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Supreme Court

D was entitled to have his*Atkins* claim considered in federal court because he satisfied 28 U.S.C. §?2254(d); the factual determinations underlying the state court?s decision?that D?s IQ score was inconsistent with a diagnosis of intellectual disability and that he presented no evidence of adaptive impairment?were unreasonable under §?2254(d)(2).*Brumfield v. Cain,* 135 S. Ct. 2269 (2015).

D was convicted of murder in a Louisiana court and sentenced to death before *Atkins v. Virginia,* 536 U.S. 304 (2002), prohibited execution of the intellectually disabled. Implementing *Atkins* in *State v. Williams,* 831 So. 2d 835 (La. 2002), the Louisiana Supreme Court determined that an evi-dentiary hearing is required when a defendant ?provide[s] objective factors? sufficient to raise ?a reasonable ground? to believe he has an intellectual disability. After *Williams,* D amended his pend-ing state post-conviction petition to raise an *Atkins* claim. Seeking an evidentiary hearing, he pointed to evidence introduced at sentencing that he had an IQ of 75, a fourth-grade reading level, been prescribed numerous medications and treated at psychiatric hospitals as a child, been identified as having a learning disability, and been placed in special education classes. The trial court dis-missed D?s petition without holding a hearing or granting funds to investigate. D sought federal habeas relief. The district court found the state court?s rejection of D?s claim was both ?contrary to, or involved an unreasonable application of clearly established federal law? and ?based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.? The court went on to determine that D was intellectually disabled. The Fifth Circuit reversed, finding D?s petition failed to satisfy 28 U.S.C. §?2254(d)?s requirements to give the state trial court and U.S. Supreme Court substantial deference. The Supreme Court vacated the Fifth Circuit?s judgment and remanded.

D was improperly denied a hearing to determine whether he was intellectually disabled to pre-clude his death sentence based on an erroneous state-court finding concerning his intellectual capacity, since the prisoner?s low IQ raised a basis for finding a reasonable doubt that the prisoner was not intellectually disabled given the margin of error in IQ testing. The state trial court also erroneously found that D did not meet the criteria for impairment in adaptive skills since the evidence indicated that he was impaired in

language skills and the ability to learn, and evidence of D?s mental health history diagnoses, and treatment suggested that D was impaired with regard to other adaptive skills.

Imposing an increased sentence under the Armed Career Criminal Act?s residual clause vio-lates due process.*Johnson v. United States,* 135 S. Ct. 2551 (2015).

After petitioner D pleaded guilty to being a felon in possession of a firearm, 18 U.S.C. §?922(g), the Government sought an enhanced sentence under the Armed Career Criminal Act (ACCA), which imposes an increased prison term on a defendant with three prior convictions for a ?violent felony,? §?924(e)(1), a term defined by §?924(e)(2)(B)?s residual clause to include any felony that ?involves conduct that presents a serious potential risk of physical injury to another.? The Government argued that D?s prior conviction for unlawful possession of a short-barreled shotgun met this definition, making the third conviction of a violent felony. The district court held that the residual clause does cover unlawful possession of a short-barreled shotgun, and imposed a 15-year sentence under ACCA. The Eighth Circuit affirmed. The Supreme Court reversed and remanded.

The Court pronounced on the meaning of the residual clause in several cases, including *James v. United States,* 550 U.S. 192 (2007), and *Sykes v. United States,* 564 U.S. 1 (2011), and rejected suggestions by dissenting Justices in *James* and *Sykes* that the clause is void for vagueness. Here, the residual clause did not survive the prohibition of vague criminal laws, because the residual clause left grave uncertainty about how to estimate the risk posed by a crime and left uncertainty about how much risk it took for a crime to qualify as a violent felony. Standing by prior decisions would undermine the goals that stare decisis was meant to serve. Remand was warranted because imposing an increased sentence under §?924(e)(2)(B)?s residual clause violated U.S. Const. amend. V?s guarantee of due process since the indeterminacy of the wide-ranging inquiry required by the residual clause both denied fair notice to defendants and invited arbitrary enforcement by judges.

