectation of privacy in his physical location and movements, and the third-party doctrine. Under the physical movement cases, the Court had previously held there was no expectation of privacy in limited surveillance of a discrete automotive journey. However, more recently, at least five justices had recognized that longer term GPS monitoring impinges upon expectations of privacy even if those movements were disclosed to the public at large. Under cases where information has been voluntarily disclosed to a third party, the Court had held there was no expectation of privacy in bank records or pen-registers. In both of those types of situations, the individual knows he or she has voluntarily turned over information to third party, so he or she assumes the risk that the records would be disclosed to police.

According to Chief Justice Roberts, there is an expectation of privacy in cell phone records because of their unique nature. Technologically, cell phones (and their subsequent records) provide near perfect surveillance, and the retrospective quality of the data

gives access to a category of information otherwise unknowable. Moreover, the voluntary nature of submission of the information to a third party is not as obvious with regard to cell phones. Cell site location information (CSLI) is not truly "shared" because the cell phone logs a cell-site record without any affirmative act on the part of the owner beyond turning the phone on. The Court declined to extend the third-party record doctrine to historical CSLI, and recognized an expectation of privacy in seven or more days of such information.

The Court also explained that the Government must generally obtain a warrant supported by probable cause before acquiring such records. In this case, the Government's application for the records only set forth (pursuant to a statute) that there were reasonable grounds to believe the information would be relevant and material. Chief Justice Roberts rejected a dissenting argument that this might engraft a probable cause requirement to a subpoena request for business records. According to the Court, CSLI records are different from business records because CSLI records implicate basic Fourth Amendment concerns about arbitrary government power much more directly than corporate tax or payroll ledgers. A warrant is only required in the rare case in which the suspect has a legitimate expectation of privacy interest in records held by a third party. Moreover, the Government will be able to get access to CSLI records if there is an exception to the warrant requirement, such as exigent circumstances. Chief Justice Roberts noted that lower courts, for instance, have approved warrantless searches related to bomb threats, active shootings, and child abductions, and, according to Chief Justice Roberts, this case does not call those circumstances into question.

Justice Kennedy filed a dissenting opinion joined by Justices Thomas and Alito. According to Justice Kennedy, this new rule puts needed, reasonable, accepted, lawful, and congressionally authorized criminal investigations at serious risk in serious cases. Further, he disagreed with the Court that cell-site records are different from any other kind of business record. This distinction is unprincipled and unworkable. Most importantly, Carpenter had no possessory or proprietary interest in the records seized by the Government. Because Carpenter lacks a requisite connection to the cell-site records, he may not claim a reasonable expectation of privacy in them. Finally, the case should have been remanded to the court of appeals to determine if the search was reasonable once the Court determined that a search had occurred.

Justice Thomas also filed a dissenting opinion. According to Justice Thomas, the Fourth Amendment protects people from unreasonable searches of their "persons, houses, papers, and effects." Because the CSLI records did not fall into any of these categories (and they were not even "his"), the Government seizure of the records did not violate the Fourth Amendment. Further, according to Justice Thomas, the "reasonable expectation of privacy test" has no basis in the text or history of the Fourth Amendment, and it should be reconsidered.

Justice Alito also filed a dissenting opinion joined by Justice Thomas. According to Justice Alito, the case will guarantee a blizzard of litigation while threatening may legitimate and valuable investigative practices upon which law enforcement has rightfully come to rely. It ignores the distinction between an actual search by law enforcement and an order requesting a party look through its own records and produce specified documents. Also it allows a defendant to object to the search of a third party's property. According to Justice Alito, this will interfere with the ability to use subpoenas to obtain records duces tecum.

Not to be outdone, Justice Gorsuch also filed a dissenting opinion. Justice Gorsuch was also critical of the expectation of privacy test, though he was careful to recognize that the Sixth Circuit had faithfully applied the Supreme Court's precedent when reaching it's decision. However, he suggested that the records at issue might constitute "paper" or "effects" deserving of Fourth Amendment protection. However, because that argument was not made, he could not affirm on that ground, so he dissented.

[**Commentary:** I would point out that it is a bit of a "tell" when the majority opinion starts off with global statements regarding the prevalence of cell phones in American society instead of the facts of the case. And that may be the real bottom line here. The arguments

on all sides are about how to frame the case and the proper intellectual rubric to apply. But with regard to the discrete issue in this case, the ruling makes sense and should be relatively easy to follow at least with regard to cell phone records. Many jurisdictions require a court order based upon probable cause to get similar information, so going forward this holding should not come as a tremendous shock, at least with regard to searches and seizure for this specific type of information. With regard to Texas, Article 18.21 was amended in 2013 to provide a procedure whereby police could obtain a warrant based upon probable cause to obtain such data. While the provision allowing for a court order based upon reasonable belief still remains, some counties have sought warrants rather than simple court orders to get this type of information. Additionally, the Court of Criminal Appeals held in *Love v. State*, that the content of messages obtained through the court order process violated the Fourth Amendment.

More problematically, however, the Court of Criminal Appeals held in *Ford v. State*, that securing four days of historical cell site location information by court order did not run afoul of the Fourth Amendment. The United States Supreme Court denied certiorari in that case (and a rehearing on the denial of certiorari). *See Ford v. Texas*, 136 S.Ct. 2380 (May 23, 2016). Then the Court decided *Carpenter*. So, is this case stil good? Did they deny cert. in *Ford* because police seized only four days of information? The Supreme Court did note in *Carpenter* that "It is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search." *Carpenter*, 2018 WL 3073916 at *9 n. 3. Note also that SCOTUS remanded a case in Texas dealing with more than seven days of CSLI for reconsideration in light of *Carpenter*. ***Hankston v. Texas*, 2018 WL 3148283 (June 28, 2018).** We don't know what SCOTUS was thinking in *Ford*. It is certainly possible that they could have felt the application in *Ford* actually established probable cause even though that was not the basis for the holding. We will have to wait and see whether this seven-day limit (discrete search theory), which had no legal support, will endure.

In broad strokes, it's also worth pointing out that several of the dissenters were critical of the reasonable expectation of privacy test itself. This aspect of the opinion may have longer legs than the distinction between six and seven days of information. This case could signal greater emphasis upon text and history in future cases dealing with the Fourth Amendment. Conversely, the dissenters frame the order in this case as a subpoena for records, though the majority rejects that comparison. Litigants could try to expand privacy interests under the Fourth Amendment by challenging subpoenas for different types of records using this case as support. Time will tell.

And what of Justice Gorsuch's lengthy dissenting opinion? He might have upheld the search anyway despite his agreement with the dissenter's textual arguments. Once the make-up of the Court changes, it will be interesting to see how his view of the Fourth Amendment squares with the others.

Oh yeah, and the opinion (including side opinions) is 119 pages long. My summary definitely does not do this opinion justice as there are many legal nuances that can be revealed from careful study. Please read every one of these opinions to get a full view of the Court's thinking on this issue and the Fourth Amendment generally.]

**2. Driver in possession of a rental car had reasonable expectation of privacy in that car even though his name was not on the rental agreement.** Pennsylvania State Troopers pulled over a car driven by Terrence Byrd, who was the only person in the car. During the stop, troopers learned that the car was rented and that Byrd was not listed on the rental agreement as an authorized driver. The rental agreement specifically noted that allowing an unauthorized driver to drive the car violated the agreement. For this reason, the troopers told Byrd they did not need his consent to search the car, including its trunk where he had stored personal effects. The search of the trunk uncovered body armor and 49 bricks of heroin, which were also not listed in the rental agreement. The Goverment charged Byrd with distribution and possession of heroin with the intent to distribute and possession of body armor. Byrd moved to suppress the evidence, but the trial court denied the motion and the federal court of appeals affirmed.

The United States Supreme Court reversed, holding that a driver of a rental car has a reasonable

expectation of privacy even when he or she is not listed as an authorized driver on the rental agreement. ***Byrd v. United States*, 138 S.Ct. 1518 (May 14, 2018) (9:2:1:0).** Writing for a unanimous court, Justice Kennedy noted that property concepts are instructive in determining the presence or absence of privacy interest protected by the Fourth Amendment. Moreover, the traditional expectation of privacy test supplements rather than displaces the traditional property-based analysis. Here, the driver and sole occupant of the rental car has the right to exclude third parties. This right to exclude does not differ depending on whether the car in question is rented or privately owned by the person in current possession of it. Justice Kennedy also rejected the Government's argument that Byrd lost his expectation of privacy by driving the vehicle in violation of the agreement, essentially voiding the contract. Even assuming this actually breached the contract, it had no effect on expectations of privacy in the car.

However, the Court ultimately remanded the case to determine whether, under the facts presented, Byrd had no greater expectation of privacy in the vehicle than a car thief because he used a third party as a straw man to rent the vehicle. The Court held that the lower courts should determine whether this constituted a criminal offense. Finally, the Court refused to consider whether the troopers nevertheless had probable cause to search the car even if Byrd had an expectation of privacy in it.

Justice Thomas filed a concurring opinion joined by Justice Gorsuch. Justice Thomas expressed doubts about the reasonable expectation of privacy test. Instead, he opined that the case turned on whether the rental car could be determined to be Byrd's "effect." This turns on three threshold questions. First, what kind of property interest do individuals need before something is considered their "effect." Second, what body of law demonstrates whether that property interest is present. Third, is the unauthorized use of a rental car illegal and does that affect the Fourth Amendment analysis.

Justice Alito also filed a concurring opinion. According to Justice Alito, relevant questions bearing on the driver's ability to raise a Fourth Amendment claim may include: the terms of the particular rental agreement, the circumstances surrounding the rental, the reason why the driver took the wheel, any property right that the driver might have, and the legality of his conduct under the law of the state where the conduct occurred. Justice Alito alerted the court of appeals that it was free to re-examine whether Byrd can raise a Fourth Amendment claim or decide the appeal on another ground.

[**Commentary:** In *Florida v. Jardines*, Justice Scalia wrote, "One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy." This case seems to show how resort to property rights makes easy cases hard. In the end, Byrd has an expectation of privacy because he's the only one driving the car and he has possession. But if he's in violation of the rental agreement, hasn't he exceeded the scope of the license given to the person who rented the car? That said, this outcome should not surprise anyone in Texas. The Court of Criminal Appeals reached the same conclusion as the Supreme Court does in *Byrd* (without resort to property-rights analysis) twelve years ago in *Parker v. State*, 182 S.W.3d 923 (Tex. Crim. App. 2006).]

**B. Home v. Car – Automobile exception does not authorize search of car parked within curtilage of a home.** A police officer saw the driver of an orange and black motorcycle with an extended frame commit a traffic violation. The motorcycle driver sped away, eluding apprehension. Further investigation revealed the motorcycle was stolen and in possession of Ryan Collins. The officer discovered photographs on Collins' Facebook featuring the motorcycle parked at the top of the driveway of a house. The officer tracked down the address of the house, drove there, and parked on the street. (He later determined the house was Collins' girlfriend and Collins stayed there a few nights a week.) The officer saw what appeared to be the motorcycle covered in a tarp at the same angle and in the same location on the driveway as in the Facebook photograph. The officer took a picture of the motorcycle from the sidewalk, and then walked onto the residential property, up to the top of the driveway where the motorcycle was parked. The officer pulled off the tarp, and ran a search of the license plate to confirm it was stolen. He took a picture of the motorcycle and went back to his car to wait for Collins. When Collins returned, the officer walked up to the

front door and knocked. Collins answered and later admitted that the motorcycle was his and that he had bought it without a title.

Collins was charged with stealing stolen property. He filed a motion to suppress the evidence that the officer had received as a result of the warrantless search "of the motorcycle." The trial court denied the motion to suppress. The Court of Appeals of Virginia affirmed based upon exigent circumstances and probable cause to believe the motorcycle on the property was the same motorcycle that evaded the officer. The Supreme Court of Virginia also affirmed based upon the automobile exception. It held that the motorcycle was contraband and the search was therefore justified.

The United States Supreme Court reversed. ***Collins v. Virginia*, 138 S.Ct. 1663 (May 29, 2018) (8:1:1)**. Writing for the majority, Justice Sotomayor explained that the search of an automobile without a warrant can be reasonable under the Fourth Amendment. This "automobile exception" is based upon the "ready mobility" of cars and the pervasive regulation of vehicles traveling on the public highways. Accordingly, "when these justifications for the automobile exception 'come into play,'" officers may search an automobile without having obtained a warrant. But these rationales only apply to cars, not houses, so cars are treated a little differently under the Fourth Amendment.

Similarly, the Fourth Amendment also protects the curtilage of a home from warrantless searches. Here, the motorcycle was parked within the curtilage of home because it was at the top of the driveway in an area that was enclosed on two sides by a brick wall about the height of a car. A person seeking to knock on the front door would have to use the driveway, but would turn before reaching the area where the motorcycle was parked. So, in physically intruding into this area, the officer invaded not only the motorcycle, but also the curtilage of the home. The scope of the automobile exception extends no further than the automobile itself. Nothing in the Court's case law allows an officer to enter a home or its curtilage to access a vehicle without a warrant. Just as an officer must have a lawful right of access to any contraband he discovers in plain view in order to seize it without a warrant, the officer must have a lawful right of access to a vehicle in order to search it pursuant to the automobile exception.

Justice Thomas wrote a concurring opinion. Justice Thomas agreed that the Court had correctly resolved the Fourth Amendment question. However, he expressed doubt that the federal exclusionary rule must be applied by the States when there is a Fourth Amendment violation. The framers would not have understood the exclusionary rule, and would have, instead, required Collins to seek a remedy for the unconstitutional search through a civil lawsuit.

Justice Alito wrote a dissenting opinion. According to Justice Alito the search was reasonable. Had the motorcycle been parked on the curb, there would not have been a need for a warrant. Additionally, a vehicle in a drive way is equally as mobile as a vehicle parked in a street. Justice Alito would have upheld the search based upon the automobile exception.

[**Commentary:** Note that the Court of Criminal Appeals has upheld a search of a van parked in a driveway based upon the automobile exception in *Keehn v. State*, 279 S.W.3d 330 (Tex. Crim. App. 2009). But note that the facts in that case may have been different than those presented here. "As he walked up the driveway to the front door, Deputy Deford looked into the van's passenger-side windows." *Keehn*, 279 S.W.3d at 332. So, did he go off the beaten path like the officer did in *Collins*? Perhaps *Keehn* will need to be re-examined in light of *Collins*, but it remains to be seen whether the holding in *Keehn* has been undermined.]

### C. Reasonable Suspicion

**1. An officer did not have reasonable suspicion to conduct a traffic stop based upon his belief that the suspect's car's tires had touched the "fog line."** Jose Luis Cortez was driving a minivan down Interstate 40 when he was pulled over. The Trooper who pulled him over indicated that he observed Cortez drive on the improved shoulder of the highway, a violation of the Texas Transportation Code. The Trooper obtained permission to search the vehicle and found drugs in the car. Cortez was arrested for possession with intent to deliver methamphetamine in

an amount over 400 grams. Cortez filed a motion to suppress the evidence. At the hearing on the motion to suppress it became evident that the Trooper believed that merely touching the fog line constituted driving on the shoulder and that he pulled Cortez over after Cortez's vehicle had touched the fog line two times. The trial court granted the motion to suppress concluding that: (1) it was not clear from the dashcam video whether Cortez's vehicle even touched the fog line; (2) even if Cortez's vehicle touched the fog line, there was no proof that he crossed the fog line and drove on the improved shoulder; and (3) even if Cortez drove on the improved shoulder, he was statutorily entitled to do so. The court of appeals affirmed, concluding that driving on an improved shoulder requires more than the mere touching of the fog line.

The Court of Criminal Appeals affirmed the judgment of the court of appeals. ***State v. Cortez,* 543 S.W.3d 198 (Tex. Crim. App. Jan. 24, 2018) (6:0:3).** Judge Richardson wrote for the majority of the Court. After reviewing the standards associated with detentions under the Fourth Amendment, Judge Richardson noted that it is generally a traffic violation to "drive on an improved shoulder" and therefore an officer would have reasonable suspicion to stop a vehicle that was driving on an improved shoulder. However, Judge Richardson pointed out that the dashcam video in this case supported the trial judge's finding that it was not clear that Cortez's tires touched the white fog line. Additionally, the Trooper's was on the left side of Cortez's vehicle and he could not have seen Cortez's vehicle touch the fog line on the right hand side of Cortez's vehicle. Even if Cortez's tires touched the fog line, Judge Richardson concluded, the momentary touch of the fog line, without any other indicator of criminal activity, was not enough to justify the stop of Cortez's vehicle for driving on an improved shoulder. This conclusion was based on the totality of the circumstances, considering that vehicles often veer over while driving without an awareness on the driver's part, and is consistent with other Texas appellate courts that have required a vehicle to cross over the fog line to constitute driving on the improved shoulder. Finally, Judge Richardson noted that even if Cortez's vehicle crossed over the fog line, he was statutorily permitted to do so because it appeared as though the Trooper was intending to pass Cortez on the right and Cortez was at the end of an exit ramp, signaling a right turn. Both of these circumstances are statutory exceptions to the prohibition of driving on the improved shoulder that are supported by the record. Therefore, the Court held that the Trooper did not have an objectively reasonable basis to stop Cortez's vehicle.

Judge Newell filed a concurring opinion in which Judge Keel joined. Judge Newell noted that although the court of appeals did not render a decision as to whether Cortez drove upon the improved shoulder to either allow another vehicle to pass or to decelerate to make a turn in, it was appropriate to reach that issue in this case as a matter of judicial economy. Judge Newell also pointed out that, in cases like this where the text, structure, and history of the statute in question provides no resolution to the inherent ambiguity of the state, the rule of lenity requires the Court to draw the line in favor of Cortez. Lastly, Judge Newell noted that the Court's opinion is consistent with the Court's prior precedent interpreting this statute in which the Court rejected a "shifting-burden, self-defense-style framework."

Presiding Judge Keller filed a dissenting opinion in which Judge Keasler joined. Presiding Judge Keller noted that determining that it was unclear whether Cortez's vehicle touched the fog line did not support the Courts' holding. Presiding Judge Keller would have held that any amount of time in which a moving vehicle is in contact with the fog line constitutes driving on the fog line. Additionally, Presiding Judge Keller noted that the Court should have afforded the parties an opportunity to brief the issue of whether Cortez's driving on the improved shoulder was statutorily permitted.

Judge Yeary filed a dissenting opinion. Judge Yeary opined that the issue of whether Cortez was permitted to drive on the improved shoulder pursuant to one of the statutorily permitted circumstances was not before the Court. Judge Yeary noted that the Court should have limited its review to the issue granted and remanded the case to the court of appeals to address any remaining issues.

**2. In establishing an officer's reasonable suspicion to prolong a traffic stop, the State does not need to prove that the officer is an expert for his**

**determinations and inferences to be afforded heightened weight.** Elvis Elvis Ramirez-Tamayo was driving a rental vehicle on Interstate 40 near Amarillo. [No, that is not a typo. His name was really "Elvis Elvis" rather than simply "Elvi".] Deputy Simpson stopped Ramirez-Tamayo for speeding. Deputy Simpson approached the passenger side of the vehicle. Rather than lower the window, Ramirez Tamayo reached over and opened the passenger door. Deputy Simpson noticed that Ramirez-Tamayo wore a lot of cologne, more than most people; was chain smoking with the windows up; and was extremely nervous. Based on his seven years of experience as a licensed Texas peace officer, Deputy Simpson formed a belief that Ramirez-Tamayo was trafficking drugs. He based his belief on his knowledge that drug traffickers commonly put drugs in the panels of doors, and this can prevent the windows from rolling down. Additionally, Deputy Simpson knew that drug traffickers often use rental vehicles, instead of their own cars, and use cologne or other cover odors to cover the odor of drugs they're hauling. Based on his suspicion, Deputy Simpson prolonged the traffic stop and had a drug-detection dog come to sniff the vehicle. The drug dog alerted the presence of drugs and approximately twenty pounds of marijuana were found in the car's four door panels. Ramirez-Tamayo was charged with possession of marijuana in an amount greater than five pounds but less than fifty pounds. The trial court denied Ramirez-Tamayo's motion to suppress the drugs. The court of appeals reversed the trial court's ruling denying the motion to suppress. In its view, the record lacked information regarding Deputy Simpson's training and experience that could support the reliability of his formation of reasonable suspicion. According to the court of appeals, the State failed to carry its burden to explain why the activities relied on were sufficiently distinguishable from the activities of innocent people under the same circumstances.

The Court of Criminal Appeals reversed the judgment of the court of appeals and reinstated the trial court's judgment of conviction. ***Ramirez-Tamayo v. State*, 537 S.W.3d 29 (Tex. Crim. App. Sept. 20, 2017) (9:0).** Judge Alcala wrote the opinion for the unanimous Court. Judge Alcala noted that as long as there was some evidence in the record to support the trial court's implied finding that the officer was reasonably capable of making rational inferences and deductions by drawing on his experience and training, the State did not have an additional burden to include extensive details about his training and experience. Here, the Court found that there was sufficient evidence on the record to support the trial court's implied factual findings that Deputy Simpson was credible and reliable and that his training and experience made him reasonably capable of rationally suspecting that Ramirez-Tamayo was in possession of drugs. Additionally, a reviewing court must look to the totality of the circumstances to see whether the detaining officer had reasonable suspicion to prolong a stop. In this case, the court of appeals looked at the innocent nature of the individual circumstances when it determined Deputy Simpson lacked reasonable suspicion. The Court concluded that the combined logical force of the circumstances presented to Deputy Simpson—a new-model rental car with what appeared to be inoperable windows, the presence of unusually strong odors, the location of the stop on an interstate highway, and an abnormally nervous driver—permitted a reasonable inference that Ramirez-Tamayo was engaged in illegal activity.

**3. A police officer did not unduly prolong the traffic stop by waiting for back up before running a license check on the driver five minutes after the traffic stop.** Ernesto Lerma was the passenger in a vehicle pulled over for two minor traffic violations. During the traffic stop the lone officer noticed Lerma was moving his feet a lot, trying to reach his hands into his pockets, and moving his hands between the seats. The officer twice asked Lerma if he had any identification, which Lerma replied that he did not. Pursuant to his normal routine, the officer asked Lerma to exit the vehicle in order to obtain a proper identification. When Lerma exited the vehicle the officer informed him that he would conduct a pat-down of Lerma and asked if Lerma had any weapons. Lerma had a pocket knife, which was removed and placed in the vehicle. During the pat-down officer felt what was consistent with cigars and a bag of some sort of substance, but did not retrieve those items. This initial pat-down occurred three minutes into the traffic stop.

The officer then asked for Lerma's name and birthdate. Lerma stated his name was "Bobby Diaz"

and gave the birthdate September 22, 1984. A second officer arrived at the scene four minutes into the traffic stop. The initial officer then ran the name and birthdate Lerma provided through his computer system and determined that Lerma did not match the description of "Bobby Diaz" with a birthdate of September 22, 1984. The officer asked Lerma when he had last smoked marijuana and indicated that he could smell marijuana on him. Lerma admitted that he had smoked synthetic marijuana that day and that he had some on him. The officer searched Lerma's pockets and found synthetic marijuana, at which point Lerma took off running; this occurred nine minutes into the traffic stop. Lerma was caught fifteen seconds later and placed under arrest. The officers searched Lerma and found a Tupperware bowl containing seventeen crack cocaine rocks in his pocket. Lerma was charged with possession of four or more grams of cocaine. Lerma filed a motion to suppress the cocaine, which was denied, and he pleaded guilty. The court of appeals reversed, holding that the officer's frisk of Lerma, made during an unjustifiably prolonged traffic stop, was not supported by reasonable suspicion.

The Court of Criminal Appeals reversed the judgment of the court of appeals. ***Lerma v. State,* 543 S.W.3d 184 (Tex. Crim. App. Jan. 24, 2018) (9:0).** Judge Newell wrote the opinion for the unanimous court. Judge Newell noted that the officer had probable cause to pull the vehicle over and the officer was permitted to order Lerma, the passenger of the vehicle, out of the car for safety reasons. In regard to whether the officer had reasonable suspicion to conduct the pat-down, Judge Newell pointed to several objective facts which led the Court to conclude that the officer was justified in fearing for his safety, and thus conducting a pat-down search for weapons. Those facts were: (1) the officer was conducting the stop alone at night; (2) the officer was outnumbered by Lerma and the other two adult occupants of the vehicle; and (3) Lerma had a weapon on his person prior to the pat-down. The fact that Lerma admitted to having a weapon did not alleviate the potential threat of additional weapons and the need for the pat-down.

In addressing whether the stop was unduly prolonged, Judge Newell noted that the officer was still actively involved in the traffic stop when he questioned Lerma and the officer had not yet conducted a computer warrant check on the driver of the vehicle. Importantly, the officer acted diligently in his investigation into the traffic stop and questioning Lerma, as indicated by the brief amount of time between the initiation of the stop and Lerma's flight and subsequent arrest (a mere nine minutes). In conclusion, the Court noted that following Lerma's flight from the officers, they had probable cause to arrest him for several offenses and the cocaine was found on Lerma's person following a lawful detention and arrest. The trial court correctly denied Lerma's motion to suppress.

[**Commentary:** Both this case and ***Ramirez-Tamayo v. State,* 537 S.W.3d 29 (Tex. Crim. App. 2017) (9:0)** discussed above provide good starting points for research in determining whether a traffic stop has been unduly prolonged.]

### D. Probable Cause

**1. Reference to multiple printers seen in a hotel room among other facts provided particularized facts to corroborate informant's information regarding fraudulent possession of identifying information and tampering with a government document.** The Mesquite Police Department arrested Marsha Stovall for forgery and fraudulent use/possession of identifying information. During an interview with Investigator Smith, Stovall informed him that she had been staying in room 119 at the Executive Inn and Suites in Mesquite, Texas, with Gordon Heath Elrod and his family. Stovall advised that the counterfeit check, driver license and social security card in her possession when she was arrested were all printed in the motel room. She told Investigator Smith that there were two desk top computers and four printers in the room. She advised that Elrod and his wife were mail thieves and the information they counterfeited came from stolen mail, which was also inside the hotel room. She stated that Elrod and his wife were printing counterfeit checks, driver licenses, and social security cards when she left the room on the day of her arrest. Prior to Investigator Smith's interview of Stovall, two Mesquite police officers made contact with Elrod in room 119 at the Executive Inn and Suites; the officers observed computers and printers in the room. Under the belief that there was evidence of forgery in room # 119 of the

Executive Inn and Suites, Investigator Smith composed an affidavit with this information and obtained a search warrant for that location. Following the search of the motel room, Elrod was arrested and charged with fraudulent use/possession of identifying information and with two offenses of tampering with a governmental record. Elrod filed a motion to suppress the evidence obtained during the search of the motel room. The trial court granted Elrod's motion to suppress, finding that the affidavit in support of the search warrant did not establish probable cause. The court of appeals affirmed the trial court's order.

The Court of Criminal Appeals reversed the judgment of the court of appeals. ***State v. Elrod,* 538 S.W.3d 551 (Tex. Crim. App. 2017) (9:0).** Writing for the unanimous court, Judge Richardson concluded that the search warrant affidavit contained enough particularized facts about Elrod's alleged fraudulent use or possession of identifying information and alleged tampering with a government record to support a finding of probable cause to issue the search warrant. In dealing with information obtained from an informant, Judge Richardson noted that probable cause exists if the information is corroborated, it is a statement against penal interest, it is consistent with information provided by other informants, it is a detailed first-hand observation, or it is coupled with an accurate prediction of the subject's future behavior. Additionally, information regarding ongoing criminal activity can bolster a finding of probable cause. In this case, the extensive and detailed statement given by Stovall, a named informant and witness to ongoing criminal activity, showed that she had personal and direct knowledge of the matters she asserted. Stovall's statements were not made in exchange for leniency, so they were against her penal interest. The statements were also corroborated by the knock-and-talk conducted by the Mesquite police officers at the motel room. Given these circumstances, the affidavit containing this information established a fair probability that evidence of a particular crime would likely be found in room 119 of the Executive Inn.

**2. Discovery of drugs on a suspect's person, after an arrest on traffic warrants but before a search of the suspect's vehicle, can supply a new basis for arrest that would justify a search of the vehicle as a search incident to arrest.** Police officers found Reinaldo Sanchez asleep in his Jeep outside of a bar early in the morning. After checking Sanchez's identity with dispatch, the officer discovered that Sanchez had several local traffic warrants for his arrest. Sanchez was placed under arrest for the traffic warrants. The officer searched Sanchez's person incident to arrest and found a cigarette box containing two small baggies with a white powdery substance, which she believed to be cocaine. The officer noticed Sanchez kept staring at his vehicle. The officer then searched Sanchez's Jeep and found a pouch containing a baggie of what appeared to be cocaine. The trial court granted Sanchez's motion to suppress the evidence found in the Jeep, concluding that the search of the vehicle was not justified as a search incident to his traffic warrants arrest and was not justified by any other law. The court of appeals affirmed.

The Court of Criminal Appeals reversed the judgment of the court of appeals. ***State v. Sanchez,* 538 S.W.3d 545 (Tex. Crim. App. Jan. 10, 2017) (9:0).** Presiding Judge Keller wrote for the unanimous Court and noted that a vehicle search incident to arrest is authorized in two situations (1) when the arrestee is unsecured and the area of the vehicle is within his immediate control, or (2) when it is reasonable that evidence of the offense of arrest might be found in the vehicle. The present case concerned the second situation. Presiding Judge Keller stated that although the formal arrest was for traffic violations, the officer had probable cause to arrest Sanchez for possession of a controlled substance after she searched Sanchez's person. The formalities associated with the arrest do not dictate whether the search incident to arrest is authorized. The Court held that as long as there is probable cause to arrest for the newly-discovered offense and the search occurs close in time to the defendant's formal arrest, an officer may conduct a search incident to arrest on the basis of an offense discovered after formal arrest for a different crime.

**3. Probable cause to arrest an individual for theft can exist when a customer conceals items in her purse, even though she had not yet exited the store and she claimed she was going to pay for the items.** A Dollar General Store clerk called the police and indicated that a customer was concealing merchandise in her purse and jacket. When an officer arrived at the Dollar General Store, the employee told

the officer that the customer in question was in the northeast corner of the store and that she was a white female with blond hair wearing blue jeans and a light blue shirt. The officer went to that part of the store and encountered Kimberly Ford, who matched the employee's description. Ford had a grocery cart with her purse in the child seat covered by a jacket. The officer informed Ford that she had been seen concealing items in her purse. Ford responded that she put items in her purse but she was not done shopping and she intended to pay for them. The officer discovered that the purse was zipped up and full of merchandise. Upon removing the merchandise, the officer discovered six small baggies of methamphetamine and two pills. Ford was arrested for theft and later charged with theft and possession of a controlled substance. The trial court granted Ford's motion to suppress the drugs, finding the officer lacked reasonable suspicion to stop Ford and lacked probable cause to arrest her. The court of appeals affirmed, however if held that the officer had reasonable suspicion to stop Ford but lacked probable cause to arrest her.

The Court of Criminal Appeals reversed the judgment of the lower courts. ***State v. Ford*, 537 S.W.3d 19 (Tex. Crim. App. Sept. 20, 2017) (6:1:2).** Writing for the majority of the court, Presiding Judge Keller held that the police officer had probable cause to arrest Ford. Presiding Judge Keller noted that a police officer must have probable cause that the suspect has committed or is committing an offense to justify an arrest. Probable cause involves a reasonable ground for belief of guilt that is particularized with respect to the person to be searched or seized. In the present case, Ford was suspected of theft. Judge Keller addressed the elements of theft: appropriation and intent to deprive the owner of the property. She noted that a customer of a store can exercise control over a property (appropriate) without leaving the store, which is what Ford did by concealing the items in her purse. Judge Keller pointed to four facts which demonstrated Ford's intent to deprive the owner of the property: (1) the store employee reported that Ford was concealing items in her purse; (2) Ford admitted to the officer that she had placed items in her purse; (3) the store cart Ford used contained other items from the store that were not in her purse; and (4) Ford's purse was covered by a jacket. Considering all of this information, the police officer had probable cause to arrest Ford.

Judge Newell concurred without opinion.

Judge Walker filed a dissenting opinion in which Judge Alcala joined. Judge Walker agreed with the majority of the Court that the officer had probable cause to arrest Ford. However, Judge Walker would have affirmed the judgment of the court of appeals based on his finding that the officer lacked reasonable suspicion when he initially stopped Ford.

**4. Police observation of a defendant visiting a known narcotics bar for a brief period of time and making a furtive gestures in his vehicle did not provide sufficient probable cause to support reliance upon automobile exception to search vehicle.** An undercover Houston police officer observed Andreas Marcopoulos enter a bar with a well-documented history of narcotics sales, exit the bar within three to five minutes, and drive away. The undercover officer observed Marcopoulos change lanes without signaling. The undercover officer requested a uniformed officer perform a traffic stop. A uniformed officer pulled up behind Marcopoulos. Both officers observed Marcopoulos making furtive gestures around the center console of his vehicle. The uniformed officer activated his emergency lights, stopped Marcopoulos, and immediately arrested him. The officer searched the vehicle and found two baggies of cocaine, one in the center console and another between the center console and the passenger seat. A third baggie was found in Marcopoulos's wallet. Marcopoulos filed a pre-trial motion to suppress the evidence uncovered by the search, but his motion was denied. Marcopoulos pleaded guilty to possession of less than one gram of cocaine and was placed on three years' deferred adjudication probation. On appeal, the court of appeals upheld the search under the automobile exception holding that the officer had probable cause to search the vehicle due to Marcopoulos' repeated history of going to a place known for selling narcotics, his uncommonly short time spent at a bar, and his furtive gestures when he noticed a patrol car behind him. The Court of Criminal Appeals granted Marcopoulos's petition for discretionary review on the sole issue of whether probable cause existed to search Marcopoulos's vehicle

under the automobile exception to the warrant requirement.