Fifth Circuit

In prosecution on charges of conspiracy to possess with intent to distribute meth, it was not error, under Fed. R. Evid. 404(b), to admit D?s prior convictions for possession and manufacturing of meth. *United States v. Wallace,* 759 F.3d 486 (5th Cir. 2014).

Ds argued that their prior convictions for possession and manufacture of methamphetamine were not relevant because they were not drug conspiracy charges. However, under *United States v. Gadison,* 8 F.3d 186 (5th Cir. 1993), a prior conviction for narcotics possession or manufacture is probative of D?s intent in a prosecution for conspiracy to distribute. D argued the seven-year-old convictions were also too remote to be considered; the court held that remoteness may weaken a con-viction?s probative value, but remoteness is not a per se bar to admitting a prior conviction. In addition, any unfair prejudice was alleviated by the district court?s limiting instruction. NOTE: The Fifth Circuit did not hold that all prior narcotics convictions are per se admissible in a drug conspiracy case; rather, ?[t]he government continues to maintain the burden of demonstrating in every case that a prior conviction is relevant and admissible under 404(b).?

The Fifth Circuit also held that *Alleyne v. United States,* 133 S. Ct. 2151 (2013), did not overrule *Almendarez-Torres v. United States,* 523 U.S. 224 (1998), which held that the U.S. Constitution does not require prior convictions to be treated like offense elements (i.e., charged in an indictment or proved beyond a reasonable doubt) even where they raise the statutory maximum (or, after *Alleyne,* the statutory minimum). Because the prior-conviction exception of *Almendarez-Torres* survived *Alleyne,* it was not unconstitutional to enhance Ds? sentence under 21 U.S.C. §?851 notwithstanding the lack of a grand jury indictment charging the prior convictions and the lack of a jury finding beyond a reasonable doubt.

Where D was convicted, on his guilty plea, of a hostage-taking conspiracy (in violation of 18 U.S.C. §§?1203(a) and 2), it was not error to apply a Ransom Enhancement because a demand for ransom is not an element of the underlying crime.*United States v. Cedillo-Narvaez,* 761 F.3d 397 (5th Cir. 2014).

D was convicted of the underlying offense for kidnapping 18 undocumented aliens, holding them hostage, and calling their family members to demand ransom. D argued that because the court applied the ransom enhancement to his sentence, there was impermissible double-counting of the ransom ele-ment. However, the court held that a ransom demand was not an element of the offense of hostage-taking under 18 U.S.C. §?1203. In addition, double-counting was permissible unless the Sentencing Guidelines explicitly disallowed it; they did not in this case.

D also argued that it was error to add a Vulnerable Victim enhancement to his sentence, because the victims? status as undocumented aliens was already incorporated into the sentence for his conspiracy conviction. The court held that the District court did not plainly err in applying a vulnerable-victim enhancement under USSG §?3A1.1(b) based on victims? status as undocumented aliens because an alien?s status is not a prerequisite to the offense of hostage-taking, and that characteristic is not already accounted for in the base offense level.

D, convicted of murder and sentenced to death, was not entitled to a certificate of appealability for any of his rejected claims for relief under 28 U.S.C. §?2255.*United States v. Fields,* 761 F.3d 443 (5th Cir. 2014).

D was not entitled to a certificate of appealability (COA) on his claims of ineffective assistance with respect to trial coun-sel?s penalty-phase investigation, investigation of the charged crime, or alleged failure to challenge expert testimony about D?s future dangerousness. The evidence presented by D was duplicative of evidence considered by the jury, or may have led the jury to conclude that additional factors in aggravation were present. In addition, a mere failure to question certain witnesses is not ineffective assistance of counsel without some indication of what those witnesses would have testified to, which D failed to provide.

D also failed to show that his competency fell below a stan-dard that would have required the district court to deny D?s request to represent himself. The court also decided that D?s requests for a COA on the grounds of, among other things, *Brady* violations, actual innocence, denial of DNA testing, and the wearing of a stun belt during trial, were meritless.

Nor was D entitled to a COA on his claim that the district court required him to reveal privileged trial strategy, in violation of his constitutional rights, by requiring him to do a practice (?dry run?) cross-examination of one witness; the ?dry run? was necessary to rein in pro se D?s excesses, and D still had a reasonable opportunity to cross-examine the witness.

District court did not reversibly err in denying D?s motion to suppress arising from a search of his airplane, la-ter found to contain marijuana; the search was a routine ?ramp check,? which can be performed at any time under FAA rules, and the evidence found during the ramp check was sufficient to obtain the search warrant that disclosed the marijuana in the plane.*United States v. Massi,* 761 F.3d 512 (5th Cir. 2014).

D was detained, and the ramp check conducted, because, among other things, D made a suspiciously large number of stops in his flight, stayed only 12 hours at his final destination, and had a prior conviction for drug trafficking. Although D was unlawfully detained by law enforcement (what had been a *Terry* stop transformed into a de facto arrest unsupported by probable cause), the good-faith exception of *United States v. Leon,* 468 U.S. 897 (1984), applied and precluded application of the exclusionary rule. When prior unconstitutional conduct has uncovered evidence used to obtain a search warrant, evidence uncovered by the search warrant is admissible if (1) the prior law enforcement conduct that uncovered evidence used in the

affidavit for the warrant was ?close enough to the line of validity? that an objectively reasonable officer preparing the affidavit or executing the warrant would believe that the information supporting the warrant was not tainted by unconstitutional conduct; and (2) the resulting search warrant was sought and executed by a law enforcement officer in good faith.

Death-sentenced Texas D was not entitled to a certificate of appealability to appeal the district court?s denial of his claim that trial counsel provided ineffective assistance in eight specific instances, nor was D entitled to appeal the district court?s rejection of his claim that he was intellectually disabled and thus ineligible for the death penalty.*Williams v. Stephens,* 761 F.3d 561 (5th Cir. 2014).

Enough evidence was presented at trial to establish that for each of D?s eight claims of ineffective assistance, D did not meet his burden of showing that ?fairminded jurists? could not have disagreed as to the correctness of the state court?s de-cision. In addition, any errors were harmless because they were not prejudicial.

D?s claim that he was intellectually disabled, and therefore ineligible for the death penalty under *Atkins v. Virginia,* 536 U.S. 304 (2003), also failed on all three of the raised grounds. First, D objected to the use of the factors articulated in *Ex parte Briseno,* 135 S.W.3d 1 (Tex.Crim.App. 2004). Because the court had previously upheld the use of those factors, this claim failed. Second, D argued that because of his schizophrenia, the jury could not have found that he was not intellectually disabled; however, there was no ?clear and convincing? proof that the jury?s finding was incorrect. Finally, D argued that the jury could not have reasonably rejected his claim that he was intellectually disabled under a governmental definition of that disability. The court rejected that claim because the jury?s determination, after weighing all evidence presented, was reasonable and not clearly and convincingly incorrect.

D convicted of being unlawfully present in the United States after deportation following a felony conviction was not entitled to reversal of his sentence where the district court applied an eight-level aggravated felony enhancement for a prior conviction of aggravated criminal contempt.*United States v. Sanchez-Espinal,* 762 F.3d 425 (5th Cir. 2014).

The district court did not err in concluding that D had previously been convicted of aggravated criminal contempt under N.Y. Penal Law §?212.52(1). D argued his prior conviction was not an aggravated felony because the charging instrument alleged that he acted intentionally and recklessly; no violence is required to commit aggravated criminal contempt; and any injury, no matter how serious, suffices for a conviction. However, the Fifth Circuit held that a violation of §?212.52(1) is a ?crime of violence? under 18 U.S.C. §?16(b), making D?s prior conviction an ?aggravated felony? under 8 U.S.C. §?1101(a)(43)(F); the district court therefore did not err in applying an eight-level ?aggravated felony? enhancement under USSG §?2L1.2(b)(1)(C).