The Court of Criminal Appeals reversed the judgment of the court of appeals. ***Marcopoulos v. State*, 538 S.W.3d 596 (Tex. Crim. App. 2017) (6:3).** Judge Keasler wrote the opinion for the majority of the Court. Judge Keasler noted that the automobile exception allows for the warrantless search of an automobile if it is readily mobile and there is probable cause to believe that it contains contraband. He noted that there was no question in this case that Marcopoulos's car was readily mobile. Judge Keasler pointed out that furtive gestures alone are insufficient to establish probable cause; they must be coupled with reliable information or other suspicious circumstances relating the suspect to the evidence of the crime to constitute probable cause. Judge Keasler noted that Marcopoulos's presence at the known narcotics bar had limited probative value because the officer was not privy to Marcopoulos's business within the bar and although the officer knew the bar was a hotbed for narcotics activity, that activity was never even remotely linked to Marcopoulos. While Marcopoulos's brief appearance at the bar was suspicious, the Court held that there was still a gap between the reasonable suspicion aroused by Marcopoulos's presence at the bar and the proof necessary to establish probable cause. In finding that the furtive gestures and the officers's suspicions did not give rise to probable cause, the Court noted that Marcopoulos's gestures were not in response to police action, but rather mere police presence, and his movements were not connected to known or suspected instrumentalities of crime. Under these circumstances, the facts do not rise to the level of probable cause to justify a search of the vehicle.

Judge Yeary dissented without a written opinion.

Judge Keel filed a dissenting opinion in which Presiding Judge Keller joined. Judge Keel would have dismissed the petition for discretionary review as improvidently granted because the search was incident to Marcopoulos's arrest, which he never challenged. Alternatively, Judge Keel would have upheld the trial court's implicit finding of probable cause to search the vehicle because the totality of the circumstances viewed in the light most favorable to the trial court's ruling indicate a fair probability of finding contraband in Marcopoulos's car.

**5. Existence of probable cause to arrest did not prohibit boat-owner from arguing that the government's arrest was retaliation against him for his exercise of free speech.** In 2006, Fane Lozman towed his floating home into a slip in a marina owned by the city of Riviera Beach, which is on the Atlantic coast of Florida. It was not a match made in heaven. Lozman became an outspoken critic of the city's plan to use its eminent domain power to seize homes along the waterfront for private development. Lozman often spoke during the public-comment period at city council meetings, criticizing councilmembers, the mayor, and other public employees. He also filed a lawsuit accusing the city council's violation of Florida's open meetings laws. During one public-comment session of the city council meeting, Lozman began discussing the recent arrest of a former county official. One councilmember (Elizabeth Wade) interrupted Lozman and directed him to stop making those remarks. Lozman continued speaking, this time about the arrest of a former official from the city of West Palm Beach. Councilmember Wade called for the assistance of a police officer in attendance. Lozman refused to leave, so Councilmember Wade ordered the officer to carry Lozman out. The officer handcuffed Lozman and ushered him out of the meeting. [The Supreme Court actually posted a copy of the video of this exchange on the Court's website at the following link: https://www.supremecourt.gov/media/video/mp4files/Lozman_v_RivieraBeach.mp4.] Lozman was charged with disorderly conduct and resisting arrest. The State's attorney determined there was probable cause to arrest, but decided to dismiss the charges anyway.

Lozman filed a § 1983 suit against the city claiming that he was arrested in retaliation for his open-meetings lawsuit against the city and his prior public criticisms of city officials. The case was tried before a jury. The jury returned a verdict for the city on all claims. Lozman sought a reversal only as to the city's retaliatory arrest. The District Court had instructed the jury that, for Lozman to prevail on the claim, he had to prove that the arresting officer was himself motivated by impermissible animus against Lozman's protected speech. The District Court determined there was at least probable cause to arrest

Lozman for violating a Florida statute for interrupting public assemblies. The Eleventh Circuit affirmed. The Eleventh Circuit assumed that the District Court's instruction was error but held that the error was harmless because the arrest was supported by probable cause. This, according to the court of appeals, defeated Lozman's First Amendment claim.

A near unanimous Supreme Court reversed, holding that, in this case, the existence of probable cause did not defeat Lozman's First Amendment claim. ***Lozman v. City of Riviera Beach,* 138 S.Ct. 1945 (June 18, 2018) (8:1)**. Writing for the Court, Justice Kennedy first explained that this was not a challenge to the Florida statute criminalizing disturbances of public assemblies. Lozman is only claiming that his arrest violated the First Amendment because it was ordered in retaliation for his earlier protected speech despite the existence of probable cause. According to Justice Kennedy, the existence of probable cause did not defeat Lozman's retaliation claim. Here, Lozman alleged not just a retaliatory arrest, but an arrest as a part of a larger governmental retaliation claim. Under this claim, Lozman must prove the existence and enforcement of an official policy motivated by retaliation. Because the retaliation is alleged to be part of an official policy, there is a compelling need for adequate avenues of redress. Further, Lozman's speech is high in the hierarchy of First Amendment values given that Lozman was alleging that the city deprived him of liberty by retaliating against him for his lawsuit against the city and criticisms of public officials. However, Justice Kennedy stopped short of holding that Lozman was entitled to relief on his claims.

Justice Thomas dissented. According to Justice Thomas, the Court does not decide the issue it had granted review on. Instead, the Court holds that probable cause to arrest does not defeat a unique class of retaliatory arrest claims. Justice Thomas would have held that Lozman must plead and prove the lack of probable cause to arrest as an element of a First Amendment retaliatory arrest claim.

[**Commentary:** The Court seems to regard Lozman's claim as saying "I spoke out against the city and they arrested me to shut me up." If we assume that is exactly how it went down, that Lozman's speech is equivalent to Erin Brockovich blowing the whistle on someone, then you can see why the Court says probable cause to arrest would not defeat the claim. The Court describes this holding as very narrow, so we'll have to see how this might play out where a defendant is arrested for DWI after driving away from a particular contentious city council meeting. In that situation the defendant is not being arrested specifically for his speech. Would probable cause to arrest defeat the claim then? That seems to be the problem Justice Thomas has with the holding. Exit question: Does this support the CCA opinion in *Faust v. State*, 491 S.W.3d 733 (Tex. Crim. App. 2015) by signaling that we must look for the existence of an official governmental policy to violate someone's First Amendment rights before we vitiate an arrest based upon probable cause?]

**E. Article 38.23 burdens – Evidence presented by State sufficiently established that recording of private conversation did not violate the wiretap statute.** Jason Earnhardt and his wife were the sole owners of Earnhardt Restoration and Roofing ("ERR"). Earnhardt hired Ronald Robey as his sales manager to solicit business and hire salespeople to go door-to-door in neighborhoods that had been hail-damaged. Robey hired Brian White (our hero) and J.D. Roberts. In June 2012, a storm hit Dallas and Collin Counties, causing extensive hail damage. Two homeowners testified that White, solicited business from them on behalf of ERR to fix their roof. They each gave a check to White to fix the room. Three other homeowners also gave checks to J.D. Roberts. The total for all checks was $32,822.04. Earnhardt became aware that some of ERR's customers had written checks that he had never received, and that ERR had customers that he was not aware of. ERR also received several hundreds of calls and emails based upon a Craigslist ad that Earnhardt had not posted or authorized.

A man named "Brandon" contacted Earnhardt by telephone. Brandon told Earnhardt that he worked as an IT guy for Robey, White and Roberts. Brandon sent Earnhardt a copy of a recorded conversation on which Robey, Brandon, and White can be heard talking about the Craigslist postings used to blow the phones up at ERR. A police investigation revealed that Robey, Roberts, and White had set up their own Earnhardt Restoration & Roofing company and they had opened bank accounts under ERR's name.

The State charged White, Robey, and Roberts with engaging in organized criminal activity and money laundering. Robey and White were tried together. The defense filed a motion in limine arguing that the audio recording was not authentic and it was illegally obtained in violation of the state wiretap statute. The trial court ruled that "assuming the State lays the appropriate predicate," the recording would be admitted because the issues raised by the defense go "more to the weight than admissibility."

The State later called Earnhardt to the stand who testified that Brandon had called him and sent him a copy of the recording. After the State offered the recording into evidence, the trial court allowed the defense to take Earnhardt on voir dire in front of the jury. The defense asked questions regarding identifying the speakers on the recording. No testimony was elicited from Earnhardt indicating that the conversations were recorded by someone other than Brandon. Defense counsel then argued that the State had not established a proper foundation and that the State had not established that the recording was legally obtained. The trial court overruled the defense objections and admitted the recording into evidence. The court of appeals affirmed, holding that the State never had the burden to prove that Brandon was the person who recorded the conversation because White never produced evidence of a violation of the wiretap statute.

A unanimous Court of Criminal appeals upheld the admission of the audio recording. ***White v. State*, ___ S.W.3d ___; 2018 WL 2975362 (Tex. Crim. App. June 13, 2018) (9:4:0).** Writing for the Court, Judge Richardson explained that generally a proponent who seeks to admit evidence must bear the burden of establishing the admissibility of the proffered evidence. However, where a defendant files a motion to suppress challenging the admissibility of evidence, the defendant has the burden to produce some evidence at the hearing on the motion to suppress in order to prove that the evidence was illegally obtained. Though the Court had granted discretionary review to determine who had the burden of production in this case, the Court did not need to reach the issue. By the time that defense counsel had objected to the admission of the recording there was already evidence in the record demonstrating that the recording was legally obtained. In fact, the defense had already elicited testimony confirming that Brandon had recorded the conversation when Robey testified in his defense and admitted that fact.

Presiding Judge Keller concurred in an opinion joined by Judges Keasler, Keel, and Yeary. While she joined the opinion, she went further to explain how she believed courts should determine who has the burden in such cases. According to Presiding Judge Keller, rules of admissibility place the burden on the proponent of the evidence to establish admissibility, while rules of exclusion require the opponent of the evidence establish a basis for exclusion. Article 38.23 is a statutory rule of exclusion and thus it was White's burden to establish that the recording was inadmissible.

**F. Federal court order authorizing a wiretap that exceeded territorial jurisdiction was not "insufficient on its face" where the order did not lack any information that the statute required and would have been sufficient absent the challenged language.** The federal government started investigating a suspected drug distribution ring based in Kansas. It submitted an application for nine related wiretap orders and the federal judge issued them. All nine met all the statutory requirements with one exception. Each order allowed for interception of a phone call located outside of Kansas by a governmental listening post also outside of Kansas. The Government listened to phones inside Kansas from a listening post inside Kansas. The Government listened to mobile phones outside of Kanas from a listening post inside Kansas. But in one instance, the Government listened to a mobile phone in California from a listening post in Missouri. As a result of the wiretaps, the Government indicted Los and Roosevelt Dahda, and several others, for conspiracy to buy illegal drugs in California and sell them in Kansas.

Prior to trial, the Dahda's moved to suppress, arguing that the federal District Court could not authorize interception of calls from the Missouri listening post. The Government agreed not introduce any evidence arising from the Missouri listening post. A Magistrate Judge and subsequently the District Court denied the Dahda's suppression motion. The Dahda's appealed, and the Tenth Circuit Court of Appeals

rejected the argument that the extra language rendered the wiretap orders insufficient on their face.

The United States Supreme Court, in an ostensibly unanimous decision, affirmed the denial of the motion to suppress. ***Dahda v. United States*, 2018 WL 2186173 (May 14, 2018)(8:0)**. Writing for the Court, Justice Breyer noted that the statutory suppression provision contained within the wiretap statute requires suppression when a wiretap order is "insufficient on its face." The Tenth Circuit interpreted this phrase to mean that the suppression provision applies when the insufficiency constitutes an orders' failure to protect the privacy of the intercepted communication or to delineate the circumstances and conditions under which the interception may be authorized. The Court rejected this argument noting that the insufficiency applies when an order is facially insufficient. That said, the Court agreed with the State that "insufficiency" does not cover each and every error that appears in an otherwise sufficient order. Rather, it covers at least an orders failure to contain information that the statute (§ 2518(4)(a-e)) specifically requires it to contain. In other words, an order is insufficient insofar as it is deficient or lacking what is necessary or requisite. The orders do contain a defect, but not every defect results in an insufficiency. The additional language was without legal effect and did not render the orders insufficient on their face given that they contained all the requisite information necessary for a valid order.

Justice Gorsuch did not participate.

[**Commentary:** Can a single federal district judge authorized a nation-wide wiretap? That was how the defendant's viewed it, but because the single instance of extra-territorial wiretapping was not admitted, this case is not the propriety of gathering and using that information. Instead, this opinion is a relatively straight-forward statutory interpretation case regarding a federal statute. As such, it may not have much impact on Texas law, though it might have use by way of analogy. Time will tell.]

## G. Qualified Immunity

**1. Officer who shot woman who refused the officer's command to drop a knife she held while walking towards another woman was entitled to qualified immunity because law regarding use of force in that situation was unsettled.** Officer Andrew Kisela, a police officer in Tucson, Arizona, received a call that a woman was hacking a tree in a neighborhood with a kitchen knife. The woman who called 911 to report this later flagged Kisela, and another officer, down to inform them that this woman had been behaving erratically. When the officers arrived at the scene, they saw Amy Hughes, who matched the description of the tree-hacker, emerge from a house carrying a large kitchen knife at her side. She approached another woman, Sharon Chadwick, and stopped no more than six feet from her. Another officer arrived and all three officers present drew their guns. At least twice they told Hughes to drop the knife. Hughes appeared calm, but did not acknowledge the officers' presence or drop the knife. Officer Kisela shot Hughes four times. The other officers handcuffed her and called the paramedics who took her to the hospital for non-life-threatening injuries. Less than a minute had transpired from the moment the officers saw the woman to the moment Officer Kisela fired the shots.

Hughes sued Kisela in federal court alleging he had used excessive force in violation of the Fourth Amendment. The District Court granted summary judgment in favor of Kisela, but the Ninth Circuit reversed. According to the Ninth Circuit, there was a clear and obvious violation of the Fourth Amendment based upon Ninth Circuit precedent that the court of appeals perceived to be analogous.

The United States Supreme Court reversed, upholding the District Court's determination that Kisela was entitled to qualified immunity. ***Kisela v. Hughes*, 138 S.Ct. 1148 (Apr. 2, 2018)(Per curiam).** The Supreme Court assumed that there was a Fourth Amendment violation (a proposition that the Court noted was not at all evidence), but held that the officer was entitled to qualified immunity. According to the Court, qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Here, the Court noted that the case law was unsettled on this issue, and there were many cases that supported Kisela's actions. Moreover, the case relied upon by the Ninth Circuit was decided after the shooting took place in this case.

Justice Sotomayor dissented, joined by Justice Ginsburg. According to Justice Sotomayor, looking at the evidence in the light most favorable to Hughes, the officer clearly used excessive force. He could have, but failed to, use less intrusive means before deploying deadly force. Here, the officer can only use deadly force when he has probable cause to believe the person poses a threat of serious physical harm, either to the officer or to others. Hughes posed no objective threat of harm to officers or others, so Kisela lacked probable cause to use deadly force.

[**Commentary:** Practitioners might consider this case conceptually analogous to two official oppression cases decided by the Texas Court of Criminal Appeals this term. *See* ***Ross v. State*****, 543 S.W.3d 227 (Tex. Crim. App. Mar. 28, 2018) (9:0) and** ***Reynolds v. State*****, 543 S.W.3d 235 (Tex. Crim. App. Mar. 28, 2018) (9:0)**, discussed below. Additionally, a few pointed moments in the per curiam opinion seem to suggest that this was as much a power struggle between the Supreme Court and the Ninth Circuit (and a disagreement with the Ninth Circuit's deadly force jurisprudence) as it was an ordinary qualified immunity case. So, maybe take the case with a grain of salt. Moreover, as more and more police shootings gain media scrutiny, maintaining a forward-looking (which the majority seems to prefer) rather than a retrospective (which the dissent seems to prefer) standard for evaluating such claims could become harder to justify publicly. And finally, if you ever find yourself holding a knife while police are pointing guns at you, please drop it.]

**2. When conducting a probable cause determination, a court should ask whether a reasonable officer could conclude, considering all of the surrounding circumstances, including the plausibility of the explanation itself, that there was a substantial chance of criminal activity.** District of Columbia police officers responded to a noise complaint for a house party. Neighbors informed the police that the house was vacant. When the officers approached the house, several of the partygoers scattered and some hid. The house was nearly barren and in disarray; it smelled like marijuana and there were beer bottles and cups of liquor on the dirty floor. The only signs of habitation were blinds on the windows, food in the refrigerator, and toiletries in the bathroom. The living room had been converted into a make-shift strip club, and a naked woman and several men were in an upstairs bedroom. There were twenty-one individuals in the house. The police questioned each of them and got inconsistent stories. Some said they were there for a bachelor party, but no one could identify the bachelor.

Two women identified "Peaches" as the house's tenant and said she authorized the party. The police officers called Peaches, who was not at the party; at first Peaches said she was renting the house and had given permission for the party, however, Peaches eventually admitted that she did not have permission to use the house. The officers were then able to contact the owner of the home. The owner confirmed to the police that he had not given anyone permission to be at the house. The officers arrested the partygoers for unlawful entry. Ultimately, the charges against the partygoers were dropped.

Sixteen of the twenty-one partygoers sued the District of Columbia and five of the arresting officers for false arrest. In a motion for summary judgment, the partygoers argued that the officers lacked probable cause to arrest them for unlawful entry. The District Court granted partial summary judgment to the partygoers, finding that the officers did not have probable cause because nothing suggested to the officers that the partygoers "knew or should have known that they were entering against the owner's will." The District Court also concluded that the officers were not entitled to qualified immunity. The Court of Appeals of D.C. Circuit affirmed noting that the partygoers had been invited by Peaches and "there is simply no evidence in the record that [the partygoers] had any reason to think the invitation was invalid."

The Supreme Court of the United States of America reversed the D.C. Circuit. ***District of Columbia, et al. v. Wesby, et al.*****, 138 S. Ct. 577 (Jan. 22, 2018)(7:1:1:0).** Justice Thomas delivered the opinion of the Court. Justice Thomas explained that the D.C. Circuit erred in analyzing individual factors, rather than the totality of the circumstances of the party. Additionally, the D.C. Circuit improperly dismissed circumstances that were susceptible of innocent explanation when it should have asked whether a reasonable officer could have concluded that,

considering all the circumstances and explanations given therefore, there was a substantial chance of criminal activity. Based on the totality of circumstances, the officers made an entirely reasonable inference that the partygoers knew they did not have permission to be in the house. Justice Thomas noted the condition of the home and the partygoer's actions when the police arrived were factors that allowed the officers to make common-sense conclusions about the circumstances. Based on Peaches' evasive behavior on the phone, the officers could also have concluded that she lied when she said she had invited the people to the house or that she told the partygoers that she was not actually renting the house. Given the circumstances, the Court held, the officers had probable cause to arrest the partygoers for unlawful entry. The Court went on to hold that the officers were also entitled to qualified immunity in this case because any unlawfulness of their conduct was not clearly established at the time of the arrests.

Justice Sotomayor filed an opinion concurring in part and concurring in the judgment. Justice Sotomayor agreed that the officers were entitled to qualified immunity in this case, but she disagreed with the Court's decision to reach of the merits of the probable cause question. Justice Sotomayor opined that the Court should have left probable cause determination for the lower courts.

Justice Ginsburg filed an opinion concurring in the judgment in part. Justice Ginsburg noted that the arresting officers believed that the absence of the premises owner's consent sufficed to justify arrest of the partygoers for unlawful entry. This belief, however, was void of the essential element that the defendant "knew or should have known that his entry was unwanted." Justice Ginsburg commented that under the Court's current precedent, the arresting officer's state of mind is irrelevant to the existence of probable cause. Justice Ginsburg expressed a concern that this standard sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protections; she suggested reexamining whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry. However, under the current state of the law Justice Ginsburg agreed with the judgment of the Court.

[**Commentary:** Though this is a case involving qualified immunity from suit, it provides some insight into the quantum of proof needed to establish probable cause. Notably, the D.C. Circuit seems to have fallen into the same trap that the court of appeals did in ***Ramirez-Tamayo v. State*, 537 S.W.3d 29 (Tex. Crim. App. Sept. 20, 2017) (9:0)** discussed above. Courts are supposed to look at whether evidence supports a probable cause determination because that is what police are looking at. There may be innocent explanations, but the question is whether the evidence rises to probable cause rather than how to weigh conflicting evidence indicating criminal activity. However, there appear to be at least two justices on the Supreme Court that are concerned that this approach will fail to hold police accountable. As an interesting side note, Justice Sotomayor argued it was only necessary to address the issue of qualified immunity in this case. Several months later in ***Kisela v. Hughes*, 138 S.Ct. 1148 (Apr. 2, 2018)(Per curiam)** she argued that the Court sidestepped the issue of whether the conduct violated the Fourth Amendment. Perhaps this is a harbinger of greater scrutiny in police shootings from the Supreme Court?]

## III. TRIAL PROCEDURE

**A. Pre-Trial Hearings—Texas Code of Criminal Procedure Article 28.01, Section 1, does not require providing notice of a pre-trial hearing commenced on the day the case is set for trial.** Victoria Mari Velasquez was charged with possessing a usable quantity of marijuana. Velasquez filed sixteen pre-trial motions, which were received and duly acknowledged by the State, including a motion to suppress evidence. On the day of trial, both sides announced ready, and the trial judge elected to hear the motion to suppress before empaneling the jury. The State objected under Article 28.01 of the Code of Criminal Procedure, claiming it had received insufficient notice of a pre-trial hearing. The trial court overruled the State's objection. The prosecutor declined to put on any evidence to refute Velasquez's allegations and the judge granted Velasquez's motion to suppress. The court of appeals determined that, because the trial judge did not carry the motion with trial, the hearing was a "pre-trial matter" and therefore Article 28.01, Section 1, entitled the parties to notice of a pre-trial hearing on the motion to suppress. Because the State did not receive any

notice, the court of appeals reversed the trial judge's ruling.

The Court of Criminal Appeals reversed the judgment of the court of appeals. ***State v. Velasquez,* 539 S.W.3d 289 (Tex. Crim. App. 2018) (5:1:4).** Article 28.01, Section 1 of the Code of Criminal Procedure provides that the court may set any criminal case for a pre-trial hearing before it is set for trial upon its merits, and direct the defendant and his attorney, and the State's attorney, to appear before the court at the time and place stated in the court's order for a conference and hearing. Writing for the majority of the Court, Judge Keasler noted that Section 1 uses word "set" twice, in reference to setting a pre-trial hearing and setting trial upon its merits. Additionally, Section 1 specifically describes the responsibilities the trial court assumes when it sets a criminal case for a pre-trial hearing, but it does not place any additional requirements upon the trial court's decision to set a case for trial on its merits or to conduct a hearing on the setting designated for trial. Therefore, Judge Keasler concluded, whatever notice requirements exist within Section 1, those requirements only apply when the trial court decides to conduct a hearing on a separate, pre-trial setting, not any time it decides to conduct a hearing "pre-trial." In this case, the suppression hearing did not take place on a pre-trial setting, as envisioned by the statute, therefore, the trial judge was not required to give advanced notice to the parties of his intentions to hold the suppression hearing on the day of trial.

Judge Hervey filed a concurring opinion in which she commented on several aspects of the case. Judge Hervey noted that the State knew about Velasquez's motion to suppress and was ready for trial; the State's lack of preparation to argue the motion was based on its misunderstanding of the trial judge's preferences. Further, Judge Hervey noted that the State did not ask for a continuance and the State conceded that it had the evidence to participate in the hearing but declined to do so. Therefore, the State's argument appeared to be more of a "strawman argument" than a legitimate concern.

Judge Richardson filed a dissenting opinion in which Presiding Judge Keller joined. Judge Richardson agreed with the court of appeals interpretation of Article 28.01, Section 1, and would have dismissed Velasquez's petition as improvidently granted. Judges Yeary and Keel dissented without an opinon.

[**Commentary:** This is a pretty close case. Judge Hervey's concurring opinion seems to point at how the State found itself in this position.]

**B. Competency Determinations—At an informal competency hearing, the trial court should limit its review to the evidence suggestive of incompetency and it must grant the defendant appointment of an expert and a formal competency hearing if there is some evidence that would support a finding that the defendant is incompetent to stand trial.** Crystal Lummas Boyett was speeding excessively when she caused a collision with another car that was occupied by three women; two of the women were killed, and the third was seriously injured. The State charged Boyett with manslaughter for one of the deaths. On the third day of the guilt-innocence phase of trial, Boyett's counsel filed a motion raising the issue of her competency to stand trial. Defense counsel informed the trial court that Boyett had been diagnosed with bipolar schizophrenia and had displayed unusual behavior during the trial. In response, the trial court held an informal competency inquiry. Defense counsel called four witnesses to testify about Boyett's competency.

First, a jury consultant for the defense testified that she believed Boyett was "divorced from reality" based on Boyett's behavior and her history of schizophrenia. Additionally the consultant opined that Boyett had no factual understanding of what was being told to her. Second, an accident-reconstruction expert for the defense testified that Boyett seemed unable to rationally understand or interact constructively with him. Third, Boyett's sister testified about Boyett's history with bipolar schizophrenia and noted that it appeared that Boyett "did not comprehend the seriousness of the trial" and lacked the present "ability to talk with counsel with a reasonable degree of rational understanding." Lastly, an attorney unaffiliated with the case testified that he had observed Boyett outside the courtroom that morning, carrying on a loud conversation with herself. The trial court denied Boyett's motion for a formal psychological evaluation

and competency hearing. Boyett was convicted of the offense. On appeal, Boyett challenged the denial of her motion for a formal psychological evaluation and competency hearing. The court of appeals examined the evidence to determine whether it established a substantial possibility of Boyett's incompetence and focused on evidence of Boyett's ability to work with her counsel for the months leading up to trial. The court of appeals held that Boyett had not met her burden, and affirmed her conviction.

The Court of Criminal Appeals reversed the judgment of the court of appeals. ***Boyett v. State,* 545 S.W.3d 556 (Tex. Crim. App. Apr. 25, 2018) (8:1:0).** Judge Alcala wrote the opinion for the majority of the Court. Justice Alcala began by reviewing the law applicable to incompetency determinations. She noted that upon a suggestion that the defendant is incompetent, the trial court must conduct an informal inquiry to determine whether there is some evidence that would support a finding that the defendant may be incompetent to stand trial. If there is some evidence of incompetency, the trial court must order a psychiatric or psychological competency examination, and, except for certain exceptions, hold a formal competency trial. Judge Alcala noted three issues that affect the evidentiary standard at the informal hearing. First, the "some evidence" standard requires more than none or a scintilla of evidence that rationally may lead to a conclusion of incompetency. Second, a trial court must consider only evidence of incompetency, and it must not weigh evidence of competency against the evidence of incompetency. Third, some evidence must be presented at the informal inquiry stage to show that a defendant's mental illness is the source of his inability to participate in his own defense.

Applying these points to the court of appeals' holding, the Court noted that the court of appeals mistakenly focused its analysis on evidence tending to show that Boyett might be competent, rather than limiting its analysis to an assessment of the evidence of incompetency. Additionally, the court of appeals interpreted the "some evidence" standard as creating a substantial possibility standard, thus imposing a higher burden of proof on Boyett. Judge Alcala noted that the Court had used the term "possibility" of incompetence in a prior case when discussing the informal inquiry, however the actual standard had not been elevated in that case, as the court of appeals did in the present case. Applying the correct standard to the evidence of incompetency in this case, the Court held that Boyett had produced some evidence that would support a finding of incompetency. The Court reversed the court of appeals and remanded the case to the trial court for a retrospective competency determination.

Presiding Judge Keller concurred without written opinion.

**C. *Ashe v. Swenson* did not prohibit conviction for possession of a firearm by a convicted felon after an acquittal on burglary and grand larceny because the defendant requested that the cases be tried separately.** Michael Currier stole a safe full of guns and money ($71,000 to be exact). He was indicted for burglary, grand larceny, and unlawful possession of a firearm by a convicted felon. Currier's previous felony convictions were for burglary and larceny. To prevent the prosecution from entering evidence of these prior convictions in the burglary and larceny cases, Currier and the Commonwealth agreed to sever the burglary and larceny cases from the possession case. Currier was acquitted on the burglary and larceny cases. Before the second trial on the firearm charge, Currier argued that the factual issue of his possession of the guns (in the safe) was necessarily decided against him in the first trial. Therefore, under *Ashe v. Swenson*, the State was precluded from introducing any evidence about the burglary and larceny in the second trial. The trial court disagreed. The Virginia Court of appeals held that the concerns at the core of the Double Jeopardy Clause—the avoidance of prosecutorial oppression and overreaching through successive trials had no application because the trials had been severed for Currier's benefit at his request. The Virginia Supreme Court affirmed.

So did the United States Supreme Court. ***Currier v. Virginia*, ___ S.Ct. ___; 2018 WL 2073763 (June 22, 2018) (5:4:4).** Writing for the Court, Justice Gorsuch explained that *Ashe v. Swenson* forbids a second trial only if to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial. But, in *Jeffers v. United States*, the Court had held, in the context of a subsequent trial on a greater offense after an acquittal of lesser-included offenses,

that a defendant who consents to separate trials can't complain about a double jeopardy violation.

Justice Gorsuch went on to express his view that the double jeopardy clause only operates to prevent retrial for the same offense after acquittal. The double jeopardy clause does not bar, according to Justice Gorsuch, relitigation of issues or evidence. However, Justice Kennedy did not join this portion of the opinion, rendering it only a plurality. Instead, he filed a brief concurring opinion limiting his rationale for joining to the idea that even if *Ashe* does recognize a right to issue preclusion, that right can be lost when the defendant agrees to the second prosecution.

Justice Ginsberg filed a dissenting opinion, which Justices Breyer, Sotomayor, and Kagan joined. According to Justice Ginsberg, Currier's acquiescence in severance of the felon-in-possession charge does not prevent him from raising a plea of issue preclusion based upon his acquittal of burglary and larceny. His acquiescence to severance does not indicate he expressly waived a plea of issue preclusion at a second trial.

[**Commentary:** Note that the real drama in this case is not so much "double jeopardy" as it is "collateral estoppel." What the Court essentially says is that even if collateral estoppel (as set out in *Ashe*) is part of the double jeopardy clause, a defendant who asks for separate trials is estopped (see what I did there) from making an issue preclusion claim in a subsequent trial. Note that only Justice Kennedy (who has announced his retirement) prevented the Court from doing away with *Ashe* altogether. Note as well, there seems to be agreement among five justices that trying people for the same offense in a single trial might not violate the double jeopardy clause. This understanding is similar to the one taken by the CCA in ***Ex parte St. Aubin*, 537 S.W.3d 39 (Tex. Crim. App. Sept. 20, 2017) (4:1:4)** discussed below. But, as noted in the commentary in that case, SCOTUS took a long look whether a multiple punishments error occurs at the point of conviction rather than sentencing before it ultimately decided not to grant review of the denial of relief on a subsequent writ. After a new Justice is installed to replace Justice Kennedy, it remains to be seen whether the Court will still have any intellectual curiosity regarding that issue. Another observation is that Justice Gorsuch's emphasis upon statutory elements instead of proof would seem to cut against the use of a "functional-equivalence" test or even the *Ervin* factors for resolving actual double jeopardy claims. Note that in ***Bien v. State*, ___ S.W.3d ___; 2018 WL 2715380 (Tex. Crim. App. June 6, 2018) (8:1)**, discussed below, criminal solicitation and criminal attempt as pleaded were the same offense because the proof of one would necessarily be included in the other. A more rigid element analysis might have yielded a different result. But who knows.]

## IV. EVIDENCE

**A. Facebook messages regarding use of ecstasy six-to-seven hours before assault on plain-clothes officer was inadmissible under Rule 403 to rebut claim of self-defense without evidence establishing dosage and effect of the drugs.** Juan Gonzalez and his two friends were walking home from school and they started to "key" several parked cars. One belonged to an off-duty police officer who confronted the boys. After an exchange of words, Gonzalez used a judo move to bring the officer backwards to the ground. The officer's head struck the concrete and fractured his skull. The injury was fatal. Several bystanders observed the altercation and later testified that Gonzalez started the fight.

The State charged Gonzalez with capital murder of a police officer. Gonzalez testified in his defense. He claimed the officer was aggressive and he feared for his safety. According to Gonzalez, the officer pushed him first and he responded in self-defense. The State introduced Facebook messages to and from Gonzalez after the crime indicating his burgeoning awareness of the trouble he was in, first laughing the crime off and later trying to reach his friends.

The State also introduced Facebook messages from earlier in the day between Gonzalez and his girlfriend. These messages revealed that Gonzalez had taken ecstasy six to seven hours before the altercation with the police officer. They also indicated he possessed ecstasy and school. A message after the altercation with his girlfriend indicated he intended to get rid of the remaining ecstasy pills. The State did not refer to this information again after introducing the evidence. The court of appeals held that this evidence

was irrelevant and the probative value was substantially outweighed by the danger of unfair prejudice. According to the court of appeals, the error was harmful and the court reversed the conviction.

A unanimous Court of Criminal Appeals reversed the court of appeals and held that even though the evidence was inadmissible under Rule 403 its admission was harmless. ***Gonzalez v. State,* 544 S.W.3d 363 (Tex. Crim. App. Apr. 11, 2018) (9:0).** Writing for the Court, Judge Newell explained that the relevancy of this information in this case was the ability to infer intoxicating effects of the drug at the time of the crime. Rather than hold that the evidence was irrelevant, the Court recognized that in a given case such evidence might be relevant. So, the Court assumed that the evidence was relevant in this case, but nevertheless held that its admission was precluded by Rule 403. As the Court explained, the record was silent as to what type of drug ecstasy is, what the intoxicating effects of ecstasy are, and how long those effects persist. Consequently, the inference that Gonzalez was acting under the influence of ecstasy when he committed the crime was weak at best, without more. The need for the evidence was also weak because the State had other evidence rebutting Gonzalez's self-defense claim, such as eyewitness testimony that Gonzalez had started the fight. Further, the evidence of the drug use and possession in school had the potential to impress the jury in an irrational an indelible way that could lure the jury into declaring guilt on a ground different than proof of the offense charged. The time to develop the evidence was brief, but this was not enough to render the evidence admissible. Ultimately, however, the introduction of the evidence was harmless because the State did not rely upon it at all in closing argument and the discussion of these messages were exceedingly brief.