D convicted of illegal reentry after deportation was not entitled, on plain error review, to resentencing; although it was error to run D?s illegal reentry sentence consecutively with a pending federal sentence imposed after revocation of probation, D failed to show his substantial rights were affected.*United States v. Nava,* 762 F.3d 451 (5th Cir. 2014).

D was sentenced in the Northern District of Texas to 27 months? imprisonment, to run consecutively to any sentence imposed upon a pending revocation of supervised release in the Western District. Under *United States v. Quintana-Gomez,* 521 F.3d 495 (5th Cir. 2008), the order to run the illegal-reentry sentence consecutively with the not-yet-imposed federal revocation sentence was clear and obvious error, satisfying the first two prongs of plain-error review. However, D failed to show that his substantial rights were affected, given that the Western District ultimately imposed a consecutive sentence anyway, and consecutive sentencing was the recommendation of the Guidelines.

District court lacked jurisdiction to revoke D?s supervised release; the Fifth Circuit vacated that court?s order.*United States v. Juarez-Velasquez,* 763 F.3d 430 (5th Cir. 2014).

Time spent in state custody on a charge that was ultimately dismissed without conviction was not ?in connection with a conviction? and hence did not toll the supervised-release period under 18 U.S.C. §?3624(e), notwithstanding that (1) D was subject to an administrative immigration detainer at the time of the state dismissal, (2) the district court later entered an ultra vires order that D should receive credit on a later federal illegal-reentry charge for the time in state custody, and (3) the Bureau of Prisons later granted that credit. Because there was no tolling, D?s supervised release expired before the warrant to revoke was issued and before the district court actually purported to revoke D?s supervised release. As the district court did not, therefore, have jurisdiction, the Fifth Circuit vacated the order revoking supervised release.

Court of Criminal Appeals

A defendant?s right to a public trial is forfeitable, and D failed to preserve his public-trial complaint for appellate review.*Peyronel v. State,* 465 S.W.3d 650 (Tex.Crim.App. 2015).

D was convicted of aggravated sexual assault of a child under age 14. The jury fined him $10,000 and assessed his pun-ish-ment at 50 years in prison. During a break in the punishment proceedings, an unidentified woman that the record showed was ?part of the defense? approached a juror and asked, ?How does it feel to convict an innocent man?? At a conference following the comment and outside the presence of the jury, the court excused all punishment-phase witnesses from the courtroom on its own motion, but the State also asked the court to exclude from the courtroom ?female members of the defendant?s family . . . during testimony. I just don?t want any of the jurors at this point to feel intimidated while having to make a decision.? Defense counsel then stated, ?Your Honor, we?d respond to that by saying that?s too broad to exclude [D]?s wife and daughter to create the impression in the jury?s mind that he has absolutely no support whatsoever here.? The judge decided to exclude everyone in the gallery. On appeal, D argued he preserved a complaint for review that his right to a pub-lic trial was violated and that the closure of the courtroom violated that right. COA agreed that he preserved his claim, reversed the trial judgment as to punishment, and remanded for a new punishment hearing. CCA reversed COA.

?We have never directly addressed the issue of whether a person?s right to a public trial is mandatory, subject to waiver, or can be forfeited through inaction. . . . [T]he majority of jurisdictions addressing the issue have held that the public-trial right may be forfeited. . . . [M]any courts cite . . . *Levine v. United States,* 362 U.S. 610[(1960).] We agree with the majority of courts and hold that a complaint that a defendant?s right to a public trial was violated is subject to forfeiture. . . .

?Appellant was worried about the perception of the jury if no one was present in the gallery to support him, but it is hardly clear from the record that Appellant?s argument was the functional equivalent of asserting that his constitutional right to a public trial was being violated. We agree with Appellant that he was not required to use ?magic language? to preserve his public-trial complaint for review, but Appellant had the burden to ?state[] the grounds for the ruling . . . sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context.? Tex. R. App. P. 33.1. Instead, Appellant is now trying to ?raise an abstract claim . . . as an afterthought on appeal.? *See Levine,* 362 U.S. at 620.?