[**Commentary:** This opinion moves this type of inquiry away from the extremely low threshold of relevancy and into a Rule 403 inquiry. Additionally, the opinion also acknowledges that some substances, such as alcohol for example, may need less background information if the effects of the particular substance are well known to the general public. Ecstasy is not one of those substances, though. And, as a general matter, the Court's line of reasoning is consistent with other decisions by the Court dealing with the refusal of a synergistic charge or a definition of intoxication by a drug without any evidence regarding the dosage, use, or effects of that drug. *See for example,* ***Burnett v. State,* 541 S.W.3d 77 (Tex. Crim. App. 2017) (5:1:3)** discussed below.]

**B. An officer's videotape recording of a replay of a time stamped surveillance video was authenticated by officer who took the video and compare it to other evidence independent of the recording.** Jamel McLelland Fowler was charged theft of a Kawasaki Mule all-terrain vehicle (ATV). Officer Jamie Torrez was the investigator involved with Fowler's case and testified at trial. In December 2014, Torrez and another officer located an ATV near the complainant's building. Torrez ran the ATV's VIN number and confirmed that it had been reported stolen. On the ground near the ATV, Torrez found a paper receipt from a Family Dollar Store. The receipt was date- and time-stamped and listed several items, including two utility knives. Torrez also found packaging for the utility knives on the ground near the ATV. Torrez testified that what they found signified that someone purchased the utilities knives and other items at the Family Dollar. Torrez went to the Family Dollar that issued the receipt. Torrez spoke with the manager and asked for surveillance footage from the date and time listed on the receipt. The manager retrieved a videotape stamped with the same date and time as on the receipt. The video was not in a format that allowed it to be copied, so Torrez had another officer use a camera to record the video. Fowler appeared in the recorded video purchasing the items found on the receipt that was found near the stolen ATV. Fowler objected to the admission of the videotape, arguing that the recorded video did not capture the full surveillance video and that the recorded video was not properly authenticated. The trial court admitted the recorded video. The jury found Fowler guilty of the theft of the ATV and assessed punishment at two years' imprisonment. On appeal Fowler argued, among other things, that the recorded video was erroneously admitted. Nothing that there was no evidence that the surveillance system was working properly, that its on-screen clock was correctly set and functioning properly, or that the original accurately portrayed the events that purportedly occurred at the time and date shown in the recorded video, the court of appeals held

that the recorded video was not properly authenticated and that the trial court reversibly erred by admitting unauthenticated videotape into evidence. The Court of Criminal Appeals granted the State's petition for discretionary review solely on the issue of the recorded video's authenticity.

The Court of Criminal Appeals reversed the judgment of the court of appeals. ***Fowler v. State,* 544 S.W.3d 844 (Tex. Crim. App. Apr. 18, 2018) (9:0).** Judge Richardson wrote the opinion for the unanimous court. Judge Richardson noted that to satisfy the authentication requirement the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. Authenticity may be established with evidence of distinctive characteristics, which include the appearance, contents, substance, internal patters, or other distinctive characteristics of the item, taken together with all the circumstances. Additionally, the proponent does not need to conclusively establish the authenticity, but merely provide some evidence to support a finding that the evidence is what the proponent claims. Judge Richardson noted four pieces of circumstantial evidence that the State used to authenticate the video: (1) Torrez's in-person request of the Family Dollar manager to pull the surveillance video on a certain date, at a certain time; (2) the distinctive characteristic that there was a date and time stamp on the video; (3) the fact that the date and time on the videotape match the date and time on the receipt found near the ATV; and (4) the fact that the videotape pulled by the manager revealed Fowler at the store on that date, at that time, purchasing the items listed on the receipt that was found near the stolen ATV. Although the State could have done more to authenticate the video, such as calling the manager or an employee of the Dollar Store who was responsible for the store's surveillance to testify, it was not required to do so. The Court held that the trial court's determination that Torrez supplied facts sufficient to support a reasonable jury determination that the recorded video was authentic, was a decision within the zone of reasonableness and was not error.

## V. OFFENSES

**A. Murder – Evidence sufficient even though neither the murder weapon nor the victim's body were found.** Rex Allen Nisbett was convicted of murdering his wife Vicki. The court of appeals found the evidence insufficient to support Nisbett's conviction and entered an acquittal. George Delacruz was convicted of murdering his wife Julie. The same court of appeals held the evidence sufficient to support the murder conviction. Both cases were unrelated and tried separately. However, the Court combined the cases to address the standard of review for murder cases where the victim's body and the murder weapon are never recovered, there are no eyewitnesses, and no confession by the defendants.

A unanimous Court of Criminal Appeals affirmed both convictions. ***Nisbett v. State*, ___ S.W.3d ___; 2018 WL 3134030 (Tex. Crim. App. June 27, 2018) (9:0).** The Court first noted the evidence was sufficient to show in each case that the victim was dead even though there was no need for a showing of what caused the victim's death. Both victims failed to make appointments had been planned, and voluntary absence would have been out of character for each victim. Both victims were mothers and were unlikely to have abandoned their children. Finally, there was physical evidence suggesting the victims had died. Nisbett's wife's blood had soaked through the carpet and there was a freshly dug hole in a shed in Delacruz's back yard.

Next, the Court noted that the evidence strongly connected each defendant to the victim's disappearance. Both defendants had troubled marriages. Both wives had expressed fear of their respective husbands to third parties, a pastor and a work supervisor. Nisbett talked about killing his wife and Delacruz called his wife "a big mistake." In both cases, the defendants were the last people to see the respective victims alive. Each defendant engaged in suspicious behavior after each respective wife disappeared. Physical and electronic evidence connected each defendant to his respective wife's disappearance. Nisbett's wife's blood on the wall in her apartment was imprinted with Nisbett's handprint. Delacruz used his wife's phone and credit card the day of her disappearance. He sent text messages and posted online media messages suggesting his wife was breaking up with her boyfriend and running away. Finally, the evidence was sufficient to show each defendant's culpable mental state based upon their

motives, attempts to conceal the bodies, and their implausible explanations.

[**Commentary:** This is a very fact-bound opinion. Any practitioner trying a "no-body" murder would be wise to read this opinion in full rather than rely upon this summary. However, also remember that these opinions seem deceptively standardized given that both were combined despite the fact that they do not really set a bar for just how much evidence is necessary to support such convictions. Both cases simply hold that the evidence in these cases was sufficient. Whether a particular case would still be sufficient with a little less evidence of motive or less evidence of the victim's responsible character remains to be seen.]

**B. Engaging in Organized Criminal Activity – Evidence is sufficient to show engaging by commission as a member of a criminal street gang when defendant is acting pursuant to his role or capacity as a gang member.** Richardo Zuniga was a member of the Barrio Aztecas street gang, a gang active in the El Paso-Juarez region. Two brothers, Jesus and Jose Vargas, were members of a rival gang, the Barrio Campestre Locos. In 2009, members of the Barrio Aztecas, including Zuniga, beat, stabbed, and shot the Vargas Brothers outside the A & M Bar in the Socorro area of El Paso. The State charged Zunia with two counts of engaging in organized criminal activity by commission as a member of a criminal street gang and one count of capital murder. Several witnesses testified that members of the Barrio Aztecas had committed the crime, that the A & M Bar was a Barrios Aztecas hangout, that the Vargas brothers were members of a rival gang, and that the shooting was consistent with Barrios Azteca activities against rival gang members. The State also presented testimony that Zuniga had been a member of the Barrio Aztecas since well before the offense, and that he was the person who shot the Vargas brothers. The jury convicted Zuniga of all charges. He received a mandatory life sentence for capital murder and two sixty-year sentences for the charges of engaging in organized criminal activity.

On appeal, Zuniga argued the evidence was insufficient. The court of appeals held the evidence supporting capital murder was sufficient but agreed with Zuniga that the evidence was insufficient to support the two engaging convictions. According to the court of appeals, there was no evidence that Zuniga had committed the offense with "the intent to establish, maintain, or participate as a member of the Barrio Aztecas." There was only evidence that Zuniga was a member of the gang and that he had committed the offense with other gang members, not that he committed the offenses with the requisite intent.

A unanimous Court of Criminal Appeals reversed. ***Zuniga v. State*, ___ S.W.3d ___, 2018 WL 2711145 (Tex. Crim. App. June 6, 2018) (9:0).** Writing for the Court, Judge Alcala explained that sufficiency of the evidence is measured under the hypothetically correct jury charge. Under that standard, as a matter of grammar and logic, the statute's intent clause applies only to the phrase that immediately follows it—"in a combination or in the profits of a combination." Therefore, the State was only required to prove that Zuniga murdered the Vargas brothers "as a member of a criminal street gang." But, the "as" in the phrase required proof that that the defendant was acting "[i]n the role, capacity, or function of" a gang member at the time of the offense. Given this understanding of the statute, the evidence was sufficient to show that Zuniga was acting "as" a member of a criminal street gang regardless of whether the evidence showed that the offense was committed with the intent to establish, maintain, or participate in the criminal street gang. Consequently, the Court reversed the court of appeals and affirmed the convictions.

[**Commentary:** Both this case and ***O'Brien v. State*, 544 S.W.3d 376 (Tex. Crim. App. May 2, 2018) (5:2:2)**, discussed below, provide insight into how the offense of engaging in organized criminal activity by commission is to be pleaded, proven, and charged. Practitioners would be wise to read both cases carefully. This case results in a fairly nuanced holding based upon a rigorous textual analysis. The upshot is that the State is only required to put on proof that a crime is "gang-related" rather than "gang-motivated." This stands in contrast to a case involving a criminal combination where, under *O'Brien*, there must be a showing that the committed crime is part of a common scheme or plan.]

**C. Continuous Sexual Abuse of a Child—A defendant does not commit the offense of continuous sexual abuse of a child if one of the two**

**acts of sexual abuse does not occur in Texas, because that act is not a violation of Texas's law.** Ronald Edgar Lee committed aggravated sexual assault against his young stepdaughter on two occasions, once in New Jersey and once in Texas. The assaults were temporally separated by at least 30 days. Lee was charged and convicted of continuous sexual abuse of a child. Continuous sexual abuse of a child requires that the person commit two or more acts of sexual abuse during a period that is 30 or more days in duration. On appeal, Lee argued that proof of two or more violations of Texas law is an essential element of the continuous-sexual-abuse offense, and because the first alleged act of abuse occurred in New Jersey, it was not a "violation" of Texas law. The court of appeals affirmed Lee's conviction holding that the continuous sexual abuse offense prohibits the commission of two or more acts of sexual abuse over a specified time, and Texas has jurisdiction if part of the prohibited conduct occurred in Texas.

The Court of Criminal Appeals reversed the court of appeals judgment. ***Lee v. State*, 537 S.W.3d 924 (Tex. Crim. App. Oct. 4, 2017) (7:2).** Writing for the majority of the court, Judge Keel pointed to the language of the continued sexual abuse statute. She noted that the continuous sexual abuse provision of the Penal Code requires that the "acts of sexual abuse" be a violation of one of Texas's penal laws. Judge Keel stated that Lee cannot commit an act that is in a violation of Texas law outside of Texas. Therefore, the Court held that the evidence was insufficient to sustain a conviction because only one violation of Texas law was proven, and that was the aggravated sexual assault committed in Texas. Because the jury necessarily found Lee guilty of aggravated sexual assault, which is a lesser-included offense of continuous sexual abuse of a child, the Court reformed the judgment to reflect a conviction for aggravated sexual assault of a child and remanded the case for a new punishment hearing.

Judge Yeary filed a concurring opinion in which Presiding Judge Keller joined. Judge Yeary agreed with the majority opinion's interpretation of the continuous sexual abuse statute. However, Judge Yeary noted that it might be possible to read the statutory definition for "act of sexual abuse" more expansively and include a contingency to include acts that would be in violation of Texas's law if it were committed in this state. Judge Yeary left it to the Legislature to add the language of contingency if that was there intent.

Judge Keasler concurred without a written opinion.

**D. Online Solicitation of a Minor—The "represents" definition of "minor" in the pre-2015 online solicitation of a minor statute is constitutional.** Jeromy John Leax was charged with two counts of online solicitation of a minor under the pre-2015 version of the statute. In relevant part, the indictment alleged that Leax knowingly solicited individuals online who represented themselves to be 13 years old (Count I) and 11 years old (Count II) with the intent that the individuals would engage in sexual conduct with him. Leax filed a motion to quash the indictment, alleging the statute was facially unconstitutional when read together with other portions of the statute. The trial court denied his motion and Leax pleaded guilty as to both counts. Leax was sentenced to 13 years confinement. The court of appeals affirmed his conviction.

The Court of Criminal Appeals affirmed the judgment of the court of appeals. ***Leax v. State*, 541 S.W.3d 126 (Tex. Crim. App. 2017) (7:2:0).** Writing for the majority of the Court, Judge Hervey noted that Leax's facial constitutional challenges had been decided by the Court's recent decision in *Ex parte Ingram*. In *Ingram*, the Court held that the "represents" definition of "minor" is constitutional once a narrowing construction is applied and that facial challenges to the anti-defensive provisions in Section 33.021 are not cognizable on pretrial habeas. The Court noted that Leax did not present any new argument to revisit its holding regarding the "represents" definition of "minor" and, although Leax's challenge to the anti-defensive provisions were cognizable, the record was insufficiently developed on appeal to show that any of the anti-defensive provisions of the statute had been invoked against him.

Judges Yeary and Newell concurred without written opinions.

[**Commentary:** This is simply an application of the Court's opinion in *Ex parte Ingram*, 533 S.W.3d 887

(Tex. Crim. App. 2017) decided at the end of last term. Notably, in that case, several of the claims raised by the defendant, namely that portions of the online solicitation statute limiting particular defenses violated the federal Constitution, were not cognizable on pre-trial habeas. The reasoning there being that they are not the law of the case until the case is tried. Judge Alcala, joined by Judge Newell (hey, that's me) concurred in that case because they believed the issue was cognizable. Judge Yeary merely concurred without opinion regarding that aspect of *Ingram* but did not join Judge Alcala. Leax made many of the same arguments from *Ingram* and the Court held that even though the arguments were cognizable, the record was not sufficiently developed to warrant relief. Consistent with his position in *Ingram*, Judge Yeary concurred without opinion. I have no idea what Judge Newell was thinking.]

**E. Possession of Child Pornography—A cropped image of a child is "made" at the time the original image was made, and child pornography can result from image editing and manipulation.** While visiting a public library, Mark Bolles viewed the image of the photograph entitled *Rosie* by Robert Mapplethorpe on the library's computer. The photograph of *Rosie*, created in 1976, depicts a young female child on a stone bench; due to her position on the bench and lack of underwear, her vagina is visible in a small part of the extreme lower portion of the image. The original *Rosie* photograph is in the collection of the Guggenheim Museum in New York City. Bolles took a picture of the *Rosie* image with his cell phone. Bolles also created a second image on his phone by zooming-in and cropping the photograph of *Rosie*. The cropped image is a close-up image of the child's genitals and part of her right leg. Based on the zoomed-in cropped image, Bolles was convicted of possession of child pornography and sentenced to two years in prison. On appeal, the court of appeals reversed Bolles's conviction holding that the evidence was insufficient to support the conviction because the full image did not depict a lewd exhibition of the genitals and the cropped image did not depict a person who was under the age of eighteen at the time the image was made because the girl in the picture was no longer a child when Bolles cropped the photograph in 2014.

The Court of Criminal Appeals reversed the judgment of the court of appeals. ***State v. Bolles*, 541 S.W.3d 128 (Tex. Crim. App. 2017) (9:0).** Judge Richardson delivered the opinion for the unanimous Court. Judge Richardson first addressed whether the cropped image depicted a person who was under the age of eighteen at the time the image was made. The Court rejected the argument that the copped image was a new and separate visual depiction of the child in *Rosie*. The cropped image of just the child's genitals was created as a new depiction in 2014, but the child's image was still "made" for the purposes of the offense on the day the photograph was taken in 1976 when the girl was under the age of 18. Based on this, the Court concluded that the court of appeal erred in holding that the cropped image was not child pornography because it did not depict a child under the age of 18. Judge Richardson then addressed "morphing" an image into child pornography, which occurs when someone alters innocent pictures of real children so that the children appear to be engaged in sexual activity. After reviewing case law from other jurisdictions, the Court joined the majority of courts and held that lascivious or lewd exhibition can be created by an individual who manipulates an existing photograph or a minor into a different image even when the original depiction is one of an innocent child acting innocently. To determine whether the cropped image constituted an image of a child under 18 engaged in "lewd exhibition of the genitals," the Court employed the use of six factors espoused by the Southern District of California in *U.S. v. Dost*. The factors are whether (1) the focal point of the depiction is on the child's genitalia; (2) the setting of the visual depiction is sexually suggestive; (3) the child is depicted in an unnatural pose, or in inappropriate attire, considering the child's age; (4) the child is fully or partial clothed, or nude; (5) the visual depiction suggests coyness or a willingness to engage in sexual activity; and (6) the visual depiction is intended or designed to elicit a sexual response in the viewer. Judge Richardson noted that while these factors are not binding on the Court, they can aid the Court in assessing child pornography. Finding that the cropped image satisfies all six *Dost* factors, the Court held that the image constituted a "lewd exhibition" of the girl's genitals. Therefore, the Court held that the evidence was sufficient to support Bolles's conviction because the cropped image was child pornography as

that term is defined in the relevant portions of the Texas Penal Code.

[**Commentary:** This case presents a pretty unique issue: How can cropping a picture of a recognized work of art nevertheless be obscene? Interestingly, however, the defendant does not appear to have tried to take it to the United States Supreme Court. (I found nothing in a docket search on the United States Supreme Court website.) Make of that what you will.]

**F. Violation of a Civil Commitment Order**

**1. A civilly committed, sexually violent predator may be punished for violating his civil commitment order while an appeal was pending even if the civil commitment order is later reversed on appeal.** Between 1982 and 2000 Michael Wayne Bohannan was convicted of two counts of aggravated rape with a deadly weapon, attempting to kidnap a nine-year-old girl, and exposing his genitals to an eight-year-old girl. In 2006 Bohannan was caught viewing child pornography in a county law library, which resulted in the State petitioning for him to be civilly committed. At the civil commitment trial, the State had two experts testify, however Bohannan's designated expert was not permitted to testify. The jury determined that Bohannan suffered from a behavioral abnormality and the trial court adjudicated Bohannan as a sexually violent predator and ordered him to be civilly commitment. Bohannan appealed this decision on the basis of the trial court's exclusion of Bohannan's expert. Under the civil commitment order, Bohannan was required to reside in a residential facility, to comply with the requirements of the Council of Sex Offender Treatment and the case manager assigned to his case, and to wear a GPS monitor and comply with the instructions for the monitoring system. Bohannan violated several terms of his civil commitment order, including the GPS monitoring requirements. Meanwhile, the court of appeals reversed the judgment of civil commitment and remanded the case for a new civil commitment trial. The Supreme Court of Texas affirmed the court of appeals judgment on August 31, 2012. In October of 2012, the State indicted Bohannan for violating the civil commitment order. The mandate of reversal was issued by the Supreme Court on January 18, 2013. On February 12, 2013, Bohannan was convicted of violating the civil commitment order. On appeal, the court of appeals upheld Bohannan's conviction. The Court of Criminal Appeals granted review to determine whether a conviction for violating a civil commitment order can be upheld when the underlying commitment order had been reversed on appeal.

The Court of Criminal Appeals affirmed the judgment of the court of appeals. ***Bohannan v. State*, 546 S.W.3d 166 (Tex. Crim. App. Nov. 22, 2017) (9:0).** Judge Walker delivered the opinion of the unanimous Court. Judge Walker first addressed Bohannan's challenge to jurisdiction. Bohannan argued that the indictment in his case was invalid because it did not state an offense because there was no valid judgment or order of civil commitment at the time. After reviewing the indictment, Judge Walker noted that it plainly identified the offense charged, so it was valid. Judge Walker noted that Bohannan's challenge was more accurately described as a challenge that one of the elements alleged was false or unsupported, but such a challenge does not affect the validity of the indictment. Because the indictment was sufficient, the Court held, the trial court was vested with jurisdiction over the case. Bohannan also argued that he was not responsible for the alleged offense because he was not under a valid order of commitment at the time of trial. Judge Walker noted that a similar issue had been addressed in *Stevenson v. State*, 499 S.W.3d 842 (Tex. Crim. App. 2016). In *Stevenson* the Court rejected the idea that a civil commitment order cannot be violated until it is a final order which has been affirmed on appeal. In addition, the Court explained that a civil commitment order violation is a "circumstances surrounding the conduct" crime and the violation arises only by the circumstance that the person has been adjudicated a sexually violent predator who has been civilly committed. Noting that the circumstance that Bohannan had been adjudicated and ordered to be civilly committed was present at the time of Bohannan's violations, the Court held that the court of appeals did not err in affirming Bohannan's conviction. Judge Walker noted, however, that *Stevenson* was decided after the court of appeals' decision in Bohannan's case. Judge Walker, therefore, reviewed the case law relied on by the court of appeals and found that those cases were consistent with *Stevenson* and under both sets of analysis Bohannan's

conviction was valid. Bohannan argued that the evidence was insufficient to convict him because the civil commitment order was reversed on appeal and therefore the Final Judgment and Order of Commitment introduced at trial were entitled to no weight. However, Judge Walker pointed out that the Final Judgment and Order of Commitment were introduced at trial without any objection and were supported by a sponsoring witness who did not suggest the documents were incorrect. Considering this evidence, the Court found that a rational jury would have concluded that the documents were conclusive proof that Bohannan was adjudicated as a sexually violent predator and then civilly committed. Lastly, Bohannan argued that the conviction offended due process and due course of law. The Court found Bohannan's arguments on this point bare and conclusory; such arguments were not enough to support reversal.

**2. The Texas Legislature did not violate the Separation of Powers Clause when it decriminalized a sexually violent predator's failure to participate in and comply with his sex offender treatment program and applied that law to cases pending on appeal.** Roger Dale VanDyke was adjudicated a sexually violent predator and civilly committed in January 2011. Between July 2011 and March 2013, VanDyke failed to make progress in his treatment program and violated several rules and requirements of his treatment program. At that time, the Health and Safety Code contained a provision which provided that it was a criminal offense for sexually violent predators to fail to participate in and comply with the terms of their sex offender treatment program. VanDyke was indicted for violating the terms of his sex offender treatment program. VanDyke filed a motion to quash and dismiss the indictment, arguing that the relevant provisions of the Health and Safety Code were unconstitutional. The motion was denied and VanDyke pleaded guilty to the offense charged and was sentenced to twenty-five years imprisonment. VanDyke appealed his conviction. While VanDyke's appeal was pending, the Texas Legislature amended the Health and Safety Code and removed the failure to participate in and comply with the sex offender treatment program from the list of criminal offenses sexually violent predators are subject to. The amendments also contained a savings clause which allowed the amendments to apply to offenses committed before the amendment's effective date, except for final convictions. The legislative support for the bill was significant enough to make the bill effective immediately upon signing. When the Governor signed the bill, the amendments went into effect. VanDyke's appeal was pending at the court of appeals at the time and he filed a supplemental briefing arguing that the amendments applied to him and decriminalized his conduct, therefore his conviction should be vacated. The court of appeals found that the amendments did apply to VanDyke, however the court found that the amendments usurped the governor's power to grant clemency. Therefore, the court held that the amendments were unconstitutional in violation of the Separation of Powers Clause of the Texas Constitution.

The Court of Criminal Appeals reversed the judgment of the court of appeals. ***VanDyke v. State,* 538 S.W.3d 561 (Tex. Crim. App. 2017) (7:2).** Judge Newell delivered the opinion of the Court. Judge Newell noted that the amendments to the Health and Safety Code did apply to VanDyke because his conviction was not final when the amendments because effective. Additionally, by removing the failure to participate in and comply with their sex offender treatment program from the list of criminal offenses sexually violent predators are subject to, the Court found that the Legislature had decriminalized VanDyke's conduct. To determine whether the amendments violated separation of powers, Judge Newell reviewed the character and effect of the governor's clemency power, particularly focusing on the pardon power, and the character and effect of the Legislature's power to repeal laws. Judge Newell noted that the governor's power to grant clemency allows the governor to affect the punishment an individual is subjected to, but it doesn't allow the governor to affect the underlying conviction; particularly, a pardon forgives the penalty but does not forgive the crime or the conviction. Judge Newell recognized that the Court had not always used consistent language in this regard, however a review of the Court's precedent showed that the Court has continuously held that a pardon does not obliterate the underlying conviction, it merely removes the legal

disabilities associated with the conviction. On the other hand, Judge Newell noted that the Legislature has the sole power to repeal laws and determine what conduct is criminal. Judge Newell pointed out that the Court has repeatedly held that when a legislative enactment repeals a criminal law and permits the repeal to apply retroactively, pending convictions predicated on the repealed law are invalid and the convictions should be reversed. Given the nature of these powers, the Court held that the Legislature was within its power to decriminalize VanDyke's conduct and apply that change to defendants whose conviction was pending on appeal; the Legislature did not violate separation of powers.

Judge Yeary filed a dissenting opinion in which Judge Keasler joined. Judge Yeary recognized that the Court derived its opinion from long-standing law. However, he opined that the framers of the Texas Constitution would have understood the governor's pardon power to wipe out the pardoned individual's conviction. Therefore, he argued, the retroactive application of the Legislature's repeal of the criminal statute, which removes individual's convictions, usurped the governor's exclusive power to pardon.

[**Commentary:** Some might consider it kind of weird to complain about a violation of the Governor's pardon power on a bill that the Governor signed. I recommend that practitioners read both opinions to fully understand how all three branches of the Texas government interact. I would also point out that the opinion does not consider whether this type of statute might violate the Separation of Powers Clause by interfering with a court's ability to enter a judgement because that argument wasn't raised. Finally, if you are interested in civil commitment proceedings for sexually violent predators, I would also direct you to the recent decision from the Supreme Court of Texas, ***In re State,*** **___ S.W.3d ___, 2018 WL 1974361 (Tex. Apr. 27, 2018) (8:0).** There, a defendant petitioned the court of appeals for a writ of mandamus to require the appointment of counsel to assist him in litigating the State's motion to amend his civil commitment order. The court of appeals granted mandamus relief, but the Supreme Court held that the court of appeals abused its discretion and granted mandamus relief for the State. According to the Court, civil litigants are generally not entitled to be represented by counsel absent a legislative mandate. Under the Civil Commitment of Sexually Violent Predators Act, an indigent defendant is entitled to appointment of counsel at a proceeding to determine if civil commitment is proper, at a biennial review, and a hearing regarding release from civil commitment. However, the Act does not allow for appointment of counsel at a modification hearing. Additionally, the Court held that there was no due process right to the appointment of counsel. The opinion also goes into some detail about the 2015 changes to the Act as well, so that case is also worth a read.]

**G. Failure to Register as a Sex Offender—Conflicting evidence regarding address provided to registration officers did not render evidence insufficient to support determination that sex offender had voluntarily failed in his duty to notify police of his change of address.** Albert Junior Febus is a registered sex offender and has a duty to register his address with the local police and fill out a change of address form when he moves. Febus had successfully complied with the registration program for six years prior to the instant offense. Prior to the offense Febus had registered his address as 6110 Glenmont Drive, Apt. #57. In March 2013 Febus obtained a new driver's license in order to obtain a new CR-14 registration identification, known as "blue card." He then went to the Houston Police Department to register a prospective change of address. He filled out a "Sex Offender Update Form" with the assistance of a registration officer. During the meeting, Febus told the registration officer that his new address was "6110 Glenmont Drive, Apt. #45." Febus's temporary license, blue card, and Sex offender Update Form all listed Febus's new address as "6110 Glenmont Drive, Apt. #45." Febus signed all of these documents and never suggested that the address was incorrect. In October 2013 Officer C.R. Black conducted a compliance check on Febus and determined that Febus was not residing at 6110 Glenmont Drive, Apt. #45. The State charged Febus with intentionally and knowingly failing to comply with his duty as a registered sex offender by failing to provide his new address to local police.

At trial, Febus argued that the incorrect address was not the result of his own conduct; it was, instead, the result of a clerical error. Febus testified that he told

the registration officer the street address for his new apartment was "6100 Glenmont Drive" not "6110 Glenmont Drive" and that he gave DPS the same information. Javier Ayala, the tenant in apartment 45 at "6100 Glenmont" testified that Febus had lived with hi m at the "6100 Glenmont" apartment from March 2013 until he was arrested. However, Lindsay Ulloa, the apartment manager of both Glenmont Drive properties testified that she had never seen Febus around the apartment and that Ayala would have informed her if Febus was living with him. The jury found Febus guilty of failing to register. On appeal Febus argued that the evidence was legally insufficient to support a determination that he had intentionally or knowingly failed to provide his new address to the Houston Police Department. Specifically, Febus argued that the failure was due to a negligent mistake by the registering authority or himself. The court of appeals rejected Febus's argument, holding that under the Court of Criminal Appeals' opinion in *Robinson v. State*, the State was not required to prove that Febus had a culpable mental state when failing to provide the correct address. The court of appeals affirmed Febus's conviction, finding the evidence legally sufficient to support the jury's verdict.

The Court of Criminal Appeals affirmed the court of appeals judgment. ***Febus v. State*, 542 S.W.3d 568 (Tex. Crim. App. Feb. 14, 2018) (6:3)**. Judge Newell wrote the opinion for the majority of the Court. Judge Newell noted that the court of appeals correctly determined that the evidence was sufficient to establish Febus's awareness of the registration requirement and that the State was not required to prove an additional culpable mental state regarding his failure to register. However, the court of appeals did not fully address Febus's claim that the jury had irrationally determined that he failed to comply with his duties to register as a sex offender. The Court adopted a rationale expressed in a concurring opinion of *Robinson*, which recognizes that when authorities rebuff a sex offender's attempt to register, the sex offender may not be criminally liable on the basis that his failure to register was involuntary. Under this rationale, Febus's argument could be restated that his failure to comply was due to the registering agency, not him, and it was therefore involuntary. Judge Newell noted, then, that the Court was required to look at the record in a light most favorable to the jury's verdict to determine if any rational factfinder could find that Febus had told the registering authorities that he was moving to "6110 Glenmont, Apt. #45." Although Febus presented evidence that he had lived at "6100 Glenmont" and testified that he told the registering agent that he was moving to "6100 Glenmont," the jury was not required to credit this evidence. There was sufficient conflicting evidence regarding what Febus told the authorities that the jury could have rationally resolved the testimonial conflict against Febus. Therefore, the evidence was sufficient to support the jury's verdict. In response to the dissent's call to overrule *Robinson*, Judge Newell noted the importance of *stare decisis* and that *Robinson* was well reasoned and workable, therefore it would be improper to overrule it.

Judge Richardson filed a dissenting opinion in which Judges Alcala and Walker joined. Judge Richardson would have overruled the Court's opinion in *Robinson* and held that the offense of failing to register is violated when one (1) knows or should know that he has a duty to register and (2) intentionally, knowingly, or recklessly fails to comply with that duty to register. Judge Richardson would have remanded the case so that the court of appeals could assess whether the evidence was legally sufficient to support the jury's verdict that Febus intentionally, knowingly, or recklessly failed to register.

[**Commentary:** If you believe, as the defendant argued, that his failure to register a change of address was due to a police typo, then this case supports the view that registered sex offenders live in a Kafka-esque bureaucratic nightmare. But a careful reading of this opinion shows that the sky is not truly falling after *Robinson*. As the Court notes, the same evidence that would have been marshalled to show that a defendant intentionally failed in his duty to register is likely to be the same evidence that will be marshalled to show both that the defendant knew he had a duty to register and that his failure was voluntary.]

**H. Violation of a Protective Order—An individual subject to a protective order violates the order by "communicating in a harassing manner" when he intentionally or knowingly sends information or messages, or speaks to, the protected person in a manner that would persistently disturb, bother**

**continually, or pester another person.** Paul Henri Wagner was married to the complainant, Laura. In 2011 the couple separated after Wagner was charged with family-violence assault against Laura. During the separation Laura obtained a protective order against Wagner. The order of protection prohibited Wagner from, among other things, "communicating directly with [Laura] in a threatening or harassing manner." The order contained a finding that family violence had occurred and was likely to occur in the foreseeable future. The order was signed on November 16, 2011. During a six-day period beginning on November 23, Wagner sent approximately sixteen text messages to Laura. Laura asked Wagner to stop texting her and to communicate with her only through email. However, Wagner continued texting Laura and she had to make a second request that Wagner stop texting her. After Laura served Wagner with a divorce petition, he made at least two phone calls to her (despite her request for him not to call her) and sent her four lengthy emails. In the emails, Wagner declared his love for Laura and begged her to reconcile with him. He also accused Laura of deceiving him, he claimed that he was having anxiety attacks and trouble breathing, and he informed her that asked their church members to contact Laura to tell her not to divorce him. Individuals from the couple's church forwarded Laura emails from Wagner regarding his desire to reconcile with her. Laura then complained to the police that Wagner had violated the protective order. Wagner was subsequently charged and tried by a jury for violating the protective order by communicating with Laura in a harassing manner. Wagner was convicted of the offense. On appeal, Wagner challenged his conviction by arguing the statute he was convicted under was overbroad and vague in violation of his federal constitutional rights. The court of appeals rejected Wagner's constitutional arguments and affirmed his conviction.

The Court of Criminal Appeals affirmed the judgment of the court of appeals. ***Wagner v. State*, 539 S.W.3d 298 (Tex. Crim. App. 2018) (8:1).** Judge Alcala wrote the opinion for the majority of the Court. Judge Alcala began by construing the statute of conviction, Penal Code Section 25.07(a)(2)(A). By its terms, this section only applies to individuals who are actively subject to one of seven types of judicial conditions or orders in family violence, sexual abuse, stalking, or trafficking cases that expressly prohibit the individual from communicating in a threatening or harassing manner with the protected person. Judge Alcala noted that that statute requires proof of the defendant's knowledge or intent to each element of the offense: (1) that he communicated; (2) directly; (3) with a protected individual or member of the family or household; (4) in a threatening or harassing manner. The Court concluded that phrase "communicates…in a … harassing manner" has an ordinary meaning that is commonly understood. Pursuant to the common meaning of the statutory terms, a person of intelligence would understand that, the statute prohibits intentionally or knowingly sending information or messages, or speaking to, the protected person in a manner that would persistently disturb, bother continually, or pester another person. Using this definition of harassing, Judge Alcala turned to Wagner's claims of overbreadth and vagueness. The Court concluded that the statute was not overly broad because it applies to very limited set of circumstances and individuals, it will almost always involve purely private matters, and the protective orders are limited in duration. Additionally, Judge Alcala noted, the statute does not implicate communicative conduct that is protected by the First Amendment because the conduct at issue invades the substantial privacy interest of the victim in an essentially intolerable manner. Wagner had argued that the statute was impermissibly vague due to its failure to define the phrase "harassing manner." Applying the plain language of the statute to the facts of this case, the Court concluded that the language is sufficiently clear to provide a person of ordinary intelligence a reasonable opportunity to know that Wagner's repeated texts, phone calls, and emails would persistently disturb, bother continually, or pester (i.e. harass) Laura. The statute, therefore, did not violate Wagner's rights under the federal Constitution due to its overbreadth or vagueness.