By requiring D to perform an analysis of the severability of the statute, COA did not properly address the merits of D?s argument that the consolidated court cost of Tex. Loc. Gov?t Code §?133.102 was a tax and thus unconstitutional.*Salinas v. State,* 464 S.W.3d 363 (Tex.Crim.App. 2015).

A jury convicted D of causing injury to an elderly individual and assessed a sentence of five years in prison. Tex. Pen. Code §?22.04(a)(3), (f); Tex. Pen. Code §?12.34(a). After sentencing D, the trial court

assessed a consolidated court cost of $133 pursuant to Tex. Loc. Gov?t Code §?133.102. D ar-gued that the consolidated court cost of §?133.102 was a tax. The trial court overruled D?s objection. COA considered D?s complaints about two evidentiary issues and his challenge to the constitutionality of the court costs and affirmed the trial court. D?s CCA petition challenged only the constitutionality of the court costs. CCA reversed COA and remanded for that court to consider D?s claim of facial unconstitutionality as to the consolidated court costs under the correct standards.

?[COA] addressed appellant?s arguments under an incorrect standard when it required appellant to also address severability principles and to establish what the funds designated in Section 133.102 actually do. We emphasize that demonstrating what the funds actually do is not the same as demonstrating what the governing statutes say about the intended use of the funds. . . . We . . . remand this case to that court to address the question of whether, based upon the statute as it is written, Section 133.102 is unconstitutional on its face, without regard to severability principles or to evidence of what the funds designated in the statute actually do.? NOTE: *Cf. Denton v. State,* below, in which a court of appeals categorized §?133.102 court costs as a ?tax.?

Sufficient evidence supported D?s conviction for failing to report as a registered sex offender because he was aware of his duty to register and told his parole officer he was going to move but failed to report in person the intended change of address seven days before he moved.*Robinson v. State,* 466 S.W.3d 166 (Tex.Crim.App. 2015).

COA affirmed D?s conviction for failing to report under the sex-offender registration requirements, Tex. Code Crim. Proc. art. 62.102. CCA granted D?s petition to decide what de-gree of mental culpability the statute required and whether to consider a trial judge?s findings of fact and conclusions of law in a sufficiency of the evidence review. CCA affirmed COA.

?We hold that a conviction under Article 62.012 [*sic*] requires knowledge or recklessness only to the duty-to-register element of the offense, and that an appellate court should disregard the trial judge?s findings of fact and conclusions of law in reviewing for sufficiency of the evidence. . . . [COA] properly applied a traditional review of the sufficiency of the evidence by viewing the evidence in the light most favorable to the verdict to determine whether any rational fact finder could have found the essential elements of the offense beyond a reasonable doubt. The court?s initial analysis, which required a culpable mental state as to Robinson?s duty to register but not his failure to register, correctly applied the elements of the offense. To sustain Robinson?s failure-to-comply conviction, the statute requires that Robinson (1) knew or was reckless about whether he had a duty to register as a sex offender, and (2) failed to report in person to the local law-enforcement authority his intent to change his address, not later than the seventh day before. . . . Robinson himself testified that he was aware of his duty to register, so we find the evidence sufficient as to this first element.? As to the second element, CCA found ?ample evidence from which a rational fact finder could conclude that D failed to provide the proper pre-move notification,? despite D?s testimony that he repeatedly attempted to provide notice but each time was turned away and D?s aunt?s testimony that he remained living with her.

D?s reply of ?None? or ?No, Your Honor? to the question of whether there was an objection to ?the seating of the jury,? ?the panel,? or ?the jury as selected? at the conclusion of jury selection did not constitute a waiver of any previously preserved claim of error during voir dire.*Stairhime v. State,* 463 S.W.3d 902 (Tex.Crim.App. 2015).

?Appellant argued on direct appeal that he was prevented from asking a proper question to the venire during jury selection. The court of appeals refused to address the merits of his complaint, however, holding that Appellant later waived any error he might have earlier preserved. *Stairhime v. State*, 439 S.W.3d 499, 507 (Tex. App.?Houston [1st Dist.] 2014). When the names of the twelve jurors were called out and the jury was empaneled, the trial court immediately asked whether either party had ?an objection to the panel or as to

the jury as selected[.]? *Id.* Appellant answered, ?No, Your Honor.? *Id.* The court of appeals agreed with the State that by his response, Appellant waived ?any complaints about the [conduct] of voir dire[.]? *Id.* We granted Appellant?s petition for discretionary review to examine whether the court of appeals correctly regarded Appellant?s answer to constitute a waiver of his appellate complaint that he had been denied the opportunity to pose a proper question.? CCA overruled *Harrison v. State,* 333 S.W.3d 810 (Tex.App.?Houston [1st Dist] 2010, pet. ref?d), insofar as it was inconsistent with this opinion, and reversed COA and remanded to that court.

A cost of court ?Related to DNA Testing,? assessed on D pursuant to the Texas Code of Criminal Procedure, was not an unconstitutional tax that violated the Texas Constitution?s separation of powers clause.*Peraza v. State,* 467 S.W.3d 508 (Tex.Crim.App. 2015, reh?g denied).

D was indicted under separate cause numbers for two instances of aggravated sexual assault of a child. After D pled guilty to the two offenses, the trial court set punishment at 25 years for each offense, and each judgment contained a $250 court cost assessment for a ?DNA RECORD FEE.? This DNA record fee is required to be assessed as a cost of court pursuant to Tex. Code Crim. Proc. art. 102.020, entitled ?Costs Related to DNA Testing.? Article 102.020(a) provides that ?[a] person shall pay as a cost of court: (1) $250 on conviction of an offense listed in Section 411.1471(a)(1), Government Code.? Article 102.020(h) directs that ?[t]he comptroller shall deposit 35 percent of the funds received under this article in the state treasury to the credit of the state highway fund and 65 percent of the funds received under this article to the credit of the criminal justice planning account in the general revenue fund.? D appealed this fee assessment, claiming it violated the Texas Constitution. This argument was based on the language in Article 102.020(5 h) directing the disbursement of such court costs; D argued that by requiring the courts to impose this ?tax? for the benefit of the state highway fund and criminal justice planning account, the Texas Legislature had reduced the courts to a tax-gathering agency of the executive branch, violating the separation of powers doctrine. The First Court of Appeals agreed with D and modified both judgments to delete the DNA record fee; the court held that the Article 102.020 fee was an unconstitutional tax, not a legitimate court cost, because it was neither necessary nor incidental to the trial of a criminal case. Six months before the First Court issued that opinion, Houston?s Fourteenth Court issued a contrary unanimous opinion in *O?Bannon v. State,* 435 S.W.3d 378 (Tex.App.?Houston [14th Dist] 2014, no pet.). Like Peraza, O?Bannon challenged the assessment of the court costs related to DNA testing, pursuant to Article 102.020, as facially unconstitutional by impermissibly compelling the courts to collect a tax. The Fourteenth Court held that O?Bannon failed to satisfy his burden to show that Article 102.020 was invalid in all possible applications and thus affirmed the trial court?s overruling of his challenge to the statute. Because of these conflicting opinions from the Houston courts, CCA granted review here. CCA reversed COA and reinstated the court costs.

A court cost for DNA testing assessed under Tex. Code Crim. Proc. art. 102.020 was not an unconstitutional tax that violated the separation of powers clause under Tex. Const. art. II, §?1, because the statutory scheme allowed for such funds to be expended for legitimate criminal justice purposes. As long as a criminal statutory assessment is reasonably related to the costs of administering the criminal justice system, its imposition will not render the courts tax gatherers in violation of the separation of powers doctrine. D failed to show that it was not possible for Article 102.020 to operate constitutionally under any circumstance, including the fee benefits to the criminal justice planning account and state highway fund.