Presiding Judge Keller filed a dissenting opinion. Presiding Judge Keller opined that the Court's definition of "harassing" does not adequately address the intensity and frequency of the conduct necessary to violate the statute. Presiding Judge Keller would have employed a definition that sets the intensity of the conduct as that which would produce substantial emotional distress. She noted that amount of repetition

required to constitute harassing communication may vary based on the context of the communication, therefore using the "produce substantial emotion distress" definition would eliminate the need to read a repetition element into the statute.

## I. Official Oppression

**1. Evidence was insufficient to show that C.P.S. investigator knew her conduct was unlawful where her search of residence pursuant to a court order did not exceed the scope of the order.** Rebekah Thonginh Ross worked as an investigator for the Greenville office of the Department of Family and Protective Services. On December 13, 2011, the Department received a report stating that a baby had been born at a mobile home to a mother who was using drugs during her pregnancy; the report indicated that the baby had not received any medical attention. Ross conducted an investigation and discovered that a baby was born at the mobile home in question on December 10, 2011; the parents were Leslie Avery Hunt Vargas (Hunt) and Nicholas Vargas. Hunt had been arrested for DWI two days before the birth and was also charged with possession of controlled substance and theft of property. Hunt also had two prior CPS cases which resulted in the removal of her first child from Hunt's home due to her drug use. On December 15, the district court issued an Order in Aid of Investigation which authorized law enforcement to accompany a representative from the Department to enter the mobile home, interview and/or examine the child, and observe the premises or immediate surroundings where the child is located or where the alleged abuse or neglect occurred. On December 16, Ross, two deputies, and another Department investigator went to the mobile home. The deputies broke down the door because no one was home. In the bedroom of the home they found a large stain of blood and bodily fluid on the underside of the bed and on the box spring; there was also blood and bodily fluid on the walls. A journal and calendar found in the room indicated that the baby had been born at the home. In the kitchen, Ross instructed a deputy to get a crock pot down from a shelf and look inside; Ross also opened kitchen cabinets and drawers, but nothing else was found. Hunt and the baby were located later that day at a different address. The other Department investigator who had accompanied Ross on the search of the mobile home reported to her supervisor that she did not believe Ross followed Department policies in conducting the search of the kitchen. Based on this report, Ross was charged with the criminal offense of official oppression.

At the bench trial in this case several witnesses associated with the Department testified about Ross's training on the Fourth Amendment, their own opinion that they would not have searched the kitchen, and the fact that this was an extremely rare case. The trial court found Ross guilty. On appeal Ross argued, among other things, that the evidence was legally insufficient to support her conviction. The court of appeals affirmed Ross's conviction, holding that the evidence was legally sufficient because the district court's Order did not authorize the search of the kitchen.

The Court of Criminal Appeals reversed the judgment of the court of appeals and rendered a judgment of acquittal. ***Ross v. State*, 543 S.W.3d 227 (Tex. Crim. App. Mar. 28, 2018) (9:0).** Judge Richardson wrote the opinion for a unanimous Court. Judge Richardson first listed the elements the State was required to prove in order to convict Ross of official oppression: (1) Ross, while acting under color of her employment with the Department, (2) intentionally, (3) subjected Hunt, (4) to a search and/or seizure, (5) that Ross knew was unlawful. Judge Richardson noted that, although Ross raised arguments to several elements of the offense, the Court was focused on whether the State's evidence was sufficient to prove beyond a reasonable doubt that Ross knew her conduct was unlawful. "Unlawful" is defined as "criminal or tortious or both and includes what would be criminal or tortious but for a defense that is not amounting to justification or privilege." Judge Richardson pointed out that the district court's Order allowed Ross to enter the home and locate the child "by any means necessary" and to search "the premises" to locate the newborn child and observe "where the alleged abuse or neglect occurred." After reviewing the facts and testimony presented at the trial, the Court found that given the amount of blood on the mattress and walls, the condition of the home, the information Ross had regarding the history of drug use, the lack of medical care to the child who was just recently born in the home, Hunt's prior criminal and CPS history, and that

there was no indication where the baby was or whether the baby was alive, it was possible that abuse and neglect took place throughout the entire home. Therefore, under these circumstances, the Court held that no rational trier of fact could have found that Ross knew her search of the kitchen was unlawful.

**2. Evidence was insufficient to show that CPS investigator "knew" her conduct in seizing and searching a minor's cell phone because issue of CPS investigator's authority to do so was unsettled at time.** Natalie Ausbie Reynolds worked as an investigator supervisor for the Greenville office of the Department of Family and Protective Services. On June 13, 2012, the Department received a referral regarding a fifteen-year-old girl, A.K., who had run away from her guardian, Brenda Robertson. Robertson had called the Department seeking assistance. Robertson informed the Department that A.K. had run away; she was using and dealing methamphetamines and marijuana; she had lost s significant amount of weight; and she had been gone for about two weeks. A.K. was found by a deputy with the Hunt County Sherriff's Department at the home of a twenty-three-year-old male. A.K. was transported to a juvenile detention center, where her personal belongings were confiscated; this included a ring, a bracelet, and her cell phone. The next day, June 14, A.K. was released to the custody of the Department because A.K. did not have an appropriate or willing caregiver, and it was determined that if she was released she would run away again. The case was assigned to Rebekah Thonginh Ross, who was an investigator with the Department and supervised by Reynolds. A.K. made it very clear that she refused to go to a placement home or any other shelter. A.K. demanded the return of her cell phone, but it was not returned to her. The cell phone was ultimately locked in a file cabinet at the Department. A.K. was taken to a placement facility that did not permit children to have cell phones. The next day, June 15, the district court awarded temporary custody of A.K. to the Department. More than a year later, Reynolds was charged with the criminal offense of official oppression based on her allegedly seizing and searching A.K.'s cell phone; the indictment alleged that she acted individually or as a party with Ross.

At the bench trial in this case another investigator, Edie Fletcher, testified that she tried to retrieve A.K.'s cell phone on June 14, but Ross would not give it to her because "she was looking for some evidence." When Fletcher addressed the issue with Reynolds, Reynolds told her that they needed the phone to go through it to find drug evidence. Fletcher then suggested to keep the phone in her filing cabinet until the morning and Reynolds agreed. The next day Fletcher gave A.K.'s cell phone to Reynolds who said she was going to finish her investigation. Other witnesses associated with the Department testified about Reynolds's training on the Fourth Amendment. On appeal, Reynolds argued that the evidence was legally insufficient to support her conviction. The court of appeals affirmed her conviction, holding the evidence was sufficient as to each element of the offense.

The Court of Criminal Appeals reversed the judgment of the court of appeals and rendered a judgment of acquittal. ***Reynolds v. State*, 543 S.W.3d 235 (Tex. Crim. App. Mar. 28, 2018) (9:0).** Judge Richardson wrote the opinion for the unanimous Court. Judge Richardson first listed the elements the State was required to prove in order to convict Reynolds of official oppression: (1) Reynolds, while acting under color of her employment with the Department, (2) intentionally, (3) subjected A.K., (4) to a search and/or seizure, (5) that Reynolds knew was unlawful. Judge Richardson noted that, although Reynolds raised arguments to several elements of the offense, the Court was focused on whether the State's evidence was sufficient to prove beyond a reasonable doubt that Reynolds knew her conduct was unlawful. "Unlawful" is defined as "criminal or tortious or both and includes what would be criminal or tortious but for a defense that is not amounting to justification or privilege." Judge Richardson noted that, given the circumstances, it was possible that A.K. was under the emergency possession of the Department at the time her cell phone was obtained by the Department. Given the fact that there is no case law addressing, nor statutory provisions specifying, the Department's rights or duties when a child is in the Department's emergency possession, Reynolds may have been authorized to seize and search A.K.'s phone. However, the Court did not need to decide whether Reynolds had authority to confiscate and search the cell phone, because the proper question was whether the State met its burden in proving that Reynolds knew her conduct was unlawful.

Based on the facts, it was not unreasonable to believe that she, or anyone in the Department acting for her, had authority to confiscate A.K.'s cell phone to protect A.K. and ensure that A.K. would not use it for self-destructive behavior. Therefore, even in the light most favorable to the guilty verdict, the evidence was insufficient to support a finding that Reynolds knew her conduct was unlawful.

[**Commentary:** Both this case and ***Ross v. State*, 543 S.W.3d 227 (Tex. Crim. App. Mar. 28, 2018) (9:0)**, discussed above, should be considered together. Notably, these opinions work in a way similar to the Court's decision in *Queeman v. State*, 520 S.W.3d 616 (Tex. Crim. App. 2017), decided last term. There, the Court sought to differentiate between evidence that rises to a level of a criminal violation instead of a mere civil cause of action. In *Reynolds* and *Ross*, the Court focuses upon whether the defendants actually "knew" their conduct was unlawful rather than simply whether the conduct was actually lawful. In this way, the quantum of proof for a criminal violation based upon official oppression must be at least as high, if not higher, than the threshold needed to surmount a claim of qualified immunity by a state actor in a civil suit. *See for example*, ***Kisela v. Hughes*, 138 S.Ct. 1148 (Apr. 2, 2018) (Per curiam)** (holding that qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known), discussed above.]

**J. Professional and Amateur Sports Protection Act violates concept of dual sovereignty by prohibiting states from repealing sports gambling laws.** The State of New Jersey wanted to legalize sports gambling at casinos and horseracing tracks. The Professional and Amateur Sports Protection Act (PASPA), however, makes it unlawful for a state to "authorize" sports gambling schemes. So, the New Jersey Legislature enacted a law that repealed provisions of state law prohibiting sports gambling insofar as they concerned the "placement and acceptance of wagers" on sporting events at horseracing tracks, casinos, or gambling houses in Atlantic City. The law was also only effective as to wagers on sporting events not involving New Jersey college teams or a collegiate event taking place within the State. The law also declared that it was not to be interpreted as causing the State to authorize, license, sponsor, operate, advertise, or promote gambling. A federal district court held that the new law violated PASPA by authorizing sports gambling. The Third Circuit Court of Appeals affirmed. It also rejected New Jersey's argument that the state law violated the "anticommandeering principle" inherent in the federal Constitution because it does not command states to take affirmative action.

The United States Supreme Court reversed, holding that PASPA does violate the anticommandeering principle because it prohibits a state from modifying or repealing its laws. ***Murphy v. National Collegiate Athletic Ass'n*, 2018 WL 2186168 (May 14, 2018) (6:1:1:3).** Writing for the Court, Justice Altio first explained that the repeal of existing laws by New Jersey did amount to an authorization in violation of PASPA. Given that the New Jersey statute violated the federal statute, he then considered whether the federal statute violated the Constitution. Justice Alito further explained that the anticommandeering doctrine prohibits the federal government from either forcing state legislatures to enact laws or prohibiting state legislatures from appealing or amending laws. Under our federal Constitution, the legislative powers granted to Congress are sizeable, but they are not unlimited. The Constitution confers on Congress certain enumerated powers. All other legislative power is reserved for the States under the Tenth Amendment. Conspicuously absent from the list of enumerated powers is the power to issue direct orders to the governments of the States. The anticommandeering doctrine represents the recognition of this limit on congressional authority. Here, by prohibiting a State from enacting new laws, PAPSA violates the anticommandeering doctrine. Further, PASPA is not a valid preemption provision. Preemption is based upon the Supremacy Clause, which is not an independent grant of legislative power. Finally, the Court held that no provision is severable from the PASPA provision directly at issue. As such, the Court struck down the entire statute.

Justice Thomas joined the Court, but wrote separately to express his discomfort with modern severability precedents. Justice Breyer concurred in part and dissented in part, based upon his position that the offending statutory provision was severable.

Consequently, he did not join the Court regarding the issue of severability and dissented to the Court striking down the entire law. Justice Ginsburg dissented along with Justice Sotomayor. According to Justice Ginsburg, nothing in PAPSA commands States to do anything other than desist from conduct federal law proscribes. She also opined that even if the provision violated the Constitution it was severable. Justice Breyer joined this part of the opinion.

[**Commentary:** This is kind of heady stuff as the Supreme Court is asked to determine where the federal government ends and state government begins. I fully acknowledge that my summary probably does not do this case justice, so I encourage practitioners to read the opinion for themselves. I have included this because, given how fundamental the nature of the opinion, it could have a lasting impact on a number of issues where states and the federal government do not see eye-to-eye. But remember, this opinion does not say "sports betting is Constitutional." It says that states can pass laws that authorize sports betting. So, it does not affect gambling laws in Texas directly, but it may provide momentum for legislative changes in the future. I am unwilling to place a bet on whether such changes take place.]

## VI. JURY INSTRUCTIONS

**A. In a DWI case, the definition of "intoxicated" submitted to the jury must be supported by the evidence presented at trial.** Burt Lee Burnett rear-ended another driver. After exhibiting slurred speech and a smell of alcohol, officers conducted standard field sobriety tests on Burnett. Burnett showed signs of intoxication during the horizontal-gaze nystagmus test, the walk-and-turn test, and the one-leg-stand test. Burnett was arrested for driving while intoxicated. During a search incident to the arrest, the officers found twenty white pills and one blue pill in Burnett's jacket. The officers believed the pills were hydrocodone. They asked Burnett if he had a prescription for the drugs, he said he did but did not state what the drugs were. At trial, the jury charge authorized the jury to find Burnett intoxicated "by not having the normal use of his mental and physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two of more of the substances, and any other substances into his body…." The jury found Burnett guilty. On appeal, Burnett argued that the trial court erroneously instructed the jury that it could convict him if it found he was intoxicated by reason of the introduction of anything other than alcohol into his system. The court of appeals held that it was error to submit the full "loss of faculties" definition of intoxication since the evidence showed only alcohol intoxication.

The Court of Criminal Appeals affirmed the judgment of the court of appeals. ***Burnett v. State,* 541 S.W.3d 77 (Tex. Crim. App. 2017) (5:1:3).** Writing for the majority, Judge Hervey declined to adopt the State's position that the entire statutory definition of "intoxicated" should be included in every DWI jury charge regardless of the evidence adduced at trial. On the contrary, it is the responsibility of the trial court to deliver to the jury a charge setting forth the law applicable to the case and it must be tailored to the facts presented at trial. Therefore, the trial court must submit to the jury only the portions of the statutory definition of "intoxicated" that are supported by the evidence. Applying this to the facts at hand, the Court held that the evidence presented at trial regarding the pills was insufficient to warrant the full statutory definition of "intoxicated." Judge Hervey contrasted the facts presented in Burnett's case with those in *Oullette*, in which the Court found the full definition was appropriate. Unlike *Oullette*, Burnett did not identified the pills and there was no evidence of what kind of drug the pills were, what intoxicating effects the pills may have, and whether Burnett was showing signs of intoxication from ingestion the pills.

Judge Richardson wrote a concurring opinion in which he further differentiated the facts in *Oullette* from the facts in the present case.

Presiding Judge Keller filed a dissenting opinion in which Judges Yeary and Keel joined. Presiding Judge Keller would have held the evidence sufficient to submit the full definition of "intoxicated" because the officers identified the pills as hydrocodone, which Burnett did not dispute, and the intoxicating effects of hydrocodone are well known.

Judge Yeary filed a dissenting opinion in which Presiding Judge Keller joined. Judge Yeary stated that

the evidence in the present case was sufficient to warrant submission of the full definition of "intoxicated." Judge Yeary also noted that the court of appeals held the admission of the evidence of hydrocodone was error, but it did not assess the harm of this error. In his view, the Court should have vacated the court of appeals judgment and remanded the cause to that court for further proceedings not inconsistent with his, and Presiding Judge Keller's, dissents.

[**Commentary:** This was a tight case, but the Court's later decision in ***Gonzalez v. State*, 544 S.W.3d 363 (Tex. Crim. App. Apr. 11, 2018) (9:0:0)** may have alleviated some of the tension from this case, as well as *Henley v. State*, 493 S.W.3d 77 (Tex. Crim. App. 2016), which was decided last term. By holding that this evidence did not give rise to the instruction, the Court here seems to suggest that this evidence would not be relevant (and possibly inadmissible). *Henley* also seemed to lift the standard for relevancy when the Court held that evidence of a defendant's state of mind for purposes of a necessity defense could not be based upon a remote fear of danger to his children. If the necessity defense charge didn't apply, then the evidence was irrelevant, under *Henley*. But *Gonzales* seems to move the needle back a little to get unanimous agreement that in the right case this kind of evidence could at least be relevant, and the jury charge, like the one in Burnett would be appropriate.]

**B. Self-defense**

**1. Admitting to holding a handgun at your side and saying "stop, leave us alone" is sufficient to establish the "confession" aspect of the confession/avoidance doctrine associated with getting a self-defense instruction.** Cesar Alejandro Gamino and his girlfriend were out in downtown Fort Worth. According to Gamino, while they were walking to their car they encountered three men. Gamino and his girlfriend claim the men threatened them and said they would "kick [his] ass." Gamino retrieved his gun from his vehicle and told the men "[s]top, leave us alone, get away from us." According to the State, Gamino confronted Mohammed Khan and his two friends when Gamino thought the men had directed a lewd comment towards his girlfriend. Khan testified that he told Gamino they were not talking to him or his girlfriend. Khan claimed Gamino said "I got something for you," walked to the driver's side of his truck, pulled out a gun, and pointed it at Khan and his friends. Gamino was charged with aggravated assault with a deadly weapon. At trial, the trial court refused to submit a self-defense instruction to the jury. Gamino was convicted. On appeal, the court of appeals reversed Gamino's conviction, holding that Gamino presented sufficient evidence to warrant submission of a self-defense instruction

The Court of Criminal Appeals affirmed the judgment of the court of appeals. ***Gamino v. State*, 537 S.W.3d 507 (Tex. Crim. App. Sept. 27, 2017) (6:1:2).** Judge Richardson wrote for the majority of the Court. Judge Richardson noted that a defendant is entitled to a jury instruction on self-defense if the issue is raised by the evidence, whether the evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense. The Court found that Gamino presented evidence that he believed the display of his gun was immediately necessary to protect himself against the victim's use or attempted use of unlawful force, that his purpose in displaying his weapon was limited to creating an apprehension that he would use deadly force if necessary, and that his conduct was not in response to verbal provocation alone. These findings support application of the "Threats as Justifiable Force" provision of the Penal Code. The Court held that because the "Threats of Justifiable Force" provision is incorporated into the law of non-deadly force self-defense under Section 9.31 of the Penal Code, Gamino was entitled to receive a self-defense jury instruction at his trial.

Judge Newell concurred in the result.

Judge Keasler wrote a dissenting opinion in which Judge Hervey joined. Judge Keasler opined that self-defense is a justification defense, requiring confession and avoidance. In his view, even considering the evidence in a light most favorable to the defendant, Gamino did not admit to a justified aggravated assault.

**2. Failure to instruct on self-defense and necessity was harmful because its omission left the jury without a vehicle by which to acquit a defendant who has admitted to all the elements of the offense.** William Rogers was caught hiding in the

master-bedroom closet of David Watson. Rogers shot Watson in the scrotum. A struggle ensued, but Watson eventually escaped. Rogers claimed that he had been having an affair with Watson's wife and he had entered the home at her request to feed her cats. Rogers claimed that Watson came home unexpectedly and Rogers hid in the closet. According to Rogers, Watson came into the closet brandishing a hunting knife and Rogers shot Watson in self-defense with Watson's .380 pistol. [Of course, Rogers later shot at Watson with Roger's own .45 that he had brought with him.] Rogers testified that he ran away from Watson after Watson wrestled the .380 pistol from him.

The State charged Rogers with burglary of a habitation with commission or attempted commission of aggravated assault as well as aggravated assault. Rogers requested jury instructions on self-defense and necessity, but both were denied by the trial court. The court of appeals vacated the aggravated assault conviction on double jeopardy grounds because it was a lesser-included offense of the burglary. The court of appeals assumed that the refusal of the instructions was error, but held that the error was harmless.

A unanimous Court of Criminal Appeals reversed. ***Rogers v. State*, ___ S.W.3d ___; 2018 WL 3134509 (Tex. Crim. App. June 27, 2018) (9:0).** Writing for the Court, Judge Keel explained that the trial court's embargo on the defensive issues left Rogers with a single path to acquittal for burglary, the consent of the victim's wife to enter the home. The jury was prevented from fairly considering the issue because the State argued that the wife's consent was irrelevant and Rogers admitted he did not have Watson's consent to enter the residence. Given these circumstances, the jury's implicit rejection of Roger's claim about consent does not support the conclusion that the jury would have also rejected his justification defenses. Deprived of any mention of these possible defenses, the jury could not have made an informed decision about blameworthiness. The Court remanded for the court of appeals to determine whether there was error in the first place.

[**Commentary:** Two observations. First, it is odd to decide that this is harmful error without first determining whether it was error in the first place. It is easy to assume that given the finding of harm that the denial of the instructions was also error, but we'll have to wait and see. Second, the justification in this case applies to conduct not an "offense." In other words, it might also seem counter-intuitive that someone could break into a home and then claim self-defense. But this case makes clear that someone might be entitled to a self-defense instruction if they presented some evidence that they were lawfully on the premises due to consent.]

### C. Variances

**1. A made-up element contained within both the charging instrument and the jury charge does not give rise to a material variance for purposes of legal sufficiency analysis.** A tow-truck driver observed a driver later identified as Jason Ramjattansingh driving erratically. The tow-truck driver called 911 to report Ramjattansingh. The tow-truck driver used the amber lights on his truck to get Ramjattansingh to pull over in a parking lot. Police arrived approximately sixteen minutes later to detain Ramjattansingh. Another officer arrived seven minutes after that to conduct field sobriety tests. Ramjattansingh could not complete the HGN test because he kept turning his head, and he showed signs of intoxication on the walk-and-turn and one-leg stand tests. Ramjattansingh admitted that he had had some shots of alcohol five hours earlier. Ramjattansingh gave two breath samples approximately two hours after he had first been reported driving erratically. The samples showed BAC levels at .235 and .220.

The State charged Ramjattansingh with driving while intoxicated. In the information, the State alleged not only that Ramjattansingh had driven while intoxicated, but also that he had a breath alcohol content of over .15 at the time of both his breath alcohol analysis and at the time of driving. The jury convicted Ramjattansingh of Class A DWI, finding that he had a breath alcohol content of over .15 at the time of the analysis and at the time of driving.

The court of appeals reversed, holding that the State was required to prove what it had alleged, namely that Ramjattansingh had a breath alcohol content of at least .15 at the time of driving. Because the State's expert admitted that she did not have sufficient facts to calculate Ramjattansingh's breath alcohol concentration

at the time of driving, the court of appeals held that the evidence was insufficient to prove a Class A DWI. Instead, the court of appeals reformed the judgement to Class B DWI and remanded the case for a new punishment hearing.

A unanimous Court of Criminal Appeals reversed. ***Ramjattansingh v. State*, ___ S.W.3d ___; 2018 WL 2714677 (Tex. Crim. App. June 6, 2018) (9:0).** Writing for the Court, Judge Newell explained that there are three categories of variances. A variance regarding a statutory allegation that defines the offense is always a material variance. A non-statutory allegation that is descriptive of an element that defines or helps define the allowable unit of prosecution is sometimes material. And a non-statutory allegation that has nothing to do with the allowable unit of prosecution is never material. Here, the DWI statute does not require a showing that a defendant's breath alcohol content be at least .15 at the time of driving. The statute only requires proof that the defendant's breath alcohol content was at least .15 at the time of the analysis. The fact that the State included surplusage in the information did not require the State to prove that Ramjattansingh had a breath alcohol content of at least .15 at the time of driving. Under the hypothetically correct jury charge for Class A DWI the State was only required to prove that Ramjattansingh was driving while intoxicated and that he had at least a .15 breath alcohol content at the time of the analysis. Further, the State did not invite error by including the surplusage in the charging instrument. The Court had previously held variances between surplusage in the charging instrument and the proof at trial to be immaterial in cases such as *Gollihar v. State* and *Cornwell v. State*.

[**Commentary:** Note that this case makes clear that the State is not required to provide retrograde extrapolation testimony to prove intoxication under the per se definition of intoxication. The Court also abrogated the court of appeals opinion in *Meza v.* State, 497 S.W.3d 574 (Tex. App.—Houston [1st Dist.] 2016, no pet.). There, the court of appeals had held, as it did in *Ramjattansingh* that evidence was insufficient to support the conviction for Class A DWI without linking the breath alcohol content analysis to the time of driving. I recognize that this could have been put under **Offenses** because it does set out the differences between Class A and Class B DWI. However, I am banking on the idea that the lasting impact of this case is in its discussion of variance law.]

**2. A variance in the manner and means by which the defendant causes bodily injury in an assault case is only material when it converts the offense proven at trial into a different offense than what was pled in the charging instrument.** During a fight with his girlfriend, Melanie Molien, Teodoro Miguel Hernandez penetrated Molien's sexual organ with his fingers and struck her in the face several times. At one point during the incident, Hernandez left the room and Molien attempted to lock him out of the room. Hernandez prevented Molien from locking him out of the room; when he reentered the room he began to choke Molien while simultaneously pouring water from a jug down her throat. Hernandez was charged with aggravated sexual assault, assault/family violence, and aggravated assault with a deadly weapon. The indictment alleged bodily injury to Molien by striking her head or body with his hands and the use of a deadly weapon, to wit: water. A jury convicted Hernandez of non-aggravated sexual assault and aggravated assault with a deadly weapon. Hernandez appealed, arguing, among other things, that the evidence was legally insufficient to show that the water was either used or exhibited as a deadly weapon. The court of appeals held that assault is not a continuous offense and that the deadly weapon must be used at some point at or before the offense is complete. The court of appeals found that the evidence failed to show that Hernandez used the water as a deadly weapon at the time he was striking Molien. Further, the court found that the State was bound to prove that the deadly weapon as alleged in the indictment—water as the deadly weapon—and that proof of a different deadly weapon would constitute a material variance. The court of appeals, therefore, reformed the judgement to reflect a conviction for the lesser-included offense of simple assault.

The Court of Criminal Appeals reversed the judgment of the court of appeals and reinstated the judgment of the trial court. ***Hernandez v. State*, __ S.W.3d __, 2017 WL 4675371 (Tex. Crim. App. Oct. 18, 2017) (6:3:0).** Judge Yeary delivered the opinion of the Court. Judge Yeary outlined the law related to a sufficiency of evidence review and stated that the evidence is measured against the hypothetically correct jury charge for the case. When there are variances

between the allegations in the indictment and the State's proof at trial, only material variances will affect the hypothetical jury charge. In this case, Hernandez and the court of appeals took the position that striking Molien with hands and choking her while pouring water on her were separate discrete acts of assault. The court of appeals believed it was the first assaultive episode that was the assault pleaded in the indictment because it was during that assault that Hernandez struck Molien with his hands. Focusing on this, the court of appeals concluded that in order to justify a deadly weapon finding, a fact finder would have to find the deadly weapon was used as Hernandez was striking Molien.

However, Judge Yeary noted that the court of appeals analysis failed to consider all the evidence. Considering all of the evidence, Judge Yeary pointed out that the variance between the pleading and proof in the case was immaterial. The variance regarding Hernandez's use of his hands is one describing the manner and means by which he caused bodily injury. Such a variance is only material when it converts the offense proven at trial into a different offense than what was pleaded in the charging instrument. The fact that Hernandez caused Molien bodily injury with his hands not by striking her but, instead by choking her, does not make the aggravated assault that was proved at trial different than the aggravated assault that was pleaded in the charging instrument. The fact that Hernandez caused Molien bodily injury with his hands not by striking her but, instead by choking her, does not make the aggravated assault that was proved at trial different than the aggravated assault that was pleaded in the indictment. The evidence was sufficient to prove that Hernandez committed aggravated assault against Molien by causing her bodily injury and that he used water as a deadly weapon while doing so.

Judge Richardson filed a concurring opinion in which Judge Walker joined. Judge Richardson would have found no variance between the indictment and what was proved at trial. Judge Richardson opined that Hernandez engaged in one continuous assault on Molien in which he beat her and tried to choke her by pouring water down her throat. Although the water was not what caused bodily injury to Molien, it was used during the commission of the assault and thus supports the deadly weapon finding.

Judge Newell concurred in the result.

[**Commentary:** Hernandez filed a motion for rehearing arguing that the majority had reached a decision that was inconsistent with prior precedent. The Court granted rehearing. So, like Led Zepplin, we'll have to see if the song remains the same. It will be interesting to see if the discussion of variance law in ***Ramjattansingh v. State*, ___ S.W.3d ___; 2018 WL 2714677 (Tex. Crim. App. June 6, 2018)**, discussed above, has any bearing on the case.]

**D. In a prosecution for aggravated assault, the State need only prove the defendant harbored a culpable mental state as to the underlying assault, therefore the defendant is not entitled to a mistake-of-fact instruction even if he reasonably believed his actions would only cause "simple bodily injury."** Robert Rodriguez and his brother assaulted a man in a nightclub parking lot. The victim's knee was badly damaged as a result. The State charged Rodriguez with aggravated robbery and aggravated assault. Both sides elicited testimony suggesting that an injury of this severity was not reasonably foreseeable, given its relatively low-impact cause. The jury charge included an instruction on transferred intent, which stated that "a person is criminally responsible for causing serious bodily injury to a person although the person did not intend or contemplate that the bodily injury be 'serious' as long as the person intended or had knowledge that his conduct would cause any bodily injury to the person." Rodriguez objected to this instruction and his objection was overruled. Rodriguez then requested a mistake-of-fact instruction arguing that if the jury believed his intent was only to cause non-serious bodily injury, then he should be acquitted of aggravated assault. Rodriguez's request was denied. The jury acquitted Rodriguez of aggravated robbery, convicted him of aggravated assault, and sentenced him to twelve years in prison. On appeal Rodriguez challenged the denial of the mistake-of-fact instruction. The court of appeals reversed Rodriguez's conviction holding that Rodriguez was entitled to the mistake-of-fact instruction he requested because the trial court gave the jury an instruction on transferred intent. The court of appeals noted that the trial court's failure to give a mistake-of-fact instruction prevented Rodriguez from presenting a viable defense.

The Court of Criminal Appeals reversed the judgment of the court of appeals. ***Rodriguez v. State*, 538 S.W.3d 623 (Tex. Crim. App. 2018) (9:0).** Judge Keasler wrote the opinion for the unanimous Court. Judge Keasler began with a review of the law on transferred intent and mistake-of-fact. Judge Keasler acknowledged that the transferred intent provision can be used to transfer intent from a lesser offense to a greater offense, even when the offenses are contained within the same penal code section, such as injury to a child and aggravated injury to a child. And the mistake-of-fact instruction should be used in conjunction with the transferred intent instruction when the defendant's mistaken belief about the injury being inflicted is reasonable under the circumstances. However, Judge Keasler noted, the mistake-of-fact instruction is limited to cases in which the actor's mistake negates the culpable mental state required for the offense. Therefore, the dispositive question in this case was whether, in a prosecution for aggravated assault, the State had the burden to prove that the defendant harbored a culpable mental state with respect to the element of "serious bodily injury." After reviewing the text of the aggravated assault provision, Judge Keasler concluded that in the context of aggravated assault, the single criminal act requiring a culpable mental state is the act of causing bodily injury; once the offender bears some culpability with respect to causing bodily injury, it is not unreasonable to hold him criminally responsible for any serious bodily injury that may occur. Because aggravated assault does not have a separate culpable mental state, the transferred intent instruction in this case did no more than what the aggravated assault provision already permits. Rodriguez's intent did not "transfer" because there was no element beyond causing simple bodily injury that required proof of intent. Judge Keasler noted that even if transferred intent was applicable to this case, Rodriguez was not entitled to the mistake-of-fact instruction for the same reasons already discussed, aggravated assault did not require a culpable mental state beyond that of assault, and therefore any mistake of fact would not have negated an elemental culpable mental state.

**E. The predicate crimes for engaging in organized criminal activity are the manner and means of committing that offense; therefore, the jury does not have to be unanimous regarding which alleged predicate crime[s] the defendant committed.** Kelvin Lynn O'Brien, his brother John, and his sister-in-law Derenda, owned several New York Gold and Silver stores in the Dallas/Fort Worth area. Together, they committed multiple jewelry store heists and smelted the gold jewelry they obtained to make blocks of gold. They would then sell the blocks of gold for profit. The largest heist, and the focus of the trail, was that of a Houston store called Karat 22. O'Brien and his brother broke into Karat 22, gathered hundreds of pounds of jewelry from its vault, and smelted the gold. They sold the gold bars made from Karat 22's inventory for a total of $2.9 million. The State charged O'Brien with one count of engaging in organized criminal activity. The State listed theft and money laundering as the two predicate offenses O'Brien allegedly committed. The jury charge presented the two predicate offenses in the disjunctive, thus allowing the jury to convict O'Brien of the engaging offense without being unanimous as to which predicate offense he committed. The jury convicted O'Brien and he was sentenced to life in prison.

On appeal, O'Brien argued that the predicate offenses of theft and money laundering were essential elements of the offense of engaging, therefore the jury was required to be unanimous as to which predicate offense O'Brien and his criminal combination committed. The court of appeals disagreed and held that the predicate offenses were the manner and means for committing the same offense. Therefore, the court held that the instructing the jury in the disjunctive regarding the predicate offenses was not error.