The offense of indecency by exposure was not necessarily subsumed within the offense of indecency by con-tact; double jeopardy did not bar D?s conviction for both.*Speights v. State,* 464 S.W.3d 719 (Tex.Crim.App. 2015).

D was convicted of two counts of indecency with a child?one count of indecency by contact and one count of indecency by exposure. He appealed that his conviction for indecency with a child by exposure improperly subjected him to double jeopardy. COA agreed. CCA granted the State?s petition to decide whether, for double jeopardy purposes, indecency by exposure is ?necessarily subsumed? within indecency

by contact when, during the same incident, the defendant first exposes himself and masturbates in front of the child and then causes the child to touch his penis. CCA reversed COA to the extent that it rendered an acquittal for the offense of indecency with a child by exposure.

Conviction for indecency with a child by exposure and indecency with a child by sexual contact did not subject D to double jeopardy because Tex. Penal Code §?21.11(a)(1) and §?21.11(a)(2)(A) admit of separate allowable units of prosecution and punishment for both the offense of indecency with a child by sexual contact and the offense of indecency with a child by exposure. For purposes of the indecency with a child statute, ?sexual contact? may be accomplished by way of any touching by a person, including touching through clothing. §?21.11(c)(1). Thus, it is possible to commit indecency with a child by sexual contact without necessarily committing indecency with a child by exposure. It is also possible to commit indecency with a child by exposure without committing indecency with a child by sexual contact. A relationship of ?exposure? to ?contact? within the indecency with a child statute is similar to the relationship between different kinds of contact involving different parts of a body within that same statute, i.e., anus, breast, or genitals. Because §?21.11(a) prohibits the commission of any one of those acts, each act is a separate offense, and as such, a discrete allowable unit of prosecution.

Court of Appeals

D should have raised his complaint about the fine via appeal from the order deferring his adjudication of guilt as it was too late to complain once adjudicated guilty, convicted, and sentenced; assessing the fee was akin to the levy of a tax and fell outside the takings clause, Tex. Const. art. I, §?17.*Denton v. State,* Nos. 07-15-00181-CR, 07-15-00182-CR (Tex.App.?Amarillo Oct 8, 2015, reh?g denied).

Appellant proclaimed that Tex. Local Gov?t Code §?133.102(e)(7), requiring a defendant convicted of a felony to pay fees for a public use, violated?as applied to appellant?the Takings Clause of Article I, §?17 of the Texas Constitution. COA overruled the issue and affirmed the trial court. ?Assessing the fee in question as a court cost was and is not an exercise in what we commonly know to be eminent domain. Instead, it is akin to a levy of a tax. As such, it falls outside the scope of the takings clause.?

It was proper to deny D?s petition for nondisclosure of his criminal history, under former Tex. Gov?t Code §?411.081, because he was convicted of a misdemeanor during his community supervision period, even though the conviction was for an offense occurring before the community supervision period began and on the same date as the offense for which he was placed on community supervision, and even though he successfully completed probation for the misdemeanor.*Wills v. State,* No. 09-14-00373-CV (Tex.App.?Beaumont Oct 29, 2015).

?[D] appeals from the denial of a petition for nondisclosure of his criminal history record information. We must decide whether, under the version of section 411.081 in effect before its amendment by the 84th Legislature in 20151, a person is entitled to an order of nondisclosure when that person is convicted during the community supervision period for an offense that occurred before the community supervision period commenced. *See* Act of June 18, 1993, 73rd Leg., R.S., ch. 790, 1993 Tex. Gen. Laws 3088 (amended in 2003, 2005, 2007, 2009, 2011, 2013, 2015)(current version at Tex. Gov?t Code §?411.084). We hold that the statute is unambiguous, and that a person is not entitled to an order of nondisclosure if that person is convicted of an offense during the period of community supervision regardless of when that offense was committed. Accordingly, the trial court did not abuse its discretion. We affirm the trial court?s order denying the petition for nondisclosure.?

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