The Court of Criminal Appeals affirmed the judgment of the court of appeals. ***O'Brien v. State*, 544 S.W.3d 376 (Tex. Crim. App. May 2, 2018) (5:1:2:1).** Judge Newell wrote the opinion for the majority of the Court. Judge Newell first noted that a jury must unanimously agree on each essential element of a crime, but it does not need to unanimously find that the defendant committed that crime in one specific way. Therefore, a jury charge that presents the jury with the option of choosing among various alternative manner and means of committing the same statutorily defined offense is permissible. Judge Newell noted that the in order to determine what the jury must be unanimous about, the Court conducts a statutory

analysis that seeks to ascertain the focus or gravamen of the offense. Upon review of its case law, the Court found that the gravamen of engaging in criminal organized activity is not the "result of the conduct" nor the "nature of the conduct." The Court concluded that the gravamen of the engaging offense is best characterized as the "circumstance surrounding the conduct," in which unanimity is required about the existence of the particular circumstances of the offense. When the defendant is charged with engaging in organized criminal activity, the jury must be unanimous that the defendant committed at least one of the enumerated offenses as part of a collaboration to carry on criminal activities. Based on this finding, the Court held that the individual predicate offenses listed in the statute are alternate manner and means of committing the offense, which do not require unanimity.

Having determined what the jury was required to be unanimous about, the Court turned to the question of whether treating each predicate offense as alternate manner and means violates due process. This question is answered by asking whether the two predicate offenses that establish the different manner of means of the engaging offense in this particular case are morally and conceptually equivalent. Noting that the predicate offenses at issue in this case—theft and money laundering—share a common nexus and are both first degree felonies, the Court held that the they are morally and conceptually equivalent and treating them as alternate manner and means of committing the same offense did not run afoul of due process.

Judge Alcala filed a concurring opinion. Judge Alcala opined that, based, the plain statutory language of the engaging offense, the Legislature did not intend to require jury unanimity as to each alleged predicate offense underlying the offense when, as here, all the predicate offenses are the same class of felony or misdemeanor. However, Judge Alcala indicated that when the predicate offenses are not of the same degree, jury unanimity would be required as to the predicate offenses.

Judge Yeary filed a dissenting opinion. Judge Yeary noted that he agreed with Judge Walker's dissenting opinion and wrote separately to add two points. First, Judge Yeary questioned whether the Court's holding would lead to double jeopardy issues down the line, due to the intertwined nature of jury unanimity and double jeopardy jurisprudence. Second, Judge Yeary suggested that predicate offenses are either elemental or they are not, and it is inconsistent to hold that they are manner and means when the offenses are of the same grade, but elements when they are not.

Judge Walker filed a dissenting opinion in which Judge Yeary joined. Judge Walker opined that the engaging offense is not a circumstances surrounding the conduct type of offense, but rather a nature of conduct type of offense. Further, Judge Walker would have held that the jury needs to be unanimous as to the predicate offenses. Judge Walker noted that the engaging offense is an "umbrella" crime, which would create due process problems if the jury was not unanimous. Additionally, Judge Walker noted that the Court's holding would have negative implications in the punishment phase of trial and would also have the effect of indirectly abrogating Ngo v. State, 175 S.W.3d 738 (Tex. Crim. App. 2005).

Judge Keasler dissented without opinion.

[**Commentary:** Three observations going forward. First, there may be a jury unanimity issue if the State alleges the commission of two offenses of different degrees as alternate manner and means. That situation was not presented in this case though. Second, the Court does not decide whether a member of a combination can be subsequently prosecuted for a predicate offense committed by the combination that comes to light only after a defendant has been convicted of engaging. But prosecuting that defendant for commission of the underlying predicate offense outright might not necessarily raise those concerns. Of course, this case does not involve a double jeopardy claim so we will have to wait and see how the double-jeopardy consequences shake out. And finally, this opinion, though ultimately about jury unanimity also speaks to the elements of the offense of engaging with six judges on the Court regarding the predicate offenses as manner and means at least with regard to predicate offenses of the same degree.]

**F. The offense of deadly conduct is by the use or exhibition of a motor vehicle as a deadly weapon can be a lesser-included offense of aggravated**

**assault.** Anthony Robert Safian was observed arriving at a house suspected of being a drug house, stay for five minutes, and then leaving. An undercover officer followed Safian's vehicle as he left the house until he stopped a short distance away in the middle of the street. The undercover officer called for a marked police car to effectuate a traffic stop of Safian's vehicle. Officer Pearce arrived in a marked patrol car and parked near Safian's vehicle. Officer Pearce began to approach Safian's vehicle on foot. Safian then placed his vehicle in gear and accelerated forward. Officer Pearce jumped into his car to avoid being hit; Safian's car narrowly missed hitting the patrol car's open door. A high speed chase ensued before Safian collided with another vehicle. Safian was arrested and heroin was found in his car. Safian was charged with aggravated assault on a public servant, evading arrest or detention while using a vehicle, and possession of less than a gram of heroin. The aggravated assault on a public servant charge alleged that Safian used or exhibited a deadly weapon during the commission of the assault, to wit: a motor vehicle.

Safian pleaded not guilty to all charges and was tried before a single jury. At the close of evidence, Safian requested an instruction on deadly conduct as a lesser-included offense to the charged offense of aggravated assault on a public servant; the trial court denied the request. The jury found Safian guilty of all three charges. On appeal Safian argued that the trial court erred by refusing his request for a lesser-included offense instruction on deadly conduct. The court of appeals determined that, as a matter of law, deadly conduct was not a lesser-included offense of the charged offense in this case because the indictment alleged that Safian "used or exhibited" a deadly weapon, as opposed to solely using a deadly weapon. Therefore, the court of appeals held that the trial court did not err by refusing to provide a jury instruction on deadly conduct.

The Court of Criminal Appeals reversed the judgment of the court of appeals. ***Safian v. State*, 543 S.W.3d 216 (Tex. Crim. App. Mar. 21, 2018) (9:0).** Judge Alcala wrote the opinion for the unanimous court. Judge Alcala noted that determining whether the defendant is entitled to a jury instruction on a lesser-included offense involves a two-step analysis; first, the court determines whether the lesser-included offense is included within the proof necessary to establish the offense charged, next the court determines whether there is some evidence in the record that would permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense. Judge Alcala pointed out that the court of appeals addressed only the first step of the analysis, so the Court's discussion was limited to that step. Under the first step, the court compares the elements of the greater offense as pled to the statutory elements of the potential lesser-included offense in the abstract. This step may be satisfied if the lesser-included offense is the functional equivalent of the greater offense. As alleged in the indictment, Safian committed aggravated assault on a public servant by intentionally or knowingly threatening Officer Pearce with imminent bodily injury and by using or exhibiting a deadly weapon during the commission of the offense, namely, a motor vehicle that in the manner of its use or intended use was capable of causing death or serious bodily injury. A person commits deadly conduct if he recklessly engages in conduct that places another in imminent danger of serious bodily injury.

Judge Alcala outlined a prior case, *Bell v. State*, in which the Court held that reckless conduct was a lesser-included offense of aggravated assault under circumstances in which the indictment alleged that the defendant used a deadly weapon. The Court had reasoned that when the threat of imminent bodily injury is accomplished by the use of a deadly weapon, the victim has by definition been exposed to the deadly character of the weapon and, as a result, placed in imminent danger of serious bodily injury. Applying that same reasoning to the present case, the Court concluded that deadly conduct is a lesser-included offense of aggravated assault based on either the use or exhibition of a deadly weapon. This is so because, regardless of whether Safian used or exhibited his motor vehicle as a deadly weapon, his conduct in doing so exposed Officer Pearce to the deadly character of the motor vehicle and the inherent risk of bodily injury. Based on this finding, the Court remanded the case to the court of appeals to conduct the second step of the lesser-included offense analysis.

**G. A trial court commits jury-charge error, regardless of whether the defendant objects, when it *sue sponte* instructs the jury on self-defense, but**

**fails to apply the self-defense instruction to lesser-included offenses.** Adrian Aaron Mendez, Jr. was socializing with several friends and consuming various drugs and alcohol. Jacob Castillo and another man joined the group. At some point, Mendez and Castillo got into a fight. The men exchanged blows until Mendez drew a knife and stabbed Castillo several times. Castillo died from the stab wounds and the State charged Mendez with murder. At trial, Mendez argued that he acted in self-defense, testifying that he know knew Castillo was associated with a gang and had a reputation for violence. Mendez stated that he only drew his knife because, based on Castillo's reputation and excited state, he believed Castillo was reaching for a gun. The jury was instructed that it could find Mendez guilty of either murder or aggravated assault. The trial court *sua sponte* charged the jury on the issue of self-defense. However, the application paragraph of the charge only applied self-defense to the murder offense, not the lesser-included offense of aggravated assault. Mendez did not object to the charge. The jury acquitted Mendez of murder, but convicted him of aggravated assault. Mendez was sentenced to seven years' imprisonment. On appeal, Mendez argued that the trial court's instruction on self-defense was erroneous and incomplete because the application paragraph permitted the jury to acquit Mendez on self-defense grounds only if it first determined that he had caused Castillo's death. The court of appeals noted that once the trial court included self-defense in the abstract portion of the charge, self-defense became law applicable to the case and the trial court was required to apply that defensive issue properly to the entire case, including the lesser-included offense. In reversing Mendez's conviction, the court of appeals held that the omission of a self-defense instruction on aggravated assault was egregiously harmful to Mendez.

The Court of Criminal Appeals affirmed the judgment of the court of appeals. ***Mendez v. State*, 545 S.W.3d 548 (Tex. Crim. App. Apr. 25, 2018) (9:0).** Judge Keasler wrote the opinion for the unanimous Court. Judge Keasler noted that trial courts are under no duty to *sua sponte* instruct the jury on defensive issues that are not requested by the defendant. However, if the trial court undertakes upon its own initiative to instruct on a defensive issue, that issue becomes the "law applicable to the case," and the trial judge must instruct the jury on the issue correctly. Therefore, by *sua sponte* instructing the jury on self-defense in this case, the trial judge assumed the duty to administer the instruction correctly. Judge Keasler noted that the Court has found jury-charge error where a trial court failed to apply its abstract charge on self-defense to the particular facts of the case at hand and where the trial court included an application paragraph that was incomplete. Extrapolating from those findings, the Court concluded that the absence of an application paragraph as to aggravated assault was erroneous in Mendez's case. The jury was properly informed under what circumstances it should convict Mendez of aggravated assault, but it was not properly informed under what circumstances it should acquit him of that offense. The Court noted that the State's petition for discretionary review did not object to the court of appeals' harm analysis, so it affirmed the court of appeals' holding without addressing the egregious harm finding.

**H. Failure to submit jury instruction on uncontested element of the offense is subject to a harm analysis based upon an erroneous jury instruction.** Scott Niles was a firefighter. One day he was scheduled to drive the ambulance, a responsibility that came with additional pay. One of his fellow firefighters overheard Niles say that he did not have a driver's license. Not surprisingly, this was a requirement for being able to drive the ambulance. This was reported to Captain Bradley Maddin. Niles was then summoned to meet with Captain Maddin and Senior Captain Haygood. Niles was prevented from driving the ambulance until he got a driver's license. Niles "did not take it well." Later, Niles told two other firefighters that he was going to start shooting people and he needed to figure out who to take out first. Niles later told another firefighter that he was going to kill everyone in the fire station. Later, Niles told another firefighter that he would come out and kill everyone if they piss him off.

The State charged Niles with terroristic threat, elevated to a Class A misdemeanor because the offense had been committed against a public servant. The State voir dired on the public servant element, and the public servant element was not contested at trial. However, the jury charge did not instruct the jury on that element of the offense. The jury returned a verdict of guilty,

and the trial court sentenced Niles to one year in jail, probated for two, within the Class A range, but outside the Class B range. On appeal, Niles argued that his sentence was illegal in violation of *Apprendi* because the jury had not found the public servant element even though he had been charged with Class A misdemeanor terroristic threat. The State conceded error, and the court of appeals reformed the judgement to reflect a conviction for Class B misdemeanor terroristic threat. The State Prosecuting Attorney's office filed a motion for rehearing to argue that the error in the case amounted to jury charge error that was subject to a harm analysis. The court of appeals denied the motion for rehearing. The Court of Criminal Appeals refused the SPA's petition for discretionary review, choosing instead to grant review on its own ground.

A near unanimous Court of Criminal Appeals reversed. ***Niles v. State*, ___ S.W.3d. ___; 2018 WL 2947890 (Tex. Crim. App. June 13, 2018) (8:1).** Writing for the Court, Judge Newell first rejected Niles's argument that the State could not raise the claim for the first time on discretionary review having conceded the error in the court of appeals. Because Niles was the appealing party in the court of appeals and need not raise a particular argument in favor of the trial court's ruling as a predicate to later raising that argument on discretionary review. Turning to the merits of the claim, Judge Newell explained that the United States Supreme Court had already held that a violation of the right to a jury determination of an individual sentencing factor is not "structural error." Instead, the error occurred when the jury was not properly instructed on every element of the charged offense. The case was therefore remanded for consideration of harm under the applicable *Almanza* standard.

Judge Yeary dissented. According to Judge Yeary, the United States Supreme Court cases relied upon by the majority all contained at least a factual finding by the trial court even though the jury charges in those cases also failed to charge the jury on every element of the offense. This distinguished the complaints in those cases about the denial of a jury determination on every element of the offense from the facts presented in this case. Further, Judge Yeary argued that this also might violate the Texas Constitution while acknowledging that the Court had already determined that there is no difference in scope between the Sixth Amendment right to a jury trial and the Texas Constitutional right to a jury trial in Article 1, section 10.

## VII. PLEA AGREEMENTS

**A. Trial court was authorized to consider the full range of punishment despite recommendation of three years because defendant agreed to consideration of the full range of punishment if she did not show up on the date she was supposed to be sentenced to three years.** Jamie Hallmark was charged with hindering apprehension. Hallmark entered into a plea agreement with the State. According the plea agreement documents, Hallmark would be sentenced to three years unless she failed to appear for her sentencing hearing, in which case she would be sentenced within the full range of punishment. The trial court confirmed this agreement with Hallmark during the plea proceedings. Hallmark failed to appear for her scheduled sentencing hearing. At the rescheduled sentencing hearing, the trial court noted that it was no longer bound by the three year agreement and, after hearing evidence, sentenced Hallmark to ten years imprisonment. Hallmark objected to the sentence as cruel and unusual and that it rendered Hallmark's waiver of rights and plea of guilty involuntary; the trial court overruled the objections. On appeal the court of appeals reversed the judgment of the trial court. It found that the trial court's statements at the plea hearing indicated that the trial court added the condition that required Hallmark to appear at her sentencing hearing in order to benefit from the plea agreement. Therefore, when the trial court sentenced Hallmark to ten years, it was not following the plea agreement and thus abused its discretion by overruling Hallmark's objection and declining to permit her to withdraw her guilty plea.

The Court of Criminal Appeals reversed the judgment of the court of appeals. ***Hallmark v. State*, 541 S.W.3d 167 (Tex. Crim. App. 2017) (7:0:2).** Writing for the majority of the court, Presiding Judge Keller noted that the plea agreement condition requiring Hallmark to appear for sentencing was similar to a condition previously addressed by the court which prohibited the defendant from committing an additional crime or else subject himself to the full

range of punishment. Similar to the "commit-a-crime / full-range-of-punishment" condition, the Court held that Hallmark's "no-show / full-range-of-punishment" condition was a part of her plea agreement and when she failed to show for her sentencing, the trial court was following the plea agreement when it considered the full range of punishment. Although the Court found that it was not clear that the trial judge injected herself into the plea negotiations, even if she did, Hallmark waived error by not objecting at the time she entered her plea. Further, Presiding Judge Keller noted, that even if the objection at sentencing was timely, Hallmark's complaint on appeal did not comport with her objections at sentencing, so nothing was presented for review.

Judge Walker filed a dissenting opinion in which Judge Alcala joined. Judge Walker would have affirmed the court of appeals, finding that the record indicates that the agreement in which Hallmark was to show up on an agreed date for sentencing was not part of the plea agreement, but was instead a side agreement made between the trial court and Hallmark after the plea agreement was reached between Hallmark and the State. Further Judge Walker opined that Hallmark preserved error on this issue by objecting at her sentencing hearing.

**B. When a state amends a criminal complaint after entering a plea agreement with the defendant, the defendant may be sentenced pursuant to the new plea agreement under the amended complaint so long as the defendant was permitted to withdraw his original guilty plea.** The State of California charged Michael Cuero with two felonies and a misdemeanor for driving his car into Jeffrey Feldman while under the influence of a drug. Pursuant to a plea agreement, Cuero pleaded guilty to causing bodily injury while driving under the influence of a drug and unlawful possession of a firearm, both felony offenses. Cuero also admitted that he had served four separate prison terms, including a term for residential burglary which qualified as a predicate offense under California's three strikes laws. Under the terms of the plea agreement, the maximum sentence Cuero could receive was 14 years and four months in prison, along with a fine and four years parole. Following the hearing on the plea agreement, but before the sentencing hearing, the State determined that another one of Cuero's prior convictions qualified under the three strikes law. The trial court permitted the State to amend the criminal complaint to reflect one felony, causing bodily injury while driving under the influence of a drug, and the two prior strikes. The trial court also permitted Cuero to withdraw his guilty plea due to the amended complaints. Cuero subsequently pleaded guilty to the amended complaint and was sentenced to 25 years in prison, the minimum sentence under the three strikes law. Cuero appealed his sentence in state court and filed a state habeas petition, but failed to obtain relief. The Federal District Court for the Southern District of California denied Cuero's petition, but the Court of Appeals for the Ninth Circuit reversed his sentence. The Ninth Circuit held that the state trial court had acted contrary to clearly established Supreme Court law by refusing to enforce the original plea agreement with its 172-month maximum sentence. According to the Ninth Circuit, Cuero was entitled to specific performance of the original plea agreement in order to maintain the integrity and fairness of the criminal justice system.

The Supreme Court of the United States reversed the Ninth Circuit. ***Kernan v. Cuero*, 138 S. Ct. 4 (Nov. 6, 2017) (Per curiam).** In a per curium opinion, the Court noted that the claim was pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, which provides that a federal court may grant habeas relief to a state prison based on a claim adjudicated by a state court on the merits if the resulting decision is contrary to or involved unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. The question before the Court was whether its prior decisions clearly required the state court to impose the lower sentence that the parties originally expected or did it permit the State's sentence raising amendment where the defendant was allowed to withdraw his guilty plea. The Court assumed for argument's sake that the State violated the Constitution when it moved to amend the complaint. The Court noted it's holding in *Santobello v. New York*, which held that a defendant may not be bound to a plea agreement following a prosecutorial breach of an enforceable provision of such an agreement. However, the Court pointed out that in applying *Santobello*, it had previously acknowledged that permitting the defendant to withdraw his plea and

replead is an adequate remedy to a breach in these circumstances, which is what the California trial court did in Cuero's case. Upon finding that none of its decisions clearly entitled Cuero to specific performance of his original plea agreement, the Court held that the California court's decision was not contrary to any holding from the Supreme Court of the United States.

## VIII. SENTENCING

### A. Death Penalty

**1. Delusional beliefs and mental illness, alone, are not sufficient to establish incompetence to be executed; the defendant must show that he does not comprehend the causal link between his offense and his imminent execution.** John David Battaglia had his daughters, nine-year-old Faith and six-year-old Liberty, call their mother, Battaglia's ex-wife, on the phone. While on the phone, Battaglia shot the girls. Battaglia was convicted of capital murder and sentenced to death. After a series of motions and writs, Battaglia's execution was scheduled for December 7, 216. A few weeks before his scheduled execution, Battaglia filed an Article 46.05 motion in state court, alleging he was incompetent to be executed. The trial court conducted an evidentiary hearing to determine execution competency. At the hearing, the trial court considered the testimony of four mental health experts, Battaglia's records, and video and audio recordings of Battaglia. Battaglia alleged that he suffered from Delusional Disorder and, as a result, he is incompetent to be executed because he does not have a rational understanding of the reason for his execution. Three of the four experts opined that Battaglia was incompetent to be executed, the fourth opined that he was competent. The trial court disregarded the experts' opinions that Battaglia was delusional and that he was not malingering; it therefore held that Battaglia was competent to be executed. The Court of Criminal Appeals stayed the execution to review the trial court's ruling.

The Court of Criminal Appeals affirmed the trial court's finding. ***Battaglia v. State*, 537 S.W.3d 57 (Tex. Crim. App. 2017) (8:1).** Writing for the majority of the Court, Judge Richardson first outlined the case law on execution competency. Based on the case law, the Court held that a prisoner is competent to be executed under Art. 46.05 if he knows he is to be executed by the State, he knows the reason he is to be executed, he knows that the execution is imminent, and, despite any delusional beliefs or other mental illness he may have, and despite the fact that he may deny having committed the capital offense, he comprehends that there is a "causal link" between his capital offense and his imminent execution, beyond merely identifying the State's articulated rationale for the execution. Further, the trial courts determination of execution competency is reviewed for abuse of discretion and almost total deference will be given to the trial court's assessment of the evidence presented. After reviewing the record, the Court found that the record supported the trial court's finding and its decision to disregard certain evidence. It was also not an abuse of discretion to find that the expert who opined that Battaglia was competent was the most credible expert because he was the only expert who worked almost exclusively in the Federal Bureau of Prisons. Judge Richardson also noted that there is little difference between Battaglia and the other defendants the Court has found competent to be executed, but there are significant differences between Battaglia and the defendants the Court has found incompetent to be executed.

Judge Alcala filed a dissenting opinion in which she argued that the majority employed an incorrect standard in determining competency. Judge Alcala concluded that under applicable law, a defendant is incompetent to be executed when (1) he does not understand that he is to be executed and that the execution is imminent, or (2) he lacks a rational understanding of the reason for his execution due to delusions stemming from a severe mental illness that places his awareness of the connection between his crime and his punishment in a context so far removed from reality that the punishment can serve no purpose. Judge Alcala would have held that the expert who testified that Battaglia was competent failed to apply the second prong correctly. She would remand the case to the trial court for reconsideration under this standard.

[**Commentary:** This opinion provides a very thorough overview of the cases involving competency to be executed. At first blush, it would seem that this defendant had established a lack of competency with both a State and a defense expert opining that he was

incompetent. But the record developed showed that the defendant was a particularly sophisticated actor capable of portraying himself as incompetent (he had, for example, researched *Panetti v. Quarterman* before claiming his lack of competency to be executed). The issue in this case is very involved, so please do not take this summary as an exhaustive explanation of this case.]

**2. A death row inmate who has a disability that prevents him from remembering the crimes for which he was sentenced to death may be executed so long as, despite his memory loss, he has a rational understanding of the connection between the crime he was convicted of and his execution.** A state court Over 30 years ago, Vernon Madison killed police officer Julius Schulte by shooting him in the back of the head two times. An Alabama jury found Madison guilty of capital murder and he was sentenced to death. As his execution approached, Madison petitioned the trial court to suspend his death sentence. Madison argued that he had become incompetent to be executed do to the effects of several recent strokes. At a hearing on the issue, the State's psychologists testified that Madison had a rational understanding of the results or effects of his death sentence and that he understood that Alabama was seeking retribution against him for his criminal acts. A psychologist hired by Madison reported that Madison's strokes had rendered him unable to remember numerous events, but that he was able to understand the nature of the pending proceeding, what he was tried for, that he was in prison for murder, that the State was seeking retribution for the murder, and that he specifically understood the meaning of a death sentence. The state court denied relief, holding that Madison understood that he was going to be executed because of the murder he committed, that the State was seeking retribution, and that he will die when he is executed. The Federal District Court denied Madison's petition for writ of habeas corpus. The Eleventh Circuit reversed. The Eleventh Circuit held that given the undisputed fact that Madison had no memory of his capital offense it followed that he did not rationally understand the connection between his crime and his execution, therefore finding Madison competent to be executed was plainly unreasonable and could not be reconciled with Supreme Court precedent on execution competency.

The Supreme Court of the United States reversed the Eleventh Circuit. ***Dunn v. Madison*, 138 S. Ct. 9 (Nov. 6, 2017) (Per curiam).** In a per curium opinion, the Court noted that Madison was only entitled to habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) if the state court's decision was contrary to or unreasonably applied clearly established Federal law, as determined by the Supreme Court of the United States. The Court reviewed its precedent on execution competency (*Panetti v. Quarterman* and *Ford v. Wainwright*). It noted that neither *Panetti* nor *Ford* clearly established that a prisoner is not competent to be executed due to a failure to remember his crimes, "as distinct from a failure to rationally comprehend the concepts of crime and punishment as applied in his case." The Court held that the state court did not unreasonably apply its precedent because Madison recognized that he was being put to death for the murder he was convicted of, despite not remembering the murder itself.

Justice Ginsburg filed a concurring opinion in which Justices Breyer and Sotomayor joined. Justice Ginsburg noted that whether the death penalty can be administered to a person whose disability prevents him from remembering his crime was not directly addressed by the Court. She stated that the issue would warrant full review, when not restrained by the limited review under the AEDPA.

Justice Breyer filed a concurring opinion in which he pointed out a reoccurring problem in death penalty cases, which he defined as the "unconscionably long periods of time that prisons often spend on death row awaiting execution." He opined that there is a growing trend in increasing the amount of time prisons wait on death row, which may require the Court to consider the ways in which the lengthy periods of incarceration increase the cruelty of the death penalty and undermines its punitive purposes. He believes it would be wise for the Court to "reconsider the root of the problem—the constitutionality of the death penalty itself."

[**Commentary:** Note that the agreement in this case flows from the framework within which it is presented.

It may very well be that there is more division amongst the judges on whether someone can be competent to be executed if he or she does not remember the crimes. Here, the Court was only tasked with determining whether the answer to that question was essentially unclear. So that's the import of this case. The Court isn't necessarily saying this defendant was competent, just that he's not entitled to federal habeas relief because the state court's decision isn't an unreasonable interpretation of clearly established federal law. Additionally, Justice Breyer's position should come as no surprise. However, it seems his argument in this case could also be applied to challenges regarding whether a sentence of life without parole might also be cruel and unusual.]

**3. Even under clinical standards, as set out in the DSM-5, Bobby Moore is not intellectually disabled such that he is ineligible for the death penalty.** Bobby Moore killed Jim McCarble, an elderly man working at the Birdsall Super Market, during the course of an aggravated robbery. Moore was convicted of capital murder and sentenced to death. In an application for writ of habeas corpus, Moore argued that he was exempt from the death penalty because he is intellectually disabled. The trial court agreed and determined that Moore was intellectually disabled under current diagnostic criteria. The Court of Criminal Appeals remanded for the trial court to determine the issue of intellectual disability under the legal standard set out by the Court of Criminal Appeals in *Ex parte Briseno*. The trial court determined that Moore was not intellectual disabled under that standard, and the Court of Criminal Appeals agreed, denying habeas corpus relief. The United States Supreme Court overruled *Briseno* and remanded the case to the Court of Criminal Appeals to determine whether Moore was intellectually disabled under current diagnostic criteria.

The Court of Criminal Appeals held that even under current diagnostic criteria, Moore had failed to demonstrate that he was intellectually disabled. ***Ex parte Moore*, ___ S.W.3d ___; 2018 WL 2714680 (Tex. Crim. App. June 6, 2018) (5:3).** Writing for the Court, Presiding Judge Keller explained that the legal determination of intellectual disability is distinct from a medical diagnosis, but it is nevertheless informed by the medical community's diagnostic framework. She noted that the Diagnostic and Statistical Manual of Disorders, 5th edition (DSM-5) embodies the current medical diagnostic standards for determining intellectual disability. Under the DSM-5, there still must be a showing that adaptive deficits be related to intellectual functioning deficits, so to the extent that the American Association on Intellectual and Developmental Disabilities (AAIDD) Manual does not require that "relatedness" the Court follows the DSM-5 instead. Under the DSM-5, there must be deficits in general mental abilities, impairment in everyday adaptive functioning (in comparison to an individual's age, gender, and socioculturally matched peers, and onset during the developmental period. The Court agreed that Moore had presented evidence of subaverage intellectual functioning based upon an IQ score of 74 that was within the standard error of measurement for intellectual disability. Further, the Court found the testimony of the State's expert, Dr. Compton, to be more credible and reliable on the issue of adaptive functioning than the experts presented by the defense. Crediting Dr. Compton's view, Moore's adaptive functioning was too great to support an intellectual-disability diagnosis. Based upon a significant amount of information demonstrating adaptive strengths, the Court concluded Moore had failed to establish significant adaptive deficits.

Judge Alcala filed a dissenting opinion that Judges Richardson and Walker joined. According to Judge Alcala, the United States Supreme Court had already essentially decided that Moore had established his intellectual disability. Further, the Court focused upon evidence demonstrating adaptive strengths rather than evidence of adaptive deficits in contravention of the United States Supreme Court's decision in *Moore*.

Judge Newell did not participate.

[**Commentary:** This is a fact-intensive opinion, and practitioners dealing with the area of law should read both the majority and the dissent carefully. It remains to be seen whether the United States Supreme Court will again grant review in this case.]

## B. Enhancements

**1. Penal Code Section 22.011(f) which makes sexual assault a first-degree felony if the actor is prohibited from marrying his victim under the**

**bigamy statute does not violate the Equal Protection Clause.** Russell Estes had an ongoing sexual relationship with K.A., a then-fourteen-year-old girl. At the time, Estes was legally married to someone else. The State charged Estes with sexual assault of K.A., but further alleged that K.A. was a person "whom the defendant was prohibited from marrying or purporting to marry or with whom the defendant was prohibited from living under the appearance of being married." This additional fact, if proven true, would subject Estes to first-degree felony punishment under Penal Code Section 22.011(f). Estes filed a motion to quash claiming the statute was unconstitutionally applied to him because it treats married people more harshly than unmarried people in violation of the Due Process and Equal Protection Clauses of the United States and Texas Constitutions. The trial court denied the motion.

The court of appeals held that the statute did violate the Equal Protection Clause. The court of appeals rejected the State's argument that Section 22.011(f) could be rationally understood as preventing the sexual exploitation of children by those who would use the "cloak of marriage" to gain access to potential victims. The court also rejected the State's argument that the statute advances Texas's "legitimate interest in protecting" and "nourish[ing] the union of marriage."

Though eight judges on the Court agreed that the statute was constitutional, the court was divided over the rationale. ***Estes v. State*, 545 S.W.3d 691 (Tex. Crim. App. May 9, 2018) (5:4:3:1).** Writing for the majority, Judge Keasler explained that rational basis review is very deferential and is ultimately not tied to the legislative intent behind the statute at issue. Rather, the question is whether a reviewing court can determine that there is a legitimate governmental purpose and law at issue is rationally related to that purpose. Here, the State has a legitimate interest in deterring, preventing, and punishing the sexual exploitation of children. And, because married people enjoy a perception of trustworthiness, the legislature could rationally determine that one who uses this perception to groom and sexually abuse a child should be punished more severely. The Court remanded the case for consideration of Appellant's claim as to whether this challenge should be analyzed under a strict scrutiny standard rather than a rational-basis review. This portion of the opinion was joined by Judges Walker, Keel, Yeary, and Presiding Judge Keller.

Judge Newell wrote a concurring and dissenting opinion joined by Judges Hervey and Richardson. According to Judge Newell, an equal protection challenge to a statute focuses upon a particular legislative classification not the effect of that classification. In light of this, the court of appeals erred in failing to consider whether the statute was rationally related to serve the State's legitimate interest in punishing sexual abuse in a bigamous or polygamous relationship. Because drawing the distinction between married and unmarried offenders is inevitable to support this legitimate interest there is no need to speculate about other rationales to support the statute. Judge Newell dissented to the remand because the court of appeals necessarily decided that the statute would not survive strict scrutiny review when it held that the statute did not survive rational basis review. Consequently, the Court could review that "decision" of the court of appeals. According to Judge Newell, the appropriate standard of review was rational-basis review because this statute did not interfere with the fundamental right to marry.

Judge Alcala dissented without opinion.

[**Commentary:** Judge Newell also explained why he felt the Court's justification for the statute was unnecessarily broad. Judge Keasler also wrote at length criticizing Judge Newell's concurring opinion for this and for undermining the distinction between as-applied challenges and facial challenges. Judge Walker did not join this portion of Judge Keasler's opinion. Despite the various temper-tantrums (mine included), it is important to keep sight of the fact that eight judges agreed that this statute is constitutional. Additionally, it is important to note that this opinion provides a striking example of just how deferential rational-basis-review is supposed to be. If lawmakers want statutes to be narrowly-tailored, they cannot rely upon reviewing courts to act as a post-hoc seamstress using the constitution to take in all the loose parts. Courts interpret statutes as they are written even if they have unintended effects. Judge Keasler's, and the majority's, adherence to that principle should be commended as it can be a difficult position to take when a statute is not well-drafted and leads to unanticipated results.]

**2. Whether a prior conviction is "final" for purposes of sentencing enhancements is to be determined in accordance with Texas law.** In 2008 Jeremey Wade Pue was convicted by a jury of the third degree felony offense of evading arrest or detention with a vehicle. He was sentenced as a habitual offender because his sentence was enhanced by two California felony convictions, one from 2002 and the other from 2007. The trial court sentenced Pue to thirty years in prison. His conviction was affirmed on direct appeal. In this current proceeding, Pue filed an application for writ of habeas corpus arguing that his thirty-year sentence was illegal because it was improperly enhanced by the 2007 California conviction. When Pue was sentenced in this case in 2008 he was on probation for the 2007 California conviction. Pue argues that under Texas law the 2007 California conviction was not a final conviction and it, therefore, should not have been used to enhance his sentence. The State argues that Texas courts should apply the law of the foreign state, here California, to determine the finality of a foreign conviction.

The Court of Criminal Appeals granted Pue relief. ***Ex parte Pue*, __ S.W.3d __, 2018 WL 1109471 (Tex. Crim. App. Feb. 28, 2018) (6:2:1).** Judge Richardson wrote the opinion for the majority of the Court. The Court held that whether a prior conviction—in-state or out-of-state—is "final" for purposes of sentencing enhancements is to be determined in accordance with Texas law. The law of another state, even the state in which the conviction was obtained, does not control whether a defendant's conviction is properly enhanced under Texas law. Judge Richardson distinguished two Court of Criminal Appeals' cases that had been used by lower courts to apply the finality laws of foreign states and he noted that the Court's holding in this case was consistent with its prior case law. As applied in this case, Pue had been placed on probation for his 2007 California felony conviction and his probation had not been revoked at the time that he was sentenced in this case in 2008, therefore his 2007 California conviction was not "final" under Texas law, and thus it should not have been used to enhance his sentence.

Presiding Judge Keller filed a concurring opinion in which Judge Keasler joined. Presiding Judge Keller noted that she agrees with the Court that Texas law should control when determining the finality of a foreign conviction and she agrees with Judge Yeary that the Court should not grant relief on an "illegal sentence" claim of the this sort without first addressing the propriety of doing so. Presiding Judge Keller would have held that Pue's counsel was deficient for failing to challenge the use of his 2007 California conviction for enhancement purposes and the Pue was prejudiced by his counsel's deficiency.

Judge Keel filed a concurring opinion in which Judges Hervey and Newell joined. Judge Keel agreed with the Court's opinion and wrote separate to offer observations in response to the dissenting opinion. Judge Keel distinguished cases relied on by the dissenting opinion and noted that the dissent was inconsistent in when it would allow illegal sentence arguments to be raised for the first time on habeas and when it would not.

Judge Yeary filed a dissenting opinion. Judge Yeary opined that Pue's argument regarding his "illegal sentence" was not cognizable in a post-conviction habeas corpus proceeding because the error in this case was apparent on the record at the time of Pue's direct appeal.

**3. In misdemeanor DWI, existence of a single prior conviction for misdemeanor DWI is a punishment issue.** The State charged Jose Oliva with driving while intoxicated. The information contained two paragraphs, the first alleged the commission of the offense and the second alleged a prior misdemeanor DWI conviction. During the guilt phase, the State focused solely upon the first paragraph. The prior conviction allegation was not read to the jury at the guilt stage, and no evidence of the prior conviction was offered. The jury instruction did not mention the prior conviction, either. During the punishment phase, the State read the prior-conviction allegation to the jury and introduced evidence of a prior DWI conviction. The jury found the prior-conviction allegation to be true, and judgment reflected a conviction for a Class A misdemeanor DWI.

On appeal, Oliva argued that his prior conviction was an element of the offense. Therefore, the evidence at guilt was insufficient to support a conviction for Class A misdemeanor DWI. The court of appeals agreed, holding that § 49.09 lacks the "shall be

punished" language present in other statutes that have been construed as punishment enhancements. The court of appeals reversed and remanded the case to the trial court with instructions to reform the judgment to reflect a conviction for Class B misdemeanor DWI and to conduct a new punishment hearing.

The Court of Criminal Appeals reversed, holding that the prior misdemeanor conviction was not an element of the offense of misdemeanor DWI. ***Oliva v. State*, ___ S.W.3d ___, 2018 WL 2329299 (Tex. Crim. App. May 23, 2018) (6:1:2).** Writing for the Court, Presiding Judge Keller explained that answering the issue requires giving effect to four different statutes: the offense base provision found in § 49.04(a) of the Penal Code, the punishment base provision found in § 49.04(b) of the Penal Code, the prior-conviction provision found in § 49.09(a) of the Penal Code, and the enhancement reading statute in Article 36.01 of the Code of Criminal Procedure. Looking at all these statutes, the Court determined they were ambiguous because they were susceptible to at least two different meanings: the prior conviction is an element of the offense, or the prior conviction is a punishment enhancement. Ultimately, the Court held that the prior conviction is not an element it is not jurisdictional, and it is, therefore, the type of enhancement referred to in Article 36.01.

In so doing, the Court rejected the argument that a statute unambiguously makes a prior-conviction an element if setting forth the fact that it would increase the degree of offense. The Court observed that it had previously stated in *Calton v. State*, that an enhancement does not change the offense, or the degree of the offense of conviction, so there can be no enhancement until a person is first convicted of an offense of a certain degree. But, the Court observed that it had cited no authority for that position. Additionally, the Court had seemed to hold in *Ex parte Benson*, that a prior conviction that merely enhances the offense level would not be an element. Consequently, the Court declined to follow this aspect of *Calton*, regarding it as dicta.

Judge Richardson filed a concurring opinion. Judge Richardson agreed that the language in *Calton* was not dicta. However, he agreed with the Court's result based upon significant policy considerations. In particular, Judge Richardson felt that introduction of the prior conviction during guilt would unduly prejudice a defendant's chance at a fair trial.

Judge Keasler filed a dissenting opinion joined by Judge Yeary. According to Judge Keasler, *Calton* was binding authority and requires a prior conviction in a misdemeanor DWI to be treated the same way a prior conviction is treated in a felony DWI, as an element. Consequently, he would have affirmed the decision of the court of appeals.

[**Commentary:** Up until this point there had been a split among courts of appeals as to whether the State is required to prove up a prior conviction as an element in a misdemeanor DWI. It remains to be seen whether this holding will stay limited to the context of a misdemeanor DWI.]

**C. Double jeopardy – The State gets to choose the "most serious offense" when separate convictions result in a multiple-punishment double jeopardy violation and there is neither offense is more serious than the other.** Michael Bien wanted to kill his ex-wife's brother. So, on December 7th, he met with a hitman in a Walmart parking lot and paid the hitman to kill his ex-wife's brother. The hitman was not a hitman, however; he was an undercover police officer. No one was actually killed.

The State charged Bien with criminal solicitation of capital murder for the act of hiring the hitman and attempted capital murder for actually paying him. A jury convicted Bien of both offenses and sentenced him to life in prison for both offenses. The court of appeals reversed, holding that conviction for both offenses violated the prohibition against multiple punishments for the same offense. According to the court of appeals, each offense required proof of different elements under the *Blockburger* test. Nevertheless, applying the *Ervin* factors, the court of appeals held that the offenses were the same for double jeopardy purposes. The court of appeals reformed the judgement to reflect only a conviction for criminal solicitation because it is the most serious offense.

The Court of Criminal Appeals affirmed. ***Bien v. State*, ___ S.W.3d ___; 2018 WL 2715380 (Tex. Crim. App. June 6, 2018) (8:1).** Writing for the

majority, Judge Newell explained that the court of appeals erred by holding that the offenses were not the same under the *Blockburger* test. Applying the cognate-pleadings or functional-equivalence test, the elements of the offense of criminal solicitation (as alleged) were subsumed within the elements of the offense of criminal attempt (as alleged). Both indictments focused upon the same meeting with the only additional element being proof of the actual employment of the would-be hitman rather than the mere solicitation of employment. Because the offenses were the same under this approach, the Court looked to see if there was express legislative intent to treat the two offenses as different. Finding none, the Court held that the convictions for both offenses violated double jeopardy.

Turning to the appropriate remedy, Judge Newell noted that the "most serious offense" test required a determination of which offense received the greatest sentence. Because Bien had received two life sentences, there was no obvious tie-breaker, though criminal solicitation is a 3g offense. Judge Newell explained that the question of which is the "most serious offense" in these circumstances is best left to the prosecutor. Here, the prosecutor had requested the conviction for criminal solicitation be retained, and the court of appeals had upheld that conviction. The Court affirmed.

Judge Yeary dissented. He noted that there had been another meeting between Bien and the would-be hitman at Walmart on December 1st. At that meeting, Bien had also solicited the hitman to kill Bien's ex-wife's brother. Even though the indictment specifically focused on the December 7th meeting, this meeting could have also constituted a separate instance of criminal solicitation. Even though the State had not made this argument and it was not the basis of the court of appeals decision, Judge Yeary argued that the Court should remand the case to the court of appeals to consider it.

[**Commentary:** Note that this opinion also provides some guidance regarding the elements of criminal solicitation. Under the terms of the statute, believing the conduct solicited would amount to capital murder is subsumed within the intent (under criminal attempt) to commit capital murder.]

**D. Immigration and Nationality Act—The definition of "crime of violence" under 18 U.S.C. §16(b) is unconstitutionally vague.** Under the Immigration and Nationality Act (INA), a non-citizen convicted of an aggravated felony is subject to deportation. The INA defines "aggravated felony" by listing numerous offenses and types of offenses, with references to federal criminal statutes. One item on the list includes "a crime of violence (as defined in section 18 of title 18 . . .) for which the term of imprisonment is at least one year." 18 U.S.C. § 16 defines a "crime of violence" as (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. James Garcia Dimaya, a native and citizen of the Philippines, is a lawful permanent resident. In 2007 and 2009, he was convicted under the California Penal Code for first-degree residential burglary, which both resulted in two year terms of imprisonment. The Department of Homeland Security initiated deportation proceedings against Dimaya, claiming that his burglary convictions were crimes of violence under § 16(b). The Immigration Judge held that Dimaya was deportable based on his burglary convictions. The Board of Immigration Appeals affirmed. The Court of Appeals for the Ninth Circuit reversed, holding that the § 16(b) was unconstitutionally vague in that it denied fair notice to defendants and failed to make clear when a risk of violation could be considered substantial.

The Supreme Court of the United States affirmed the judgment of the Ninth Circuit. ***Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (5:3:1:4:3).** Justice Kagan delivered the opinion of the Court. Justice Kagan noted that the § 16(b) was similar to the residual clause used to define "violent felony" in the Armed Career Criminal Act (ACCA), which the Court held was unconstitutionally vague in 2015. Section 16(b), the Court noted, suffered from the same two features that rendered ACCA's residual clause unconstitutionally vague. First, it calls for the court to identify a crime's "ordinary case" in order to measure the crime's risk, but provides no reliable way to discern what the ordinary version of the case looks like. Therefore, it

creates uncertainty about how to estimate the risk posed by a crime. Second, its speculative "substantial risk" standard compound the uncertainty at issue. Because the two features that conspired to make ACCA's residual clause unconstitutionally vague were also present in § 16(b), the Court held that § 16(b) was also unconstitutionally vague. A plurality of the court (the majority minus Justice Gorsuch) rejected the government's assertion that a less rigid form of the void-for-vagueness doctrine should apply to removal cases, noting that the penalty of deportation is so severe.

Justice Gorsuch filed an opinion concurring in part and concurring in the judgment. Justice Gorsuch wrote separately to express his views on the importance of the stringent application of the void-for-vagueness doctrine.

Chief Justice Roberts filed a dissenting opinion in which Justices Kennedy, Thomas, and Alito joined. Justice Roberts opined that § 16(b) does not give rise to the concerns that led the Court to find ACCA's residual clause unconstitutionally vague. He expressed his views that § 16(b) did not cause the same kind of uncertainty that existed in ACCA's residual clause.

Justice Thomas filed a dissenting opinion in which Justices Kennedy and Alito joined. Justice Thomas noted that he agreed with Chief Justice Roberts and wrote separately to address two additional points. First, Justice Thomas opined that he doubts that the practice of striking down statutes as unconstitutionally vague is consistent with the original meaning of the Due Process Clause. Second, Justice Thomas advised that the Court should abandon the "categorical approach" used in void-for-vagueness cases.

[**Commentary**: This is another one of those cases where five justices only agree to part of a majority that results ultimately in a grant of relief while other judges join broader aspects of the opinion and four judges dissent, three of whom would dissent more broadly than one of their colleagues. You know, one of those. I leave it to you to tease out the different nuances positions. But the upshot is that this is fallout from the Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), wherein the Court held that "violent felony" in the Armed Career Criminal Act was unconstitutionally vague. Here, "a crime of violence" is unconstitutionally vague.]

## IX. APPEALS

**A. Motion for New Trial—Trial court did not abuse its discretion in denying new trial based upon claim that attorney had improperly advised the defendant to waive jury punishment because trial court could have disbelieved the defendant's affidavit.** Dan Dale Burch was indicted for sexual assault. He pled not guilty and opted for a jury to assess his guilt. The jury convicted him. Burch's attorney advised him that the judge could assess punishment at deferred adjudication. Burch elected to have the judge decide his punishment. At the sentencing hearing, Burch presented testimony from his brother and sister that he would make a good candidate for probation. The trial court declined to give Burch probation and sentenced him to seven years. Burch filed a motion for new trial asserting that his trial counsel erroneously advised him that he was eligible for deferred-adjudication probation from the judge. Burch was, in fact, statutorily prohibited from being placed on deferred by the judge. Burch filed a motion for new trial along with an affidavit from his lawyer confirming his error and the other reasons he advised Burch to go to the judge for punishment. Burch also filed his own affidavit confirming the allegations and swearing that had he known that the judge could not assess deferred-adjudication probation, he would have elected to go to the jury for punishment. The trial court denied Burch's motion for new trial. The court of appeals reversed the trial court, finding that Burch was deprived of a meaningful opportunity by not having a factfinder who could consider placing him on probation.

The Court of Criminal Appeals reversed the court of appeals. ***Burch v. State*, 541 S.W.3d 816 (Tex. Crim. App. 2017) (5:4:0)**. Judge Hervey wrote for the majority of the Court. Judge Hervey noted that Burch was required to show that his counsel's performance was deficient and that there was a reasonable probability that the outcome would have been different but for his counsel's deficient performance. In particular, to establish prejudice Burch was required to show: (1) he was initially eligible for probation, (2) his counsel's advice was not given as part of a valid trial

strategy, (3) his election of the assessor of punishment was based upon his attorney's erroneous advice, and (4) the results of the proceeding would have been different had his attorney correctly informed him on the law. In finding that the trial court did not err in denying Burch's motion for new trial, Judge Hervey noted that the court of appeals failed to give proper deference to the trial court's denial of Burch's motion for new trial. The denial of a new-trial motion requires an appellate court to view the evidence in the light most favorable to the trial court's ruling and to imply findings and conclusions in favor of that ruling if none are issued. Judge Hervey stated that this required the reviewing court to assume that the trial judge disbelieved Burch's affidavit. If Burch's affidavit was not believed, then Burch could not establish that he not would have elected to go to the judge for punishment. Therefore, Judge Hervey concluded, the trial court did not abuse its discretion when it denied Burch's motion for new trial and the court of appeals decision to the contrary was error.

Presiding Judge Keller filed a concurring opinion in which she stated that, in addition to the reasons for rejecting Burch's claim set out in the majority opinion, the Court could also reject the claim because the trial court believed it could have placed Burch on community supervision. Burch, therefore, was not prejudiced because he received consideration of the full punishment range his counsel advised him on (even though the trial court could not have actually granted community supervision if it had wanted to).

Judge Keel filed a concurring opinion in which Judges Richardson, Yeary, and Walker Joined. Judge Keel agreed with the majority opinion's outcome but believed that the Court utilized the wrong prejudice standard. Judge Keel opined that prejudice should have been evaluated in terms of the impact the attorney's bad advice had on Burch's decision to waive a jury for punishment.

[**Commentary:** The debate here is over how prejudice is evaluated. A majority upheld the denial of the defendant's motion for new trial because the trial court could have found the allegations and the evidence supporting them as lacking credibility. But there appears to be a split amongst the judges over whether prejudice from the waiver of jury assessment of punishment should be evaluated based upon the loss of a particular type of proceeding or upon the reliability of the proceeding received. As discussed below, ***Miller v. State*, ___ S.W.3d ___, 2018 WL 2327371 (Tex. Crim. App. May 23, 2018) (6:2:1:3)**, makes clear the focus is upon the decision-making of the defendant not the reliability of the proceeding he actually recieved.]

## B. Jurisdiction

**1. Following an appellate decision, the trial court does not regain jurisdiction over the case until the appellate mandate is issued.** Hector Macias was charged with committing family violence assault. Macias filed a motion to suppress evidence, which the trial court granted. The State appealed and filed a motion to stay further trial court proceedings, which the court of appeals granted. On October 16, 2013, the court of appeals handed down an opinion reversing the trial court; the appellate mandate did not issue at that time. The trial court called the case for trial on January 16, 2014. The jury was chosen and sworn, the parties presented their evidence, and the guilt-phase jury charge was read to the jury. At this point, it was brought to the court's attention that the appellate mandate had not issued yet. The trial court concluded that the trial proceedings were a nullity, it could not even declare a mistrial, and it dismissed the jury. The appellate mandate issued on January 30, 2014. Macias filed a pretrial habeas application, alleging that any future trial on the charged offense would violate double jeopardy. The trial court denied the application. The court of appeals concluded that its appellate decision reversing the trial court's order necessarily lifted its earlier stay order, even though the mandate had not yet issued. Therefore, it held that the trial court had jurisdiction over the case and jeopardy had attached to the trial. The court of appeals reversed the trial court and granted Macias relief on his habeas application.

The Court of Criminal Appeals reversed the judgment of the court of appeals. ***Ex parte Macias*, 541 S.W.3d 782 (Tex. Crim. App. 2017) (9:0:0).** Writing for the unanimous court, Presiding Judge Keller noted that when the State appeals a motion to suppress and a stay in the proceeding is granted, all further proceedings in the trial court are suspended until the trial court receives the appellate court mandate (subject to certain exceptions, not applicable to this

case). The trial court does not have jurisdiction over a case until the appellate mandate is issued. Therefore, the trial court in the present case did not have jurisdiction over Macias's case during the first trial; the trial court properly denied habeas relief.

**2. Texas Code of Criminal Procedure Article 42.12, Section 23(b), authorizes a defendant to appeal an order granting "shock" community supervision.** Bernard Winfield Shortt was indicted for burglary of a habitation and pleaded guilty in exchange for a recommendation of deferred adjudication. As a condition of his deferred adjudication community supervision, he was ordered to pay restitution. Later, the State moved to revoke his deferred adjudication community supervision and Shortt pleaded true to the revocation allegations. The trial court adjudicated his guilt and sentenced Shortt to ten years' imprisonment. Five months later, the trial court entered an order suspending the execution of Shortt's sentence and placing him back on community supervision. The trial court once again ordered Shortt to pay restitution. Shortt appealed the order, arguing that the re-imposition of restitution violated his right against double jeopardy. The State agreed that the order was faulty because the trial court lacked authority to impose restitution as a condition of Shortt's "shock" community supervision, but did not agree that double jeopardy was implicated. The court of appeals dismissed he appeal for want of jurisdiction.

The Court of Appeals vacated the court of appeals judgment. ***Shortt v. State*, 539 S.W.3d 321 (Tex. Crim. App. 2018) (5:4).** Judge Yeary wrote the opinion for the majority of the Court. Judge Yeary noted that the issue in this case boils down to whether Article 42.12, Section 23(b), of the Texas Code of Criminal Procedure authorizes a defendant to appeal from an order granting "shock" community supervision. Article 24.12, Section 23(b), provides: "The right of the defendant to appeal for a review of the conviction and punishment, as provided by law, shall be accorded the defendant at the time he is placed on community supervision." Community supervision, Judge Yeary noted, is statutorily the same whether it is granted as part of original judgment, or after the execution of the sentence has already begun ("shock" community supervision). Judge Yeary pointed out that the Court has long entertained claims that the trial court imposed illegal conditions of community supervision brought by defendants who have appealed from a judgment placing them on regular community supervision prior to the imposition of sentence, presumably under Section 23(b). Given the Court's willingness to read Section 23(b) to allow an appeal of the conditions of community supervision from a judgment that suspends imposition of sentence, the Court concluded that there was no compelling reason it should not also construe it to authorize and appeal of the conditions of community supervision from a later order granting "shock" community supervision. The Court, therefore, determined that the court of appeals had jurisdiction to entertain Shortt's appeal and remanded the case for further proceedings.

Presiding Judge Keller wrote a dissenting opinion in which Judges Keasler, Hervey, and Keel joined. Presiding Judge Keller noted that Section 23(b) provides the right to appeal in two situations: (1) an appeal of "the conviction and punishment" at the time the defendant is placed on community supervision, and (2) an appeal of revocation proceedings. This case falls under situation (1). In Presiding Judge Keller's view, the phrase "conviction and punishment" denotes when a judgment is entered conviction the defendant of a particular offense and imposing some sort of punishment. Presiding Judge Keller would have held that "conviction and punishment" occurs at the time of sentencing, not when the defendant is later placed on shock probation, so any appeal of shock probation is not authorized by Section 23(b). Presiding Judge Keller noted several issues that may arise with the Court's holding and noted that the right to appeal an order in criminal cases is limited and the Court should not read the right to appeal authorized by Section 23(b) to encompass the appeal at issue in this case.

[**Commentary:** This was a tight case with a very narrow holding. It simply holds that a defendant who asks for shock probation can appeal the imposition of one of the conditions of that probation. It is hard to see how it might apply beyond that situation, but who knows.]

**3. Trial court's amended order granting defendant's request for "shock probation" was an order that modified a judgment because it had a different style and additional, material findings of**

**fact.** The trial court signed an order granting Crispen Hanson shock probation after his conviction on two counts of injury to a child. Ten days later, the trial court signed an "amended order" that included slight variations from the original order. The style was different and additional fact findings were added. The State filed a notice of appeal from the amended order eighteen days after the trial court signed the amended order. The court of appeals dismissed the appeal for want of jurisdiction. The court of appeals concluded that the amended order was not an appealable order. A near-unanimous Court of Criminal Appeals reversed. Writing for the Court, Judge Hervey explained that Article 44.01(a)(2) states in relevant part that the State may appeal an order of a court in a criminal case if the order arrests or modifies a judgment. Here, the amended order granting shock probation modifies a judgment. This is not a case where the amended order is identical to the original order but for the signature. Presiding Judge Keller concurred without opinion. ***State v. Hanson*, ___ S.W.3d ___; 2018 WL 3133690 (Tex. Crim. App. June 27, 2018) (8:1:0).**

**4. A court of appeals does not have jurisdiction over oral ratifications of pre-existing judgements.** Vera Elizabeth Guthrie-Nail pleaded guilty to conspiracy to commit capital murder. A judgment was entered against her on September 12, 2012. Without giving notice to Guthrie-Nail or conducting a hearing, the trial court issued a *Nunc Pro Tunc* Judgement on December 4, 2012, changing the "Findings on Deadly Weapon" entry from "N/A" to "Yes, a firearm." Guthrie-Nail appealed and the court of appeals affirmed. The Court of Criminal Appeals reversed the court of appeals judgment, holding that Guthrie-Nail's right to due process was violated when the trial court issued an unfavorable *nunc pro tunc* judgment without notice and a hearing. The Court of Criminal Appeals remanded the case to the trial court for proceedings consistent with the Court's opinion. On December 16, 2016, the trial court conducted a hearing and the trial court orally confirmed that it had intended to make an affirmative finding of a deadly weapon on the original September 2012 judgment; the trial court did not issue a new order *nunc pro tunc* order. Guthrie-Nail once again appealed. The court of appeals dismissed the appeal because the trial court had not entered an appealable order.

The Court of Criminal Appeals affirmed the court of appeals' dismissal. ***Guthrie-Nail v. State*, 543 S.W.3d 225 (Tex. Crim. App. Mar. 28, 2018) (9:0).** Judge Richardson wrote the opinion for the unanimous Court. Judge Richardson noted that courts of appeals do not have jurisdiction over oral ratifications of pre-existing judgments. Rather, appellate jurisdiction is invoked when the appellant timely files a notice of appeal after the trial court enters an appealable order. Judge Richardson observed that, despite the trial court intent to orally ratify its original *Nunc Pro Tunc* Judgment at the December 2016 hearing, it did not enter an "appealable order" to that effect. In affirming the court of appeals's dismissal, Judge Richardson advised that if the trial court wishes to make a correction to the September 2012 judgment based on what transpired at the December 2016 hearing, the trial court must enter a new *nunc pro tunc* judgment, which would then be an appealable order.

[**Commentary:** This case will outlive us all.]

### C. Preservation

**1. When a timely and specific objection is overruled at trial, it is sufficient to preserve error on appeal so long as the objection comports to the argument made on appeal.** Johntay Gibson was suspected of committing a robbery in which the owner of the store was murdered. Gibson was arrested on outstanding warrants, taken into custody, and interviewed about the robbery. *Miranda* warnings were read to Gibson at the beginning of the interview. After seven hours of questioning, Gibson invoked his right to an attorney. Interviewing stopped for approximately five hours, though officers briefly spoke with and photographed Gibson during this time. An officer then continued interviewing Gibson, without reading Gibson the *Miranda* warnings again. Gibson was subsequently charged with capital murder. Gibson filed a motion to suppress the interview; the motion did not address the five hour span between the initial interview and the continuation of the interview without any additional *Miranda* warnings. After a hearing, the trial court denied the motion. At trial, Gibson objected to the interviewing officer's testimony, asking that the second part of the interview be suppressed because Gibson was not re-warned. The trial court overruled Gibson's objection and admitted the evidence of the

interview. Gibson was convicted of capital murder and sentenced to life without the possibility of parole. Gibson appealed and argued, among other things, that the trial court erred in dying his motion to exclude the second part of his videotaped statement because the officers failed to re-warn him and advise him of his rights. The court of appeals held that Gibson failed to preserve error on the issue because his argument on appeal did not comport with any objection raised in his motion to suppress or at the suppression hearing.

The Court of Criminal Appeals reversed the court of appeals. ***Gibson v. State*, 541 S.W.3d 164 (Tex. Crim. App. 2017) (8:1:0).** Writing for the majority of the Court, Judge Walker distinguished Gibson's pre-trial motion to suppress and his trial objection. Judge Walker noted that to preserve a complaint for review, a party must have presented a timely objection or motion to the trial court stating the specific grounds for the ruling desired. Additionally, there is no requirement that to preserve error the appellate argument must comport with any related motion to suppress when there is a trial objection that comports with the appellate argument. In Gibson's case, he made a specific objection to the admission of the evidence at trial, which the trial court overruled and admitted the evidence. Regardless of the written suppression motion claims, Gibson's argument on appeal corresponds with his trial objection and he has therefore preserved his claim for preview.

Presiding Judge Keller filed a concurring opinion. Presiding Judge Keller noted that Gibson made a new claim during the trial, different from the one raised in his motion to suppress. However, Gibson's brief to the court of appeals said that the motion to suppress was re-litigated at trial, even though he advanced his new claim on appeal. So, hearing that the motion to suppress was re-litigated at trial, the court of appeals looked at the motion and evaluated that claim instead of the new claim raised orally at trial. Presiding Judge Keller pointed out that it was likely Gibson's brief to the court of appeals which caused the court of appeals failure to recognize the distinction. Nevertheless, she agreed that Gibson's trial objection and brief were sufficient to show that he is entitled to have his claim reviewed on the merits.

**2. A defendant can complain for the first time on appeal that a trial court's statements amounted to a comment on the weight of the evidence because trial judges have an independent duty to refrain from making such comments.** In August of 2008, Abraham Jacob Proenza was caring a four-month-old baby boy. On August 11, 2008, Proenza noticed that the baby was blue and purple in color and struggling to breathe. Although Proenza administered emergency medical care to the baby and promptly contacted 911, the baby died later that night. Proenza admitted that he had noticed the baby vomiting several times in the weeks, days, and even hours leading up to his death. An autopsy of the baby revealed that he was severely malnourished and dehydrated at the time of his death. Proenza was charged with Injury to a Child. Proenza, who was not the child's biological or adoptive father, argued that the lacked the requisite intent to harm the child because of his genuine, though perhaps mistaken, belief that he could not obtain medical care for the child without some documentary proof that he was the child's legal guardian. Proenza argued that his belief was based on previous interactions with the clinic at which the baby's pediatrician worked. During trial, the baby's pediatrician testified that the medical staff at the clinic cannot see minor patients unless they are accompanied by a documented legal guardian. After the defense and State had completed questioning the doctor, the trial judge interjected and asked the doctor about the day-to-day enforcement of the clinic's policy. Defense counsel did not object, but clarified the testimony brought out by the judge by further examination. The trial judge interjected yet again, expressing skepticism that the clinic's policy was enforced as stringently as the follow-up questions suggested. Defense counsel did not object to the second exchange between the judge and the doctor. The jury found Proenza guilty and assessed his sentence at forty years' imprisonment.

Proenza appealed, arguing that the trial judge improperly commented on the weight of the evidence when she engaged with the doctor. The court of appeals noted that the defendant may complain for the first time on appeal about the trial court's lack of impartiality under the rubric of fundamental error so long as the trial judge's conduct was so egregious to deem the judge biased on the matter. The court of

appeals found that the trial judge's comments did rise to that level and no objection was required. In finding that it could not say beyond a reasonable doubt that the trial court's error did not contribute to Proenza's conviction, the court of appeals reversed.

The Court of Criminal Appeals affirmed the court of appeals in part and remanded the case to allow the court of appeals to conduct a new harm analysis. ***Proenza v. State*, 541 S.W.3d 786 (Tex. Crim. App. 2017) (6:3:3).** Writing for the majority of the Court, Judge Keasler examined the Court's precedent on preservation of error. Under *Marin v. State*, 851 S.W.2d 275 (1993), claims of error fall into one of three distinct kinds: category-one rights which are absolute requirements and prohibitions, category-two rights which are rights of litigants which must be implemented by the system unless expressly waived, and category–three rights which are rights of litigants which are to be implemented upon request. Determination of the category turns on the nature of the right allegedly infringed, not the circumstances under which it was raised. Category-one and –two rights do not require an objection at trial to preserve error; category-three rights do. Judge Keasler noted the difference between "fundamental error" in the context of preservation and harm, and reaffirmed the Court's holding that there is no common-law "fundamental error" exception to the rules of preservation established by *Marin*. Turning to the issue of a trial judge's improper comment on the evidence, the Court found that Texas Code of Criminal Procedure Article 38.05 creates an independent duty on the trial court to refrain from sua sponte discussing or commenting on the weight of the evidence. This independent duty elevates improper judicial commentary to at least a category-two, waiver-only right. Judge Keasler noted that the record did not reflect that Proenza plainly, freely, and intelligently waived his right to his trial judge's compliance with Article 38.05, so his claim could be presented for the first time on appeal. Judge Keasler then noted that the correct harm analysis for a statutory violation is the non-constitutional standard, which requires that any non-constitutional error that does not affect substantial rights to be disregarded. The court of appeals in this case applied a constitutional-error harm analysis. The Court, therefore remanded the case for the court of appeals to revisit the harm analysis under the proper standard.

Judge Newell filed a concurring opinion in which Judges Hervey and Alcala joined. Judge Newell wrote separately to address why the Court should be warry about placing too much emphasis on *Marin*. Judge Newell pointed out that *Marin* is useful once a right has been categorized but it is not helpful in categorizing rights in the first place, noting that not all rights fit neatly into one of *Marin*'s three categories.

Presiding Judge Keller filed a dissenting opinion in which Judges Yeary and Keel joined. Presiding Judge Keller noted that the contemporaneous objection requirement is the general rule applied to claims of error. She would have held that the statutory language of Article 38.05 does not create a non-forfeitable right and, therefore, complaints under Art. 38.05 require preservation.

[**Commentary:** It is worth noting that the trial court did not merely comment, it actually engaged in questioning of a witness and that questioning actually undermined the defendant's case. Additionally, the arguments on both side of this argument are certainly weighty. But ultimately, if a trial court is willing to go to lengths like this, an objection that the trial court is being partial is likely to lead to escalation. In the end, it may make more sense to allow the defense to raise such claims on appeal without further exacerbating matters at the trial level. After all, is defense counsel supposed to lodge an objection like the one that starts Judge Newell's concurrence, "Your honor, with all due respect, if you're going to try my case for me, I wish you wouldn't lose it."? That said, Presiding Judge Keller's point that this will likely lead to more confusing litigation is well taken and may prove prescient. Time will tell.]

**3. When an inflammatory comment is made during jury argument, the complaining party must pursue an objection to an adverse ruling in order to preserve error on appeal.** Luis Miguel Hernandez discovered that his wife was having an affair with their neighbor. After making this discovery, Hernandez saw the neighbor outside of their apartment building and yelled at the neighbor about the affair. A fist fight ensued. After a brief fight, Hernandez ran back to his

apartment and the neighbor collapsed to the ground with a stab wound in his chest. The neighbor later died from the stab wound. Hernandez was charged with murder. Hernandez admitting to cussing at the neighbor and directing racial slurs at him, but claimed he stabbed the neighbor in self-defense. During closing arguments, the State argued that Hernandez provoked the fight by calling the neighbor and his family "niggas." Defense counsel objected that the word "niggas" was not in the record, as the only testimony had been that Hernandez used racial slurs. The trial court initially overruled the objection, but, after a bench conference, sustained the objection and instructed the jury to disregard the comment. Defense counsel did not request a mistrial. Hernandez was convicted and sentenced to fourteen years in prison. On appeal Hernandez sought to reverse his conviction on the basis of the State's improper jury argument. Hernandez argued that the he received an adverse ruling because the trial court initially overruled his objection to the use of the word "niggas" or, in the alternative, the argument was so egregious that the traditional mode of error preservation should not be required. In a split opinion, the court of appeals reversed Hernandez's conviction. The court of appeals held that Hernandez had preserved his complaint and that he was harmed because the State's statement could not be cured by an instruction to disregard.

The Court of Criminal Appeals reversed the judgment of the court of appeals. ***Hernandez v. State,* 538 S.W.3d 619 (Tex. Crim. App. 2018) (9:0).** Judge Keel wrote the opinion for the unanimous Court. Judge Keel noted that the right to trial untainted by improper jury argument is a forfeitable right, which the defendant must object to and pursue his objection to an adverse ruling in order to claim it on appeal. Judge Keel stated that even an inflammatory jury argument is forfeited if it is not pursued to an adverse ruling, noting a case which the Court had previously held that even when arguments are so egregious that an instruction to disregard would be ineffectual, the defendant should have moved for a mistrial to preserve error. The Court declined to elevate the comment to one of prosecutorial misconduct.

[**Commentary:** Interesting bookend to ***Proenza v. State,* 541 S.W.3d 786 (Tex. Crim. App. 2017) (6:3:3)**, discussed above. Inflammatory comments during jury argument by the prosecutor are forfeitable. Here, the prosecutor is not a neutral actor like a trial court, so the defendant must pursue his claim to an adverse ruling to preserve error.]

**4. Defendant's failure to request limiting instruction regarding the prosecutor's mention during opening statement of a defendant's blood alcohol level that had not been introduced forfeited ability to complain on appeal about the denial of a mistrial.** The State charged John Lee with Class B driving while intoxicated. During opening statement, the State indicated that the evidence would show that Lee's blood had been taken at a hospital and showed Lee's blood alcohol content was .169, double the legal limit. Lee did not object to this. During the trial, the State was unable to introduce evidence of the blood draw because the State had lost the vials containing the blood samples. The defendant asked for a mistrial, which the trial court denied. At no point did the defense seek to strike the testimony regarding the blood draws or request a limiting instruction. The court of appeals held that the trial court abused its discretion by denying the motion for mistrial. A unanimous Court of Criminal Appeals reversed. Writing for the Court, Judge Yeary explained that the jury was already instructed that the statements of counsel were not evidence. Further, Lee failed to request a specific limiting instruction prior to seeking a mistrial, and there was no reason to doubt that such instructions would be effective. Finally, the evidence of intoxication was compelling even without the evidence of Lee's blood alcohol content. ***Lee v. State,* ___ S.W.3d. ___; 2018 WL 2947894 (Tex. Crim. App. June 13, 2018) (9:0).**

**D. Harm**

**1. A trial court's failure to require the State to elect which act of sexual abuse it intended to rely upon is harmless when the purposes of the election requirement are satisfied.** Richard Charles Owings was charged aggravated sexual assault of a child. The indictment alleged one incident of sexual abuse in the form of genital-to-genital contact. At trial, K.M., the child victim and Owing's step-granddaughter, testified that the sexual abuse was ongoing. She testified that on numerous occasions Owings would lock her in his bedroom with him and vaginally rape her. K.M. also

testified about three specific occasions in which Owings vaginally raped her and forced her to perform oral sex on him. Owings testified on his own behalf and denied any sexual abuse ever occurring. At the close of the State's case, Owings requested that the State make an election as to which act of sexual abuse it was relying on for a conviction. The trial court denied Owing's request, however the jury charge included a limiting extraneous offense instruction. The jury found Owings guilty and sentenced him to thirty years confinement. Owings appealed arguing, among other things, that the trial court erred in denying his request that the State elect which act of sexual abuse it was relying on for the conviction. The court of appeals reversed Owings's conviction, holding that the trial court committed harmful constitutional error when it failed to require the State to elect which specific instance of sexual abuse it relied upon for conviction.

The Court of Criminal Appeals reversed the judgment of the court of appeals. ***Owings v. State*, 541 S.W.3d 144 (Tex. Crim. App. 2017) (7:2:0).** Judge Richardson wrote the opinion for the majority of the Court. The Court agreed with the court of appeals that the trial court erred by not requiring the State to elect which act it was relying on for a conviction. However, upon analyzing this constitutional error in the context of the purposes underlying the election requirement, the Court found that the error was harmless. The first purpose of election is to protect the accused from the introduction of extraneous offenses. Judge Richardson noted that the extraneous offenses were admissible in this case to show the state of mind of Owings and K.M. and their relationship. Additionally, a proper limiting instruction was include in the jury charge regarding these offenses, so the failure to require an election did not interfere with this purpose. The second purpose is to minimize the risk that the jury would convict, not because one or more crimes were proven beyond reasonable doubt, but because all the acts together convinced the jury that the defendant was guilty. Judge Richardson explained that this purpose was also met because the incidents of sexual abuse were all recounted by the same source, K.M., and did not involve the presentation of evidence of different activities from different sources that a jury might add up to the defendant being guilty even though no individual offense was proven beyond a reasonable doubt. The third purpose is to ensure a unanimous verdict. Similar to the reasoning that purpose two was met, Judge Richardson noted that the evidence of abuse was recounted by K.M. and the jury either believed all of the incidents occurred or none of them did so this purpose was met. Lastly, the fourth purpose is to provide the defendant notice of which offense to defend against. Judge Richardson noted that this purpose was met because Owings presented the same defense for each act of abuse—that no abuse occurred at all; Owing's defense would not have changed regardless of the election.

Judge Yeary filed a concurring opinion in which he suggested that the Court should revisit applying the constitutional harm analysis to election errors and determine whether it may be more appropriate to apply the standard for harm governing non-constitutional errors in this context.

Judge Walker filed a concurring opinion in which he further discussed the purposes served by the election rule and added to the discussion on the harm analysis. Ultimately, he noted that the case should have been brought under the continuous sexual abuse of a young child statute. If it had been, election would not have been an issue.

**2. The erroneous admission of a defendant's drug use on the morning of the offense and possession of drugs did not affect the defendant's substantial rights because the State did not emphasize the evidence and other evidence of the defendant's guilt supported his conviction.** This case was discussed above on the issue of admissibility of evidence, so I will not rehash the facts in great detail here. Juan Antonio Gonzalez was charged with capital murder of a police officer after he was involved in a fight with off-duty officer, which resulted in a fatal head injury for the officer. The State introduced evidence that Gonzalez had taken ecstasy six to seven hours prior to the offense, but did not emphasize the evidence at all. A unanimous Court of Criminal Appeals held that although the trial court erred in admitting the evidence, Gonzalez was not harmed because the admission of the evidence did not affect Gonzalez's substantial rights. The State spent very little time addressing the evidence and it did not emphasize the evidence beyond introducing it.

Importantly, the State did not mention the evidence during its closing argument. Further, in connection with the other evidence in the case, it was not so emotionally charged as to prevent the jury from rationally considering the rest of the evidence before it. Given the nature of the evidence of guilt and the State's lack of emphasis on the drug evidence, the Court found that Gonzalez's substantially rights were not affected. ***Gonzalez v. State*, 544 S.W.3d 363 (Tex. Crim. App. Apr. 11, 2018) (9:0).**

**E. Court Costs**

**1. A defendant whose petition for discretionary review raising the issue of the constitutionality of consolidated fees was pending when the Court decided *Salinas* is entitled to relief.** Carlton Charles Penright was charged and convicted of sexual assault. Upon conviction, Penright was required to pay court costs, which included $133 of consolidated fees pursuant to the Texas Local Government Code. The court of appeals rejected Penright's challenge to the consolidated fee statute. Penright filed a petition for discretionary review to the Court of Criminal Appeals complaining that the court of appeals failed to explain how the comprehensive rehabilitation fee is a legitimate criminal justice purpose. Penright's petition for discretionary review was pending when the Court decided *Salinas v. State*.

The Court of Criminal Appeals modified the trial court's judgment. ***Penright v. State*, 537 S.W.3d 916 (Tex. Crim. App. Sept. 20, 2017) (7:1:1).** Presiding Judge Keller wrote for the majority of the Court and noted that in *Salinas*, the Court held that the portions of the consolidated fee statute that were allocated to "comprehensive rehabilitation" and "abused children's counseling" were unconstitutional in violation of separation of powers. Additionally, *Salinas* was to apply retroactively to defendants who had raised the appropriate claim in a petition for discretionary review before the date of the *Salinas* opinion, if the petition was still pending when *Salinas* was handed down, and the claim was otherwise properly before the Court. Presiding Judge Keller opined that Penright met these requirements and the Court modified his judgment by subtracting the portion of Penright's fee allocated to "comprehensive rehabilitation."

Judge Newell concurred without written opinion.

Judge Yeary filed a dissenting opinion in which he stated that he dissented for the same reasons he did in *Salinas*.

**2. When court costs are not assessed until after judgment is entered, leaving the defendant with no time to object to the trial court, the defendant may raise a challenge to the court costs for the first time on appeal.** William Johnson was convicted of aggravated robbery with a deadly weapon. A bill of court costs was prepared weeks after his judgment was entered. On direct appeal, he challenged the constitutionality of the comprehensive rehabilitation fee, assessed as part of the consolidated court costs. The court of appeals held his claim was not preserved because Johnson did not object to the imposition of the fee before the trial court.

The Court of Criminal Appeals reversed the court of appeals judgment regarding court costs. ***Johnson v. State*, 537 S.W.3d 929 (Tex. Crim. App. Oct. 4, 2017) (6:1:1).** In a per curium opinion, the Court noted that Johnson did not have the opportunity to object to the fees, since they were imposed after his judgment was entered, so he was entitled to challenge the costs for the first time on appeal. Applying the holding in *Salinas v. State*, which held the comprehensive rehabilitation court cost unconstitutional, the Court modified the judgment against Johnson by reducing the mandatory court fees by the percentage attributable to comprehensive rehabilitation.

Judge Newell filed a concurring opinion in which he joined in the Court's order reforming the judgment because the court of appeals did not apply the retroactivity discussion in *Salinas v. State* in this case. However, he noted that applying the retroactivity dicta in *Salinas* results in the unequal treatment of defendants on direct appeal.

Judge Yeary filed dissenting opinion in which he stated that he dissented for the reasons articulated in his dissenting opinion in *Salinas v. State*.

Judge Hervey did not participate.

## X. SIXTH AMENDMENT RIGHT TO COUNSEL

**A. Sixth Amendment guarantees a defendant the right to choose the objective of his defense and insist that his counsel refrain from admitting guilt regardless of whether this would be sound trial strategy.** Robert McCoy was charged with the murder of the mother, stepfather, and son of McCoy's estranged wife. The prosecutor gave notice of the intent to seek the death penalty. The court appointed counsel from the public defender's office, and McCoy pleaded not guilty. At defense counsel's request, McCoy was examined by a court-appointed sanity commission who found McCoy competent to stand trial. McCoy told the court that his relationship with his court-appointed attorney had broken down so he asked to represent himself until his family could engage new counsel for him.

Private counsel, Larry English, signed on to represent McCoy and concluded that the evidence against McCoy was overwhelming. He also concluded that, absent a concession at the guilt stage that McCoy was the killer, a death sentence would be impossible to avoid at the penalty phase. McCoy disagreed, angrily, and told his attorney not to make that concession. He claimed he was out of State at the time of the killings and that corrupt police killed the victims when a drug deal went wrong. McCoy insisted that English should pursue an acquittal and not make the concession. Eventually, McCoy sought to have English removed, and English wanted to be removed. Two days before trial, the trial court directed English to remain counsel of record. During opening, English conceded that the jury would not be able to reach any conclusion other than that McCoy caused the deaths of these individuals. However, he argued that McCoy did not have the requisite culplable mental state. McCoy protested that English had sold him out. McCoy later testified in his own defense claiming he was innocent and presenting an alibi "difficult to fathom." During closing, English conceded that McCoy committed these crimes, but urged mercy in view of McCoy's serious mental and emotional issues. The jury found McCoy guilty and sentenced him to death.

The United States Supreme Court reversed, holding that trial counsel's concession of guilt over his client's objection violated the Sixth Amendment. ***McCoy v. Louisiana*, 138 S.Ct. 1500 (May 14, 2018) (6:3)**. Writing for the majority, Justice Ginsberg explained that the Sixth Amendment guarantees a criminal defendant the assistance of counsel, though at common-law self-representation was the norm. But the choice to have assistance of counsel does not mean the defendant surrenders control entirely to counsel. Trial management is the lawyer's province. Counsel makes decisions such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence. Some decisions are reserved for the client, such as whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. The autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category. Counsel may reasonably assess a concession of guilt to avoid the death penalty, but the client may wish to avoid admitting that he killed family members. Justice Ginsberg distinguished the case from *Florida v. Nixon*, 543 U.S. 175 (2004) because there the defendant did not consent or object to counsel's concession of guilt. Here, he affirmatively opposed the concession.

Interestingly, the Court stated that "because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence." Instead, the Court held that violation of a defendant's Sixth Amendment-secured autonomy ranks as structural error because it affects the framework within which the trial proceeds. Thus, it was not subject to harmless error review.

Justice Alito dissented, along with Justices Thomas and Gorsuch. At the outset, Justice Alito noted that the case involved a rare confluence of events unlikely to recur. Specifically, overwhelming evidence of guilt coupled with a border-line incompetent defendant who repeatedly stated he was happy with the representation by his attorney. He changed his mind about the attorney the weekend before trial.

Regarding the Court's Sixth Amendment-secured autonomy holding, Justice Alito noted that this right is unlikely to ever be seen again. First, because it will only come up in capital cases. Second, because rational capital murder defendants are unlikely to insist on contesting guilt under similar circumstances. Third,

if there is such a fundamental disagreement between retained counsel and the client they will part ways. Fourth, if appointed counsel tries something like this, the trial court can appoint substitute counsel. Finally, it is unlikely there will ever be express protests on the record, so the courts will have to follow *Florida v. Nixon*. Instead, Justice Alito argued, there will be more questions about the circumstances in which an attorney can make the unilateral decision to concede an element of the offense charged.

Finally, Justice Alito argued that this error was not structural. According to Justice Alito, there had never been adversarial briefing on the issue, yet the Court decided the issue. The proper course would be to let the lower court decide the issue first.

[**Commentary:** Um . . . what?]

**B. Habeas applicant failed to establish ineffective assistance of counsel where trial counsel's credible affidavit provided legitimate justifications for claimed deficiencies in representation.** Orian Lee Scott was charged with nine offenses in three separate indictments. Each indictment was identical except they named different victims. In each indictment Scott was charged with one count of possession of child pornography, one count of inducing a sexual performance by a minor, and one count of producing or promoting a sexual performance by a child. Scott pleaded guilty to the possession of child pornography charges; a jury convicted him on the remaining charges. Following the trial on punishment, Scott was sentenced to 100 years' confinement. On direct appeal, Scott raised various arguments, including that the evidence was legally insufficient to support his convictions for inducing a sexual performance by a child. The court of appeals agreed, and it rendered acquittals on those counts. The Court of Criminal Appeals affirmed the court of appeals' judgment entering acquittals. Scott filed a post-conviction writ application alleging ineffective assistance of counsel. The habeas court made findings that Scott's counsel was not ineffective and that Scott was not prejudiced by his trial counsel's performance. The habeas court recommended denying relief.

The Court of Criminal Appeals denied relief. ***Ex parte Scott,* 541 S.W.3d 104 (Tex. Crim. App. 2017) (8:1:0).** Judge Hervey wrote for the majority. Scott alleged his counsel was ineffective at the punishment phase of trial by not presenting mitigating evidence through his own testimony and testimony of three other witnesses, not objecting to Scott being sentenced to 100 years in prison, not objecting to the stacking of Scott's sentences, not objecting to allegedly improper statements during the State's closing argument, and not objecting to a statement by the judge that part of the State's closing argument was "a fair assumption based on the record." In each alleged instance of ineffective assistance, the Court found that trial counsel's performance was based either on reasonable trial strategies or the lack of cooperation from witnesses. Because Scott's trial counsel's actions were based on reasonable trial strategies, the Court held that Scott's trial counsel was not ineffective.

Judge Keel concurred without a written opinion.

[**Commentary:** This is a summary of a case with multiple allegations of deficient performance. Ultimately, trial counsel provided reasonable explanations for all the alleged deficiencies and the trial court found trial counsel credible. Practitioners are advised to read the whole thing.]

**C. Claim regarding attorney's affirmative mis-advice about deportation consequences is cognizable on a writ of habeas corpus despite the non-retroactivity of *Padilla v. Kentucky*.** In 2002, the State charged Samuel Garcia with possession of cocaine of at least four grams but less than 200 grams of cocaine with the intent to deliver, a first-degree felony. Garcia asked his attorney whether there would be adverse immigration consequences because he was a lawful permanent resident. The attorney responded that Garcia "would probably be okay" and that "the charge would probably not result in deportation." Garcia pleaded guilty and was sentenced to ten years imprisonment, but the sentence was probated for ten years. He was also deported. When he returned to the United States, he filed an application for a writ of habeas corpus. The court of appeals affirmed the trial court's judgment granting relief. [This is an 11.072 writ, not an 11.07 writ because of probation].

A unanimous Court of Criminal Appeals affirmed. ***Ex parte Garcia,* 547 S.W.3d 228 (Tex. Crim. App.**

**May 9, 2018) (9:0).** Writing for the Court, Judge Hervey explained that *Padilla v. Kentucky* imposed an affirmative duty to advise a client that he would be deported in certain cases. Garcia's claim is not that his attorney had a duty to advise him. Garcia's claim is that his attorney had a duty to state the law correctly if he rendered immigration advice even though he was under no obligation to render it. As such, it is more akin to bad probation-advice claims or bad parole-eligibility claims. So, affirmative mis-advice claims regarding deportation consequences is a cognizable affirmative mis-advice claim. It is not barred from consideration as a retroactive application of a Padilla claim.

[**Commentary:** In its opinion, the Court simply defers to the court of appeals analysis, noting that the court had "exhaustively reviewed state and federal jurisprudence." If you would like to look at that exhaustive review, the cite to that case is *Ex parte Osvaldo*, 534 S.W.3d 607 (Tex. App.—Corpus Christi, 2017). Yes, it says "Osvaldo" not "Garcia." That's Garcia's middle name, and for some reason that's the style of the lower court opinion. The Court of Criminal Appeals points out this discrepancy in its own opinion so I would imagine that will eventually be corrected (though it hadn't been at the time of this writing).]

**D. Deficient Performance**

**1. When a defendant's guilty plea would cause him to automatically lose legal immigration status and become removable, counsel has a duty to correctly advise the defendant of those consequences.** Cristian Aguilar is a Honduran national who, at the time of his arrest for attempting to evade arrest in a motor vehicle, was lawfully present in the United States as a nonimmigrant with temporary protected status. He was attempting to adjust his status and gain lawful permanent residency. Due to his immigration concerns, he asked his immigration attorney to advise his plea counsel. During three separate discussions, Aguilar's immigration attorney informed the plea counsel that if Aguilar was convicted of a felony he would lose his temporary protected status and have no legal immigration status and that Aguilar would be ineligible for lawful permanent residency if he was sentenced to more than six months imprisonment. Plea counsel negotiated a plea agreement were Aguilar would plead guilty to attempted evading arrest with a motor vehicle, a state-jail felony, and be sentenced to six months in jail. On plea counsel's advice, Aguilar accepted the plea agreement and plead guilty. Pleading guilty to a state-jail felony rendered Aguilar ineligible to maintain his temporary protected statue. Aguilar's habeas corpus application alleged that ineffective assistance of counsel rendered his guilty plea involuntary.

The Court of Criminal Appeals granted habeas relief. ***Ex parte Aguilar,* 537 S.W.3d 122 (Tex. Crim. App. 2017) (6:2:1).** In *Padilla v. Kentucky*, the United States Supreme Court held that when the removal consequences of a guilty plea are clear, counsel has a duty to correctly advise a defendant of those consequences. Writing for the majority, Judge Alcala extended the holding in *Padilla* to circumstances where, as here, a defendant's guilty plea causes him to automatically lose legal immigration status and become removable. Aguilar's plea counsel was aware that a felony conviction would make Aguilar ineligible to retain his temporary protected status, leave him with no legal status, and render him removable. The Court found the plea counsel was deficient in negotiating a plea agreement for a state-jail felony and advising Aguilar that the plea would not have negative immigration consequences. In order to show prejudice, Judge Alcala asserted that Aguilar was required to demonstrate that there was a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Throughout the habeas proceedings Aguilar maintained that he would never have agreed and entered a guilty plea if he had known it would have problems with immigration or put him in danger of deportation. Judge Alcala, therefore, concluded that Aguilar was harmed. The Court held that ineffective assistance of counsel rendered Aguilar's plea involuntary and vacated his plea.

Judge Yeary filed a concurring opinion in which Judge Keel joined. Judge Yeary believed the Court should not extend *Padilla* to require criminal defense attorneys to advise clients on matters related to legal immigration status. Instead, Judge Yeary would have held that Agular was entitled to relief because his plea counsel chose to give him more specific advice with

respect to potential deportation consequences, and was, therefore, obligated to advise him correctly.

Presiding Judge Keller wrote a dissenting opinion in which she stated she would not have extended *Padilla*'s holding because it is unclear whether Aguilar will actually be deported based on his guilty plea. Additionally, Presiding Judge Keller opined that whether the general habeas harm standard applies depends on whether direct appeal was an available remedy, not on whether the claim at issue incorporates a harm standard on its own, unless the harm standard is actually more onerous on defendants than the general habeas harm standard.

**2. Erroneous advice about parole eligibility during plea negotiations can constitute deficient performance.** Malcom Jamon Evans was charged with causing serious bodily injury to a child. Pursuant to a plea agreement, the State dropped the deadly weapon allegation and Evans pleaded guilty with a 50-years cap. Evans was sentenced to 50 year in prison. In his habeas application, Evans argues that his attorney misadvised him about the effect of a deadly weapon finding on his parole eligibility. Evans says that if his attorney had correctly advised him, he would have insisted on going to trial.

The Court of Criminal Appeals granted relief. ***Ex parte Evans*, 537 S.W.3d 109 (Tex. Crim. App. Sept. 20, 2017) (6:2:1)**. Writing for the majority of the Court, Judge Keel first noted that Evans's claim for relief was grounded in the federal constitution and must be in accordance with United States Supreme Court precedent. She then pointed out that in *Hill v. Lockhart* the Supreme Court held that a defendant is entitled to effective assistance of counsel in the guilty plea context and, to prevail, must show that there is reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. The Court found Evans's claim met the *Hill* standard and, because *Hill* predated the finality of Evans's conviction, the Court granted relief.

Presiding Judge Keller filed a concurring opinion in which Judge Hervey joined. Presiding Judge Keller argued that *Hill* did not control this case because the Supreme Court did not hold that erroneous advice about parole eligibility was constitutionally ineffective assistance. Instead, Presiding Judge Keller would have granted relief by according retroactive status of the Court's rule in *Moussazadeh III*.

Judge Keasler filed a dissenting opinion in which he argued that Evans is not entitled to relief under either *Hill* or *Moussazadeh III*.

**3. Calling witnesses who provide favorable testimony does not necessarily amount to deficient performance even if those witnesses ultimately provide damning testimony on cross-examination.** A jury found Alvin Wesley Prine guilty of sexual assault. At the punishment phase of his trial the State presented the testimony of the complainant and rested on a Friday afternoon. Over the weekend, the State notified Prine's attorney that it had just learned and intended to prove that some 27 years earlier, Prine had fathered a child with his children's 15-year-old babysitter. When trial resumed, the defense called a probation officer who testified to Prine's eligibility for probation, but on cross-examination revealed that he did not believe Prine deserved probation. The defense also called Prine's aunt and sister who both testified about Prine's positive qualities and how helpful he had been to each of them. On cross-examination Prine's aunt testified that Prine had fathered a child with his under-age babysitter and Prine's sister acknowledged the sexual relationship Prine had with the babysitter. The jury sentenced Prine to 20 years' confinement and a fine of $8,000. On appeal, Prine argued that his attorney was ineffective during the punishment phase of trial for calling three witnesses who gave damaging testimony on cross-examination. The court of appeals agreed with Prine and remanded the case for a new punishment hearing.

The Court of Criminal Appeals reversed the judgment of the court of appeals and affirmed the trial court's judgment and sentence. ***Prine v. State*, 537 S.W.3d 113 (Tex. Crim. App. Sept. 20, 2017) (8:1).** Writing for the majority of the Court, Judge Keel noted that counsel's performance is deficient if it falls below an objective standard of reasonableness and when the record is not fully developed counsel should only be found ineffective if his conduct was so outrageous that no competent attorney would have engaged in it. Prine raised his ineffective assistance of counsel claim on direct appeal, therefore the record did not contain trial

counsel's reasoning or strategies for his decisions. Judge Keel pointed to several assumptions the court of appeals made in coming to its decision. These include that the defense attorney called the probation officer to the stand without determining whether his testimony would harm the defendant and that the extraneous offense evidence would not have come in if defense counsel did not call Prine's aunt and sister. Judge Keel, however, pointed out that the assumptions were either not supported by the record or the record was silent as to the defense attorney's reasoning. Without more, the record does not support the conclusion that the defense attorney's actions were so outrageous that no other attorney would have conducted the punishment phase in the same manner.

Judge Alcala filed a dissenting opinion. Judge Alcala noted that Prine's counsel called witnesses to the stand that testified that a probated sentence was inappropriate and that Prine had previously sexually assaulted a child. According to Judge Alcala, nothing the trial counsel could or would say to explain his performance could justify this extreme malfeasance. Judge Alcala would have held that that, under an objective standard of reasonable performance, Prine's counsel rendered ineffective assistance of counsel.

**4. Plea counsel provided deficient performance by failing to research relevant case law and advise the defendant about case law which clearly established that the State would be unable to meet its burden to prove the offense as alleged.** Darren Lewis hand-wrote a false prescription on a clinical form bearing Dr. Louis E. Warfield's name. Lewis was charged by felony indictment with obtaining a controlled substance through the use of a fraudulent prescription form. The State supported the charge with an affidavit by Dr. Warfield stating that he had never prescribed any substances to Lewis. Lewis pleaded guilty. Six months after Lewis's plea, the State learned that Dr. Warfield had serious credibility issues which may have undermined the State's case. Lewis filed a habeas corpus application alleging that his plea was involuntary because it was induced by the State's unwitting sponsorship of "false" evidence, presumably Warfield's potential trial testimony. Lewis then filed a supplemental habeas corpus application alleging that his guilty plea was also involuntary due to ineffective assistance of plea counsel. Lewis alleged that his counsel failed to explain that, under *Avery v. State*, the State would be required to prove that the prescription form itself was fraudulent, not simply forged, and that the State's evidence would fail to prove this in his case. The habeas judge recommended that the Court of Criminal Appeals grant relief on both grounds.

The Court of Criminal Appeals granted relief on Lewis's ineffective assistance of counsel claim. ***Ex parte Lewis*, 537 S.W.3d 917 (Tex. Crim. App. Sept. 27, 2017) (9:0).** Judge Keasler wrote for the unanimous court. Judge Keasler noted that ignorance of well-defined general laws, statutes, and legal propositions is not excusable and may lead to a finding of ineffective assistance of counsel. Counsel's conduct is deficient on this basis if the specific legal proposition the client faults counsel for failing to assert is well considered and clearly defined. In the present case, Lewis's plea counsel was unaware of this Court's holding in *Avery v. State*, which held that in fraudulent prescription form cases, the State is required to prove that the prescription form itself was fraudulent, not simply forged. Judge Keasler pointed out that *Avery* was decided two years prior to Lewis's plea and was well considered and clearly defined. Under *Avery*, the State would be unable to prove the allegations against Lewis, therefore, the Court found Lewis's plea counsel ineffective in advising him on this issue. The Court adopted the habeas judge's findings that but for the plea counsel's error, Lewis would not have pleaded guilty and would have insisted on a trial; it therefore concluded that Lewis demonstrated prejudice. Upon finding ineffective assistance of counsel and granting relief on that issue, the Court dismissed Lewis's original habeas application as moot.

### E. Prejudice

**1. Defendant establishes prejudice based upon attorney's mis-advice regarding probation eligibility by showing that the bad advice caused the defendant to waive a judicial proceeding.** The State charged Arthur Miller, Jr., with aggravated sexual assault of a child and indecency with a child. If convicted of either crime, Miller would be ineligible for probation from a judge, but not a jury. His attorney advised him, however, that he could still get probation from a judge. Miller then waived his right to a jury and pleaded not guilty before the judge. After the bench

trial, the judge found him guilty of both charges and sentenced him to 22 years in prison for aggravated sexual assault and ten years for indecency. Miller filed a motion for new trial alleging ineffective assistance of counsel based upon his attorney's bad advice regarding his probation eligibility. The trial court denied the motion and the court of appeals affirmed.

On original submission, the Court affirmed the court of appeals in a plurality decision. The plurality held that Miller had failed to establish he was prejudiced by his attorney's bad advice regarding probation eligibility. The plurality explained that Miller was required to show that the outcome of the proceedings would have been different had he not waived his right to a jury trial and had a jury assess punishment. The plurality held that Miller could not show that. Because this was the prejudice standard used by the court of appeals, the plurality affirmed.

Before mandate issued, the United States Supreme Court issued its opinion in *Lee v. United States*, 137 S.Ct. 1958 (2017). Miller filed a motion for rehearing, which the Court of Criminal Appeals granted. On rehearing the Court of Criminal Appeals withdraw its original opinion.

The Court of Criminal Appeals held that the appropriate standard for determining prejudice in this situation is whether the deficient performance caused the defendant to waive a judicial proceeding he was otherwise entitled to have. Writing for the majority, Judge Keel explained that the ordinary measure of prejudice for ineffective assistance claims is whether the deficient performance might have affected the outcome of the proceeding that the defendant had. But where the deficient performance might have caused a waiver of the proceeding, prejudice is measured by whether the deficient performance caused the defendant to waive a judicial proceeding. The Court noted that in the United States Supreme Court recent decision in *Lee v. United States*, the Court determined that the defendant was prejudiced by his attorney's bad advice regarding immigration consequences because it resulted in the waiver of a jury trial and acceptance of guilty plea. Finally, the Court noted that CCA precedent on this issue has been inconsistent. In *Recer v. State*, the Court had focused upon the defendant's decision-making when assessing prejudice flowing from an attorneys bad advice regarding probation eligibility. But in *Riley v. State*, the Court had included an extra requirement that the defendant show that the result of the proceedings would have been different had the attorney given correct advice about the law. The Court abandoned this portion of the opinion in *Riley*, in light of United States Supreme Court precedent in *Hill* and *Lee*.

Judge Newell filed a concurring opinion joined by Judge Walker. Judge Newell first noted the Court's decision was not an expansion of the right to effective assistance of counsel given that the prejudice standard was based upon United States Supreme Court precedent. Second, he observed that recent Supreme Court precedent supported the Court's focus upon the effect of the deficient performance on the defendant's decision-making. Finally, he indicated that Miller would have at least established prejudice as to his punishment trial given that he was forced to choose between probation eligibility and probation ineligibility based upon his attorney's advice.

Presiding Judge Keller filed a dissenting opinion noting that even a violation of public trial rights are subject to a showing of prejudice based upon ineffective assistance. Judge Alcala also filed a dissenting opinion joined by Presiding Judge Keller and Judge Keasler. Judge Alcala opined that the standard set out by the Court was too expansive, and that Miller had failed to show prejudice because he could not show he would have received probation from the jury.

[**Commentary:** On the one hand, it seems completely unrealistic that Miller would have received probation from a jury given the evidence presented to the judge at the punishment proceeding Miller received. But on the other hand, how could a defendant ever prove prejudice under such a standard? In Texas Practice, the following observation was made about the Court's opinion on original submission, "In light of *Lee*, the plurality in *Miller* appears to be wrong." This, as well as the holding in *Lee* itself, was persuasive to at least one of the judges who had voted the other way on original submission. Note that the case was remanded to the court of appeals to apply this prejudice standard. It remains to be seen whether Miller can show that he

was prejudiced by his waiver of a jury trial at guilt or just at punishment.]

**2. A defendant was not prejudiced trial counsel's advice to proceed to trial with eleven jurors instead of moving for a mistrial because the trial judge would not have granted a motion for mistrial and denying the motion would not have been error on the part of the trial court.** Following an incident at a nightclub, Rene Gutierrez was charged with three counts of aggravated assault, one count of assault on a public servant, and one count of harassment of a public servant. Gutierrez elected for a jury to determine his guilt. After the jury was sworn in, the State called its first witness, Officer Ruben Ramirez. At that time, one of the jurors informed the judge that he went to school with Officer Ramirez. After questioning the juror outside the presence of the other jurors, the trial judge determined that the juror was not biased and that he would not be removed from the jury. Alternatively, the judge told the parties that they could agree to proceed with eleven jurors. Gutierrez's trial counsel advised Gutierrez to proceed with eleven jurors. Gutierrez was convicted of harassment of a public servant and two counts of aggravated assault by the eleven-person jury. Gutierrez filed a motion for new trial arguing, among other things, that he received ineffective assistance of counsel because he would have exercised his right to a twelve-member jury, but for his attorney's deficient advice that he should waive that right. The trial court granted Gutierrez's motion for new trial, finding Gutierrez's counsel ineffective. The Court of Appeals affirmed, holding that Gutierrez's counsel was ineffective and that Gutierrez was prejudiced.

The Court of Criminal Appeals reversed the judgment of the court of appeals. ***State v. Gutierrez,* 541 S.W.3d 91 (Tex. Crim. App. 2017) (8:1:0).** Judge Hervey wrote for the majority of the Court. For the purposes of its analysis, the Court presumed Gutierrez's trial counsel was deficient. Gutierrez presented two arguments as to how he prejudiced. First, he argued that had his attorney properly advised him about his right to be tried by a twelve-member jury, he would have requested a mistrial, and that request would likely have been granted. Judge Hervey noted that the standard of review on this issue is whether the court likely would have granted a mistrial at the time of trial. Recognizing that the trial judge had found that the juror was not biased, the Court held that it is unlikely that the judge would immediately thereafter grant a request for a mistrial based on juror bias. Therefore, Gutierrez's first argument was dismissed. Second, Gutierrez argued that he was prejudiced because the trial court would have erred if it had denied a mistrial because the juror withheld material information that prevented Gutierrez from intelligently exercising his peremptory strikes and challenges for cause. Judge Hervey pointed out that in order to show that the trial court would have erred in denying a mistrial Gutierrez had to show that, when viewing the evidence in the light most favorable to granting a new trial, the court abused its discretion because no reasonable reading of the record supports the court's finding, i.e. that the juror was biased. After a review of the record, the Court found that it was subject to conflicting, but reasonable, interpretations regarding the juror's bias. For this reason, the Court held that Gutierrez could not prove that the trial court would have erred if it had denied a request for a mistrial because the record did not show that the only reasonable interpretation of the evidence was that the juror was biased.

Judge Newell concurred without opinion.

## XI. HABEAS CORPUS

**A. A habeas corpus applicant must be able to show that a statutory provision was used against him at trial in order to establish standing to challenge the provision post-conviction.** Kenneth Jay McClellan pleaded guilty to online solicitation of a minor under the age of fourteen pursuant to the pre-2015 version of the statute. He was sentenced to three years' confinement and was required to register as a sex offender for 10 years. He did not appeal is conviction. He later filed a post-conviction application for a writ habeas corpus arguing that the statute under which he was convicted was facially unconstitutional. The Court of Criminal Appeals filed and set his case to review two issues: (1) whether a defendant can challenge the constitutionality of a statute for the first time in a post-conviction application even though the statute has not been previously held unconstitutional, and (2) assuming an applicant may do so, is the solicitation of a minor statute, as it existed when

McClellan committed the offense, unconstitutionally vague and overbroad. Specifically, McClellan argued that the "represents" definition of "minor" in the pre-2015 version of the statute was facially unconstitutional because it infringes on substantial amount of free speech and that certain anti-defensive provisions of the statute were facially unconstitutional. After filing and setting McClellan's case, however, the Court of Criminal Appeals decided *Ex parte Ingram v. State*, __ S.W.3d __, 2017 WL 2799980 (Tex. Crim. App. June 28, 2017), which held that the pre-2015 version of the online-solicitation-of-a-minor statute is facially constitutional.

The Court of Criminal Appeals denied relief. ***Ex parte McClellan*, 542 S.W.3d 558 (Tex. Crim. App. Nov. 15, 2017) (7:2:0).** Writing for the majority of the Court, Judge Hervey noted that in light of the Court's holding in *Ingram*, the Court did not need to decide the first issue regarding whether McClellan can raise a facial challenge to the online-solicitation-of-a-minor statute for the first time post-conviction. In addressing the second issue, Judge Hervey noted that the constitutionality of the "represents" definition of "minor" was resolved in favor of the State in *Ingram*. As to the anti-defensive provisions, Judge Hervey pointed out that McClellan suffered from the same defect presented in *Ingram* in relation to these issues, that he could not currently show that he had standing to raise the issues because the record did not establish that the anti-defensive provisions were invoked against him. Judge Hervey noted that remanding the case to allow McClellan to supplement the record would be inappropriate in this case because the standing issue could have been litigated at trial, and therefore it cannot now be raised on post-conviction habeas. Additionally, a remand would be a futile exercise because there was no way to know how a trial-type proceeding would have unfolded. Judge Hervey concluded that even if McClellan were permitted to challenge the facial challenge to online-solicitation-of-a-minor statute for the first time on post-conviction habeas, his claims would fail; therefore, the Court denied relief.

Judges Yeary and Newell concurred without written opinions.

**B. A writ applicant must show good cause in order to obtain dismissal of his or her application without prejudice after the trial court designates issues and orders affidavits.** Steve Herbert Speckman pleaded guilty to aggravated sexual assault of a child and was placed on deferred adjudication community supervision. Subsequently, his community supervision was revoked and the trial court adjudicated him guilty and sentenced him to thirty years' imprisonment. The court of appeals affirmed the trial court's judgment. Speckman filed an Article 11.07 application for post-conviction habeas relief, presenting claims of actual innocence, trial-court errors, failure by the state to disclose exculpatory evidence, and ineffective assistance of counsel. The habeas court designated the issues and ordered trial counsel to provide an affidavit. After the habeas court received the affidavit, it adopted the State's proposed findings of fact and conclusions of law, and recommended that relief be denied. The habeas court forwarded the application to the Court of Criminal Appeals. After the Court received the application but before it adjudicated Speckman's habeas claims, Speckman filed a motion to dismiss the application without prejudice. The Court of Criminal Appeals filed and set the case to determine whether to grant or deny Speckman's late-stage motion to dismiss without prejudice and to explain the rationale underlying its decision.

The Court of Criminal Appeals denied relief, but permitted Speckman to refile his motion to dismiss to conform with the rule set forth in the Court's opinion. ***Ex parte Speckman*, 537 S.W.3d 49 (Tex. Crim. App. Sept. 20, 2017) (9:0).** Writing for the unanimous court, Judge Alcala first pointed out the public policy interest in finality of convictions and preservation of judicial resources. Despite these interests, the Court declined to adopt a rule that would create a rebuttable presumption of unreasonableness to all late-state motions for dismissal and require applicants to overcome that presumption before their motions may be granted. Instead, the Court held that if an applicant makes a showing of good cause for a late-stage dismissal without prejudice, then granting the motion is appropriate. In an effort to provide context, Judge Alcala listed instances in which an applicant would not be able to show good cause. An applicant would not be able to show good cause when the Court determines

that a perceived deficiency in the existing application could be remedied by alternatives to dismissal such as (1) the presentation of additional evidence; (2) the filing of an amended or supplemental application raising new claims in the habeas court; or (3) a stay of the proceedings for a reasonable period of time. The Court advised that a motion for late-stage dismissal without prejudice would ideally explain why the three alternatives it discussed would be inadequate to remedy the alleged problem in the case. The Court declined to give further context of what constitutes good cause at this time.

**C. An applicant may not make a facial challenge to the constitutionality of a statute for the first time in a post-conviction habeas proceeding.** Clinton David Beck, a middle school teacher, was convicted of engaging in an improper relationship with a student based on text messages of a sexual nature that he exchanged with an eighth-grade female student. At the time of Beck's offense, the improper-relationship offense incorporated aspects of the offense of online-solicitation-of-a-minor but required the complainant to be a person enrolled in primary or secondary school and the offender had to be an employee of the place where the complainant was a student. Beck did not argue that the improper-relationship statute was unconstitutional at any point during the trial proceedings or on direct appeal. After Beck's direct appeal, the Court of Criminal Appeals held that Subsection (b) of the online-solicitation-of-a-minor statute was facially unconstitutional in violation of the First Amendment. Subsection (b) was the provision of the online-solicitation-of-a-minor statute that was incorporated into the improper-relationship statute. Beck filed a post-conviction application for writ of habeas corpus arguing that because the improper-relationship statute referenced the online-solicitation provision that was declared to be facially unconstitutional, the improper-relationship statue was necessarily unconstitutional on its face. The trial court denied relief. The court of appeals affirmed the trial court's denial of relief by reasoning that Beck was barred from raising his constitutional challenge to the improper-relationship statute for the first time in a post-conviction habeas proceeding.

The Court of Criminal Appeals affirmed the court of appeals. ***Ex parte Beck*, 541 S.W.3d 846 (Tex. Crim. App. 2017) (7:1:1).** Judge Alcala delivered the opinion of the Court. Judge Alcala first explained the general rule that facial constitutional challenges to a statute may not be raised for the first time on post-conviction review. This general rule is grounded in the idea that complaints that could have been raised on direct appeal cannot be raised on post-conviction habeas review. Judge Alcala noted that the Court had previously held that facial constitutional challenges to statutes may not be raised for the first time on direct appeal because such claims are subject to forfeiture. The same reasoning which prohibits a facial challenge to the constitutionality of a statute on direct appeal applies to prohibiting such a challenge at a subsequent post-conviction phase. An exception to this rule, however, arises when the statute of conviction has been declared facially unconstitutional, in which case an appellant may subsequently challenge their conviction even if they had not challenged the constitutionality of the statute at an earlier time. Judge Alcala noted that this exception applies both to direct appeals and post-conviction habeas proceedings. Beck argued that his case qualified for the exception because the Court had declared the online-solicitation-of-a-minor provision incorporated into the improper-relationship statute unconstitutional. The Court rejected this argument because, as Judge Alcala pointed out, the improper-relationship statute is an entirely different statute that applies in a much narrower context than did the former online-solicitation provision. Having found that no binding judicial authority had declared the improper relationship statute to be invalid, the Court agreed with the court of appeal's conclusion that Beck's first-time facial constitutional challenge to the statute of his conviction falls under the general rule that provides that such complaints may not be presented for the first time in a post-conviction habeas proceeding. The Court, therefore, held that Beck had forfeited his challenge and may not now litigate the issue.

Judge Yeary filed a concurring opinion. Judge Yeary argued that a claim that a penal statute is facially unconstitutional, in every conceivable application, is a claim that ought to be cognizable in any initial post-conviction application of writ of habeas corpus, regardless of whether it was preserved at an earlier proceeding. However, he stated that a claim that a penal statute often operates in a way that impinges on

First Amendment rights, though it may have some legitimate sweep, should not be available in post-conviction proceedings unless the habeas applicant can establish that his own First Amendment rights were violated. Judge Yeary concluded that Beck had not made such a showing and thus he concurred in the judgment of the Court.

Judge Newell dissented without a written opinion.

**D. Article 11.073 — Exculpatory DNA test results from rape kit in capital murder during course of sexual assault case provided basis for new trial under Article 11.073 but were not sufficient for actual innocence relief.** This is a very fact-intensive case involving four different defendants, Richard Bryan Kussmaul, James Edward Long, James Wayne Pitts, Jr., and Michael DeWayne Shelton. Because all four defendants were involved in the same capital murder and all were granted the same level of relief, the Court combined all the cases together in one opinion. All four were implicated in the 1993 capital murder of a Steven Neighbors and Leslie Murphy and the sexual assault of Leslie Murphy. Witnesses saw the victims and the co-defendants together at a club on the night of the murders, and Long, Pitts, and Shelton all confessed to involvement in exchange for pleas of guilt to the aggravated sexual assault and testimony against Kussmaul at his trial. This testimony was corroborated by forensic evidence and the co-defendants providing information about the crime that only they could know such as leading police to the location of the bodies. A rape kit was performed, and DQ-Alpha testing had excluded all four men as being the source of the DNA. However, no one appeared to be aware of these results, and the testimony at Kussmaul's trial indicated that there was no seminal fluid on the blanket or bed sheet where the sexual assault took place.

The co-defendants later recanted their trial testimony and all four men sought DNA testing of the rape kit in the case through Chapter 64 proceedings. More advanced DNA testing (Autosomal STR testing and Y-STR DNA testing), performed in 2012, excluded all four men and included DNA from an unknown male. With regard to the Chapter 64 proceedings, the trial court found that had the DNA results been available at the time of trial, it is reasonably probable that Kussmaul would not have been convicted for the offense of capital murder. The trial court made a similar finding with regard to the other co-defendants convicted of sexual assault. The court of appeals affirmed the trial court's finding. Based upon those findings all four men sought habeas corpus relief. The trial court recommended granting relief based upon Article 11.073 and claims of actual innocence.

A unanimous Court of Criminal Appeals granted relief based upon the new DNA testing but rejected the claims regarding actual innocence. ***Ex parte Kussmaul*, ___ S.W.3d ___; 2018 WL 2715406 (Tex. Crim. App. June 6, 2018) (9:0).** Writing for the Court, Judge Newell explained first that three of the defendants, Kussmaul, Long, and Pitts, who had filed subsequent applications for habeas corpus relief had set forth a new factual basis for relief based upon the new DNA tests. While there had been some DNA testing in 1993, those results were not available through reasonable diligence. Additionally, the new testing was also the result of newly available techniques. Consequently, the applicants had overcome the statutory bar prohibiting subsequent applications based upon previously unavailable facts and a new legal basis for relief. Based upon the findings in the Chapter 64 proceeding, the Court held that all four defendants were entitled to a new trial based upon new scientific evidence.

However, the Court rejected the argument that the four men were entitled to actual innocence relief. According to the Court, the recantation testimony by the co-defendants was not credible. Further, factual innocence requires a showing that the applicants were innocent of any lesser-included offenses and any greater-included offenses. This was a capital murder case. The DNA evidence undermined the sexual assault aspect of the crime, but not the capital murder which included the death of two people within the same transaction. Consequently, the applicants had not proven by clear and convincing evidence that they were "actually innocent."

[**Commentary:** This is a VERY fact intensive case with many pages devoted to the facts of the offense, the corroboration of the co-defendants' testimony, and the procedural history of the case. This summary hits the legal highlights, but any application of this as precedent will be tied to the facts of this case.

Practitioners must read this opinion for themselves to get a thorough understanding of the holding. The two big takeaways, however, are that this case is a clean 11.073 case in which relief was granted, and that proving actual innocence requires proof of innocence of all possible offenses including greater offenses.]

**E. Subsequent Writ Issues**

**1. The statutory innocence-gateway exception will not support a multiple-punishment double-jeopardy claim raised in a subsequent habeas application.** Michael St. Aubin shot five people at the 1998 Mardi Gras celebration in Galveston and was charged with one count of murder and four counts of attempted capital murder. Oscar Nava was the victim alleged in the murder and was the second victim alleged in each of the attempted capital murder counts. St. Aubin was found guilty of all five charges and sentenced to life in each case. St. Aubin filed an original habeas application in 2001, alleging ineffective assistance of counsel and improper jury instruction. While his original applications were on remand to the trial court, St. Aubin filed more habeas applications. The Court denied relief on his additional applications in November 2001, and the initial applications in May 2002. St. Aubin filed his current habeas application on July 15, 2015, alleging that he received multiple punishments for the same conduct in violation of the Double Jeopardy Clause.

The Court of Criminal Appeals dismissed the application. ***Ex parte St. Aubin,* 537 S.W.3d 39 (Tex. Crim. App. Sept. 20, 2017) (4:1:4)**. Writing for the Court, Presiding Judge Keller stated that after the final disposition of an initial application that challenges a conviction, the Court may not consider the merits of a subsequent habeas application. She discussed two potentially applicable exceptions: the innocence-gateway exception and the new-legal-basis exception. The innocence-gateway exception requires that no rational juror could have found the applicant guilty beyond a reasonable doubt. A pre-condition for the application of the innocence-gateway exception is that a constitutional violation occurred at or before a finding of guilt. Presiding Judge Keller categorized St. Aubin's claims as multiple-punishment violation of double jeopardy, which cannot occur until the entry of judgment, after a finding of guilt and sentencing. Therefore, she found the innocence-gateway did not apply. The new-legal-basis exception requires a showing that the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application because the legal basis for the claim was unavailable on the date the applicant filed the previous application. To fulfill this exception, the applicant must show that the legal basis was not recognized by and could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before the date of the previous application. St. Aubin cited *Ex parte Milner* for his proposition that he has suffered a double jeopardy violation. Presiding Judge Keller noted that *Milner*, though decided after St. Aubin's prior application, relied on familiar principles of double-jeopardy articulated from the Supreme Court and this Court. Therefore, St. Aubin's claims could have been reasonably formulated prior to the decision in *Milner*. Finding no other potentially applicable exceptions, the Court held that the subsequent-application bar applied and that it may not consider the merits of St. Aubin's claims.

Judge Keasler filed a concurring opinion. Judge Keasler would have resolved the case based on the cognizability of St. Aubin's claims. He argued that double-jeopardy claims should not be cognizable in an application for habeas corpus. He asserted that habeas corpus proceedings may not be used for claims that should have been raised on appeal. Although claims that require subsequent record development and claims asserting a violation of an absolute requirement or prohibition may be raised for the first time in a habeas application, Judge Keasler does not believe double-jeopardy claims fall into these categories. In particular, he asserts that double-jeopardy is a waivable right and is forfeited if not raised in an appeal.

Judge Newell filed a dissenting opinion in which Judges Alcala, Richardson, and Walker joined. Noting that the State waived procedural default, Judge Newell opined that the Court should have vacated and set aside St. Aubin's attempted capital murder convictions and left the murder conviction, and its attendant life sentence, in place, as recommended by the State and the trial court.

[**Commentary:** The United States Supreme Court looked at this case but ultimately denied review. At the same time, they were looking at ***Currier v. Virginia,* ___ S.Ct. ___; 2018 WL 2073763 (June 22, 2018)**, discussed above, which found no double-jeopardy-collateral estoppel violation. Make of that what you will.]

**2. *Moon v. State* does not provide a new legal basis to defeat the subsequent writ bar because the relevant legal theory of the case, appellate review of the sufficiency of a juvenile court's transfer order, was recognized in Texas prior to *Moon*.** Miguel Angel Navarro attended a party when he was fifteen years old. An altercation arose during the party and three people were stabbed; one of the victims died at the scene. Navarro was charged with murder and two counts of aggravated assault for the stabbings. The State asked the juvenile court to waive its exclusive jurisdiction so that Navarro could be tried as an adult. The court granted the request and Navarro was tried in district court. Navarro was convicted of murder and one count of aggravated assault; the jury assessed punishment at 99 years for the murder charge and 20 years for the aggravated assault charge. The trial court denied Navarro's motion for new trial. Navarro's convictions were affirmed on appeal. Navarro filed his initial writ applications claiming ineffective assistance of counsel; both applications were denied without written order in November of 2014. Navarro's federal writ petitions were stayed when he filed a subsequent writ application with the trial court. In his subsequent writ application Navarro argued that a legal basis for his sufficiency claim was not recognized, nor could it have been reasonably formulated, when he filed his previously considered writ applications. Additionally, he argued that the Court of Criminal Appeals decision in *Moon v. State*, 451 S.W.3d 28 (Tex. Crim. App. 2014), is retroactive and that the juvenile court transfer in his case was deficient because it failed to comply with the requirements of *Moon*. The habeas court found that the juvenile court failed to "show its work" in its written transfer order, as required by *Moon*, in that it fails to specifically state the facts on which the juvenile court based is decision to waive jurisdiction. Additionally, the habeas court found that before *Moon*, Navarro could not have reasonably formulated his "show your work" sufficiency claim.

The Court of Criminal Appeals dismissed the application for writs of habeas corpus. ***Ex parte Navarro,* 538 S.W.3d 608 (Tex. Crim. App. 2018) (7:2).** Judge Hervey wrote the opinion for the majority of the Court. The Court had filed and set the case to determine whether Navarro could rely on the Court's opinion in *Moon* and, if so, whether Navarro was entitled to relief based on *Moon*. However, the Court did not reach the merits of Navarro's case because it found that he failed to show that his subsequent writ applications satisfied the Article 11.07 Section 4 subsequent-writ bar of the Texas Code of Criminal Procedure. In *Moon*, the Court held that a juvenile courts' transfer order waiving its exclusive jurisdiction was subject to legal and factual-sufficiency appellate review; in so holding, the Court stated that a juvenile court must "show its work" in the transfer order with specific reasons explaining why the court is waiving exclusive jurisdiction. Judge Hervey pointed to Supreme Court precedent which permitted sufficiency review of juvenile-transfer orders as far back as 1966, citing *Kent v. United States*, 383 U.S. 541 (1966). Additionally, Judge Hervey noted that Texas had codified the holding in *Kent* in 1973, by requiring a juvenile court to "state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court" before it could waive its exclusive jurisdiction. Texas appellate courts had also been reviewing the sufficiency of juvenile-transfer orders since as far back as 1975. Navarro had argued that even though appellate courts had entertained sufficiency challenges to juvenile-transfer orders, his claim could not have been reasonably formulated because the courts of appeals routinely denied such claims. Given the case precedent, however, Judge Hervey concluded that the legal basis for Navarro's claim had been recognized in Texas prior to *Moon* and Navarro's initial writ applications, therefore Navarro is barred from presenting his claim in a subsequent writ. Judge Hervey also noted that Navarro's jurisdictional claim does not satisfy the actual innocence bar to subsequent writs either.

Judge Alcala filed a dissenting opinion in which Judge Walker joined. Judge Alcala would have held Navarro's subsequent writ applications were not barred because *Moon* satisfies the new-legal-theory-requirement for subsequent habeas applications and she

would have addressed the substantive arguments presented by Navarro.

**E. Parole issues -- Habeas corpus is not the proper tool to compel the Parole Board to comply with a statute or regulation, however mandamus may lie if the applicant can show he is clearly entitled to relief.** Morris Landon Johnson II was convicted of forgery, possession of a controlled substance, and delivery of a controlled substance. He was sentenced to ten years on the forgery case, ten years on the possession case, stacked on the forgery sentence, and forty years on the delivery case, to run concurrently with the other sentences. According to the Parole Board policy, when an inmate has concurrent sentences, as Johnson does, the Board does not consider him for release to parole until he becomes eligible under the sentence with the latest parole-eligibility date. Johnson's concurrent sentence with the latest parole-eligibility date is the forty-year sentence. In a post-conviction application for writ of habeas corpus, Johnson claims that the Parole Board should conduct a parole review of each sentence as it becomes eligible, as if it were the only sentence, which would result in parole review when his ten-year forgery sentence would become parole-eligible. He argues doing so would give him the chance to be paroled on the forgery sentence earlier than if the first review is based on his eligibility on the forty-year sentence, and thus start the running of his possession sentence.

The Court of Criminal Appeals denied relief. ***Ex parte Johnson*, 541 S.W.3d 827 (Tex. Crim. App. 2017) (5:2:4).** Presiding Judge Keller delivered the opinion of the Court. Presiding Judge Keller noted that habeas relief is generally only available for jurisdictional defects and violations of constitutional and fundamental rights. Although in *Ex parte Sepeda*, 506 S.W3d 25 (Tex. Crim. App. 2016), the Court had held that habeas corpus was the proper remedy to compel the Parole Board to comply with a statute regarding parole-denial letters, Presiding Judge Keller noted that any statement about habeas as the proper remedy in such cases was dicta. She noted that *Sepeda* was anomaly in the Court's habeas jurisprudence and thus overruled the case. Presiding Judge Keller noted that Texas inmates do not have a liberty interest in release on parole and because no other constitutional right was even arguably at stake, Johnson failed to show a constitutional basis for relief. Further, Johnson failed to show a jurisdictional defect or a violation of some other category one *Marin* right to warrant relief. Presiding Judge Keller concluded that any post-conviction relief from a failure to properly conduct a timely parole review would have to be via mandamus. However, Johnson did not have a clear right to the relief sought because the statute at issue could be interpreted to deny him relief, therefore mandamus would not be appropriate either.

Judge Keasler filed a concurring opinion in which Judge Hervey joined. Judge Keasler wrote separately to provide a reading of the relevant parole statute that would satisfy both parties. Judge Keasler suggested a retroactive parole determination in the limited context of consecutive sentence. Under such a determination, the Parole Board could wait until the later parole-eligibility date of the consecutive sentences, but also consider the inmate's parole eligibility on the sentence that had an earlier parole-eligibility date. In this case, the Parole Board could retroactively grant parole on Johnson's forgery sentence when it reviews his parole-eligibility on the delivery case and allow him to receive the credit towards his sentence on the possession case.

Judge Alcala filed a dissenting opinion. Judge Alcala noted that she agrees with the Court that almost all of the Parole Board's decisions are wholly discretionary and not subject to judicial oversight, however, in rare cases such as this one involving mandatory statutory procedural requirements, she would should grant habeas or mandamus relief. Judge Alcala would have held that when, as here, an inmate is serving two sentences concurrently but he also has a yet-to-commence third sentence, that will be served consecutively to the shorter of his concurrent sentences, the parole board must consider him for parole on his shorter concurrent sentence at the point at which he becomes statutorily eligible for parole on that sentence.

Judge Walker filed a dissenting opinion in which Judge Richardson joined. Judge Walker would have held that the parole authorities are failing to perform a ministerial duty imposed by one of the Board of Pardons and Paroles's own regulations and therefore Johnson should be granted mandamus relief.

Judge Newell dissented without a written opinion.

[**Commentary:** Alas, *Ex parte Sepeda*, we hardly knew you . . .]

## F. Federal Writs

**1. A federal district court may provide funding to defendants in federal cases, as well as state and federal prisoners seeking collateral relief in federal court, for investigative, expert, or other reasonably necessary services if the judge determines that a reasonable attorney would regard the services as sufficiently important.** In July 2017, Carlos Manuel Ayestas was convicted of capital murder and sentenced to death for the murder of Santiago Paneque in Houston, Texas. On direct appeal and in his state habeas application, Ayestas argued that his trial counsel was ineffective because he failed to secure the testimony of Ayestas's family members, who lived in Honduras, to present mitigating evidence. The Texas Court of Criminal Appeals affirmed Ayestas's conviction and sentence on direct appeal and subsequently denied him habeas relief as well. In 2009, Ayestas filed a federal habeas petition with the assistance of new counsel. Ayestas argued that his trial counsel was ineffective because he failed to investigate Ayestas's mental health and alcohol and drug abuse during the trial's penalty phase. The district court held that Ayestas was procedurally barred from presenting his arguments because they had not been raised in state court. The district court's decision was later vacated in light of the Supreme Court's holdings in *Martinez v. Ryan* and *Trevino v. Thaler*. These cases collectively allowed Texas prisoners to overcome procedural default of a trial-level ineffective assistance of counsel claim by showing that the claim is substantial, and that state habeas counsel was also ineffective in failing to raise the claim in a state proceeding. Ayestas subsequently filed an *ex parte* motion requesting funding to develop his claim that both trial and state habeas counsel were ineffective, pursuant to 18 U.S.C. § 3599(f). The district court found that Ayestas's claim was precluded by procedural default and denied his request. The Fifth Circuit Court of Appeals affirmed, noting its precedent that a § 3599(f) funding applicant must show that he has a "substantial need" for the services, which Ayestas had not established, and that funding may be denied when an applicant fails to present "a viable claim that is not procedurally barred."

The Supreme Court of the United States vacated the judgment of the Fifth Circuit Court of Appeals. ***Ayestas v. Davis*, 138 S. Ct. 1080 (2018) (9:0).** Justice Alito wrote the opinion for the unanimous Court. After determining that the Court had jurisdiction over the case, Justice Alito turned to the question of whether the Fifth Circuit used the proper standard when it affirmed the denial of Ayestas's funding request. Justice Alito noted that § 3599 authorizes federal courts to provide funding to a party who is facing the prospect of a death sentence and is "financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services." After reviewing the meaning of the phrase "reasonably necessary," the Court concluded that in order to authorize funding the district court must determine, in the exercise of its discretion, whether a reasonable attorney would regard the services as sufficiently important. The Court determined that the Fifth Circuit's standard, "substantial need," created a heavier burden than that statutory term of "reasonably necessary." Further, although a habeas petitioner seeking funding must present "a viable constitutional claim that is not procedurally barred," the Court said that, in cases in which funding stands a credible chance of enabling a habeas petition to overcome the obstacle of procedural default, it may be error for the district court to deny funding. In providing guidance on the application of the "reasonably necessary" test, Justice Alito noted that the test requires an assessment of the likely utility of the services requested. Therefore, a district court may consider the likelihood that the contemplated services will help the applicant win relief, but the applicant must not be expected to prove that he will win. Having determined that the Fifth Circuit applied the incorrect standard, the Court remanded the case for the Court of Appeals to consider the application of the correct standard to this case.

Justice Sotomayor filed a concurring opinion, in which Justice Ginsburg joined. Justice Sotomayor agreed with the Court's opinion in whole and wrote separately to explain why, on the record before the Court, the Fifth Circuit Court of Appeals should find that Ayestas is entitled to funding under the proper standard.

[**Commentary:** It is worth noting that this is a case interpreting a federal statute, so arguably it should have no impact upon Texas. However, court watchers might see this as further expansion of the *Martinez/Trevino* line of cases in that now a defendant may be entitled (pursuant to federal statute) to appointment of an investigator to help provide evidence of ineffective assistance of writ counsel. Is this an indication of movement towards recognizing a Sixth Amendment right to post-conviction habeas counsel?]

**2. When a defendant files a petition for habeas corpus with a federal district court pursuant to the AEDPA, the federal district court may "look through" an unexplained state court decision to the last related state court decision that provided a relevant rationale and presume that the unexplained decision adopted the same reasoning.** A Georgia jury convicted Marion Wilson of murder, and related crimes, and sentenced him to death. Wilson's conviction and sentenced were affirmed on appeal. Wilson then filed a petition for habeas corpus in state court, arguing that he had received ineffective assistance of counsel during his sentencing. Wilson presented new evidence that he believed his trial counsel should have introduced, including testimony about his childhood and an impairment in Wilson's brain. The state habeas court denied Wilson's petition because it found that Wilson's trial counsel was not deficient, and, in any event, the new evidence was inadmissible on evidentiary grounds, was cumulative of other testimony, or otherwise, in reasonable probability would not have changed the outcome of trial. The George Supreme Court denied Wilson's application for a certificate of probable cause to appeal the state habeas court's decision without explanation. Wilson then filed a petition for habeas corpus in the United States District Court for the Middle District of Georgia, pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), raising essentially the same ineffective assistance claims. The District Court assumed that Wilson's counsel had been deficient, but deferred to the state habeas court's conclusion that Wilson was not prejudiced. The Court of Appeals for the Eleventh Circuit noted that the District Court was wrong to "look through" the Georgia Supreme Court's denial and assume that it rested on the grounds given in the lower court's opinion. However, the Eleventh Circuit noted several arguments that "could have supported" the Georgia Supreme Court's actions and it, thus, affirmed the District Court.

The Supreme Court of the United States reversed the judgment of the Eleventh Circuit. ***Wilson v. Sellers*, 138 S. Ct. 1188 (2018) (6:3).** Justice Breyer delivered the opinion of the Court. The Court concluded that federal habeas law employs a "look through" presumption, which allows a federal habeas court reviewing an unexplained state court decision to "look through" that decision to the last related state court decision that provides a relevant rationale and presume that the unexplained decision adopted the same reasoning. As this is a presumption, not an absolute rule, the State may rebut the presumption by showing that the unexplained decision most likely relied on different grounds than the reasoned decision below. Justice Breyer noted that employing this presumption in the federal habeas context is supported by its precedent which has used it in similar situations involving procedural bars to review. Further, Justice Breyer pointed out, every Circuit that has considered this matter has applied this presumption, with the exception of the Eleventh Circuit. The Court further explained that this presumption is to be used for the specific and narrow purpose of identifying the grounds for the higher court's decision, as the AEDA directs federal courts to do. Therefore, a federal court's interpretation of the state court's silence should not be taken as binding precedent outside of this narrow context. Lastly, Justice Breyer noted that the Court's approach does not show disrespect for the state courts and it is unlikely to lead to a large number of courts writing full opinions where they would otherwise have ruled summarily.

Justice Gorsuch filed a dissenting opinion in which Justices Thomas and Alito joined. Justice Gorsuch opined that traditional principles of appellate review demand the opposite of the "look through" presumption employed by the Court. He argued that courts independently review each case and that summary affirmances should not be read as signaling agreement with the lower court's reasoning.

[**Commentary:** Again, a federal case interpreting federal law, but may be worth reviewing for possible trends that might effect Texas law.]

**XII. EXPUNCTIONS – THE UNIT OF EXPUNCTION IS THE INDIVIDUAL CHARGE NOT THE ENTIRE ARREST; BEING ARRESTED ON TWO UNRELATED CHARGES DOES NOT PREVENT EXPUNCTION FOR A CHARGE THAT ULTIMATELY RESULTS IN AN ACQUITTAL.**

T.S.N. was arrested for aggravated assault with a deadly weapon and misdemeanor theft. Both charges were unrelated to each other. She pleaded guilty to the theft charge, but pleaded not guilty to the aggravated assault. A jury acquitted her on the aggravated assault charge. She filed a petition for expunction of criminal records related to her arrest and subsequent acquittal of the aggravated assault. The State argued that article 55.01 of the Code of Criminal Procedure entitles an individual to expunction of arrest records only if the results of the prosecutions as to all of the charges underlying the arrest meet the statutory requirements for expunction. The trial court granted the expunction on the aggravated assault, and the State appealed. The court of appeals affirmed, concluding that the statute linked "arrest" to a single "offense," permitting expunction of the records related to the aggravated assault charge.

A unanimous Texas Supreme Court affirmed. ***State v. T.S.N.*, 2018 WL 2169785 (Tex. May 11, 2018)(9:0)**. Writing for the Court, Justice Johnson explained that article 55.01(a) provides that a person who has been arrested for a felony or a misdemeanor is entitled to have all records and files related to that arrest expunged if the person is tried and acquitted. However, article 55.01(c) creates an exception to this rule if the offense of acquittal arose out of a criminal episode and the person remains subject to prosecution for at least one other offense occurring during the criminal episode. According to the Court, section 3.01 of the Penal Code defines "criminal episode" in relevant part as two or more offenses "committed pursuant to the same transaction or pursuant to two or more transaction that are connected or constitute a common scheme or plan." The Court rejected the State's argument that the expunction statute used the term "arrest" as a unit of expunction. If that were the case, the expunction statute would have explicitly stated that expunction was proper for "all the offenses." The Court acknowledged that several courts of appeals had adopted the State's argument and treated "arrest" as the unit of expunction. But, the Court explained that article 55.01 is not simply arrest-based or offense-based, leaving open the possibility that an expunction based upon 55.01(a)(2) (which deals with dismissals and plea bargains) could be arrest-based even while article 55.01(a)(1) (which deals with acquittals) appears to be offense-based.

[**Commentary:** The Court also acknowledged an amicus brief from the Texas Department of Public Safety regarding the practical difficulty of excising out records for one offense when a defendant is arrested for multiple offenses at the same time. Trying to figure out whether different offenses are part of the same episode has been pretty fact intensive on the criminal side of the bar, so it's easy to empathize with DPS's concern. A bright line rule would certainly be easier to implement. Nevertheless, the statute says what the statute says, and it's not for courts to embellish on what the legislature wrote even if that might make the statute work better.]

**[The. End.]**

Judge David Newell was elected to the Texas Court of Criminal Appeals on November 4, 2014.

The son of Thomas and Linda Newell, David was born at the Bethesda Naval Hospital in Maryland, though he grew up in Sugar Land, Texas with his much taller, older brother, Robert Newell. David graduated cum laude from William P. Clements High School. He earned his undergraduate degree in English with a concentration in Creative Writing at the University of Houston. He graduated magna cum laude, earning University honors and honors in his major. He received his J.D. from the University of Texas School of Law in 1997 before returning home to work in the Fort Bend County District Attorney's Office. He served as an appellate prosecutor for 16 years, first in Fort Bend County and later in the Harris County District Attorney's Office from 2007 until his election to the Court.

Judge Newell has twice served as the Chairman of the Editorial Board for the Texas District and County Attorney's bi-monthly journal, The Texas Prosecutor. He also co-authored a regular byline for the journal, "As the Judges Saw It," a column that analyzed and summarized the significant decisions of the Court of Criminal Appeals and the United States Supreme Court. He served repeatedly on the planning committee for the Advanced Criminal Law Course for the State Bar of Texas. And he has presented the Court of Criminal Appeals Update at the Texas Conference on Criminal Appeals, the TDCAA Criminal and Civil Law Update, and the Texas State Bar's Advanced Criminal Law Course. On the Court, he currently serves as the Chairperson of the Court of Criminal Appeals Rules Advisory Committee. He is also the co-course director, along with Judge Barbara Hervey, for the “Robert O. Dawson Conference on Criminal Appeals,” a biennial criminal appellate seminar for the University of Texas School of Law CLE.

Judge Newell is board certified by the Texas Board of Legal Specialization in both criminal law and criminal appellate law. He is also licensed by the State Bar of Texas and admitted to practice before the Fifth Circuit Court of Appeals and the United States Supreme Court. In 2013, David received the C. Chris Marshall Award for Distinguished Faculty from the Texas District and County Attorneys' Association. David and his beautiful wife, Shayne, currently live in the Houston area with their two sons.